

International Refugee Law III: The Principle of Non-Refoulement

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ABSTRACT

The principle of non-refoulement is a fundamental aspect of international law that prohibits states from returning individuals to territories where they face persecution, torture, or serious harm. This principle is enshrined in the 1951 Refugee Convention and reinforced by human rights law, customary international law, and humanitarian law. It applies to refugees and asylum seekers, ensuring their protection from being returned to dangerous situations. While generally considered absolute, limited exceptions exist for national security or serious crimes. Despite its importance, challenges persist in its application and enforcement, including restrictive interpretations and variability among states.

This Chapter provides a comprehensive review of the principle of non-refoulement, covering its development, interpretation, and application in various international and national contexts. The review is structured around four main sub-chapters, each focusing on a different aspect of the principle.

The first sub-chapter explores the principle of non-refoulement under the Refugee Convention, including its historical development, interpretation, and exceptions. The second sub-chapter examines the principle's application in the case law of UN bodies, including the UNHCR and judicial/quasi-judicial bodies. The third sub-chapter discusses the principle's scope and application under the European Convention on Human Rights and the practice of the European Court of Human Rights. The final sub-chapter reviews the principle's application in other regional international courts, such as the Court of Justice of the European Union and the Inter-American Court of Human Rights, as well as national courts.

Overall, this Chapter provides a thorough analysis of the principle of non-refoulement, highlighting its importance in protecting individuals from persecution, torture, and serious harm. It also underscores the challenges and complexities that arise in its application and enforcement, including restrictive interpretations and variability among states.

KEYWORDS

non-refoulement, refugee, persecution, international protection, asylum

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1. The Principle of Non-Refoulement Under the Refugee Convention

1.1. Introduction

The principle of non-refoulement is a cornerstone of international refugee law, protecting individuals from being returned to countries where they would face persecution or harm. This principle has evolved over time, from its early roots in ancient practices of providing refuge to those fleeing persecution, to its codification in international law through the 1951 Refugee Convention.

The 1951 Refugee Convention and its 1967 Protocol establish the framework for non-refoulement, outlining the responsibilities of states towards refugees and asylum seekers. Article 33 of the Convention prohibits states from expelling or returning refugees to territories where their lives or freedom would be threatened, subject to certain exceptions related to national security and public order.

This Chapter explores the development of the non-refoulement principle, from its historical origins to its contemporary application in international law. It examines the scope and limitations of the principle, including the exceptions provided for in the 1951 Refugee Convention, and discusses the critical role of states in upholding the principle of non-refoulement in the protection of refugees and asylum seekers.

Outline of the Key terms:

- Asylum – A form of protection given by a State on its territory, based on the principle of non-refoulement and internationally or nationally recognised refugee rights, which is granted to a person who is unable to seek protection in their country of citizenship and / or residence, in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹
- Asylum seeker – In the global context, a person who seeks protection from persecution or serious harm in a country other than their own and awaits a decision on the application for refugee status under relevant international and national instruments. In the EU context, a third-country national or stateless person who has made an application for protection under the Geneva Refugee Convention and Protocol, in respect of which a final decision has not yet been taken.²
- Non-refoulement – In the global context, a core principle of international refugee and human rights law that prohibits States from returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment, or punishment, or any other human rights violation. In the international protection context, a core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom

1 European Migration Network, 2023, EMN Asylum and Migration Glossary, term: “Asylum”.

2 Ibid., term: “Asylum seeker”.

- may be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.³
- Refugee – In the global context, either a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it. In the EU context, either a third-country national who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail themselves of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned before, is unable or, owing to such fear, unwilling to return to it, and to whom exclusion grounds do not apply.⁴
 - International protection – In the global context, the actions by the international community on the basis of international law, aimed at protecting the fundamental rights of a specific category of persons outside their countries of origin, who lack the national protection of their own countries.⁵

1.2. The Principle of Non-Refoulement Before the Adoption of the 1951 Refugee Convention

The principle of non-refoulement represents the foundation of both international refugee law and asylum, reflecting the international community's commitment to guaranteeing everyone's enjoyment of human rights, including the rights to life, liberty, and security of person, as well as freedom from torture and cruel, inhuman, or degrading treatment or punishment.⁶ It follows from the right to seek and enjoy asylum from persecution in other countries, as outlined in Article 14 of the Universal Declaration of Human Rights.⁷ Returning a refugee to persecution or danger jeopardises these and other rights.⁸

1.2.1. The Historical Overview of the Principle of Non-Refoulement

Since ancient times, individuals have fled their countries of origin, mainly for political or religious reasons, and host states, usually received the non-citizens coming to

3 Ibid., term: "Non-refoulment".

4 European Migration Network, 2023, EMN Asylum and Migration Glossary, term: "Refugee".

5 Ibid., term: "International Protection".

6 UNHCR, Note on the Principle of Non-Refoulement, 1997.

7 UNGA, UDHR.

8 Ibid.

their states for these reasons.⁹ Shaping the scope of legal protection for those who flee oppression to other countries commenced in the 19th century, alongside the need of accepting those who were in need of protection.¹⁰ While the protection of those non-citizens who are in need had been rooted in the legal nature of states since antiquity, the legal history of providing international protection was introduced during the League of Nations.¹¹ Throughout the League of Nations era (1921-1946), various institutions were established to undertake some or all responsibilities of the High Commissioner for Refugees: the Nansen International Office for Refugees (1931-1938), the Office of the High Commissioner for Refugees from Germany (1933-1938), the Office of the High Commissioner of the League of Nations for Refugees (1939-1946), and the Intergovernmental Committee on Refugees (1938-1947).¹² These organisations provided global protection to refugees based on international legal agreements typically concluded within the context of the League of Nations.

1.2.2. *The Principle of Non-Refoulement in the First Half of XX Century*

Initial attempts to establish the encompassing legal framework¹³ for the protection of refugees were made by adopting the Convention relating to the International Status of Refugees¹⁴ in 1933. It addressed various administrative actions, including the issuance of “Nansen certificates”, issues of refoulement, legal matters, labour conditions, industrial accidents, welfare and relief, education, fiscal policies, and exemptions from reciprocity, while also providing for the establishment of “committees for refugees”. The 1933 Convention represents a significant advancement in refugee protection and served as a foundational model for the 1951 Convention.¹⁵ The 1933 Convention was ratified by Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain and Northern Ireland, Italy, and Norway. Despite the low number of ratifications, it was through this Convention that the principle of non-refoulement gained recognition as a part of international treaty law.¹⁶

The Convention outlined the commitment¹⁷ of each contracting party to refraining from expelling or preventing the entry of refugees, such as expulsions or non-admittance at the border (refoulement), who had been granted regular residency within its territory,¹⁸ however, the Convention made an exception for the considerations of national security and public order.¹⁹

9 Goodwin-Gill and McAdam, 2007, p. 47.

10 See e.g., Parry and Fitzmaurice, 1965, pp. 53–4, 64–5.

11 Jaeger, 2001, pp. 843, 727.

12 Ibid., pp. 843, 729.

13 Goodwin-Gill and McAdam, 2007, p. 202; Zimmermann, Machts, and Dörschner, 2011, pp. 1399–1401.

14 Convention Relating to the International Status of Refugees, 1933.

15 Jaeger, 2001, pp. 843, 730.

16 Ibid.

17 Fitzmaurice, 2013, pp. 1, 2.

18 Convention on the International Status of Refugees, 1933, art. 3.

19 Ibid.

Furthermore, article 3 of the Convention pledged not to deny entry to refugees at the borders of their countries of origin. Meanwhile, the very same provision gave discretion to the Contracting States to implement any internal measures it considered necessary for refugees who, having been expelled for reasons of national security or public order, and who were unable to exit its territory due to the lack of required authorisations and visas, which they had not received despite their requests or the involvement of relevant institutions.²⁰

According to Gilbert, the 1933 Convention established the *non-refoulement principle* as a recognised element of international treaty law.²¹

As Goodwin-Gill and McAdam observe, the limited ratifications of instruments that featured ambiguous or complex provision significantly hindered the formal principle of non-refoulement. Nevertheless, the necessity for protective principles for refugees started to become apparent.²²

The subsequent significant stage in global protection was represented by the establishment of the International Refugee Organization (IRO) founded on 15th December 1946 through Resolution 62 (I) of the UN General Assembly. It functioned from 14th July 1947 until its dissolution on 28th February 1952, mainly focusing on the resettlement of refugees and internally displaced persons.

The far-reaching displacement²³ resulting from warfare and human rights violations during and after the Second World War encouraged the expansion of the non-refoulement principle to the protection of the right to asylum of those refugees who had fled their homes at great lengths. Soon after the formation of the United Nations, the General Assembly secured the right of refugees to remain in their host countries should they have “valid objections” to returning to their countries of origin. Resolution 8(1) accorded forcefully displaced non-citizens protection from their forceful return.²⁴ And after several years, the notion of non-refoulement was introduced in 1950 in the draft of the Convention on the International Status of Refugees.²⁵ While the first draft of the proposed provision enshrined the absolute notion²⁶ of the non-refoulement principle, the 1951 Conference of Plenipotentiaries²⁷ softened the absolute nature of the non-refoulement principle by incorporating exceptions relating to public order and national security.²⁸

Nevertheless, as Lauterpacht and Bethlehem noted, the consideration of the unique circumstances in article 33(2) did not grant states an unlimited degree of discretion in limiting the application of the non-refoulement rule, as the potential

20 Ibid.

21 Jaeger, 2001, pp. 843, 723.

22 Goodwin-Gill and McAdam, 2007, p. 203.

23 Grenville, 2005, p. 310.

24 UNGA, Res 8 (I), 1946.

25 UNESC Res 248 (IX)B, 1949; UNGA Res 429(V), 1950; UNGA, CSR, 1951, p. 137.

26 UN, Report of the Ad Hoc Committee on Refugees and Stateless Persons, 1950.

27 Goodwin-Gill and McAdam, 2007, p. 204.

28 UNGA, CSR, 1951, p. 137, art. 33:2.

individual impacts of refoulement should be evaluated.²⁹ Thus, it was understood that a deviation from the non-refoulement principle was acceptable only when there were “reasonable grounds” to believe that a very specific level of potential danger to national security or public order existed.³⁰ Ultimately, Article 33 of the 1951 Refugee Convention was adopted with established restrictions, along with Article 42(1), which disallowed any reservations to the rule.³¹

1.3. The Principle of Non-Refoulement in Article 33 of the 1951 Refugee Convention

The 1951 Refugee Convention was adopted on July 28th 1951, and became effective in 1954. As of January 2025, there are 146 state parties to the Convention. Article 1(A) of the Convention provides a definition of the term “refugee”, which includes several fundamental criteria: there must be a well-founded fear of persecution, which should be based on race, religion, nationality, membership of a particular social group or political opinion; the individual must be outside their country of origin; they must be unable or unwilling to seek the protection of that country; and they must also be unable or unwilling to return to it.

