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The Anatomy of Non-Refoulement: A Centrepiece of International Refugee Law and Human Rights Law

ABSTRACT: *Although the principle of non-refoulement remains vital under international refugee law and human rights law, its content and scope are the subject of extensive scholarly discussions. Therefore, this paper seeks to provide a concise analysis of non-refoulement starting from the 1951 Geneva Convention relating to the Status' Refugees and to explore accurately its meaning based on its material, personal, and geographical scope. This paper also endeavours to briefly examine non-refoulement under universal and regional human rights instruments. Further, it aims to compare the interpretations of non-refoulement under international refugee law and human rights law based on the relevant case-law of international and domestic courts in addition to that of the respective monitoring mechanisms.*

KEYWORDS: asylum, the principle of non-refoulement, international human rights law, international refugee law, Refugee Convention

1. Introduction

Modern international refugee law was formulated immediately after the end of the Second World War when millions of Europeans had fled the old continent owing to prolonged persecution, mainly by the Nazi and Stalinist regimes.[1] In addition to family reunification and non-discrimination, non-refoulement emerged as the most significant principle of international refugee law from the outset. Succinctly,

1 Gatrell, 2000

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https://doi.org/10.47078/2024.1.31-49

the principle of non-refoulement reflects the humanitarian imperative of solidarity—the prohibition against sending back non-nationals to a country where there is a real risk of persecution or serious violations of human rights. The principle of non-refoulement applies to states, obligating them to not force refugees or asylum seekers to return to a country where they are likely to be subjected to persecution.' Further, the 'principle of civilization'[2] is enshrined under numerous treaties: It is found in several international instruments related to refugee, humanitarian, and human rights laws, while it is also a well-established norm of international customary law. When analysing treaties containing the prohibition of refoulement, one can conclude that besides explicit and obvious wording, the principle of non-refoulement exists in implicit form as well. In these instances, case-law and the interpretation of respective monitoring bodies shed light on the implied meaning of some provisions of human rights treaties, mostly related to the prohibition against torture and other forms of ill-treatment. Thus, the aim of this paper is (1) to define the legal contours of non-refoulement; (2) to integrate the relevant case-law of international and domestic courts as well as respective monitoring bodies; and finally, (3) to compare the content and scope of non-refoulement under international refugee law and human rights law.

2. The principle of non-refoulement under international refugee law

The principle of non-refoulement acquired the status of international treaty law by virtue of Article 3 of the 1933 Convention relating to the International Status of Refugees[3] as follows:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by applications of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order...

This provision later served as a model for further legislation.[4]

The most significant step in the evolution of non-refoulement was unquestionably the adoption of the 1951 Geneva Convention relating to the Status of

2 Grahl-Madsen, 1982, p. 439.
3 Convention of 28 October 1933 relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663.
4 Jager, 2001, p. 730.

Refugees (hereinafter: 'Refugee Convention')[5] under the auspices of the United Nations (UN). Article 33(1) of the Refugee Convention states:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

According to the contemporary interpretation of non-refoulement under Article 33, no reservations are allowed to be attached thereto under Article 42[6] and under VII (1) of the 1967 Protocol,[7] and thus it embodies a *lex specialis* as part of the set of rules of international refugee law under further human rights instruments.

The principle of non-refoulement is undoubtedly a landmark in international refugee law; moreover, given its considerable impact on the regime of the Refugee Convention, it can be labelled 'the cornerstone of international refugee law.'[8] As Gammeltoft-Hansen established, 'the non-refoulement obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters.'[9] Simultaneously, it is important to note that in accordance with Article 33(1) of the Refugee Convention, non-refoulement does not indicate the right of the individual to be granted asylum in a particular State.[10] Rather, it means that when a particular State is not prepared to grant asylum to a person who is in need of international protection, it must adopt a fair procedure and ensure that the person will not be sent to a country where his or her life, dignity, or freedom would be endangered owing to his or her race, religion, nationality, membership of a particular social group, or political opinion.[11] The prohibition of refoulement applies to all authorities of a State Party to the Refugee Convention and all persons acting on behalf of a State Party. Regarding the standard of proof for the prohibition of refoulement, 'would

5 1951 Geneva Convention relating to the Status of Refugees, Geneva, 28 July 1951, U.N.T.S., vol. 189, p. 137.
6 Art. 42(1) of the Refugee Convention. At the time of signature, ratification, or accession, any State may make reservations to articles of the Convention other than to Arts. 1, 3, 4, 16(1), 33, 36–46 inclusive.
7 Protocol relating to the Status of Refugees, New York, 31 January 1967, U.N.T.S., vol. 606, p. 267.
8 San Remo Declaration on the Principle of Non-Refoulement (September 2001) [Online]. Available at: https://perma.cc/JH4T-JDQD (Accessed: 20 August 2023).
9 Gammeltoft-Hansen, 2011, p. 44.
10 Weis, 1995, p. 342.
11 Lauterpacht and Bethlehem, 2003, p. 76.

