ARNELL, P. 2022. The universality of human rights in UK extradition law. *Transnational criminal law review* [online], 1(1), pages 52-68. Available from: https://doi.org/10.22329/tclr.v1i1.7481

The universality of human rights in UK extradition law.

ARNELL, P.

2022

THE UNIVERSALITY OF HUMAN RIGHTS IN UK EXTRADITION LAW

Paul Arnell*

Accepted: 20 June 2022

ABSTRACT: The question of the universality of human rights has arisen in the context of United Kingdom and European Court of Human Rights extradition jurisprudence. It is a consequence of the law requiring that all extraditions must be compatible with human rights. Originating in the European Court of Human Rights, and now found in the Extradition Act 2003, this obligation is firmly entrenched in UK extradition law and practice. Difficulties have resulted following the particular interpretation of the nature and scope of article 3 of the European Convention on Human Rights 1950. That article prohibits torture and inhuman and degrading treatment and punishment. It has been held to be an absolute prohibition. Courts have grappled with whether absoluteness means universality. That is, whether the nature and scope of the prohibition as applied within the territory of the Council of Europe applies similarly to conditions and policies in requesting states. If so, extradition may be stymied on account of differences in criminal justice policies. Sentencing practices and prison conditions are the two facets of practice of particular relevance. This article considers the context and jurisprudence around extradition and the universality of human rights. It concludes that universal human rights and effective transnational criminal cooperation may never be fully accommodated.

KEY WORDS:

Extradition, inter-state cooperation, human rights, universality, jurisdiction

1. INTRODUCTION

Courts in Europe have been in the vanguard of conditioning extradition law and practice with human rights protection. Leading this development has been the European Court of Human Rights (ECtHR). In the UK, the Human Rights Act 1998 obliges courts to take ECtHR judgments into account. More directly, the Extradition Act 2003 provides that the extradition of requested persons must be compatible with Convention Rights. Simply, the extradition of accused and convicted persons from the UK must be compatible with the rights set out in the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR) at the level of both national and international law. A contentious facet of this requirement concerns the nature and scope of the prohibition of torture and inhuman and degrading treatment and punishment.[1] The ECtHR has interpreted article 3 such that the prohibition is exceptional in its application and rigour. Its jurisprudence provides that the right bears no limitations or exceptions. The ECHR itself provides it is non-derogable. The article 3 prohibition is absolute. In the extradition context, a difficulty arises when a court faces the question of whether article 3 applies to circumstances outside its jurisdiction in an identical manner to those within it. In other words, whether it is universal.

The practical consequences of accepting a distinction in the nature and scope of article 3 in the extradition context may be severe. They can include, for example, extradition with the likelihood of a mandatory life sentence without the realistic prospect of eventual release and objectively harsh incarceration conditions including 23 hours a day solitary confinement. On the other hand, the effect of adhering to a single conception may be inimical to the efficacy of transnational criminal justice. Persons accused of serious crimes may go unprosecuted as a

* Reader in Law, Law School, Robert Gordon University, Aberdeen. Email: p.arnell@rgu.ac.uk. The author would like to thank the anonymous reviewers for their comments and suggestions. Any errors and infelicities remain those of the author.

1 Hereinafter inhuman and degrading treatment and punishment is referred to as ill-treatment.

result. Several recent cases in England and Wales and Scotland have addressed this issue.[2] The English High Court and the Scottish High Court of Justiciary have had to consider conflicting ECtHR and House of Lords jurisprudence.[3] A judgment of the Grand Chamber of the ECtHR on the issue is pending.[4] The case law provides insight into the differing and at times opposing purposes of extradition and human rights. Those conflicts lie at the heart of the universality versus relativity debate in UK extradition law. An analysis of the contextual influences upon extradition and article 3, the state of the law and leading jurisprudence sheds light on the question of whether universal human rights and effective transnational criminal cooperation can ever be accommodated. Further, it raises the question of whether the inimical practical effect of relativity is more apparent than real.

2. UNIVERSALITY, ABSOLUTENESS AND RELATIVITY

An analysis of article 3 in extradition in UK law is affected by the meanings ascribed to universality, absoluteness and relativity. There is a voluminous body of literature on these words and concepts.[5] That the present examination is limited to article 3 in UK extradition law largely curtails the requirement to enter more general debates. The approach of the relevant courts, the ECtHR and those in the UK, to the nature and scope of the prohibition of torture and ill-treatment in extradition is our focus. Approaches to the concepts from the perspectives of international human rights law per se and moral philosophy, for example, are not directly germane.[6] Whilst the subject matter under examination is relatively narrow, that does not mean it is simple. The germane case law is contradictory and contains lacunae. Indeed, a gap is encountered at the outset. This is that the terms 'universality' and 'universal' are absent from the relevant jurisprudence. They are not found in the seminal case in the area, *Soering v UK*,[7] or a more recent case supporting a singular understanding of article 3 in extradition, *Trabelsi*.[8]

---

2 In England and Wales, see *Hafeez v US* [2020] 1 WLR 1296; *Sanchez v US* [2020] EWHC 508 (Admin). In Scotland, see *Amnott v US* [2022] HCJAC 6. Criticizing the English jurisprudence in failing to properly consider ECtHR case law is Lewis Graham, 'Extradition, Life Sentences and the European Convention' (2020) 25(3) Judicial Review 228.

3 Weighing in favour of universality are the ECtHR decisions of: *Trabelsi v Belgium* (2015) 60 EHRR 21; *Lopez Elorza v Spain* App no 30614/15 (ECtHR 17 December 2017). Amongst the contrasting jurisprudence is *R (on the application of Wellington) (FC) v Secretary of State for the Home Department* [2008] UKHL 72 and the ECtHR decision of *Ahmad v UK* (2013) 56 EHRR 1

4 In *Sanchez-Sanchez v UK* (App no. 22854/20), with oral arguments being made 23 February 2022, see <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7267618-9897653&filename=Grand%20Chamber%20hearing%20Sanchez-Sanchez%20v.%20the%20United%20Kingdom.pdf> accessed 5 May 2022

5 See generally Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Hum R Q 218. Addressing the position under the ECHR: Tilmann Altwicker, 'Non-universal Arguments under the European Convention on Human Rights' (2020) 31 EJIL 101; Natasa Mavronicola, 'What is an 'Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 Hum R L Rev 723 and Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart 2021).

6 Lord Hoffmann's 2009 lecture to the Judicial Studies Board provides a criticism of universality and the human rights system under the Council of Europe, Lennie Hoffmann, 'The Universality of Human Rights', at <https://conservativehome.blogs.com/files/hoffmann_2009_jsb_annual_lecture_universality_of_human_rights.pdf> accessed 5 May 2022.