The 1951 Refugee Convention provides a non-refoulement provision in Article 33(1) establishing the prohibition of expelling or returning a refugee to the borders of those countries where their life or freedom may be jeopardised due to their race, religion, nationality, affiliation with a specific social group, or political beliefs.³²

1.3.1. “Contracting State” as the Main Guarantor of the Protection of the Non-Refoulement Rule

The Convention refers to the entities that are subject to the prohibition on refoulement as the “Contracting State”, which encompasses all States that are parties to the 1951 Convention. Furthermore, in accordance with Article I(1) of the 1967 Protocol, it also includes all States that are parties to the 1967 Protocol, regardless of their status concerning the 1951 Convention.³³

Generally States bear responsibility for actions concerning individuals who are subject to or within their jurisdiction.³⁴ Consequently, an individual’s status as being under a State’s jurisdiction is determined not by their physical presence within that State’s territory, but rather by whether they were under the effective control of, or impacted by representatives acting on behalf of that State in relation to the alleged conduct. Therefore the liability of the Contracting State for its actions, and those of

²⁹ Lauterpacht and Bethlehem, 2003, pp. 168, 169.

³⁰ Ibid.

³¹ CSR, art. 42:1.

³² Ibid., art. 33.

³³ Lauterpacht and Bethlehem, 2003, p. 108.

³⁴ See, e.g., ICCPR, art. 2:1; Optional Protocol to the ICCPR, 1966, art. 1 ; UNGA Res. 2200A (XXI); art. 1 of the ECHR; ACHR, art. 1:1.

individuals operating under its authority extends beyond the confines of its territory and ultimately depends on the ability to attribute the relevant actions to that State.³⁵

1.3.2. *Prohibited Conduct Under the Non-Refoulement Rule*

The phrase “in any manner whatsoever” in article 33(1) of the 1951 Refugee Convention clearly suggests that the primary intention was to forbid any action of removal or rejection that could endanger the individual involved, whether it be expulsion, deportation, return, rejection, or others.³⁶ The 1951 Convention and international law imply that States possess the unrestricted authority to deny entry to individuals who have a legitimate fear of persecution. Rather it indicates that when States are unwilling to provide asylum to those with a well-founded fear of persecution, they are obligated to pursue actions that do not constitute refoulement. Such actions may include transferring individuals to a safe third country or implementing alternative measures such as temporary protection or refuge.³⁷

1.3.3. *Protected Persons Under the Non-Refoulement Rule*

It is claimed that the principle of non-refoulement is applicable exclusively to those individuals who have been formally acknowledged as refugees. This claim is based on the understanding that refugee status is conferred under domestic law once it is established that an asylum seeker fulfils the requirements of a “refugee” as specified in Article 1A(2) of the 1951 Convention. Nevertheless, there are several compelling reasons to challenge the legitimacy of this position. Article 1A(2) of the 1951 Convention states that the term encompasses any individual who, due to a well-founded fear of persecution, meets the criteria outlined. Thus, within the context of the 1951 Convention and the 1967 Protocol, an individual who fulfils the requirements of Article 1A(2) qualifies as a refugee, irrespective of whether they have received formal recognition through a domestic legal procedure.³⁸

The Handbook on Procedures and Criteria for Determining Refugee Status, prepared by the *UNHCR*, provides an authoritative discussion on the matter, pointing out that a person qualify as a refugee under the 1951 Convention as soon as they meet the criteria outlined in the definition. The *UNHCR* explains that this qualification occurs prior to the formal determination of their refugee status.³⁹ Consequently, the non-refoulement rule applies not only to recognised refugees but to the asylum seekers as well, persons who are outside the country of their origin and are applying for the need of international protection.

A different approach would greatly compromise the effectiveness and utility of the protective measures established by the Convention, as it would allow States to

35 Lauterpacht and Bethlehem, 2003, p. 110.

36 Ibid., p. 112.

37 Ibid., p. 113.

38 *UNHCR*, Note on Non-refoulement, 1977, p. 116.

39 *UNHCR*, Handbook on Procedures and Criteria for Determining Refugee Status.

circumvent the Convention's provisions by denying formal refugee status to individuals who fulfil the criteria outlined in Article 1A:2.

1.3.4. *Exceptions from the Non-Refoulement Rule*

Article 33 enshrines the principle that no state is permitted to expel or return refugees to a location where their life or freedom may be jeopardised due to their race, religion, nationality, membership to a particular social group, or political beliefs. Nonetheless, it is crucial to acknowledge that there are specific situations in which states may attempt to exclude individuals from the protections afforded by the principle of non-refoulement.

The Refugee Convention itself provides for certain exceptions to this principle, under particular circumstances. These exceptions are predominantly grounded in considerations pertaining to national security and public order. The expulsion clause outlined in article 33(2) states that the prohibition against refoulement may be set aside under specific conditions. Under article 33(2), a refugee cannot assert the advantage of the regulation prohibiting refoulement if there are reasonable grounds to consider them as a threat to the security of the host country, or if they have been convicted by a final judgment of a particularly serious offense, thereby posing a risk to the community of that nation.

Therefore, the Convention acknowledges that individuals who have engaged in serious criminal activities or who present a threat to the security of the host country may be excluded from the protections afforded by the principle of non-refoulement. Article 33(2) includes two exceptions to the principle of non-refoulement: the public order exception and the national security exception. It is crucial to emphasise that despite the existence of exceptions to non-refoulement, the right to seek asylum and the imperative to safeguard individuals from persecution remain fundamental. These exceptions should be interpreted narrowly, and states are required to reconcile their legitimate security interests with their responsibilities to protect those in need.⁴⁰

1.3.4.1. National Security Exception

The notion of national security can be deduced from the principle that each State has the autonomy to freely determine its political, economic, social, and cultural systems. This is further supported by the State's *prima facie* exclusive authority in the *domaine réservé* and its entitlement to employ force in self-defence.⁴¹ Within this context, States are afforded a degree of discretion.⁴²

The exception, from a textual interpretation standpoint, is evidently intended for prospective application. This implies that it pertains to potential threats to a nation's security moving forward, rather than those that have occurred in the past. Although previous actions may be pertinent in evaluating whether there are justifiable reasons

40 Syahrin, 2017, pp. 168–178.

41 Goodwin-Gill and McAdam, 2007, pp. 235–236.

42 Zimmermann, Machts, and Dörschner, 2011, p. 1415.

to consider the refugee a future risk to the country, the primary focus remains on the potential danger to national security.⁴³

Article 33(2) of 1951 Refugee Convention does not specify the types of actions that would activate the national security exception. Additionally, it does not clarify what constitutes adequate evidence of a threat to the nation's security. This is a domain where States typically have a margin of appreciation. This margin of appreciation is, nonetheless, constrained in its extent. Firstly, there must be "reasonable grounds" to consider a refugee as a threat to the security of the host country. Consequently, the State in question cannot act in an arbitrary or capricious manner. The appropriate authorities are required to specifically evaluate the potential for future risk, and their determination must be substantiated by evidence.

This evaluation is supported by the provisions of Article 1F of the 1951 Refugee Convention which stipulates that the Convention does not apply in cases where there are substantial grounds for believing that the individual in question has, among other things, committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime, or actions that contravene the aims and principles of the United Nations. These actions are of an exceptionally serious nature. Given that the threshold for potential danger outlined in Article 33(2) is more stringent than that in Article 1F, it would be inconsistent with the overall framework of the Convention to interpret the term "danger" in Article 33(2) as encompassing anything less than a very serious threat.⁴⁴

In consideration of the constraints surrounding the application of the exceptions outlined in Article 33(2), a State intending to deport a refugee or asylum seeker to their country of origin must carefully evaluate the specific risks faced by the individual in question. Certain types of risk will categorically prevent refoulement, without exception. This is particularly relevant in situations where there is a threat of torture or other forms of cruel, inhuman, or degrading treatment or punishment. Consequently, prior to invoking an exception under Article 33(2), a State must undertake all reasonable measures to ensure that the individual would not be subjected to such dangers or any comparable threats as previously mentioned. Furthermore, the principle of proportionality must be upheld, assessing whether the risks posed to the refugee by expulsion or return outweigh potential threats to public security that would result from allowing them to remain.⁴⁵

1.3.4.2. Danger to the Community Exception

Article 33(2) of the 1951 Refugee Convention provides that the prohibition of refoulement cannot be claimed by a refugee who has been definitively convicted of a particularly serious crime poses a threat to the safety of the community in that country. Numerous elements that have been previously discussed regarding the interpretation

43 Lauterpacht and Bethlehem, 2003, p.135.

44 Lauterpacht and Bethlehem, 2003, p. 136; Grahl-Madsen, 1997, pp. 235–236.

45 Weis, 1990, p. 342.

of the national security exception will similarly apply, with necessary adjustments, to the interpretation and application of the “danger to the community” exception. Additional factors relevant to the national security exception that also pertain to the “danger to the community” exception include the necessity to evaluate individual circumstances, as well as the principles of proportionality and the balancing of the interests of the State against those of the individual involved.

Furthermore, while the assessment of danger to the community grants the State of refuge a margin of appreciation, this discretion is not without limits and is more narrowly defined than in the context of the national security exception.⁴⁶ Specifically, the implementation of the danger to the community exception mandates that the refugee must have been (a) convicted by a final judgment, and (b) of a particularly serious crime. In the absence of these criteria, the question of whether the individual poses a future risk to the community of the relevant country does not warrant consideration.⁴⁷

In conclusion, the principle of non-refoulement, enshrined in Article 33 of the 1951 Refugee Convention, is a fundamental pillar of international refugee law. Its evolution from ancient practices to its codification in modern international law underscores the international community’s commitment to protecting individuals from persecution and harm. The principle’s application extends to both recognised refugees and asylum seekers, emphasising the importance of safeguarding those fleeing violence, oppression, and human rights abuses.

The exceptions to non-refoulement, particularly those related to national security and danger to the community, are narrowly defined and subject to stringent criteria. States are required to carefully balance their security interests with their obligations to protect individuals from persecution and harm. The principle of proportionality and the need for evidence-based decision-making are crucial in this regard.

Ultimately, the principle of non-refoulement remains a cornerstone of international protection, and its effective implementation is essential in ensuring the safety and dignity of refugees and asylum seekers worldwide. As the global refugee crisis continues to evolve, it is imperative that states uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection.