be threatened' indicates a relatively high threshold, a 'reasonable degree of likelihood that the persecution will occur.'[12]

Despite the clear correlation between the two, non-refoulement differs from asylum[13] from both conceptual and legal perspectives. While non-refoulement is a negative obligation for States, prohibiting them from sending any person back to a country where they are likely to face persecution, asylum is a positive one encompassing the granting of a new residence and long-term protection from the jurisdiction of another State. In other words, non-refoulement is an obligation for States, whereas asylum is one of their rights, which simultaneously means that it is not a right of the individual.[14] As a consequence of this normative separation, the Refugee Convention, except in its Preamble,[15] does not comprise any provision on asylum, which was intentional on the part of the drafting fathers of the Refugee Convention. The statement of the delegate of the UK on the Conference of Plenipotentiaries unambiguously clarified this stance: 'The right of asylum… was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him.'[16] Nevertheless, unalienable interactions exist between the State's obligation of non-refoulement and the State's right to grant asylum: Non-refoulement shall be considered when a State decides whether to grant or refuse asylum. From this perspective, the separation of non-refoulement and asylum seems quite hypothetical, as in practice, before removing an asylum seeker from State territory, the respective State must conduct an assessment of non-refoulement under any circumstances.

Under Article 33(1) of the Refugee Convention, the material scope of the principle of non-refoulement is relatively broad. The wording 'in any manner whatsoever' means any act of sending back non-nationals when there is a real risk of persecution. According to contemporary jurisprudence, the legal nature of that act is irrelevant, and it can be realised through deportation, extradition, maritime

12 R v Secretary of State for the Home Office, ex parte Sivakumaran and Conjoined Appeals (UNCHR Intervening) [1998] AC 958 (UK), para. 993.

13 Asylum, that is, helping those who seek refuge from danger, has a long history. Traditionally, asylum was a religious duty that used to be linked to a holy place that provided divine protection from manmade jurisdiction. However, as the concept of sovereign nation States emerged after the Peace of Westphalia, the power to grant asylum shifted from religious institutions to State authorities. The right to seek asylum started to be recognised as a human right only in the 20th century, in the era of the adoption of universal human rights treaties. Rabben, 2016, pp. 27–66; Schuster, 2002, pp. 44–56.

14 Chetail, 2019, pp. 190–190.

15 Refugee Convention, Preamble, Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem for which the United Nations has recognized an international scope and nature cannot therefore be achieved without international co-operation.

16 UNGA 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting' (22 November 1951) UN Doc. A/CONF.2/SR/13, 13.

interception, non-admission at the border, transfer, and rendition, among others.[17] Subsequently, the essence is not the act but its consequence, that is, putting the dignity, life, or liberty of the person in danger. Simultaneously, refoulement is different from expulsion or deportation, as these concepts cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.[18] The prohibition of refoulement encompasses not only the prohibition to return to the country of origin, but also to any country where the person's life or freedom would be threatened based on any of the five limitative grounds.

Regarding the personal scope, the protection against refoulement under Article 33(1) applies to any person who, on the one hand, meets the 'inclusion criteria' for refugees provided under Article 1A(2) of the Refugee Convention, and on the other hand, does not fall under the scope of the 'exclusion criteria.'[19] Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained by the declaratory nature of refugee status. As the United Nations High Commissioner for Refugees (UNHCR) eloquently stated,

> a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.[20]

The UNHCR also established the following:

> every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because application might be rejected at borders

17 Chetail, 2019, p. 187; Lauterpacht and Bethlehem, 2003, p. 87.
18 Goodwin-Gill and McAdam, 2021, p. 466.
19 UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (2007) (hereinafter: UNHCR 2007 Advisory Opinion) [Online]. Available at: https://www.refworld.org/docid/45f17a1a4.html (Accessed: 3 October 2023).
20 UNHCR 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (2011) UN Doc. HCR/1P/4/ENG/REV.3, para. 38.

> or otherwise returned to persecution on the grounds that their claim had not been established.[21]

One may thus conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have a refugee status with regard to the benefits of non-refoulement protection for the duration of the asylum procedure unless proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx.'[22] Consequently, non-refoulement is of special significance for asylum seekers: As they may be potential refugees, they should not be returned or expelled while their asylum application is pending. Additionally, as Chetail observes,[23] the personal scope of non-refoulement under the Refugee Convention can be also supported by the principle of *effet utile*. According to the International Court of Justice, which based its position on *effet utile* in the Case Concerning the Territorial Dispute between Libya and Chad, the principle of effectiveness is among the 'the fundamental principles of interpretation of treaties.'[24] *Effet utile* means that among the numerous methods of treaty interpretation, the one which best captures the practical effect of the respective norm shall be applied, and this cannot be realised if asylum seekers are not protected based on non-refoulement.