7 (1989) 11 EHRR 439.

8 *Trabelsi v Belgium* (2015) 60 EHRR 21. The words find no place in the other leading article 3 expulsion cases of *Chahal v UK*, (1997) 23 EHRR 413; *Ahmad* or *Harkins and Edwards v UK*, (2012) 55 EHRR 19; ECtHR cases affecting the universality debate.

Nor are they found in a leading case favouring relativity, *Wellington*.[9] There is clearly a dearth of extradition-related judicial dicta mentioning or ascribing meaning to universal.

The word 'universal' is found in the well-known article 3 case of *Ireland v UK*,[10] concerning interrogation techniques used in Northern Ireland during the Troubles. The separate Opinions of Judges Zekia, O'Donoghue and Evrigenis refer to it when discussing the meaning of torture. Two of the three references allude to article 5 of the Universal Declaration of Human Rights 1948 (UDHR).[11] That reference is of some use in confirming its meaning. The UDHR is a common standard of achievement for all peoples and all nations.[12] It is unlimited by territory, or nationality. That is the common understanding of universal. As a feature of the law, universal is more commonly found in discussions of criminal jurisdiction. A crime subject to universal jurisdiction is one over which all states can lawfully take cognisance.[13] The absence of reference to universal in article 3 jurisprudence generally and extradition case law more specifically is telling. Whilst the question of a single, immutable understanding of the protection afforded under article 3 has been considered on a number of occasions, the jurisprudence instead alludes to universal's counterpoint, relative, and the feature of the right that arguably mandates its singular conception, its absoluteness.

More useful in coming to the meaning of universal in extradition law is focusing upon relative or relativist, the terms against which it is usually juxtaposed.[14] A notable allusion to relativist is found in the speech of Lord Hoffmann in *Wellington*, where he stated a 'relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function.'[15] He does not specify or discuss the contrary approach. A common usage of relative is found where courts consider the minimum level severity of treatment necessary to engage article 3. In *Ireland*, the ECtHR held that the assessment of ill-treatment was 'relative.'[16] Baroness Hale in *Wellington* refers to *Soering* in that vein. Whether ill-treatment amounts to inhuman or degrading treatment or punishment, she stated, depends upon 'all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.'[17] The designation of treatment as contrary to article 3 is dependent upon a number of variables. Notably, the situs of the ill-treatment and the desirability of extradition are not amongst them, explicitly in any event. Presently, it is Lord Hoffmann's reference to relativity that is of particular value, in that it comes close to directly referring to geography in the application of article 3. He uses the word in drawing a distinction between article 3 as applied within the UK and outside it. Article 3 should be relative, Lord Hoffmann said, such that its scope and nature turn on the desirability of extradition and, necessarily, the situs of the possible ill-treatment.

---

9 *R (on the application of Wellington)(FC) v Secretary of State for the Home Department* [2008] UKHL 72

10 (1978) 2 EHRR 25.

11 The third, by Judge O'Donoghue, occurs in a sentence describing the difficulties attendant to alighting on a single understanding of torture of 'universal' application, ibid 55.

12 As per its preamble. Cited at <www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 5 May 2022.

13 See *In Re Piracy Jure Gentium* [1934] AC 586; In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)* [2000] 1 AC 147, 198, Lord Browne Wilkinson said: 'The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture where committed. International law provides that offences jus cogens may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution"', quoting the US case *Demjanjuk v Petrovsky* (1985) 603 FSupp 1468.

14 See, for example, Douglas Lee Donoho, 'Relativism versus Universalism in Human Rights, The Search for Meaningful Standards' (1990–1991) 27 Stan J Intl L 345.

15 *Wellington* (n 9) para 27.

16 *Ireland* (n 10) para 162. A similar reference is found in *Ahmad* (n 3) para 201.

17 Wellington (n 9) para 51, citing *Soering* (n 7) para 100.

It is absolute, amongst the three words, that finds the most pronounced place in extradition human rights jurisprudence. Indeed, absolute is commonly used by the ECtHR to describe article 3. It has been referred to alongside relativism in extradition jurisprudence. Baroness Hale, in *Wellington*, accepts that one's right not to be subjected to conduct in violation of article 3 is absolute.[18] The ECtHR's position is that an absolute right can never be justifiably interfered with. In considering article 3 the ECtHR has focused 'on a juxtaposition, looking at it in relation to the "qualification" of rights: in the form of lawful derogations, exceptions or interferences.'[19] Three facets of the absoluteness of article can be discerned from the ECtHR jurisprudence; that it cannot be lawfully interfered with, that it is non-derogable, and that it applies irrespective of the victim's conduct.[20] Relevant to our present purposes, in *Chahal* the ECtHR held that prohibition provided by article 3 is 'equally absolute in expulsion cases.'[21] In a sense, then, universality is a facet or consequence of absoluteness. An absolute right under the ECHR applies fully regardless of circumstances, including the reasons for possible interference and geography. It is therefore universal, not contingent upon, or relative to, the circumstances. That noted, article 3 may be universal only according to the ECHR as interpreted by the ECtHR. Only its 46 state parties are bound by it. The ECHR obliges state parties to secure the rights and freedoms contained within it to everyone with their jurisdiction, under article 1. Whilst controversial in itself, that jurisdiction is obviously and necessarily limited.[22] There is no obligation upon non-state parties to adhere to its terms. Article 3 is not relevant to prison conditions and the length of prison sentences in third states, for example, save where a contracting party proposes to subject a person within its jurisdiction to them by way of extradition. Universality for our present purposes, then, is a facet of absoluteness and a counter-point to relativity. It mandates that a single conception of article 3 be applied both within the UK and to future possible human rights violations in requesting states.

3. CONTEXTUAL INFLUENCES AND CONSIDERATIONS

3.1 Introduction

The application of human rights protection to requested persons in the extradition context within the UK is multi-faceted.[23] Conflicting authority on the scope and nature of article 3 is part of the complexity. Further shaping and affecting human rights in extradition are a range of disparate factors including differences in criminal justice and penological policies between nations, the role played by courts in developing the law, and the judicial acceptance of the importance of extradition.

3.2 Differences in Criminal Justice and Penological Policies

A common factor underlying human rights arguments in UK extradition hearings are differences in criminal justice and penological policies. There is, of course, variation in approach between the UK and its extradition partners to trial-related processes and the

---

18 ibid para 50. She then goes on to make the point that the context of the case determines what is ill-treatment.