2. The Principle of Non-Refoulement in the Case Law of UN Bodies

2.1. Introduction

The principle of non-refoulement, a cornerstone of international refugee law, has been extensively interpreted and applied by various UN bodies, including the UN High Commissioner for Refugees (UNHCR), judicial and quasi-judicial bodies, and

⁴⁶ See also, Zimmermann, Machts, and Dörschner, 2011, pp. 1421–1422.

⁴⁷ Lauterpacht and Bethlehem, 2003, p. 138.

other international organisations. This chapter examines the practice of these bodies in relation to the principle of non-refoulement, highlighting its scope, limitations, and application in different contexts.

UN judicial and quasi-judicial bodies, such as the Human Rights Committee and the Committee against Torture, have also contributed to the development of the principle of non-refoulement. These bodies have confirmed that the principle is applicable not only to refugees but also to individuals who may face serious human rights abuses, including torture and cruel, inhuman, or degrading treatment.

This chapter also explores the application of the principle of non-refoulement in situations of mass influx, where the scale and suddenness of arrivals can pose significant challenges to states. The UNHCR and other international organisations have emphasised that the principle of non-refoulement remains applicable in such situations, and that states have a responsibility to protect individuals from return to danger, regardless of the circumstances.

Finally, this chapter discusses the formation of customary international law on non-refoulement, highlighting the widespread acceptance and practice of the principle among states. This chapter concludes that the principle of non-refoulement has become a fundamental principle of international law, applicable to all states, regardless of their treaty obligations.

2.2. The Practice of the UNHCR Regarding the Interpretation of the Non-Refoulement Rule

The discussion surrounding the extent of states' obligations concerning non-refoulement persisted shortly after the 1951 Refugee Convention was adopted. This debate primarily focused on whether this principle solely safeguarded refugees who were already within the territory of the receiving state or if it also extended to those at the borders. There was uncertainty regarding whether it implied a "no duty to admit" policy for states or conversely, suggested an obligation to provide asylum – an interpretation that was largely unwelcomed by most states.⁴⁸ The UNHCR, in its Advisory Opinion, clearly stated that the principle of non-refoulement is applicable to all forms of forcible removal. This includes deportation, expulsion, extradition, informal transfers, renditions, and non-admission at the border.⁴⁹ The UNHCR affirmed⁵⁰ that individuals who have not had their status officially declared are also protected from refoulement under Article 33(1).⁵¹ For asylum-seekers, the non-refoulement principle is especially important. Since these individuals might be refugees,

48 UN, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 1951; Weis, 1953, pp. 478, 482, 487.

49 UNHCR, Advisory Opinion, 2007, p. 7.

50 Ibid., pp. 2–3.

51 E.g., UNHCR Conclusion No. 6, 1977, para. (c).

it is a well-established principle of international refugee law that they should not be sent back or expelled until their status has been decided.⁵²

The UNHCR stated⁵³ that the ban on refoulement to a risk of persecution under international refugee law applies to all types of forced removal, as shown by the language of Article 33(1) of the 1951 Convention, which discusses expulsion or return (refoulement) “in any manner whatsoever”. It is applicable not only regarding return to the country of origin or for a stateless individual, the country of previous habitual residence, but also to any other location where a person has cause to fear threats to his or her life or freedom related to one or more of the grounds outlined in the 1951 Convention, or from where he or she could be sent to such a threat.⁵⁴ According to the Advisory Opinion,⁵⁵ the 1951 Convention article 33(1) principle of non-refoulement does not by itself grant a person the right to asylum in a specific state. Key principles like non-refoulement (article 33) and non-penalisation of entry (article 31) are established by the 1951 Convention and the 1967 Protocol, which also specify who is eligible for international protection. They do not, however, specify how to determine someone’s status as a refugee. States must choose a course of action that does not lead to their direct or indirect removal to a location where their lives or freedom would be in danger because of their race, religion, nationality, membership in a specific social group, or political beliefs when they are unwilling to grant asylum to individuals seeking international protection on their soil.⁵⁶ This could entail, for instance, relocation to a secure third nation or, in some cases, another remedy like temporary safety or sanctuary.

With regards to the limitations to the principle of non-refoulement outlined in article 33(2), the Advisory Opinion concluded that the enforcement of this provision necessitates a personalised assessment by the country where the refugee is located to determine whether he or she falls under one of the two categories. The UNHCR emphasises that the ban on refoulement to a nation where the individual in question would confront a genuine risk of irreversible harm, such as breaches of the right to life or the right to be protected from torture or cruel, inhuman, or degrading treatment or punishment, applies to all individuals who might be located within a State’s territory or under its jurisdiction, including asylum seekers and refugees, and is relevant to the country from which removal is to take place or any other nation to which the individual may later be sent. It is non-derogable and is applicable in every situation, including in the context of efforts to fight terrorism, and in times of armed conflict.⁵⁷ As a result, States are required to ensure, before executing any removal action that the individual they plan to deport from their territory or jurisdiction would not face a

52 See: UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979, 1992, para. 28.

53 UNHCR, Advisory Opinion, 2007, pp. 2–3.

54 See: UNHCR, Note on Non-Refoulement, 1977, para. 4; See also Weis, 1995, p. 341.

55 UNHCR, Advisory Opinion, 2007, pp. 2–3.

56 See: Lauterpacht and Bethlehem, 2003, para. 76.

57 UNHCR, Advisory Opinion, 2007, p. 10.

threat of serious human rights violations like those indicated earlier. If there is such a risk, the State is prohibited from forcibly deporting the individual in question.⁵⁸

In UNHCR's opinion, a thorough examination of the *travaux préparatoires* affirms the primary humanitarian objective and aim of the Convention and offers substantial evidence that the non-refoulement clause in article 33(1) was designed to prevent any actions or inactions by a Contracting State that would result in sending a refugee back to regions where he or she may encounter persecution or threats to life or freedom.⁵⁹ Consequently, the UNHCR asserts that the critical factor is not whether those individuals are physically present within the State's borders, but rather if they fall under the effective control and jurisdiction of that State.⁶⁰

Similarly, the UNHCR Executive Committee (the ExCom) has repeatedly confirmed the "fundamental significance" of the non-refoulement principle.⁶¹ With the unprecedented rise in forced displacement, international instruments,⁶² UNHCR Executive Committee conclusions,⁶³ state practices,⁶⁴ and scholarly opinions⁶⁵ over time have clarified⁶⁶ article 33 of the Refugee Convention, now covering both non-return and non-rejection,⁶⁷ regardless of where an asylum-seeker presents themselves for entry, whether within a state or at its border.⁶⁸

Since 1977 the UNHCR ExCom has addressed the non-refoulement principle numerous times.⁶⁹ The Committee has conveyed significant concern that, although the principle of non-refoulement is largely adhered to in practice, this principle has been ignored in certain instances. Therefore, the ExCom has repeatedly reaffirmed the vital significance of adhering to the principle of non-refoulement – both at the border and within the territory of a State for individuals who may face persecution if returned to their country of origin, regardless of whether they have been officially acknowledged as refugees.⁷⁰ The Committee has emphasised that any action that forces a refugee to return or sends him to a nation where he has valid grounds to

58 Ibid., p. 11.

59 UNHCR, Advisory Opinion, 2007, pp. 12–14.

60 Ibid., p. 19.

61 UNHCR ExCom Conclusions: No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, para. (i).

62 OAU Convention, art. II(3); CoE Committee of Ministers Resolution 67, 1967; Declaration on Territorial Asylum, art. 3(1); AALCO, "1966 Bangkok Principles on the Status and Treatment of Refugees" 2001, art. III; Council Directive 2004/83/EC, 2004, art. 21; Council Directive 2005/85/EC, 2006, art. 3(1); Council Directive 2011/95/EU, 2011, art. 21.

63 UNHCR ExCom Conclusions: No. 6, 1977, para. (c); No. 22, 1981, para. II(A)(2); No. 81, 1997, para. (h); No. 82, 1997, para. d(iii).

64 Collins, 1971, pp. 67–77.

65 Hurwitz, 2009, p. 176; Goodwin-Gill and McAdam, 2007, p. 207; Hailbronner, 1988, pp. 123, 128; Grahl-Madsen, 1972, p. 94.

66 Cf. VCLT, 1969, arts. 31:1–2.

67 Goodwin-Gill and McAdam, 2007, p. 208.

68 *R. v Immigration Office at Prague Airport*, 2005, para. 26 (Lord Bingham).

69 See for example, UNHCR ExCom Conclusions: No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, para. (i).

70 UNHCR ExCom Conclusions: No. 6, 1977; No. 11, 1978; No. 14, 1979; No. 16, 1980.

fear persecution represents a serious breach of the acknowledged principle of non-refoulement.⁷¹

In its Conclusion 22 the ExCom clarified that in instances of significant influx, asylum-seekers ought to be accepted into the State where they initially seek asylum, and if that State is not capable of providing them with durable admission, it should still allow them entry at least temporarily and offer them protection in line with the principles established below. They should be accepted without any bias related to race, religion, political views, nationality, country of origin, or physical disability.⁷² The Committee has emphasised that the principle of non-refoulement ensures all asylum-seekers access to fair and effective procedures for evaluating their protection needs, as per the 1951 Convention and 1967 Protocol. It prohibits border rejections without these processes, mandates necessary support provision, and seeks solutions that respect human dignity. The ExCom has reiterated that the principle of non-refoulement also forbids returning refugees to areas where their safety is threatened due to race, religion, nationality, social group, or political beliefs, protecting those vulnerable to torture risks.⁷³

The Committee has vigorously condemned the ongoing occurrence and frequently tragic humanitarian outcomes of refoulement in every form, including through summary removals, sometimes *en masse*, and emphasises the necessity, in this context, to allow refugees into the territory of States, which encompasses no denial at borders without access to just and effective processes for assessing their status and protection requirements.⁷⁴ The Committee has additionally emphasised that applicable international treaty obligations that prohibit refoulement serve as significant protective mechanisms to meet the protection requirements of individuals who are beyond their country of origin and may be of interest to UNHCR but may not meet the refugee criteria outlined in the 1951 Convention and/or its 1967 Protocol.⁷⁵

2.3. Non-Refoulement in the Practice of the UN Judicial and Quasi-Judicial Bodies

The acceptance of agreements beyond international refugee law and the evolution of international legal principles regarding international protection have demonstrated the broader application of the non-refoulement principle beyond article 33 of the 1951 Refugee Convention.⁷⁶ The duty to refrain from returning a person to severe danger has been implicitly or explicitly outlined⁷⁷ in the case law of international human rights law, functioning as a *de facto* right to asylum.⁷⁸