The asylum seeker's application *per se* triggers the application of non-refoulement as soon as the person is within the jurisdiction of the State Party to the Refugee Convention. The European Court of Human Rights (ECtHR) pointed out in *Amuur v. France*[25] and *Hirsi et al v. Italy*[26] that non-refoulement extends protection from the moment when the person concerned intends to enter the border of another country, that is, it not only protects those already staying in the territory of a particular State from expulsion. As the Human Rights Committee (HRC) remarks, this jurisdiction is extended to 'anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party.'[27] Therefore, non-refoulement has a so-called extraterritorial scope, meaning that it is applicable in those territories that are not part of State territory

21 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.
22 Goodwin-Gill and McAdam, 2021, p. 469.
23 Chetail, 2019, p. 188.
24 Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v Chad, Judgment of 3 February 1994, ICJ Reports 6, para. 51.
25 ECtHR, *Amuur v France* (Application No. 19776/92), Judgment, 25 June 1996.
26 ECtHR, *Hirsi Jamaa et al v Italy* (Application No. 27765/09), Judgment, 23 February 2012.
27 UN Human Rights Committee (HRC), General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 10.

in a legal sense but are under the effective control of the respective State Party.[28] According to the UNHCR interpretation, when the drafters of the Refugee Convention intended a particular clause of the treaty to apply only to those within the territory of a State Party, they chose language that leaves no doubt regarding their intention. Besides, the UNHCR established that any interpretation that tailors the geographical scope of Article 33(1) as not applicable to measures whereby a State, outside its territory, drives back refugees to a country where they face the threat of persecution would be manifestly inconsistent with the humanitarian object and purpose of the Refugee Convention and its 1967 Protocol. The first two paragraphs of the Preamble of the Refugee Convention read as follows: 'considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,' and 'considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.' The UNHCR underpins the overriding humanitarian object and purpose of the Refugee Convention based on a comprehensive review of the *travaux préparatoires*. The UNHCR, in accordance with Article 32 of the 1969 Vienna Convention on the Law of Treaties[29] on the supplementary nature of historical interpretation, is of the view that turning to the drafting history of Article 33(1) is not necessary owing to the unambiguous wording of this provision; however, the *travaux préparatoires* might be of interest in explaining the content and scope of non-refoulement.[30]

Although non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. While drafting the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement;[31] therefore, the final text of Article 33(2) states,

> the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

28 De Boer, 2015, pp. 118–134; Goodwin-Gill, 2011, pp. 443–457; Trevisanut, 2014, pp. 661–675.

29 Art. 32 of the 1969 Vienna Convention on the Law of Treaties. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result that is manifestly absurd or unreasonable.

30 UNHCR 2007 Advisory Opinion [Online].

31 Goodwin-Gill and McAdam, 2021, p. 468.

This provision encompasses two exceptions that reflect a State-centred approach: The first is related to the public security of the host country, while the second protects the host country specifically against crime. Nonetheless, these provisions should be interpreted restrictively and only be applied in highly exceptional circumstances. The wording of Article 33(2) clearly implies this restrictive approach regarding the second exception defending the host country specifically against crime: (i) 'convicted by a final judgment' suggests that effective remedies were exhausted; (ii) 'for a particularly serious crime' suggests that international crimes, such as crimes against humanity and crimes against the State, for example, terrorism, should be considered; and (iii) 'constitutes a danger to the community of that country' suggests that owing to the risk of subsequent offence, the person is dangerous for the host country.[32] However, Article 33(2) of the Refugee Convention does not affect the host State's non-refoulement obligations under international human rights law, which are absolute and allow no such exceptions (see in detail below).[33]

Although under Article 33(1) of the Refugee Convention, a return to the State where persecution has occurred is prohibited, a return to any other State is not, which has led to restrictions applied by host States such as the 'first country of arrival rule' and the 'safe third country rule'. This approach often entails 'chains of deportation' that lead to refugees finding themselves in the State where they first arrived after fleeing their homeland.[34] Additionally, some States practice 'extraterritorial refoulement' and intercept refugees on the high seas to keep them outside territorial waters. In *Sale v Haitian Centers Council*, the US Supreme Court[35] found that intercepting Haitians on the high seas and returning them to their home State is lawful; however, the Inter-American Court of Human Rights[36] declared that it breaches Article 33 of the Refugee Convention. In the same vein, the ECtHR declared a similar bilateral agreement between Italy and Libya, concluded in 2012, unlawful in *Hirsi Jamaa and Ors v. Italy*.[37]

Australia has also pursued a legally dubious practice of 'offshore processing centres' for several years, where asylum seekers not only have been returned to the high seas so they cannot enter State territory, but also their asylum applications have been assessed in these processing centres; even if they are recognised as refugees, they have been legally prevented from settling in Australia. The opening of the offshore processing centres was closely connected with the infamous 'Tampa affair.' In August 2001, a small Indonesian fishing boat overloaded