19 Mavronicola (n 5) 736.

20 Natasa Mavronicola, 'Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law: A Reply to Steven Greer' (2017) 17 HRL Rev 479, at p 489.

21 *Chahal* (n 8) para 80.

22 The ECtHR has developed relatively complex rules governing when and in what circumstances the jurisdiction of state parties extends to persons or circumstances outside their borders, see Paul Arnell, *Law Across Borders: the Extraterritorial Application of UK Law* (Routledge 2012) ch 4.

23 The intricacies do not solely relate to a possible future contravention in the requesting state. In the UK, the right to a fair trial under article 6 does not generally apply to extradition hearings, see Paul Arnell, "The Contrasting Evolution of the Right to a Fair Trial in UK Extradition Law" (2018) 22 Intl J Hum Rts 869.

punishment of those convicted.[24] These differences have come to the fore in arguments based on the prohibition of torture and ill-treatment and the right to a fair trial in particular.[25] Of relevance to article 3 and universality is the position taken to article 6. This is because the response by the ECtHR and UK courts to differences in trial-related facets of criminal justice policy has included an acceptance that extradition can lawfully take place in circumstances that might contravene article 6 were they to occur in the UK. In *Kapri v Lord Advocate*, Lord Hope noted that threshold test for a violation of article 6 in extradition is a flagrant breach that will completely deny or nullify the right in the destination country.[26] This went beyond irregularities or lack of safeguards in the trial process that might give rise to a breach of the right were to occur within the contracting state.[27] The acceptance of differentiation in the scope and nature of article 6 is relevant to a possible similar distinction being made in relation to article 3. It provides a precedent, albeit under a different (non-absolute) article, for relativity.

Several facets of penological policy have arisen in article 3 extradition cases. These generally relate to the possible punishment per se, the conditions in which incarceration may be served, and the length and reducibility of prison sentences. The position of punishment per se is largely settled, in the sense of extradition to face a possible death sentence. Diplomatic assurances are required by the UK providing that, if the requested person is convicted, the death penalty will not be sought. Simply, extradition to retentionist states in the absence of an assurance does not take place.[28] The UK reiterated its opposition to the death penalty in all circumstances in 2021 as part of the UN Human Rights Council High Level Panel on the subject.[29] In recent years, differences in penological policies other than those relating to capital punishment have come to the fore. In *Soering*, it was the death row phenomenon in Virginia, not capital punishment per se, that was at the heart of the case.[30] Notably, in *Ahmad*,[31] the ECtHR inter alia considered the United States' (US) policy of subjecting certain inmates to special administrative measures, or 'SAMs.' It held that extradition where there was a likelihood of their imposition did not contravene article 3. Applicable in a minority of federal cases, SAMs can include 23 hours a day in solitary confinement and facets of sensory deprivation.[32] Relevant in a general prison condition sense, as opposed to a policy directed at

---

24 Of note is that rehabilitation has been recognized by the ECtHR as an increasingly important purpose of imprisonment, see *Dickson v UK* (2008) 46 EHRR 41, para 28.

25 Plea-bargaining in the US has, for example, given rise to article 6 arguments, see *Bermingham v Serious Fraud Office* [2006] EWHC 200 (Admin). So too have differences in policies regarding trials *in absentia*, see *Cretu v Romania* [2021] EWHC 1693 (Admin). See Rosemary Davidson, Ben Lloyd, and Adam Payter, 'Extradition Law – Recent Developments and the Potential Impact of Brexit' (2016) 10 Crim LR 743.

26 [2013] UKSC 48, para 32.

27 This phraseology was put forward by the Lord Advocate without objection, ibid para 30.

28 The UK was criticized for not requiring assurances prior to the rendition from Iraq to the US of former UK nationals Alexanda Kotey and El Shafee Elsheikh where they faced a possible death sentence, see Carlyn Miller, 'Serving justice through our commitment to human rights' (*British Institute of Human Rights*) <www.bihr.org.uk/blog/serving-justice-human-rights> accessed 5 May 2022. The US did not in fact seek a death penalty: Ellen Nakashima and Rachel Weiner, 'U.S. says it won't seek death penalty for ISIS "Beatles" tied to killing of American, British hostages' *Washington Post* (19 August 2020) <www.washingtonpost.com/national-security/islamic-state-beatles-death-penalty/2020/08/19/f9207262-e24c-11ea-8181-606e603bb1c4_story.html> accessed 5 May 2022.

29 See Rita French, 'UN Human Rights Council 46: UK statement for the biennial high level panel on death penalty' (Geneva, 24 February 2021) <www.gov.uk/government/speeches/un-human-rights-council-46-uk-statement-for-the-biennial-high-level-panel-on-death-penalty> accessed 5 May 2022.

30 At that point capital punishment had not been abolished within the Council of Europe.

31 *Ahmad* (n 3). See Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute: The Undermining of Article 3 ECHR in Ahmad v UK' (2013) 76 MLR 589; Paul Arnell, "The European Human Rights Influence upon UK Extradition – Myth Debunked" (2013) 21 Eur J Crime Cr L Cr J 317.

32 See Katherine Erickson, 'This is Still a Profession: Special Administrative Measures, the Sixth Amendment and the Practice of Law' (2018) 50 Col Hum Rts L Rev 283.

a requested person, is over-crowding. In this regard there have been a series of UK and ECtHR cases, including pilot decisions, stipulating the area required under article 3 by requested persons if and when jailed subsequent to rendition.[33]

The length, review and reducibility of sentences in the requesting jurisdiction are the aspects of penological policy that have been considered in an increasing number of article 3 extradition cases. In one case, the High Court of Justiciary described the question it faced as whether:

> … a potential mandatory life sentence, without parole, for a lesser crime than murder constitutes a breach of Article 3 of the European Convention on Human Rights (inhumane and degrading treatment) because it is grossly disproportionate and, in any event, not capable of being reduced thereafter.[34]

The jurisprudence discussed below considers the judicial response to this and certain other aspects of US sentencing practices. Prior to this, however, it is relevant to note that the reducibility of whole-life sentences within England and Wales has been considered by the ECtHR in *Vinter v UK*,[35] and subsequently *Hutchinson v UK*.[36] Following a Court of Appeal judgment,[37] the ECtHR found that the position in England and Wales governing the review of life sentences was compatible with article 3.[38] Section 269(4) of the Criminal Justice Act 2003 gives a judge a power to order a prisoner be imprisoned for life without eligibility for parole. He may be released only by order of the Secretary of State if she is satisfied that 'exceptional circumstances exist which justify the prisoner's release on compassionate grounds,' under section 30(1) of the Crime (Sentences) Act 1997. The Court of Appeal held that the section 30 power led to UK law being article 3 compliant. The point to note presently is that whilst the approach taken to sentencing varies between the UK's jurisdictions and their extradition partners, the extent of those differences is not as pronounced as perhaps thought.[39] In a general sense, though, there are undoubted differences in criminal justice and penological policies between the UK and its extradition partners. The UK has had the worst excesses of its punitive tendencies mitigated through its adherence to the ECHR. A number of the leading article 3 extradition cases have arisen in light of the contrast between this fact and the illiberal facets of US federal criminal justice.