71 UNHCR ExCom Conclusion No. 14, 1979.

72 UNHCR ExCom Conclusion No. 22, 1981.

73 UNHCR ExCom Conclusion No. 81, 1997.

74 UNHCR ExCom Conclusion No. 85, 1998.

75 UNHCR ExCom Conclusion No. 103, 2005.

76 Goodwin-Gill and McAdam, 2007, pp. 285, 310.

77 Ibid., pp. 285-286.

78 Suntinger, 1995, pp. 203, 224.

International human rights treaties established responsibilities for states to refrain from extraditing individuals to another nation where there is a risk of severe human rights abuses, including arbitrary loss of life, torture, or other cruel, inhuman, or degrading treatment.⁷⁹ For instance, Articles 6 and 7 of the ICCPR forbid the arbitrary taking of life, torture, and cruel, inhumane, or degrading treatment or punishment. The UN Human Rights Committee in its General Comments No 20 and No 31 has reaffirmed the non-derogable character⁸⁰ of Article 7, additionally confirming that the transfer of an individual to a location where he or she would confront a genuine risk (an unavoidable and predictable outcome) would result in a breach of the responsibilities placed on states under the ICCPR.⁸¹

The General Comment emphasises the established jurisprudence of the Human Rights Committee, which asserts that States may be held liable for violations of rights under the ICCPR committed by their agents within the territory of another State, regardless of whether such actions occur with the consent of that State's Government or against its will.⁸² Furthermore, it notes that under certain conditions, individuals may be considered subject to the jurisdiction of a State Party to the ICCPR even when they are located outside that State's territory.⁸³ The Human Rights Committee, in the cases of *Lopez Burgos v. Uruguay* and *Celiberti de Casariego v. Uruguay*, concluded that it would be utterly unacceptable to interpret the obligations under article 2 of the Covenant in a manner that would allow a State party to commit violations of the Covenant within the territory of another State, violations that it would be unable to carry out within its own borders.⁸⁴ The Human Rights Committee in *Pereira Montero v. Uruguay* provided the same reasoning.⁸⁵

Similarly, the Committee against Torture has confirmed that the non-refoulement obligation found in Article 3 of the Convention against Torture (the CAT) is relevant in any territory under a State party's jurisdiction. The CAT reaffirmed its earlier position, stating that this perspective includes all regions under the *de facto* effective control of the State party, irrespective of whether such control is exercised by military or civil authorities. Furthermore, it specified that these provisions are applicable to, and entirely accessible by, all individuals who are under the effective control of its authorities, regardless of their location.

2.4. The Existence and Scope of the Non-Refoulement Principle in Mass Influx Situations

The UN General Assembly and the UNHCR Executive Committee have reiterated several times that the principle of non-refoulement is applicable to asylum seekers as

79 Goodwin-Gill and McAdam, 2007, pp. 302, 308, 310–11, 316.

80 ICCPR, art. 4:2; UNHRC, CCPR General Comment No. 20, p. 3.

81 *GT v. Australia*, 1997, para. 8.1.

82 *Lopez Burgos v. Uruguay*, 1981, para. 12.3; *Celiberti de Casariego v. Uruguay*, 1981, para. 10.3.

83 See, e.g., Concluding Observations of the HRC, United States of America, 1995, para. 284.

84 *Lopez Burgos v. Uruguay*, 1981, para. 12.3; *Celiberti de Casariego v. Uruguay*, 1981, para. 10.3.

85 *Pereira Montero v. Uruguay*, 1983, para. 5.

well, and thus, the official acknowledgment of an individual as a refugee is in no way a prerequisite for enforcing the non-refoulement rule against him or her;⁸⁶ neither is it significant how an asylum seeker arrives in the territory of the state.⁸⁷

The existence and extent of the non-refoulement obligation in situations of mass influx has also been the subject of considerable debate, as the term mass influx is not directly stated in the 1951 Refugee Convention, the 1967 Protocol, or the jurisprudence of international refugee law.⁸⁸ Lauterpacht and Bethlehem contend that the principle of non-refoulement is relevant, irrespective of the scale and suddenness of the arrival of asylum-seekers, as the language of article 33(1) does not provide justification for excluding the principle in cases of mass influx.⁸⁹ This viewpoint is strongly endorsed by various international instruments, such as the OAU Convention, Cartagena Declaration, EU Temporary Protection Directive, and UNHCR conclusions.⁹⁰ There exists a widely accepted belief that the potential for a significant surge in refugees and asylum seekers reveals the constraints of the state's duty to refrain from returning or denying entry to refugees,⁹¹ considering the resources available to the receiving states. Durieux and McAdam note that a scenario involving a mass influx may result in a *de facto* suspension of all but the most immediate and compelling protections provided by the Convention, taking into account the resources accessible to the host states.⁹²

As a result, the continually rising displacement issues have ultimately affected the extent of refugee protection and altered both the substance and breadth of the non-refoulement principle, while amplifying worries about the effectiveness and implementation of the refugee protection framework.⁹³ Additionally, as Edwards correctly anticipated in 2005, it is at this point that human rights law has intervened to address the “grey areas”.⁹⁴

2.5. Forming a Customary Rule of Non-Refoulement

The establishment of non-refoulement as a customary obligation commands an undeniable importance in terms of its universal applicability to all nations, even those not constrained by treaty law. The principles of customary international law

86 UNHCR ExCom Conclusions: No. 6, 1977, para. (c); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 82, 1997, paras. (d), (i); UNGA Res 52/103, 1998, para. (5).

87 Goodwin-Gill and McAdam, 2007, p. 233.

88 Gibney and Hansen, 2005, pp. 393, 394.

89 Lauterpacht and Bethlehem, 2003, p. 104.

90 OAU Convention, art. II(5); AALCO, Bangkok Principles, art. 3.4; Cartagena Declaration on Refugees, 1984, art. III(8); Council Directive 2001/55/EC, 2001; UNHCR ExCom Conclusions: No. 15, 1979, para. (f); No. 19, 1980, paras. (a), (b), (i); No. 22, 1981, paras. II(A)(1), II(A)(2); No. 4, 1994, para. (r); UNHCR, Protection of Refugees in Mass influx Situations: Overall Protection Framework, 2001, paras. (6), (13).

91 Goodwin-Gill and McAdam, 2007, pp. 243, 229–31.

92 Durieux and McAdam, 2004, pp. 4, 9, 13.

93 Goodwin-Gill, 2001, pp. 1–2.

94 Edwards, 2005, pp. 293, 295, see also Edwards, 2009, pp. 763, 792.

are particularly vital for the human rights protection framework in scenarios where treaty terms may not obligate several states, or when there is an immediate necessity for interpreting, enforcing, or altering pertinent treaty terms.⁹⁵

To be considered as an international customary rule, a consistent state practice must be accompanied by the conviction that following the rule is mandated by law.⁹⁶ At the UN Conference on the Status of Stateless Persons, the non-refoulement rule was declared as a general principle of international law, roughly three years after one of its initial conventional provisions in the 1951 Refugee Convention.⁹⁷ Although scholars have further evaluated this declaration as premature,⁹⁸ the principle of non-refoulement has progressed significantly over the past 60 years in both international practice and treaty law, alongside the acknowledgment of the right to asylum.⁹⁹ With 146 states now obligated by the conventional duty of non-refoulement, the norm-creating nature of this principle has been firmly established by international conventions,¹⁰⁰ the UNHCR Executive Committee Conclusions,¹⁰¹ the UN General Assembly Resolutions,¹⁰² and others.

States have international legal personality, and their actions can show the customary rule of non-refoulement. This rule involves the behaviour of their government branches and actions by private individuals and groups acting for them.¹⁰³ International organisations, NGOs, and individuals also impact this customary rule.¹⁰⁴ Evidence for the non-refoulement rule can come from various actions, including diplomatic communications, government branches' activities, treaties, and UN General Assembly resolutions.¹⁰⁵

The non-refoulement rule can be seen as a general practice if it meets two main requirements. Firstly it must be widely accepted by a sufficient number of states,

95 Byers, 2004, pp. 166–180.

96 ICJ Statute, 1945, art. 38:1 (b); *Asylum case* 1950; see also, *North Sea Continental Shelf cases*, 1969, para. 37; *Military and Paramilitary Activities in and against Nicaragua*, 1986, para. 98; *SS “Lotus”*, 1927.

97 Convention relating to the Status of Stateless Persons, 1960, see also, Convention Relating to the International Status of Refugees, 1933, art. 3.

98 Hurwitz, 2009, p. 204; Goodwin-Gill and McAdam, 2007, p. 345.

99 See: ECHR; ICCPR; UNCAT.; Hurwitz, 2009, p. 204; Goodwin-Gill and McAdam, 2007, p. 345; Zimmermann, Machts, Dörschner, 2011, p. 1411.

100 OAU Convention, art. II(3); Declaration on Territorial Asylum, art. 3(1); CoE Committee of Ministers Resolution 67, 1967; Cartagena Declaration on Refugees; AALCO, Bangkok Principles, arts. III.3, III.5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949, art. 45.

101 UNHCR ExCom Conclusions: No. 6, 1977, para. (a); No. 17, 1980, para. (d); No. 68, 1992, para. (f); No. 71, 1993, para. (g); No. 74, 1994, para. (g); No. 79, 1996, para. (j); No. 81, 1997, para. (i); No. 99, 2004, para. (l); No. 103, 2005, para. (m).

102 Including: UNGA res 32/67, 1977, para. 5(c); UNGA res 33/26, 1978, para. 6; UNGA res 60/120, 2005, para. 3; UNGA res 60/129, 2006, para. 3; UNGA res 61/137, 2007, para. 3; UNGA res 62/124, 2008, para. 4.

103 ILC, 2018, p. 130; Mendelson, 1999, p. 198.

104 ILC, 2018, p. 130; Mendelson, 1999, p. 203.

105 ILC, 2018, p. 133.

though not necessarily all, who have had the chance to adopt it. Secondly there needs to be a consistent pattern in how states behave regarding this rule.¹⁰⁶ Similarly, based on the conclusions of the ICJ in the *Fisheries case* and the ILC draft Conclusions, the uniformity, or recognisable pattern of conduct of the states, necessitates significant rather than total consistency.¹⁰⁷ While total uniformity is not needed, having no cases of states claiming refoulement when expelling refugees suggests strong support for the non-refoulement rule.

State reports to the Human Rights Committee and the Committee against Torture show that expulsions, deportations, refusals of admittance, or removals are not usually seen as cases of refoulement.¹⁰⁸ This raises an important question about whether such actions affect the consistency of the customary rule. The ICJ in the *Asylum case* explained that absolute uniformity is not required to establish an international customary rule;¹⁰⁹ and it should align with consistent practice among states. This was further supported in the *North Sea Continental Shelf* and *Nicaragua cases*,¹¹⁰ where the ICJ stated that while states' practices should generally align with the rule, variations do not create a new rule but indicate the breach of an existing one, as states often justify their actions by citing exceptions within the rule.