32 Chetail, 2019, pp. 189–190.
33 Lauterpacht and Bethlehem, 2003, pp. 159, 166, 179.
34 Hernández, 2019, pp. 431–432.
35 Sale v. Haitians Centers Council (1993) 509 US 155.
36 Haitian Interdiction Case 10.675 IACommHR No. 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550, paras. 156–158.
37 ECtHR, *Hirsi Jamaa and Ors v. Italy* (Application No. 27765/09), Judgment, 23 February 2012.

with more than 400 asylum seekers, mainly of Hazara ethnicity from Afghanistan, was stranded on the high seas near the Christmas Islands. The asylum seekers were rescued by a Norwegian freighter, the MV Tampa, under the direction of the Australian Maritime Safety Authority. However, when the Tampa's captain set course for the closest port in Indonesia with facilities to dock such a large vessel, some asylum seekers threatened to commit suicide if they were sent back there. Simultaneously, the Australian government refused to grant permission to land any of the asylum seekers, and Australian troops boarded the ship and prevented it from sailing any closer to the Christmas Islands. On the same day, the Australian prime minister submitted a backdated bill on border protection to provide retrospective authority for the boarding of the Tampa. In September, the Australian government concluded agreements with Nauru and New Zealand, and finally, the Tampa's asylum seekers were taken to Nauru, or sent therefrom to New Zealand. In the aftermath of the 'Tampa affair', the Australian government passed a series of laws establishing a new legislative framework for asylum issues, the so-called 'Pacific Solution,' which meant that asylum seekers did not have an automatic right to apply for refugee status if they arrived on many of Australia's offshore islands, including the Christmas Islands. Many human rights organisations have criticised this policy, and the Papuan Supreme Court shut down two processing centres, in Nauru and on Manus Island, in 2017, finding the restriction on the movement of asylum seekers unconstitutional.[38] Nonetheless, on and off since 2011, Australia had automatically sent asylum seekers arriving by boat to Nauru for refugee status determination,[39] until the summer of 2023 when even the last refugees were moved from the offshore processing centre.[40]

3. The principle of non-refoulement under international human rights law

As a result of the normative development of human rights law, non-refoulement has also become a pivotal tool for protection under this branch of international law. As for universal human rights treaties, this fundamental principle was enshrined under Article 3 of the 1984 UN Convention against Torture,[41] which,

38 Gammeltoft-Hansen, 2011, pp. 100–157.

39 Morris, 2023; National Museum Australia, Defining Moments, 'The Tampa affair' [Online]. Available at: https://www.nma.gov.au/defining-moments/resources/tampa-affair (Accessed: 29 January 2024).

40 Doherty and Gillespie, 2023; Tooby, 2023.

41 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, U.N.T.S., vol. 1465, p. 85. Art. 3(1). No State Party shall expel, return ('refouler'), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. (2) For the purpose of determining whether there are such grounds, the competent authorities shall

for the first time, adopted a general human rights context and extended beyond refugee law. Some years later, Article 16 of the 2006 UN International Convention for the Protection of All Persons from Enforced Disappearance[42] reinforced the universal endorsement of non-refoulement.[43] At the regional level, one can identify the principle of non-refoulement in several treaties as well: Article 3(2) of the 1957 European Convention on Extradition,[44] Article 22(8) of the 1969 American Convention on Human Rights,[45] Article 4(5) of the 1981 Inter-American Convention on Extradition,[46] Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture,[47] Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union,[48] and Article 28 of the 2004 Arab Charter on Human

take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

42 International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, U.N.T.S., vol. 2716, p. 3. Art. 16(1). No State Party shall expel, return ('refouler'), surrender, or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights or of serious violations of international humanitarian law.

43 Molnár, 2019, pp. 5–9.

44 Art. 3(2) of the European Convention on Extradition, Paris, 13 December 1957, ETS 24. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion, or that that person's position may be prejudiced for any of these reasons.

45 Art. 22(8) of the American Convention on Human Rights 'Pact of San José, Costa Rica,' San José, 18 July 1978, U.N.T.S., vol. 1144, p. 123. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

46 Art. 4(5) of the Inter-American Convention on Extradition, Caracas, 25 February 1981 [Online]. Available at: https://www.oas.org/juridico/english/treaties/b-47.html (Accessed: 22 July 2023). Extradition shall not be granted when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion, or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.