3.3 The Role of the Courts in Developing Human Rights in Extradition

Affecting the development of human rights in extradition is the fact that it has largely been a judicial occurrence. The UK's extradition legislation and the treaties to which it is party were largely enacted and concluded unaffected by human rights. The European Convention on Extradition 1957,[40] the UK-US Extradition Treaty 2003,[41] and the UK-India Extradition Treaty

---

33 See, for example, *Varga and Others v Hungary* (2015) 61 EHRR 30. The pilot judgment procedure of the ECtHR is a means of dealing with cases deriving from the same underlying problem, see ECtHR, 'The Pilot-Judgment Procedure' <www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf> accessed 5 May 2022.

34 *Amnott* (n 2) para 2. Of course, sentencing practice differs between Scotland and England and Wales.

35 (2016) 63 EHRR 1.

36 (2017) 43 BHRC 667.

37 *Attorney General's Reference (No 69 of 2013)* [2014] EWHC Crim 188.

38 See Ergul Celiksoy, '"UK Exceptionalism" in the ECtHR's Jurisprudence on Irreducible Life Sentences' (2020) 24 Intl J Hum Rts 1594.

39 In a similar vein as regards prison conditions, in *Shahid v Scottish Ministers* [2015] UKSC 58 the Supreme Court held that solitary confinement in a Scottish prison for periods totalling 56 months did not contravene article 3.

40 ETS No 24.

41 Treaty Series No 13 (2007).

1993,[42] for example, all fail to expressly provide that human rights may form a bar to extradition.[43] More recently, the extradition provisions within the Trade and Cooperation Agreement 2020, in Part 3 Title 7, also fail to expressly refer to human rights.[44] Within UK law it was only on 1 January 2004, when the Extradition Act 2003 entered into force, that human rights were legislatively provided for.[45] The previous statute, the Extradition Act 1989 did not refer to human rights. Even with the Extradition Act 2003 stipulating that extradition from the UK must be compatible with Convention Rights it has been the courts, particularly but not only the ECtHR, that have played an important role in developing the specificity of the interplay between the two. *Soering* must be noted here, but there are also a number of further important cases cited throughout this article. A relevant aspect of the judicial development of the law for our purposes are the tests which are applied in adjudging whether a proposed rendition is compatible with human rights. The flagrant denial of justice test, applying when article 6 is put forward, has been noted above. In relation to article 8, protecting the right to respect for private and family life, the test is whether there are substantial grounds for believing that there is a real risk of treatment which would violate that right.[46] Case law has refined that test such that it includes a balancing exercise incorporating proportionality.[47] The test applicable under article 3 is discussed below. Judicially significant also, however, has been the development and ascription to article 3 of absoluteness by the ECtHR. That attribute reflects the importance of the prohibition of torture and ill-treatment, which in turn collides with another facet of the jurisprudence; that emphasizing the importance of extradition.

3.4 The Judicial Emphasis of the Importance of Extradition

Pronounced judicial recognition of the importance of the purposes of extradition is notable in the extradition and human rights jurisprudence in the UK and the ECtHR. Governments themselves, of course, demonstrate the value they ascribe to the process through concluding extradition agreements. The UK, as most states, has agreed to be reciprocally bound under international law to the terms of such treaties which are, naturally, disposed towards rendition. Extradition treaties normally contain a general obligation to extradite followed by limited and specific exceptions. These facts are straightforward and not unexpected. In contrast and perhaps surprisingly, is the judicial recognition, emphasis and elucidation of the reasons militating in favour of rendition. In *Norris*, Lord Philips stated: 'It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity.'[48] Expanding upon this sentiment was Baroness Hale in *HH v Italy*:

> There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to

[42] Cited at <https://mea.gov.in/Images/CPV/leta/UK_Extradition_Treaties.pdf>, accessed 5 May 2022.

[43] In contrast, the UN's Model Treaty on Extradition 1990 provides *inter alia* that extradition should be barred where the requested person would not receive the minimum guarantees found in article 14 of the ICCPR, protecting the right to a fair trial, cited at <www.unodc.org/pdf/model_treaty_extradition.pdf> accessed 5 May 2022.

[44] See Edward Grange and Sophia Kerridge, "Extradition under the EU-UK Trade and Cooperation Agreement" (2021) 12 NJECL 213. Note however, the criminal co-operation aspects of the TCA hinge upon the UK's continued adherence to the ECHR as per article 692.

[45] Section 21A conditions accusation cases of extradition to the UK's former EU partners, and s 87 to all other states with which the UK has regular extradition arrangements.

[46] See *Norris v US* [2010] UKSC 9.

[47] See *Celinski v Poland* [2015] EWHC 1274 (Admin).

[48] *Norris* (n 46) para 52.

> other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.[49]

This sentiment counters the influence and effect of human rights in the process. The tests conditioning the individual rights noted above make their successful invocation in extradition more difficult than in wholly intra-territorial circumstances. These two judicially derived features of the law, human rights and the importance of extradition, clash head-on where the right in question is absolute and putatively universal. That conflict is readily apparent, and unreconciled, in the seminal case of *Soering*.