To support the existence of the non-refoulement rule, both *opinio juris* and state practice must clearly be shown. While there exists no formal judicial declaration, the principle of non-refoulement has been widely accepted by UN member states as customary international law.¹¹¹ This acceptance is highlighted in key documents like the Global Consultations on International Protection,¹¹² the 2016 New York Declaration for Refugees and Migrants,¹¹³ and the 2018 Global Compact on Refugees.¹¹⁴

The International Law Commission (ILC) states that *opinio juris* can be shown through state actions such as public statements, positions at international events, actual conduct, treaty practices, legal opinions, diplomatic actions, and court decisions.¹¹⁵

Accession to treaties by states can also be regarded as an indication of *opinio juris*, as states act this way because they believe it is the correct course of action. The norm-generating nature of the principle of non-refoulement has also consistently been highlighted by UN General Assembly resolutions and the UNHCR. For instance, the ICJ has deduced the presence of *opinio juris* from the UN General Assembly

106 ILC, 2018, pp. 135–136.

107 *Fisheries case*, para. 131; Delimitation of the Maritime Boundary in the Gulf of Maine Area, paras. 81, 116, 131, 138.

108 Goodwin-Gill and McAdam, 2007, pp. 351–352.

109 *Asylum case*, paras. 276–277.

110 *North Sea Continental Shelf cases*, para. 43; *Nicaragua*, para. 186.

111 *Tehran case*, para. 88; See also Goodwin-Gill and McAdam, 2007, p. 346.

112 UNHCR, Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees, 2002, para. 4.

113 New York Declaration 2016, paras. 24, 58, 67.

114 Global Compact on Refugees, 2018, paras. 5, 87.

115 ILC, 2018, para. 140.

resolutions, its own or other tribunals' practices,¹¹⁶ as well as significant codification conventions¹¹⁷ and the efforts of the ILC.¹¹⁸ Similarly, states avoid expressing formal or informal opposition to the principle, while consistently recognising its normative nature regardless of being a state party to the 1951 Refugee Convention or 1967 Protocol.¹¹⁹

As a general principle, the creation of a customary non-refoulement rule ensures its clear application and consistent understanding across all nations, regardless of their commitment to treaty obligations.¹²⁰ Thus, the unrestricted enforcement of the non-refoulement rule should serve as a significant guarantee for upholding and implementing the right to asylum. Nevertheless, as previously demonstrated, the extent and details of the non-refoulement rule differ between customary and treaty law, resulting in a complex interpretation and application, particularly concerning refugee issues.

In conclusion, the principle of non-refoulement has been extensively interpreted and applied by various UN bodies, including the UNHCR, judicial and quasi-judicial bodies, and other international organisations. These bodies have consistently emphasised the importance of non-refoulement in protecting individuals from a return to danger, regardless of their nationality, location, or circumstances.

The practice of UN judicial and quasi-judicial bodies has further solidified the principle of non-refoulement, with the Human Rights Committee and the Committee against Torture confirming its applicability beyond the 1951 Refugee Convention. The principle of non-refoulement has also been recognised as a customary rule of international law, with its widespread acceptance and practice among states. This recognition underscores the importance of upholding the principle in all circumstances, including situations of mass influx and in the context of international human rights law.

Ultimately, the principle of non-refoulement remains a cornerstone of international protection, and its effective implementation is essential for ensuring the safety and dignity of refugees and asylum seekers worldwide. As the global refugee crisis continues to evolve, it is imperative that states and international organisations uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection.

116 *North Sea Continental Shelf cases*, paras. 3, 44; *Gulf of Maine Area*, paras. 246, 293–294; *Nicaragua*, paras. 14, 108–109; *Nuclear Weapons*, paras. 226, 254–255; *Pulp Mills on the River Uruguay*, paras. 203–206.

117 See e.g. *North Sea Continental Shelf cases*, paras. 3, 28–32; *The Land and Maritime Boundary between Cameroon and Nigeria*, paras. 303, 429–30.

118 See e.g. *Gabcíkovo-Nagymaros case*, paras. 38–42, 46.

119 UNHCR, 1994, para. 5; see also, Goodwin-Gill and McAdam, 2007, p. 347.

120 Hurwitz, 2009, p. 207.

3. The Principle of Non-Refoulement in The Case Law of the ECtHR

3.1. Introduction

The principle of non-refoulement is a cornerstone of international human rights law, protecting individuals from being returned to countries where they may face serious harm or persecution. The European Court of Human Rights (ECtHR) has played a significant role in shaping this principle, particularly through its interpretation of Article 3 of the European Convention on Human Rights (ECHR). This Chapter explores the ECtHR's case law on non-refoulement, examining the scope of this principle, its application in various contexts, and the Court's approach to assessing the risk of ill-treatment.

3.2. The Scope of Non-Refoulement Under the ECHR

The principle of non-refoulement has become a well-established tenet of international law, with the 1951 Geneva Convention serving as the most comprehensive international instrument regarding its articulation. In relation to the obligation of non-refoulement, the European Convention on Human Rights (ECHR) acts as a supplementary instrument. The rights and responsibilities in question have arisen from the extensive jurisprudence of the European Court of Human Rights (ECtHR). The Court acknowledged that states have an indisputable authority to regulate the entry of foreign nationals into their territory, while it emphasised the importance for states to implement this right in alignment with the provisions of the ECHR.¹²¹

Under the ECHR, it is prohibited for states to deport individuals if such actions would infringe upon their rights as outlined in article 2 (right to life) and article 3 (prohibition of torture, inhuman or degrading treatment or punishment).¹²² Article 15 of the ECHR further emphasises that these rights are inviolable and cannot be suspended, even during emergencies. Additionally in certain exceptional circumstances, states are also barred from deporting individuals who would face a severe violation of their rights under article 5 (right to liberty) or article 6 (right to a fair trial) in the receiving country.¹²³

The ECHR stipulates in article 13 that states are obligated to conduct an independent and thorough examination of claims that present substantial grounds for fearing a genuine risk of torture, inhuman, or degrading treatment or punishment upon repatriation. If an individual possesses an “arguable complaint” indicating that their removal could subject them to treatment that violates articles 2 or 3 of the ECHR, they are entitled to an effective remedy that halts their removal, thereby ensuring an automatic suspensive effect. The ECHR collectively prevents the return of any

121 *Amuur v. France*, para. 41.

122 *Saadi v. Italy*.

123 *Harkins v. the United Kingdom*, paras. 62-65.

individual who would encounter a genuine risk of such treatment.¹²⁴ Furthermore, the principle of non-refoulement is relevant in situations involving non-admission and rejection at borders.¹²⁵

The above mentioned obligations extend to situations where an asylum seeker is returned to a transit country that may be designated as a “safe third country”, yet fails to provide adequate protections against refoulement. The state conducting the expulsion cannot simply presume that the individual will receive treatment in accordance with the ECHR standards in the receiving country. It is imperative for authorities to conduct a thorough and current evaluation, particularly regarding the accessibility and effectiveness of the asylum system in the receiving country and the practical safeguards in place.¹²⁶

Article 8 of the ECHR safeguards the right to private and family life, and its application is relative, necessitating a balance between the rights it protects and other values upheld by the state’s legal framework, such as national security and public order. The obligation of non-refoulement is significantly underscored by Protocols 4 and 7 of the Convention. Additional Protocol No. 4 explicitly prohibits the collective expulsion of aliens in its Article 4. Article 1 of Additional Protocol No. 7 addresses the rights of aliens who legally reside within a state’s territory in the context of expulsion measures. This Article guarantees that an alien cannot be expelled unless such action is executed in accordance with the law.

For an expulsion measure concerning a legally resident alien to be valid, it must adhere to legal standards. Consequently the alien must be afforded the opportunity to exercise their rights under article 6 of the ECHR, which pertains to the right to a fair trial. Nonetheless, the protections provided by this article are not absolute; the second paragraph stipulates that an alien may be expelled prior to the exercise of these rights if such action is justified by national security concerns or the public order interests of the expelling state.¹²⁷

3.3. The Scope of Non-Refoulement Under the Practice of the ECtHR on Article 3

Article 3 of the ECHR imposes an absolute prohibition of torture or inhuman or degrading treatment or punishment. Article 3 ECHR is unequivocal, and states cannot invoke any justification for breaching the principle of non-refoulement.¹²⁸ While this article does not explicitly mention the principle of non-refoulement, the ECtHR has

124 *M.A. v. France*; *Salah Sheekh v. the Netherlands*, para. 135; *Soering v. the United Kingdom*; *Vilvarajah and Others v. the United Kingdom*.

125 *N.D. and N.T. v. Spain*, para. 178.

126 *Ilias and Ahmed v. Hungary*, paras. 124–141.

127 *Furramani and Bushati*, 2022, p. 114.

128 *Soering v. UK*, para. 88; *Chahal v UK*, para. 78; *Ahmed v Austria*, para. 40; *Weissbrodt and Hörtreiter*, 1999, p. 36; *Goodwin-Gill and McAdam*, 2007, p. 311.

consistently interpreted it as being inherently included since the landmark case of *Soering v UK*.¹²⁹

The case of *Soering v United Kingdom* represents a significant ruling by the ECtHR. This judgment determined that the extradition of a German citizen to the United States to face allegations of capital murder, along with the associated risk of experiencing the death row phenomenon, constituted a violation of Article 3 of the ECHR, which protects individuals from inhumane and degrading treatment. Beyond the legal precedent set by this ruling, it also led to a commitment from both the United States and the State of Virginia to refrain from pursuing the death penalty against the German national implicated in the case, who was ultimately extradited to the United States.

The Court has addressed the issue of non-refoulement in its subsequent practice, and this provision is now firmly recognised as one of the most robust protective mechanisms within the Council of Europe.¹³⁰

Materially, it safeguards rights that are not explicitly enumerated within the Convention, while territorially it ensures the protection of individual rights against infringements by states that are not signatories. The complainant is not required to demonstrate an actual violation; rather, it suffices to establish that there are substantial grounds to believe that a real risk of such a violation exists.¹³¹

As the Court states in *Chahal v the United Kingdom*,¹³² The protection afforded by Article 3 is characterised by its absolute and obligatory nature, indicating that no exceptions are permissible, even if an individual poses a threat to the internal security of the state.