47 Art. 13(4) of the Inter-American Convention to Prevent and Punish Torture, Cartagena de Indias, 28 February 1987, OAS Treaty Series, No. 67. Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman, or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

48 Art. 19(2) of the Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, Official Journal of the European Union, C 326/391. No one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Rights.[49] Although it does not constitute a binding law, Para. III (5) of the 1984 Cartagena Declaration of Central America, Mexico, and Panama (hereinafter: the 1984 Cartagena Declaration)[50] is worth mentioning. The wording of the 1984 Cartagena Declaration is the boldest and the most outspoken among that of all the above-mentioned documents, as Para. III (5) identifies non-refoulement as an imperative norm of international law (*jus cogens*). Simultaneously, the 1984 Cartagena Declaration seems to have rarely been applied in practice, so its case-law is undeveloped and national authorities rarely use it when it comes to the protection of refugees.[51]

Additionally, the principle of non-refoulement has appeared implicitly at the universal level. Article 14 of the 1948 Universal Declaration on Human Rights (UDHR),[52] which provides the right to seek and enjoy asylum from persecution, can be directly traced to the horrifying events of the Second World War, along with Article 13[53] (the right to leave one's country) and Article 15[54] (the right to nationality).[55] Since the UDHR has failed to provide the individual right to be granted asylum, just like the right to property, and it was not restated under the 1966 International Covenant on Civil and Political Rights (ICCPR),[56] non-refoule-

49 Art. 28 of the Arab Charter on Human Rights, League of Arab States, 2004 [Online]. Available at: https://www.refworld.org/docid/60a28b534.html (Accessed: 31 May 2023). Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.

50 Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama, Cartagena, 22 November 1984 [Online]. Available at: https://www.refworld.org/docid/3ae6b36ec.html (Accessed: 22 July 2023) Para. III (5) To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees, and in the present state of international law, should be acknowledged and observed as a rule of *jus cogens*.

51 Reed-Hurtado, 2013, p. 5.

52 Art. 14(1) of the United Nations General Assembly Resolution 217 (III) A, 10 December 1948. Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

53 Art. 13(1) of the UDHR Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country.

54 Art. 15(1) of the UDHR. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

55 Ádány, 2016, p. 239.

56 Art. 7 of the International Covenant on Civil and Political Rights, New York, 16 December 1966, U.N.T.S., vol. 999, p. 171 and vol. 1057, p. 407. No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ment has played a key role in addressing the hiatus of the right to asylum in the UN human rights protection system.[57]

A year later, non-refoulement was enshrined again under Article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereinafter: 1949 GC IV)[58] as an inevitable cornerstone of comprehensively recodified international humanitarian law. Article 45 of the 1949 GC IV adopted a more explicit and sophisticated wording of non-refoulement than the UDHR, including political opinion or religious belief as possible grounds of persecution. However, the personal scope of this provision covers only protected persons, that is,

> those who, at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.[59]

The text of Article 45 of the 1949 GC IV reflects a *lex specialis*: Since humanitarian law provides an additional protection to human rights law, the application of non-refoulement as a rule of humanitarian law offers additional protection to that under the interpretation of non-refoulement under human rights law.[60]

In addition to the above-mentioned documents, other general human rights instruments constitute an implicit provision where their respective monitoring mechanisms imply the duty of non-refoulement. Most importantly, Article 3 of the 1950 European Convention on Human Rights[61] (ECHR) includes the absolute prohibition of torture or inhuman or degrading treatment or punishment, Based on the aforementioned Article, the European Commission of

57 Lauterpacht, 1948, p. 354.

58 Art. 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, U.N.T.S., vol. 75, p. 287. […] In no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs.

59 Art. 4 of the International Committee of the Red Cross, Convention (IV) relative to the Protection of Civilian Persons in Time of War – Definition of Protected Persons [Online]. Available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-4 (Accessed: 22 July 2023).

60 Molnár, 2016, pp. 51–61.

61 Art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, ETS 5. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Human Rights addressed this issue as early as 1961 in *X v. Belgium*,[62] suggesting that the removal of foreign nationals might contradict Article 3 of the ECHR. The ECtHR officially confirmed the principle of non-refoulement in *Soering v. the United Kingdom*[63] in 1989. In this landmark case, the ECtHR found that the so-called death row phenomenon would have breached Article 3 of the ECHR, that is, the prohibition of inhuman or degrading treatment, if the applicant had been extradited to the US. Two years later, the ECtHR adopted a more cautious stance in *Vilvarajah and Others v. the United Kingdom*,[64] where the five applicants were asylum seekers of Tamil ethnicity from Sri Lanka whose requests were denied in the UK and who had been returned to Sri Lanka. The ECtHR rejected their allegations of a breach of Article 3, citing the risk of ill-treatment, and a breach of Article 13 because of UK's ineffective judicial remedy. In *Vilvarajah*, the ECtHR based its reasoning on the fact that people of Tamil ethnicity were not in a more adverse position than people of other ethnicities in Sri Lanka. However, in *Chahal v. the United Kingdom*,[65] the ECtHR referred to *Soering*, prohibiting the deportation of a Sikh separatist to India because of the risk of violating Article 3. In *Chahal*, the ECtHR held that the prohibition derived from non-refoulement is made in 'absolute terms [...] irrespective of a victim's conduct.'[66] In *Salah Sheekh v. the Netherlands*[67] and in *Saadi v. Italy*,[68] unlike in *Vilvarajah*, the ECtHR held that if the applicant is a member of a community that is the target of persecution, he or she only needs to prove his or her membership of the persecuted community or the mere fact of persecution. In 2011 and 2012, the ECtHR delivered three relevant judgments that are also worth mentioning in this regard. *MSS v. Belgium and Greece*[69] concerned an Afghan asylum seeker who fled Kabul in 2008, entered the EU through Greece, and travelled to Belgium, where he applied for asylum. According to the Dublin rules, Greece was considered the EU Member State responsible for the examination of his asylum application. Therefore, the Belgian authorities transferred him there, where he faced detention in unhealthy conditions before living on the streets without any material support. At issue in the judgment was the risk of violating the right to life, the prohibition of inhuman or degrading treatment or punishment, and/or the