3.5 The *Soering* Case

Introducing human rights protection into extradition in Europe was *Soering*. Simply, the ECtHR held that Soering's extradition from the UK to Virginia would contravene article 3 where there was a likelihood he would spend considerable time on death row awaiting execution.[50] The ratio of the case is that in extradition the responsibility of a requested state party is engaged not only until the point the individual is removed from that state's territory but continues until the known and direct consequences of the rendition come to an end.[51] The well-known test provides that a decision to extradite may give rise to an issue under article 3, and engage the responsibility of the state under the Convention, where substantial grounds have been shown for believing that the person, if extradited, faces a real risk of being subjected to torture or ill-treatment in the requesting country.[52]

The essence of *Soering* is relatively clear. There are, however, contradictory passages within the judgment that support the universality of article 3 and open the door for relativity. As to the first, the ECtHR stated that article 3 makes no provision for exceptions, nor derogation. It is an absolute prohibition enshrining one of the fundamental values of the Council of Europe and is recognized as an international standard.[53] As such, there is an inherent obligation upon state parties not to extradite where the test is met. The ECHR must be interpreted and applied so as to make its safeguards practical and effective.[54] In contrast, the ECtHR stated that the jurisdictional provision, article 1, cannot be understood to justify a general principle that an extradition cannot occur unless conditions abroad are in full accord with each of the safeguards of the Convention.[55] It stated that an assessment of the minimum level of severity necessary to engage article 3 turned on factors such as the nature and context of the treatment or punishment and the manner and method of its execution.[56] Notably, the ECtHR further stated that a fair balance between the interests of the community and the individual's rights was also relevant, as were the factors favouring extradition such as bringing

---

49 [2012] UKSC 25 para 8.

50 The UN Human Rights Committee decision in *Ng v Canada* (1993) 98 ILR 479 is somewhat similar to *Soering*, albeit relying on article 7 of the International Covenant on Civil and Political Rights 1966.

51 In John Dugard and Christine van den Wyngaert's 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187, it is interestingly noted that there has been little judicial discussion of why human right obligations have been given primacy over extradition treaties. They suggest the reason may be found in 'some sort of two-tier system of legal obligation,' at 195. In the last two decades, however, it appears clear that human rights obligations have in fact been of relatively limited effect in practice, even as regards the absolute and universal prohibition of torture and ill-treatment, as seen below.

52 *Soering* (n 7) para 91.

53 ibid para 88.

54 ibid para 87.

55 ibid para 86.

56 ibid para 100.

offenders who flee abroad to justice and preventing the emergence of safe havens.[57] This is clear support for relativity.

The prospective and extraterritorial nature of a possible violation of article 3 in Soering's case complicated the ECtHR's analysis. It noted that it did not normally pronounce on the existence of potential violations.[58] A departure from this position was required on account of the serious and irreparable nature of the possible suffering. As a result of the necessity to ensure the effectiveness of article 3, 'an assessment of conditions in the requesting country against the standards of Article 3 of the Convention' was required.[59] There was, it held, no question of adjudging the responsibility of the US under the ECHR.[60] The ECHR 'does not purport to be a means of requiring the Contracting States to impose Convention standards on other states.'[61] The ECtHR held, therefore, that article 3 is both absolute and universal and relative. It applies in extradition with the proviso that the desirability of extradition is a relevant factor in assessing the minimum level of severity. In the 30 years since the judgment, courts in the UK, guided and affected by ECtHR jurisprudence, have grappled with this conundrum.

4. CONFLICTING JURISPRUDENCE

4.1 Universalist Authority

Two strands of cases shed light on the difficulties arising from, and the particularities attendant to, the application of article 3 in extradition. Supporting universality on the one hand are *Trabelsi* and *López Elorza*; favouring relativity on the other are *Wellington* and *Ahmad*.

4.1.1 *Trabelsi*

Trabelsi was sought from Belgium by the US for terrorism-related crimes. In opposition to extradition, he put forward the possible maximum life sentence he faced in the US and the procedures through which it might be reduced. Before the ECtHR he argued that his extradition was incompatible with article 3 because the sentences he faced were irreducible in fact. Presidential pardon and sentence commutation were governed by the executive with no judicial supervision nor predefined minimum criteria, he argued. The ECtHR firstly held that a life sentence is not per se incompatible with the Convention. An irreducible life sentence, however, might give rise to an issue under article 3.[62] Life sentences are prohibited that are irreducible *de facto* and *de jure*. The ECtHR noted that, in *Vinter*, it held that irreducibility should be considered in light of the preventative and rehabilitative aims of the penalty. Further, there must be a review where the detention is considered remaining justified on legitimate penological grounds.[63] A prisoner is entitled to know when sentenced what he must do to be considered for release and when a review would take place or could be sought, it held.

The ECtHR held that the assurances given to Belgium by the US were not sufficiently precise. It affirmed that the protection afforded by article 3 in extradition is absolute. Bluntly, it said whether the ill-treatment is inflicted by a non-state party to the ECtHR was 'beside the

57 ibid para 89.
58 ibid para 90.
59 ibid para 91.
60 ibid para 91.
61 ibid para 86. The position has been repeated, including in *Harkins and Edwards* (n 8) para 129.
62 *Trabelsi* (n 8) para 112.
63 ibid para 115.

point.'[64] The obligation not to extradite where there are substantial grounds for believing there is a real risk of treatment contrary to article 3 applies, regardless of the source of the request being from within or outside the Council of Europe. The protection afforded under article 3 was held to be universal. A discretionary life sentence was not grossly disproportionate in Trabelsi's case. US Presidential pardons and sentence commutation decisions, however, were not based upon objective and pre-established criteria, known to the prisoner at the time of sentencing, on whether he had changed such that his continued detention was no longer justified on legitimate penological grounds.[65] Trabelsi's extradition was found to have violated article 3.

4.1.2 *López Elorza*

Two years subsequent to *Trabelsi*, in 2017, the ECtHR again faced the issue of the application of article 3 in extradition. In *López Elorza*, it considered the extradition of an accused drug trafficker where he faced a possible maximum term of life imprisonment. The requesting state, the US, had given Spain an assurance that López Elorza, if convicted, would not be subject to an unalterable sentence of life imprisonment. If one was imposed, it provided that he could seek a review and could later seek, by way of petition for pardon or commutation, a lesser sentence.[66] The Spanish courts considered the assurance sufficient. López Elorza applied to the ECtHR arguing that his extradition would be incompatible with article 3 on account of a possible disproportionately long sentence and the insufficient mechanisms in US law governing the review of life sentences.

In coming to its decision, the ECtHR referred to information supplemental to the original assurance provided by the US. This included the fact that the majority of federal criminal cases do not go to trial, but end with guilty pleas.[67] The information also noted that the judge at his trial will have a broad discretion to determine the sentence.[68] López Elorza would have a right to appeal his sentence, as would the government. Further, it noted the length of the sentences that had been imposed upon López Elorza's co-conspirators. The ECtHR reiterated the position on life sentences and *de facto* and *de jure* reducibility. In a specific section titled 'Principles applicable to removal of aliens,' the ECtHR again confirmed the universal nature of article 3, and that the fact that the ill-treatment is inflicted by a non-party to the ECHR is beside the point. In order to establish possible responsibility of the requested state, an assessment of the conditions in the requesting state is inevitable, but this does not involve, the ECtHR said, the imposition of ECHR standards on third states. Any liability is incurred by the extraditing state.[69] The Court emphasized that it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that if extradited he would be exposed to a real risk of treatment contrary to article 3. Specifically, Lopez Elorza had to demonstrate that the maximum penalty would be imposed without due consideration of all the relevant mitigating and aggravating factors or that a review of such a sentence would be unavailable.[70]

---

64 ibid para 116. The court cited *Saadi v Italy* (2009) 49 EHRR 30, para 138, which affirms that no distinction in application can take place on the basis of the situs of the ill-treatment. It does not contain the phrase 'beside the point.'