Chahal v United Kingdom is a 1996 ruling by the ECtHR that invoked Article 3 of the ECHR. This article prohibits the deportation of Sikh separatist Mr. Chahal to India due to the potential risk of violations of Article 3, specifically concerning torture or inhuman or degrading treatment or punishment. The judgment built upon the significant precedent set by *Soering v United Kingdom*. The Court underscored the essential nature of Article 3, asserting that the prohibition is stated in ‘absolute terms... irrespective of the victim’s conduct’.

It is evident that the safeguards provided by the ECHR regarding the principle of non-refoulement are broader than those outlined in the Geneva Convention. The latter confines its application to the notion of persecution, thereby linking it specifically to asylum seekers, whereas the ECHR applies this principle to any individual who may face treatment as described in Article 3.¹³³

A review of the ECtHR’s jurisprudence reveals that two key factors are pertinent in assessing the scope of non-refoulement under Article 3 ECHR: i) the intensity of

129 *Soering v. UK*, paras. 87, 88; *Cruz Varas v Sweden*, para. 99, *Vilvarajah and Others v UK*, para. 108; Weissbrodt and Hörtreiter, 1999, pp. 1–73, 27f.

130 Weissbrodt and Hörtreiter, 1999, 27f.

131 Julien-Laferrriere, 2006, p. 148.

132 *Chahal v. the United Kingdom*, para. 139.

133 Furramani and Bushati, 2022, p. 113.

suffering associated with the treatment imposed, and ii) the genuine risk that such treatment would occur if the individual were to be deported.¹³⁴

3.3.1. *Ratione Personae Scope of Article 3 of the ECHR*

Article 1 of the ECHR obliges the member states to ensure to *everyone* within their jurisdiction the protection of the rights and freedoms provided for by this Convention. Therefore, it makes no distinction between nationals and non-nationals, unless provisions in the treaty explicitly provide for the lawfulness of such distinctions.

The principle of non-refoulement applies universally to all individuals within a state's jurisdiction. It imposes a significant limitation on the notion that the expulsion of an individual completely and permanently terminates the state's responsibility towards that person.¹³⁵ This is due to the obligation of states to ensure that individuals are not subjected to treatment that contravenes human rights law, regardless of whether such treatment occurs within the territory of a state party to the treaty or beyond its jurisdiction. Thus, when a state extradites or expels an individual to another country, this action is considered as part of a continuum of events that may lead to the risk of ill-treatment.¹³⁶

While the ECtHR has affirmed a state's right to control foreign entry and exit under international law, states party to the ECHR must however limit these rights in accordance with their obligations under the Convention.¹³⁷

3.3.2. *Threshold of Evidentiary Requirements for the Application of the Principle of Non-Refoulement Under Article 3 of the ECHR*

3.3.2.1. Minimum Level of Severity over a Mere Possibility of Ill Treatment

The threshold for inhuman treatment is higher than that for degrading treatment, yet in both instances; the severity of suffering remains the most significant consideration.¹³⁸ The Court noted in the case of *Peers v Greece*, that ill-treatment must evoke 'feelings of suffering and inferiority capable of humiliating and demeaning' the individual.¹³⁹ Consequently, the humiliating impact is crucial for determining the severity of degrading treatment. However, even in the absence of public awareness, treatment may still be considered degrading if the individual perceives it as humiliating.¹⁴⁰ Conversely, inhuman treatment – while often also degrading – primarily concerns the physical integrity of the individual and the bodily harm inflicted upon them.¹⁴¹

134 Flegar, 2016, pp. 148–169, 151.

135 Gibney and Hansen, 2005, p. 1.

136 Röhl, 2005, p. 7.

137 Ibid.

138 *Ireland v. UK*, para. 162; Weissbrodt and Hörtreiter, 1999, p. 30.

139 *Peers v. Greece*, para. 75; Röhl, 2005, p. 15.

140 *Tyrer v. UK*, para. 32; Weissbrodt and Hörtreiter, 1999, p. 31.

141 *Tyrer v. UK*, paras. 30, 32, 35; *Costello-Roberts v. UK*, paras. 8, 9, 31, 32; Weissbrodt and Hörtreiter, 1999, p. 31.

Furthermore the cases of *Tyrer v UK* and *Costello-Roberts v UK* indicate that the element of publicity is also a pertinent factor.¹⁴²

Nevertheless, the threshold for suffering does not provide clarity regarding the conditions under which an individual may or may not be returned in accordance with the non-refoulement principle. Therefore, it is essential to incorporate an additional criterion: the real risk threshold that will be discussed below.¹⁴³

3.3.2.2. Substantial Grounds for Believing

The assessment of non-refoulement concerning inhuman or degrading treatment necessitates a careful evaluation of the real risk involved, which is crucial in determining whether a state would breach its obligations under article 3 of the ECHR by repatriating an individual to their country of origin. The case law of the ECtHR has identified both temporal and personal scopes as essential criteria for this real risk assessment. In the landmark case of *Soering v. UK*, the Court established that article 3 ECHR mandates “substantial grounds for believing” that the individual in question faces “a real risk of exposure to inhuman or degrading treatment”.¹⁴⁴ Subsequent rulings, such as *Saadi v. Italy* further emphasised the significance of the real risk criterion.¹⁴⁵

The case of *Saadi v. Italy* was adjudicated by the ECtHR, where the Court unanimously reaffirmed and expanded upon the principles established in *Chahal v. United Kingdom* concerning the absolute nature of the non-refoulement principle and the obligations imposed on a state under Article 3 of the ECHR. In this case, the Court was tasked with determining whether there was a risk that Saadi would face torture or ill-treatment if he were deported to Tunisia. This inquiry differed from the standard of proof required for an event that had already taken place, as it necessitated an assessment of the likelihood of a future occurrence. The Court employed the test of ‘whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3’.

Regarding the temporal scope, the ECtHR, in *Chahal v. UK*, asserted that the real risk must be evaluated in a “rigorous” manner, indicating that ‘the present conditions are decisive’.¹⁴⁶ This interpretation was reinforced in *Jabari v. Turkey*, which highlighted the necessity for a ‘meaningful assessment of the applicant’s claim’ and the importance of considering any changes in circumstances.¹⁴⁷

142 Flegar, 2016, pp. 148-169, 152.

143 *Ireland v. UK*, para. 167; *Tyrer v. UK*, para. 30; Van Dijk and Van Hoof, 1998, p. 311; Röhl, 2005, p. 15; Flegar, 2016, pp. 148-169, 151.

144 *Soering v. UK*, para. 88; Weissbrodt and Hörtreiter, 1999, p. 34.

145 *Saadi v. Italy*, paras. 124-125.

146 *Chahal v. UK*, paras. 86, 96; See also, *Ahmed v. Austria*, para. 42f; Weissbrodt and Hörtreiter, 1999, p. 34.

147 *Jabari v. Turkey*, para. 40; See, for example, *Cruz Varas and Others v. Sweden*, para. 80. Weissbrodt and Hörtreiter, 1999, p. 34f.

However, in *Salah Sheekh v. the Netherlands*, the Court determined that establishing past persecution was not a prerequisite; rather it required a forward-looking assessment of risk, where past persecution could serve as an indicative factor but was not necessarily definitive.¹⁴⁸

In *Salah Sheekh v. the Netherlands* the Applicant was a Somali national who argued before the ECtHR that his deportation to Somalia would place him under genuine risk of experiencing treatment that violates Article 3 of the ECHR, considering his personal circumstances as a member of a minority amidst the broader human rights issues in Somalia. The Court concluded that the Applicant's expulsion to Somalia would contravene Article 3 of the Convention, since there was a significant risk that deportation to "relatively safe" areas in Somalia could lead to his transfer to unsafe regions, thus rendering the "internal flight alternative" unviable. The Court highlighted that even if ill-treatment occurs arbitrarily or is perceived as a result of the generally unstable situation, the asylum seeker would still be protected under Article 3, asserting that it would not be necessary for an applicant to demonstrate additional special distinguishing characteristics to prove that he or she would be personally at risk.

The ECtHR in the case of *Vilvarajah and Others v. UK* determined that, while widespread human rights violations in a country may suggest a genuine risk, they do not automatically warrant protection under article 3 of the ECHR.¹⁴⁹ The assessment of real risk must consider both general and individual circumstances, demonstrating that the individual would face a greater threat than the average person in a similar context.¹⁵⁰ Moreover, the mere potential for ill-treatment is insufficient to invoke protection under article 3 ECHR.¹⁵¹

In contrast, in *Salah Sheekh v. the Netherlands*, the ECtHR adopted a more collective perspective, indicating that an applicant need not demonstrate any "special distinguishing features" beyond being a member of a minority group to establish a real risk.¹⁵² In this instance, the mere possibility of ill-treatment was deemed adequate for protection under article 3 of the ECHR.¹⁵³ This indicates a gradual evolution in the ECtHR's approach, which has not yet reached definitive interpretative boundaries. The interpretation of article 3 of the ECHR remains flexible, with its application largely determined on a case-by-case basis. Previous analyses suggest that the criteria for identifying inhuman or degrading treatment are relative.¹⁵⁴

3.3.2.3. Real ("Foreseeable") Risk

A key factor in determining the extent of *non-refoulement* under Article 3 is the existence of a "real risk" of ill-treatment. In *Soering* the Court has firmly established that

148 *Salah Sheekh v. the Netherlands*, para. 136; Flegar, 2016, pp. 148-169, 152.

149 *Vilvarajah and Others v. UK*, paras. 9-66, 111; Weissbrodt and Hörtreiter, 1999, p. 35.

150 *Chahal v. UK*, para. 96; *Vilvarajah and Others v. UK*, para. 108.

151 *Ibid.*; Flegar, Vulnerability 2016, pp. 148-169, 152.

152 *Salah Sheekh v. the Netherlands*, para. 148.

153 *Ibid.*

154 Van Dijk and van Hoof, 1998, p. 311. Röhl, 2005, p. 15.

there should be *substantial grounds* for believing that the person concerned, if extradited, would face a *real risk* of being subjected to torture or inhuman or degrading treatment in the requesting country.¹⁵⁵ The Court’s reasoning behind such a lowering of the standard of proof from certainty to risk is twofold. The grave and irreversible nature of the purported suffering at stake necessitates the implementation of preventive measures that should be interpreted broadly to guarantee the efficacy of the protection afforded by that Article.¹⁵⁶ Secondly, the Court has regularly stressed the absolute nature of the prohibition of treatment contrary to article 3 even in the most difficult of circumstances, such as the fight against terrorism or organised crime.¹⁵⁷ Thus an expulsion despite substantial grounds for believing that the person might subsequently be tortured or subjected to inhuman treatment would plainly be contrary to the spirit and intent of the article.¹⁵⁸ While certainty is not required, the Court has on the other hand held that ‘[a] mere possibility of ill-treatment [...] is not in itself sufficient to give rise to a breach of Article 3’.¹⁵⁹ Generalised violence, statistics of incidences of ill-treatment, or authoritative reports pointing to the vulnerability of certain groups of which the applicant might be a member, have been regarded as insufficient to engage Article 3 responsibility.¹⁶⁰

As the Court established in *Cruz Varas*, the “real risk” criterion needs to be assessed at the time of the final Court proceedings,¹⁶¹ and it is the probability of ill-treatment at that moment which should invoke the responsibility of the expelling state, not the actual occurrence of the article 3 violation before the individual’s flight or after their expulsion. In cases where immigrants have been the victim of torture prior to their flight, but where conditions in the country of origin have improved sufficiently, according to all available knowledge at the time, the person may, *mutatis mutandis*, be lawfully expelled. By analogy, if contrary to all available information at the time, it has been plausibly established that there was no real risk, and the person does indeed become subjected to ill-treatment upon return, the expelling state will not be held responsible.