62 EComHR, *X v. Belgium* (No. 984/61), Decision, 30 May 1961.
63 ECtHR, *Soering v. the United Kingdom* (Application No. 14038/88), Judgment, 7 July 1989, paras. 87–88.
64 ECtHR, *Vilvarajah and Others v. the United Kingdom* (Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), Judgment, 30 October 1991.
65 ECtHR, *Chahal v. the United Kingdom* (Application No. 22414/93), Judgment, 15 November 1996.
66 ECtHR, *Chahal v. the United Kingdom* (Application No. 22414/93), Judgment, 15 November 1996, para. 413.
67 ECtHR, *Salah Sheekh v. the Netherlands* (Application No. 1948/04), Judgment, 11 January 2007.
68 ECtHR, *Saadi v. Italy* (Application No. 37201/06), Judgment, 28 February 2008.
69 ECtHR, *MSS v. Belgium and Greece* (Application No. 30686/09), Judgment, 21 January 2011.

right to an effective remedy. Eventually, in its judgment, the ECtHR found that degrading living conditions can trigger the prohibition of refoulement. In *Sufi and Elmi v. the United Kingdom*,[70] the ECtHR once again highlighted the principle of non-refoulement when it established that the deportation of two applicants to Somalia would constitute a violation of Article 3 because of the humanitarian crisis and indiscriminate violence in the African country. In *Othman (Abu Qatada) v. the United Kingdom*,[71] a case concerning a recognised refugee in the UK who was to be deported to Jordan in the interests of national security, the UK government obtained assurances from Jordan that the applicant would not be subjected to ill-treatment and would be tried fairly by the Jordanian authorities. Despite the efforts of the UK, the ECtHR found a violation of non-refoulement in connection with the flagrant denial of the right to a fair trial.

After the ECtHR delivered the *Soering* judgment, other universal and regional monitoring bodies endorsed the implicit duty of non-refoulement, including the Committee of the Rights of the Child,[72] the Committee on the Elimination of Discrimination against Women,[73] the Inter-American Commission of Human Rights,[74] and the African Commission on Human and Peoples' Rights.[75] Moreover, as the second pillar of the International Bill of Human Rights, Article 7 of the ICCPR reiterates the absolute prohibition of torture and bans it through an extraterritorial interpretation, that is, a State indirectly commits torture by transferring the person concerned to a country where he or she will be tortured or subjected to cruel, inhuman, or degrading treatment or punishment.[76] The HRC elaborated in *Kindler v. Canada*[77] and in General Comment No. 31[78] that the implicit duty of non-refoulement could be connected not only with the prohibition of torture but also with any human right under the ICCPR. Additionally, in

70 ECtHR, *Sufi and Elmi v. the United Kingdom* (Application Nos. 8319/07 and 11449/07), Judgment, 28 June 2011.

71 ECtHR, *Othman (Abu Qatada) v. the United Kingdom* (Application No. 8139/09), Judgment, 17 January 2012.

72 UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 27.

73 UN Committee on the Elimination of Discrimination against Women (CEDAW), Communication No. 33/2011 concerning *MNN v. Denmark*, 8–26 July 2013 CEDAW/C/D/33/2011, para. 8.10.

74 The Haitian Centre for Human Rights et al v United States, Case No. 10.675, Report No. 51/96 (IAComHR 13 March 1997) Doc. OEA/Ser.L/V/II.95 Doc. 7 Rev., para. 167.

75 *John K. Modise v. Botswana*, Decision on the Merits, Comm. No. 97/93, IHRL 223 (AComHpR 2000), para. 91.

76 See Art. 7 of the UN Human Rights Committee (HRC), CCPR General Comment No. 20 (Prohibition of Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment), 10 March 1992.