65 ibid para 137.

66 *Lopez Elorza* (n 3) para 16.

67 ibid para 32. Plea bargaining in the US was one of the issues raised by the requested persons in the extradition case of the so-called Nat-West Three, in *R (on the application of Bermingham) v Serious Fraud Office*, [2006] EWHC 200 (Admin).

68 The Federal Sentencing Guidelines are found here <www.ussc.gov/guidelines-manual/guidelines-manual> accessed 5 May 2022.

69 *López Elorza* (n 3) para 104.

70 ibid para 107.

Applying the law to the facts, the ECtHR distinguished *López Elorza* from *Trabelsi*. It found that the applicant had not advanced reasons why the advisory range of sentence in the Sentencing Guidelines, between 188–235 months, would not be applied in his case. It noted he had been accused of drug trafficking, whilst Trabelsi had been accused of terrorism-related crimes. The sentences given López Elorza's co-conspirators were of a lesser duration than that stipulated in the Guidelines.[71] There was, it noted, US legislative provision designed to prevent unwarranted sentence disparities among defendants convicted of similar offences.[72] The ECtHR held that the risk López Elorza faced of being sentenced to life imprisonment was so slight and hypothetical that it could not be said that he demonstrated that his extradition would expose him to a real risk of treatment reaching the article 3 threshold.[73] Accordingly, the avenues for review were not considered. His extradition would not give rise to a violation of article 3.

4.2 Relativity in England and Wales and the ECtHR

Two precedents amongst the extradition and human rights jurisprudence favouring the relativity of article 3 stand out. This is because of the directness and manner in which they address the issue and the courts where they were decided. They are *Wellington* and *Ahmad*, decided by the House of Lords and the ECtHR respectively. Both pre-date the universalist authorities above.

4.1.3 *Wellington*

Leading to *Wellington* was a US extradition request for murder in the first degree. The possible sentences for which were death or life imprisonment without parole or release except by the act of the state Governor. The extradition request included an assurance that the death penalty would not be sought. Wellington's extradition was ordered by the Secretary of State, with arguments against it being dismissed by the District and Administrative Courts. Wellington appealed to the House of Lords on the ground, based on article 3, that the punishment of life imprisonment without eligibility for parole was inhuman or degrading.

The majority of Law Lords interpreted *Soering* to mean that the desirability of extradition mandated a distinction being drawn between the parties to the ECHR and third states as regards the meaning of ill-treatment (as opposed to torture).[74] Simply, ill-treatment within the territory of a state party would not necessarily be so in a non-party. What amounted to ill-treatment turned on all the circumstances of the case. One such circumstance was the desirability of extradition.[75] As noted above, Lord Hoffmann stated that a relativist approach to the scope of article 3 'seems to me essential if extradition is to function.'[76] Lord Carswell explicitly agreed.[77] Referring to the Scottish case of *Napier v Scottish Ministers*,[78] Lord Hoffmann noted that a consequence of not accepting relativity could mean that extradition might not take place to countries poorer than Scotland, where people not in prison often have to make do without flush lavatories.[79] He further noted that human rights other than that

71 ibid para 115.
72 That being s 3553(a)(6) of Title 18 of the US Code.
73 *Lopez Elorza* (n 3) para 119.
74 *Wellington* (n 9) para 23 per Lord Hoffmann.
75 ibid para 24.
76 ibid para 27.
77 ibid para 57. Mavronicola suggests that this position confuses the applicability of article 3 with its specification. She states it '… traverses the distinction between applicability and specification under Article 3 in a way that undermines the applicability parameter, which goes to the core of its absolute nature,' (n 5) 750–1.
78 2005 1 SC 307.
79 *Wellington* (n 9) para 27. In *Napier* it was held that the practice of slopping-out in a Scottish prison in the particular circumstances of the case was inhuman and degrading and contravened article 3.

guaranteed by article 3 are applied differently in an extradition context such as the right to a fair trial.

Baroness Hale's opinion began with confirming that the right not to be subjected to ill-treatment is absolute, such that an individual cannot be expelled where there are substantial grounds for believing that he faces a real risk of being subjected to ill-treatment. She also noted, however, that the context of the case affects the assessment of what is to be regarded as ill-treatment. She held it is the minimum level of severity that is relative.[80] As alluded to above, the ECtHR's position that the assessment of the minimum level of severity was dependent upon all the circumstances of the case, including the desirability of extradition and, perhaps, the conduct for which the requested person had been convicted.[81] Lords Brown and Scott agreed with the decision in the case, although they suggested a different approach to reconciling the conflict between the absolute nature of article 3 and the desirability of extradition.[82]

4.1.4 *Ahmad*

Providing support to the relative application of article 3 in extradition is *Ahmad*. Here six accused terrorists challenged their extradition from the UK to the US. The possible life sentences and prison conditions they faced were central to their arguments.[83] Assurances had been given by the US as regards death penalty and the place of trial. Whilst the length of possible sentences varied as between the applicants, they included life sentence without parole. Charges faced by the applicants included conspiracy to provide material support to terrorists and conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country. In giving judgment the ECtHR addressed the distinctions identified in *Wellington* between extradition and other forms of removal, between torture and other forms of ill-treatment and between the minimum level of severity required in the domestic and extraterritorial context.[84] As to the first, the form of removal was held to be immaterial to the question of the applicability of article 3.[85] Making a distinction between torture and other forms of ill-treatment, the ECtHR found, had some support in *Wellington* and *Soering*. It went on, however, to hold that its subsequent jurisprudence 'normally refrained from considering whether the ill-treatment in question should be characterized as torture or inhuman or degrading treatment or punishment.'[86] A reason given for this was the difficulty determining the severity of ill-treatment in extradition and other removal cases on account of the exercise being necessarily prospective. It cited with approval that the article 3 prohibition was 'equally absolute in expulsion cases.'[87] The ECtHR here distinguished *Soering* and disagreed with the view taken by Lord Hoffmann. To this point, *Ahmad* provides support for universality.