3.4. Obligation of Non-Return Due to the Real Risk of Ill-Treatment Giving Rise to a Breach of Other Provisions of the Convention

One significant case concerning the criterion of exceptional circumstances is *D v. The United Kingdom (UK)*, where the Court recognised that, given the “exceptional circumstances” and the “critical stage” of the applicant’s illness, there was a genuine risk of him experiencing “inhuman treatment” in violation of article 3 ECHR upon return.¹⁶²

155 *Abdurrahim Incedursun v. The Netherlands*, paras. 27, 83.

156 *Soering*, para. 88.

157 *E.g. Dulas v. Turkey*, para. 52; *Denizci*, para. 383; *Ahmet Özkan*, paras. 334 et seq.

158 *Soering*, para. 88; Röhl, 2005, pp. 17–18.

159 *Vilvarajah and Others v. UK*, para. 111.

160 See: *H.L.R.*, para. 41; Röhl, 2005, p. 18.

161 *Cruz Varas and Others v. Sweden*, para. 76.

162 *D v. UK*, para. 53; *Stoyanova*, 2011, pp. 777–817, 799; *Flegar*, 2016, pp. 148–169, 154.

This conclusion was reached despite the fact that the conditions in St. Kitts did not inherently violate any prohibition against refoulement.¹⁶³ Another notable case that extensively addressed the threshold for exceptional circumstances was *Bensaid v. UK*, where the court ruled that the less favourable conditions in Algeria compared to the UK did not meet the threshold for “exceptional circumstances” as established in *D v. UK*.¹⁶⁴ In this instance, the Court considered the situation of an individual diagnosed with schizophrenia who faced deportation to Algeria, a country with limited treatment options and severe symptoms, including hallucinations.¹⁶⁵ The ECtHR did not identify a genuine risk of violating article 3 ECHR; instead it set a “high threshold” requiring a “sufficiently real risk” in cases where adverse conditions are not directly attributable to the country of origin.¹⁶⁶

The ECtHR reaffirmed its stringent stance in subsequent rulings, including *Arcila Henao v. the Netherlands*, *Ndangoya v. Sweden*, *Amegnigan v. the Netherlands*, and notably, *N v. UK*. Likewise, in the case of *Arcila Henao v. the Netherlands*, the Court differentiated between the applicant suffering from AIDS, whose condition had not progressed to a critical level, and the applicants in *D v. UK*. Similarly, in *Ndangoya v. Sweden*, and *Amegnigan v. the Netherlands* cases, the applicants could be sent back to their countries of origin since his AIDS condition had not reached a critical stage, and no exceptional circumstances were noted.¹⁶⁷

In the case of *N v. UK*, the Ugandan applicant was diagnosed with AIDS at a less advanced stage compared to that of the applicant in *D v. UK*.¹⁶⁸ The ECtHR asserted that medical treatment, categorised as an economic, social, and cultural right, does not fall under the purview of Article 3 of the ECHR.¹⁶⁹ Consequently, states are not obligated to provide medical treatment in accordance with the ECHR.¹⁷⁰ The Court determined that the applicant was not “critically ill at the present time”, and any future health conditions would be speculative, thus precluding the existence of exceptional circumstances. While earlier cases permitted some flexibility in interpreting exceptional circumstances, *N v. UK* establishes a significantly elevated threshold for article 3 of the ECHR.¹⁷¹

In the case of *MSS v. Belgium and Greece*, the Court adopted a more lenient standard of severity than in previous rulings, as it did not necessitate “exceptional circumstances”.¹⁷² Instead, it based its findings on the “general situation” to determine

163 *D v. UK*, para. 54.

164 *D v. UK*, para. 53; *Bensaid v. UK*, paras. 36–40; Stoyanova, 2011, p. 800.

165 *Bensaid v. UK*, paras. 7, 10, 19, 36–40, 41.

166 *Bensaid v. UK*, paras. 7, 10, 19, 40.

167 *Arcila Henao v. the Netherlands*; *Ndangoya v. Sweden*; *Amegnigan v. the Netherlands*; *N v. UK*, paras. 39–41; Flegar, 2016, pp. 148–169, 155.

168 *N v. UK*, paras. 8–14, 50–51.

169 *Ibid.*, paras. 8–14, 50–51, 44; Clayton, 2011, p. 768f.

170 *Ibid.*, paras. 8–14, 50–51.

171 Flegar, 2016, pp. 148–169, 155.

172 *MSS v. Belgium and Greece*, para. 324. Cf. *D v. UK*, para. 53; *Bensaid v. UK*, paras. 36–40; *N v. UK*, paras. 8–14, 50–51.

a violation of refoulement by Belgium. Furthermore, unlike in the cases of *D v. UK*, *Bensaid v. UK*, and *N v. UK*, the ECtHR did not limit its considerations to medical conditions; it also explicitly acknowledged the living conditions that MSS experienced.¹⁷³ In the same case, the ECtHR reiterated that a requisite level of severity must be present in all instances.¹⁷⁴ This principle aligns with the Court’s ruling in other cases, such as *Tyrer v. UK*, where it was established that a certain degree of humiliation must be evident in each individual case.¹⁷⁵

In the case of *Sufi and Elmi v. UK*, the Court highlighted the “dire” humanitarian conditions in Somalia, which posed a risk of ill-treatment in violation of Article 3 ECHR.¹⁷⁶ The Court referenced earlier cases, including *Salah Sheekh v. the Netherlands* and *N v. UK*, while contrasting them with *MSS v. Belgium and Greece*, ultimately deciding that the standard set by *MSS v. Belgium and Greece* was the appropriate one to apply in this case.¹⁷⁷

The European Court of Human Rights has established a robust framework for protecting individuals from refoulement under Article 3 of the European Convention on Human Rights. The Court’s jurisprudence emphasises the absolute nature of this principle, prohibiting states from deporting or extraditing individuals to countries where they may face a real risk of torture, inhuman or degrading treatment. The ECtHR’s approach to assessing risk considers both general and individual circumstances, and its case law highlights the importance of thorough evaluations and effective remedies in ensuring compliance with the Convention’s obligations. While the Court’s standards may evolve over time, its commitment to upholding the principle of non-refoulement remains a cornerstone of human rights protection in Europe.

4. The Principle of Non-Refoulement in the Case Law of Other Regional International Courts as Well as National Courts

4.1. Introduction

The Court of Justice of the European Union (CJEU) has played a significant role in shaping the principle of non-refoulement within the European Union. In its caselaw, the CJEU has established that the principle of non-refoulement requires EU Member States to thoroughly evaluate the risks faced by individuals before returning them

173 *MSS v. Belgium and Greece*, paras. 263, 367; *D v. UK*, paras. 49–54, *Bensaid v. UK*, para. 36, *N v. UK*, para. 50; Flegar, 2016, pp. 148–169, 156.

174 *MSS v. Belgium and Greece*, paras. 219, 254.

175 See: *Tyrer v. UK*, para. 32; *Peers v. Greece*, para. 74; *Pretty v. UK*, para. 52; *MSS v. Belgium and Greece*, para. 220; Van Dijk and van Hoof, 1998, p. 311; Röhl, 2005, p. 15; Flegar, 2016, pp. 148–169, 156.

176 *Sufi and Elmi v. UK*, paras. 11–21, 259.

177 *Sufi and Elmi v. UK*, paras. 278–283; Flegar, 2016, pp. 148–169, 157.

to another country. The CJEU has also emphasised the importance of considering the individual circumstances of each case and the potential risks of indirect refoulement.

The Inter-American Court of Human Rights has also contributed to the development of the principle of non-refoulement. The Court ruled that states have a duty to adequately consider asylum applications and uphold the principle of non-refoulement. The Court emphasised the importance of providing individuals with a fair opportunity to present their case, and ensuring that their rights are protected.

National courts have also played a crucial role in applying the principle of non-refoulement. The Courts have ruled that EU Member States must thoroughly evaluate all relevant factors when making decisions regarding Dublin transfers and return decisions.

4.2. The Practice of the Court of Justice of the European Union: Interrelation of the EU Acquis and the 1951 Refugee Convention

The principle of non-refoulement is enshrined in EU law in Article 78(1) TFEU and article 18 and 19 of the EU's Charter of Fundamental Rights. Article 78(1) TFEU provides in that regard that the Union shall develop a common policy on asylum, subsidiary protection and temporary protection while providing relevant international protection to any third-country national and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28th July 1951 and the Protocol of 31st January 1967, relating to the status of refugees, 'and other relevant treaties'.¹⁷⁸

The CJEU's authority to issue rulings on preliminary references under article 267 TFEU, along with its jurisdiction in other legal actions, significantly influences the definitional and interpretative framework of EU legislation regarding the return of irregular migrants.¹⁷⁹ The binding nature of the CJEU's judgments, which apply *erga omnes*, is particularly crucial, especially since EU law on returns explicitly references international human rights law.¹⁸⁰

The CJEU has also made significant contributions over the past decade regarding the adjudication of cases involving the expulsion of non-nationals.¹⁸¹ Therefore, Judgments of the CJEU have also consolidated the application of this principle in the EU.¹⁸² The case law established by the Court, which interprets the EU acquis concerning the "return of illegally staying third-country nationals", has seen a steady increase since its landmark decision in *Kadzoev*.¹⁸³

Under the Charter, the CJEU is required to consider the case law of the ECtHR when interpreting Charter rights that correspond to those enshrined in the ECHR,