77 Kindler v. Canada (1993) HRC CCPR/C/48/D/470/1991, para. 13.2.

78 UN Human Rights Committee (HRC), General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 12.

Kindler, the HRC returned the ruling of the Supreme Court of Canada that held that the government policy allowing for the extradition of convicted criminals to a country in which they may face death penalty was valid under the Canadian Charter of Rights and Freedoms.[79] Simultaneously, as the aforementioned cases demonstrate, the ECtHR seemed reluctant to expand the possible scope of non-refoulement beyond the prohibition of torture, inhuman or degrading treatment or punishment, the right to life, freedom from slavery and arbitrary detention, and the right to a fair trial.

4. Differences and similarities in the aspects of non-refoulement under international refugee law and human rights law

Indeed, serious violations of any human right would trigger the correlative prohibition of refoulement if the gravity of the human rights violation reaches at least the level of degrading treatment. Therefore, the human rights aspect of non-refoulement coincides substantially with that of its refugee law counterpart. Chetail points out that while degrading treatment and persecution are autonomous in international law, defining both as a serious violation of human rights is correct and 'erodes their distinctive character,' that is, 'degrading treatment equates with persecution under the refugee definition.'[80] In spite of the similarities, the scope of non-refoulement under human rights law differs from that in its refugee law counterpart in three respects. First, the human rights law aspect is not limited to the five grounds (race, religion, nationality, membership of a particular social group, and political opinion) enumerated under Article 33(1) of the Refugee Convention. Second, the human rights law aspect is not limited geographically to those who are outside the country of their nationality. For instance, the human rights aspect of non-refoulement applies to persons pursuing diplomatic missions and to persons who are staying in an area controlled by occupying or peacekeeping missions, or that is otherwise under the effective control of another State.[81] Third, the human rights aspect of non-refoulement has an absolute nature when there is a real risk of torture or of inhuman or degrading treatment or punishment, including the death penalty. In such cases, the human rights aspect of non-refoulement applies not only to refugees and asylum seekers under Article 33(1) of the Refugee Convention, but to anyone. While refugee law offers subsidiary protection exclusively to those

79 The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada, forming the first part of the 1982 Constitution Act [Online]. Available at: https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/pdf/charter-poster.pdf (Accessed: 19 August 2023).

80 Chetail, 2014, pp. 19–72.

81 Noll, 2005, p. 542.

who deserve it under the criteria established by the Refugee Convention, human rights law is inclusive and universal.

It is clear that the norm prohibiting refoulement is part of customary international law, and thus is binding on all States, whether or not they are parties to the Refugee Convention. However, what could remain uncertain is whether the norm has achieved the status of *jus cogens*[82] *per se*. The Executive Committee of the UNHCR in numerous conclusions,[83] the 1969 'Addis-Ababa Convention,'[84] the 1984 Cartagena Declaration of Refugees, the 1984 Convention against Torture, the American Convention on Human Rights and the ECHR, and the EU Charter of Fundamental Rights formulate an absolute ban without exceptions,[85] and so does the case-law of the respective monitoring mechanisms in the case of a prospective violation of the prohibition of torture or inhuman or degrading treatment or punishment. However, as discussed above, Article 33(2) of the Refugee Convention does not establish an absolute prohibition, as it presents two exceptions to the non-refoulement obligations of States.

5. Concluding remarks

The principle of non-refoulement is one of the fundamental building blocks of the universal system for the protection of refugees; however, as has been demonstrated above, it has been repeatedly challenged by asylum States. The significance of non-refoulement lies in its *prima facie* function, as it serves as an entry point when assessing an asylum seeker's refugee application, while it is a precondition for other rights guaranteed by the Refugee Convention. Simultaneously, non-refoulement is limited in applicability and scope under the Refugee Convention, with special regard to the five grounds enshrined under Article 33(1), to the 'outside the country of nationality rule,' and to the exceptions permitted by Article 33(2). As for the human rights law aspect of non-refoulement, the case-law of international and domestic courts and respective monitoring bodies

82 Art. 53 of the 1969 Vienna Convention on the Law of Treaties. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Art. 64 of the 1969 Vienna Convention on the Law of Treaties. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

83 See Executive Committee of the UNHCR Conclusion No. 25 of 1982, No. 55 of 1989, and No. 79 of 1996.

84 OAU Convention governing the specific aspects of refugee problems in Africa, 10 September 1969, U.N.T.S. vol. 1001, p. 45.

85 Farmer, 2008, pp. 1–36; Allain, 2001, pp. 533–558.

has demonstrated that these limits do not exist: The prohibition of refoulement applies to anyone when there is a real risk that serious violations of human rights, especially degrading treatment, will occur. Despite their differences, then, the meaning of non-refoulement under refugee law coincides in substance with that under human rights law. The reason for this is the essence of non-refoulement, namely the principle of civilisation and solidarity and the prevalence of human rights, including the human rights of refugees.