Consideration of the third distinction drawn in *Wellington* led the ECtHR to surprisingly veer into relativity. That distinction was between the minimum level of severity required domestically and extraterritorially. Here the ECtHR noted it agreed with Lord Brown that the absolute nature of article 3 did not mean that any form of ill-treatment will act as a bar to removal. It stated that it has repeatedly held that Convention standards are not to be applied to third states. It said: 'This being so, treatment which might violate art. 3 because of an act or omission of a contracting state might not attain the minimum level of severity which is required

80 *Wellington* (n 9) paras 50–51.
81 Mavronicola discusses the question of what are legitimate factors to take into account in that assessment, (n 5) 750.
82 This is mentioned below.
83 Those conditions included SAMs, noted above.
84 *Ahmad* (n 3) para 167.
85 ibid para 168.
86 ibid para 171.
87 Citing *Chahal* (n 8) para 80.

for there to be a violation of art. 3 in an expulsion or extradition case.'[88] In other words, the threshold of ill-treatment can vary between state and non-state parties. The ECtHR listed a number of factors decisive in intra-territorial article 3 cases, such as the presence of premeditation and an intention to debase or humiliate the applicant, and stated that they 'will not readily be established prospectively in an extradition or expulsion context.'[89]

Applying the law to the facts, the ECtHR held the conditions at the place of incarceration, ADX Florence, for all bar the second applicant did not violate article 3.[90] SAMs, it held, could be subject to a step-down programme that would bring them to an end. The possible discretionary life sentences faced by four of the remaining five applicants were not grossly disproportionate in light of the terrorist-related charges they faced. Those sentences were found to be reducible. A possible mandatory life sentence without parole faced by the fifth applicant was also, in the absence of evidence of exceptional circumstances, not grossly disproportionate. There would be no violation of article 3 if he was extradited. The specifics of possible reducibility were not considered. Overall, the ECtHR found that there would be no violation of article 3 on account of prospective prison conditions, length of the possible sentences, and the reducibility of those sentences for all five applicants.

5. THE ACCOMMODATION OF UNIVERSALITY AND THE DESIRABILITY OF EXTRADITION

The conflict between the universality of article 3 and the desirability of extradition is clear and continuing. The Grand Chamber of the ECtHR is considering its position. Oral arguments in *Sanchez-Sanchez* were put forward in spring 2022.[91] It is to be hoped that clarity and consistency is brought to the ECtHR's case law. The prospect of a complete resolution, however, is unlikely. This is for two main reasons. Firstly, the universal and absolute nature and scope of article 3 is ultimately irreconcilable with the desirability of extradition where the UK and its partners adopt materially different criminal justice and penological policies. This is evident in the case law discussed above. Second, even if the Grand Chamber devises a formula for accommodating universality and the desirability of extradition it is not inevitable that that position will be adopted by UK courts. As noted, the Human Rights Act 1998 obliges UK courts to take ECtHR judgments into account. The degree of judicial deference to those judgments has lessened over recent years.[92] The importance of extradition in the eyes of the judiciary has been seen. UK courts may seek to distinguish an ECtHR decision that interprets article 3 in a way deemed unnecessarily inimical to those purposes. Further, the UK Government has proposed to weaken the relationship between the Strasbourg Court and the UK judiciary.[93] If those changes are carried out, clearer avenues to depart from ECtHR jurisprudence will open to UK courts – although oversight by the ECtHR would remain. In light of these considerations, and especially the seemingly irreconcilable nature of universality and the desirability of extradition, the possible options for their accommodation merit discussion.

---

88 *Ahmad* (n 3) para 177.

89 ibid para 178.

90 The case of the second applicant was deferred on account of his specific mental health concerns.

91 *Sanchez-Sanchez v UK* (App no. 22854/20).

92 In *Amnott* (n 2) para 25 Lord Carloway described the position as the High Court of Justiciary being required to 'ascertain and apply the European jurisprudence unless there is a sound reason for not doing so'. See Lewis Graham, 'Taking Strasbourg Jurisprudence into Account' (2022) EHRLR 163.

93 See the UK Government's Consultation Paper, 'Human Rights Act Reform: A Modern Bill of Rights' at <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights> accessed 5 May 2022 and Richard Clayton, 'The Government's New Proposals for the Human Rights Act: an Assessment' (2020) EHRLR 81.

The accommodation, as opposed to reconciliation, of an absolute and universal article 3 and the desirability of extradition comes at a cost. So too does countenancing relativity. This becomes evident in considering the three ways in which the law could evolve. Two of these options were proffered in *Wellington*. Lords Hoffmann and Carswell and Baroness Hale found that it was inevitable and necessary to accept relativity. In contrast, Lords Brown and Scott suggested raising the bar at which the minimum level of severity was reached within the UK, and therefore article 3 engaged. A third option, notably not put forward in *Wellington*, is to accept universality and, therefore, equality in the scope and nature of article 3 within and outside the country.

The position of article 3 in UK extradition law, as applied in *Wellington*, as binding in England and Wales and persuasive elsewhere in the country, is that it applies on a relative basis.[94] This entails the explicit acceptance by UK courts of the possibility of requested persons, if convicted, being subjected to ill-treatment that would be inhuman or degrading for persons imprisoned in the UK. This distinction in application of article 3 has been called an insidious displacement of the absolute protection hitherto afforded by article 3 and the creation of acceptable derogations.[95] Indeed, relativity explicitly admits differing standards of protection under article 3. As such it conflicts with absoluteness. Article 3 protection here is territorially contingent, and universally inapplicable. Relativity accords with Lord Hoffmann's view, stated extra-judicially, that human rights are 'universal in abstraction but national in application.'[96] It is unlikely that the ECtHR will explicitly or directly adopt this position. The strength of the dicta it has often put forward in favour of the absolute character of article 3 militates against it doing so. Nor should relativity be adopted. It conflicts with the ratio of *Soering*, that the responsibility of a requested state is engaged not only within its territory but also within the requesting territory until the known and direct consequences of the extradition come to an end. A diminution of that responsibility through a change in the scope of article 3 in the course of an extradition affects the essence of absoluteness and the values that underpin it.