Bibliography

- Ádány, T. V. (2016) 'Nemzetközi jogi szempontok a migrációs válság kezeléséhez', *Iustum Aequum Salutare*, 12(2), pp. 237–249.
- Allain, J. (2001) 'The Jus Cogens Nature of Non-Refoulement', *International Journal of Refugee Law*, 2001/13, pp. 533–558; https://doi.org/10.1093/ijrl/13.4.533.
- Chetail, V. (2014) 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Rubio-Marín, R. (ed.) *Human Rights and Immigration*. 1st edn. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198701170.003.0002.
- Chetail, V. (2019) *International Migration Law*. 1st edn. Oxford: Oxford University Press.
- De Boer, T. (2015) 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection', *Journal of Refugee Studies*, 28(1), pp. 118–134; https://doi.org/10.1093/jrs/feu024.
- Doherty, B., Gillespie, E. (2023) 'Australia to move last refugee from offshore processing on Nauru – but its cruelty and cost are not over', *The Guardian*, 24 June 2023. [Online]. Available at: https://www.theguardian.com/australia-news/2023/jun/24/australia-to-move-last-refugee-from-offshore-processing-on-nauru-but-its-cruelty-and-cost-is-not-over (Accessed: 29 January 2024).
- Farmer, A. (2008) 'Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection', *Georgetown Immigration Law Journal*, 23(1), pp. 1–36.
- Gammeltoft-Hansen, T. (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*. 1st edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511763403.006.
- Gatrell, P. (2000) *Forced Migration during the Second World War: An Introduction* [Online]. Available at: https://www.gale.com/intl/essays/peter-gatrell-forced-migration-second-world-war-introduction (Accessed: 30 July 2023).
- Goodwin-Gill, G. S. (2011) 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement', *International Journal of Refugee Law*, 23(3), pp. 443–457; https://doi.org/10.1093/ijrl/eer018.
- Goodwin-Gill, G. S., McAdam, J. (2021) *The Refugee in International Law*. 4th edn. Oxford: Oxford University Press.
- Grahl-Madsen, A. (1982) 'International Refugee Law Today and Tomorrow', *Archiv des Völkerrechtes*, 20(4), pp. 411–467.
- Hernández, G. (2019) *International Law*. 1st edn. Oxford: Oxford University Press.
- Jager, G. (2001) 'On the History of the International Protection of Refugees', *International Review of the Red Cross*, 83(843), pp. 727–737; https://doi.org/10.1017/S1560775500119285.
- Lauterpacht, E., Bethlehem, D. (2003) 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Türk, F., Nicholson, F. (eds.) *Refugee Protection in International Law: The UNHCR's Global Consultations on*

International Protection. 1st edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511493973.008.

- Lauterpacht, H. (1948) 'The Universal Declaration of Human Rights', *British Yearbook of International Law*, 25(1), pp. 354–381.
- Molnár, T. (2016) 'The Principle of Non-Refoulement under International Law: Its Inception and Evolution in a Nutshell', *Corvinus Journal of International Affairs*, 1(1), pp. 51–61.
- Molnár, T. (2019) 'A külföldiek kiutasításának korlátai a Polgári és Politikai Jogok Nemzetközi Egyezségokmányának koordinátarendszerében – 50 év távlatából' in Csapó, Zs. (ed.) *Jubileumi tanulmánykötet az 1966. évi egyezségokmányok elfogadásának 50 évfordulójára*. Budapest: Dialóg Campus – Wolters Kluwer.
- Morris, J. (2023) *As Nauru Shows, Asylum Outsourcing Has Unexpected Impacts on Host Communities* [Online]. Available at: https://www.migrationpolicy.org/article/nauru-outsource-asylum (Accessed: 29 January 2024).
- Noll, G. (2005) 'Seeking Asylum at Embassies: A Right to Entry under International Law', *International Journal of Refugee Law*, 17(3), pp. 542–573; https://doi.org/10.1093/ijrl/eei020.
- Rabben, L. (2016) *Sanctuary and Asylum: A Social and Political History.* Seattle and London: University of Washington Press.
- Reed-Hurtado, M. (2013) 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', *UNHCR Legal and Protection Policy Research Series*, PPLA/2013/03, pp. 1–33.
- Schuster, L. (2002) 'Asylum and the Lessons of History', *Race and Class*, 44(2), pp. 40–56; https://doi.org/10.1177/0306396802044002974.
- Tooby, N. (2023) 'Australia Evacuates Last Refugee on Nauru', *Human Rights Watch*, 29 June 2015. [Online]. Available at: https://www.hrw.org/news/2023/06/29/australia-evacuates-last-refugee-nauru (Accessed: 29 January 2024).
- Trevisanut, S. (2014) 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', *Leiden Journal of International Law*, 27(3), pp. 661–675; https://doi.org/10.1017/S0922156514000259.
- Weis, P. (1995) The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary. 1st edn. Cambridge: Cambridge University Press.