Raising the minimum level of severity necessary to trigger article 3 within the Council of Europe as a manner of accommodating the desirability of extradition whilst adhering to universality is logically attractive. A single understanding of the scope and nature of article 3 would apply. The essence of absoluteness and universality would survive. In practice, the necessity of a judicial choice being made between adopting an intra-Council of Europe understanding of article 3 and extradition would end. The cost of this approach, however, is seemingly prohibitive, dependent upon how high the bar is raised. Accepting *de facto* irreducible life sentences and particularly punitive prison conditions, akin to a version of European SAMs, for example is untenable. It ill-accords too dramatically with the ECtHR's approach. More realistically, there could be a middle ground where, for example, whole life sentences with defined avenues for commutation are countenanced. Indeed, this appears to be happening. The ECtHR in *Hutchinson* accepted the approach taken by the UK as regards whole life sentences.[97] The acceptance by the UK Supreme Court of periods of solitary confinement as compatible with article 3 was noted above.[98] As with relativity generally, it appears unlikely that the ECtHR will adopt this position. It appears, in law, to be disproportionate. It would entail raising the minimum level of severity across the Council of Europe so that the extradition of a relatively small number of individuals every year could proceed whilst universality and

94 Relativity was followed in the Scottish case of *Amnott* (n 2). See Paul Arnell, 'Extradition and the Universality of Human Rights in Scotland' (2022) 11 Scots L Times 55.
95 Mavronicola and Messineo (n 31) 601.
96 Hoffmann (n 6) para 23.
97 In *Hutchinson v UK* (2015) 61 EHRR 13, affirmed by the Grand Chamber in *Hutchinson* (n 35).
98 In *Shahid* (n 39).

absoluteness are maintained. That noted, proportionality depends on how far the bar had to be raised and as seen previously, that is not as far as many would think.

Accepting universality is a third way in which an absolute conception of article 3 can be accommodated within extradition. This requires courts to maintain a single conception of the scope and nature of article 3 to both circumstances within the country and to those which might arise in requesting states. This accords with the essence of universality and is logically coherent. It would, however, likely give rise to a greater number of cases where extradition would be barred on the basis of article 3. Where barred, a process akin to what occurred following the ending of extradition in death penalty cases could occur. Diplomatic assurances mitigating the law or procedure giving rise to the possible human rights violation could be sought.[99] Admittedly, assurances are not free from controversy. Questions over their reliability, monitoring, and indeed ethics remain.[100] These noted, an assurance specifying that a particular form of sentence review would be applied at a specific stage in the term of imprisonment is not inherently unreasonable.[101] Extradition would be conditional on such an undertaking.[102] Of course, granting such assurances may not be acceptable to the requesting jurisdiction or may be at odds with a constitutional or other legal impediment within it. In such a case, the UK would face the possibility of mounting a prosecution itself, extraditing or deporting the individual to an article 3-compliant jurisdiction or setting the requested person free. The possibility of a domestic prosecution as an alternative to extradition is mirrored in the *aut dedere aut judicare* principle, commonly found in treaties addressing forms of transnational criminality. A UK prosecution in such circumstances, however, would likely face evidential difficulties.[103] Of note is that in several cases in somewhat kindred circumstances no UK prosecution followed.[104] Deportation to a third country may not be possible.[105] Where an option, it is limited by the fact that it only applies to non-UK citizens and dual nationals.[106] Setting free persons accused of serious crimes abroad is highly problematic.[107] It may heighten the risk of further criminality and could lead to the UK becoming a safe-haven. Overall, there is little doubt that there is no readily available or easy method of addressing the consequences of adhering to universality in extradition where the UK's partners are not amenable to providing adequate assurances.

---

99 See UK Home Office, 'Assurances in Extradition Cases – Obtaining and Monitoring Assurances' January 2016, cited at <http://data.parliament.uk/DepositedPapers/Files/DEP2016-0191/2016-1-20_Assurances_Review.pdf> accessed 5 May 2022. The leading ECtHR case on assurances is *Othman v UK* (2012) 12 EHRR 1.

100 See Martina Elvira Salerno, 'Can Diplomatic Assurances, in their Practical Application, Provide Effective Protection against the Risk of Torture and Ill Treatment?' (2018) 8 NJECL 453.

101 In *Kafkaris v Cyprus* (2009) 49 EHRR 35, para 100 the ECtHR accepted a margin of appreciation in such matters, stating 'it should be observed that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention.'

102 This is discussed by Dugard and van den Wyngaert as a possible method of balancing the human rights of requested persons and the demands of international criminal justice, (n 51) 206–08.

103 Mentioned by Dugard and van den Wyngaret, (n 51) 209–10.

104 The circumstances were a barred extradition and an expectation of an English prosecution. See Paul Arnell and Gemma Davies, 'The Forum Bar to Extradition in UK Law: An Unnecessary Failure' (2020) 84 J Crim L 142.

105 It may be barred on account of human rights. See for example, *Othman* (n 99).

106 The UK has increasingly employed citizenship deprivation, see Paul Arnell, 'The Legality of the Citizenship Deprivation of UK Foreign Terrorist Fighters' (2020) 21 ERA Forum 395.

107 As to the possibility of an individual not being brought to trial the ECtHR has said this eventuality would be 'difficult to reconcile with society's general interest in ensuring that justice is done in criminal cases': *Lopez* (n 3) para 111.

6. CONCLUSION

Criminal cooperation between states and the protection of human rights are internationally recognized as important. The purposes of each can, and do, conflict. Following *Soering* and the development of the absoluteness of article 3 their relationship has become fraught. A body of jurisprudence containing tests for the application of the prohibition of torture and ill-treatment and other entitlements has emerged, in part, to reflect the perceived necessity to condition the extradition practice of state parties to the ECHR and cognisance of the desirability of extradition. The most intractable facet of this jurisprudential process has centred upon the accommodation of a universal and absolute prohibition on torture and ill-treatment. Simply, adhering to universality leaves no room to manoeuvre. That the UK's leading non-EU extradition partner, the US, practices criminal justice and penological policies that are on occasion particularly harsh and punitive relative to the approach taken by the ECtHR causes difficulties. Courts within the UK and the ECtHR have grappled with the conflict. The Grand Chamber will contribute to the debate when it hands down its judgment in *Sanchez-Sanchez*. From a human rights perspective it will ideally confirm absoluteness and universality. Aligning with numerous dicta, this will affirm the importance and value of the prohibition of torture and ill-treatment. In light of the differences, real and perceived, in criminal justice and penological policies between the Council of Europe, the UK, and certain third states, a clear and explicit pronouncement in this vein appears impossible. Its cost in practical terms is just too great. A compromise, satisfying neither adherents of universality and absoluteness or proponents of relativity, appears to be the likely outcome. This would reiterate absoluteness whilst accepting relativity. It would perpetuate the messy compromise that reflects the facts and notionally adheres to principle.