178 UNHCR, 2015, p. 70.

179 See: TEU, arts. 19:1–3; TFEU, arts. 263, 267, 344.

180 Tamás, 2021, p. 261.

181 Taylor, 2015.

182 Saliba, 2015.

183 Case C-357/09 PPU, *Said Shamilovich Kadzoev*.

as outlined in article 52(3) of the Charter. The references to the ECHR and ECtHR case law vary widely, encompassing acknowledgments of states' sovereign rights to determine the admission and expulsion of non-nationals, as seen in the opinions of the Advocates General in *the Kadzoev*,¹⁸⁴ *El Dridi*,¹⁸⁵ and *Mahdi*¹⁸⁶ cases. Additionally, they include interpretations of the principle of non-refoulement as articulated in article 19(2) of the Charter, particularly concerning serious health issues, in line with the jurisprudence of the ECtHR, as demonstrated in the *Abdida* ruling.¹⁸⁷

In *Bundesrepublik Deutschland v. B and D*,¹⁸⁸ the CJEU highlighted that the provisions outlined in article 21(2) of the Qualification Directive (QD) correspond with those in article 33(2) of the 1951 Refugee Convention. The Court noted the necessity of considering any potential threat that a refugee may currently pose to the relevant Member State within the context of the QD. This consideration is particularly significant under article 21:2 of the Directive, which permits the host Member State to refoule a refugee if there are reasonable grounds to believe that the individual poses a threat to the security or community of that Member State, a right similarly conferred by article 33:2 of the 1951 Geneva Convention.¹⁸⁹

The Court examined the alignment of the *EU asylum acquis* with the Refugee Convention in the joined cases *C-391/16*, *C-77/17*, and *C-78/17*¹⁹⁰ concerning the revocation of refugee status. The CJEU established that despite the European Union not being a contracting party to the Geneva Convention, it possesses jurisdiction over the matter due to the obligations set forth in article 78:1 TFEU and article 18 of the Charter, which mandate the Union to adhere to the provisions of that convention. The Court concluded that EU law offers a broader scope of international protection for the refugees in question than that provided by the Geneva Convention. Consequently, even though there exists the possibility to revoke or deny the renewal of refugee status, EU law ensures a level of protection against refoulement that surpasses the safeguards outlined in the 1951 Geneva Convention. The Court noted that while refugee status may be revoked, individuals affected by article 14:6 retain various rights specified in the Geneva Convention which, as emphasised in the Advocate General's Opinion, affirms their status as refugees for the purposes of article 1(A) of that Convention, notwithstanding the revocation or refusal.

The CJEU's Judgement in *H. T. v. Land Baden-Württemberg*¹⁹¹ addresses the interpretation of Article 21 of Council Directive 2004/83/EC in relation to exceptions to the principle of non-refoulement and the potential revocation of a residence permit granted to a refugee under article 24 of the same Directive. Article 21:3 provides States with the

184 Ibid., para. 5.

185 Case 61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, para. 29.

186 Case C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, para. 45.

187 Case C-562/13 (*Abdida*), paras. 47, 51–52; Molnár, 2021, pp. 269, 280.

188 CJEU, *Bundesrepublik Deutschland v. B and D*.

189 Ibid., para. 101, see also, UNHCR, 2015, pp. 81–82.

190 CJEU – Joined Cases C-391/16, C-77/17 and C-78/17, Judgment 2019.

191 CJEU – Case C-373/13, *H. T. v Land Baden-Württemberg*, Judgment 2015.

authority to revoke a refugee's residence permit only if the criteria outlined in Article 21:2 are satisfied: specifically, that such action does not contravene their international obligations and that there are either valid reasons to believe the refugee poses a threat to national security or, following a final conviction for a particularly serious crime, poses a risk to the community. The Court emphasised that this provision is limited to cases of non-refoulement rather than expulsion to a third country.¹⁹² Furthermore, the language of Article 24:1 does not categorically exclude the possibility of revoking a residence permit when compelling national security or public order reasons necessitate such action.¹⁹³ The Court considered the principle of non-refoulement as established in EU primary law, and articulated in Article 21:1 of Directive 2004/83, which asserts that refugees are generally safeguarded against refoulement. It examined the exceptions outlined in these articles, which are intended to be applied only as a last resort. The Court determined that if a Member State revokes, terminates, or declines to renew the refugee status of an individual under Article 14:4 of the directive, that individual is entitled to the rights specified in Article 14:6 of the directive, including those in Articles 32 and 33 of the Geneva Convention. The implications of invoking the derogation in Article 21:2 of Directive 2004/83 for the affected refugee can be severe, as it may result in their return to a country where they face danger. Consequently, this provision imposes stringent conditions on the practice of refoulement, stipulating that only a refugee convicted by a final judgment of a "particularly serious crime" may be deemed a "danger to the community of that Member State" as defined by this provision. Furthermore, even if these conditions are met, the refoulement of the refugee remains one of several options available to Member States, which retain the discretion to pursue alternative, less severe measures.¹⁹⁴

In the Joined cases of *N.S. v. United Kingdom* and *M.E. v. Ireland*,¹⁹⁵ the CJEU determined that the article 4 of the Charter should be understood to imply that Member States are prohibited from transferring an asylum seeker to the Member State deemed responsible under the Regulation if they are aware of systemic deficiencies in that Member State's asylum procedures and reception conditions. Such deficiencies must be significant enough to raise substantial grounds in believing that the asylum seeker would be at a genuine risk of experiencing inhuman or degrading treatment as defined by the provision. The Court observed that the Common European Asylum System (CEAS) is designed under the assumption that all participating States, whether they are Member States or third countries, uphold fundamental rights, including those enshrined in the Geneva Convention, the 1967 Protocol, and the ECHR.¹⁹⁶ This framework allows Member States to trust one another in this respect. Nevertheless, the Court acknowledged the possibility that significant operational challenges

192 *H. T. v. Land Baden-Württemberg*, paras. 42–44.

193 *Ibid.*, paras. 48–55.

194 *Ibid.*, paras. 70–72.

195 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

196 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others*, para. 78.

could arise in a particular Member State, which could lead to a considerable risk that asylum seekers, upon being transferred to that State, might be treated in ways that violate their fundamental rights. The Court concluded that it cannot be assumed that any violation of fundamental rights would automatically impact the obligations of other Member States under the Dublin Regulation.¹⁹⁷

The prohibition will be activated only when the nature of the violation indicates a genuine risk that an asylum seeker may endure inhuman or degrading treatment as defined by Article 4 of the Charter. The Court clarified that systemic deficiencies in the asylum process and the conditions for receiving asylum seekers in the responsible Member State could create such a risk, thereby imposing a corresponding prohibition on transfer. Member States are prohibited from transferring an asylum seeker to a designated Member State under the Dublin II Regulation if they are aware of systemic shortcomings in that Member State's asylum procedures and reception conditions, which provide substantial grounds for believing that the asylum seeker would be at real risk of inhuman or degrading treatment, as outlined in Article 4 of the Charter of Fundamental Rights (CFR). The application of the Dublin II Regulation, based on an unqualified assumption that the fundamental rights of the asylum seeker will be upheld in the responsible Member State, contradicts the obligation of Member States to implement and interpret the Dublin II Regulation in alignment with fundamental rights. Member States cannot rely on an absolute presumption of adherence to fundamental rights;¹⁹⁸ rather, this presumption must be subject to challenge. The Court referenced the ruling in *M.S.S. v. Belgium and Greece* by the ECHR Grand Chamber, noting that the extent of the fundamental rights violations highlighted in that case demonstrated the existence of systemic deficiencies in Greece's asylum procedures and reception conditions at the time of transfer.

The CJEU has recently issued a pivotal ruling¹⁹⁹ *Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21* concerning international protection. This judgment stems from a preliminary ruling addressing five Italian cases that shared similar circumstances. These cases involved international protection applicants in Italy who had previously submitted applications in other Member States and subsequently filed new applications in Italy. They were subjected to the "take back procedure" under the Dublin III Regulation, which mandates their return to the initial Member State.²⁰⁰ The Court concluded that since applicants are entitled to present evidence and arguments that could influence a transfer decision, they possess a right to information and should be granted access to a personal interview. A Member State's failure to provide this could lead a national court to annul transfer decisions.²⁰¹

197 Ibid., para. 82.

198 CJEU, *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others*, para. 100.

199 CJEU, *Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21*, Judgement.

200 Ibid., paras. 40, 46, 52.

201 Ibid., paras. 107–128.

Furthermore, the Court clarified that the second Member State is not permitted to evaluate the risk of “indirect refoulement” by the first Member State in the context of a transfer decision unless there are systemic deficiencies in the asylum procedures and reception conditions of that first Member State. The principle of non-refoulement is a fundamental tenet of international refugee and human rights law, which prohibits states from returning individuals to countries or territories where they may face persecution, torture, inhumane or degrading treatment, or other violations of human rights.²⁰² This ruling elucidates the Dublin procedure for second Member States, particularly regarding the procedural safeguards for applicants facing transfer decisions and the assessment of “indirect refoulement” within this framework.²⁰³

4.3. The Practice of the Inter-American Court of Human Rights

On November 25th 2013, the Inter-American Court of Human Rights (IACtHR) issued its first ruling in *Pacheco Tineo case* regarding a state’s duty to adequately consider asylum applications and uphold the principle of non-refoulement. In this ruling, the IACtHR outlined a set of essential guarantees for asylum and expulsion processes as derived from the American Convention on Human Rights (ACHR).²⁰⁴

The Court determined that Bolivian authorities had hastily dismissed the asylum request of the Pacheco Tineo family, who were Peruvian nationals recognised as refugees by Chile. Their expulsion was carried out without an oral hearing or the opportunity for the family to present their case. This expulsion occurred within an unreasonably brief time period and lacked any evaluation of the risks the family would face upon return to their home country. Given the authorities’ awareness of the family’s refugee status in Chile, they bore a heightened responsibility to exercise care, diligence, and caution in handling the asylum request. Furthermore the family was not informed of the refusal decision, which hindered their ability to comprehend the rationale behind it and to pursue an appeal. In their home country, the parents had endured three years of imprisonment, with the father being a survivor of a massacre in a Peruvian prison. After their deportation to Peru, they were wrongfully imprisoned on charges of terrorism for four months. The Court ruled that the family’s expulsion violated their right to seek and obtain asylum as stipulated in Article 22(7) of the ACHR, the principle of non-refoulement under Article 22(8) of the ACHR, the right to a fair trial as outlined in Article 8 of the ACHR, and the right to judicial protection under Article 25 of the ACHR. Additionally, the arbitrary detention of the mother in Bolivia prior to their deportation, the withholding of documents, and the resulting state of severe uncertainty and distress, all constituted violations of the family’s right to mental and moral integrity as enshrined in Article 5 of the ACHR. Ultimately, the Court identified multiple violations of their rights.²⁰⁵

202 Ibid., paras. 129–142.

203 Ibid., paras. 136–149.

204 *The Pacheco Tineo Family v. Plurinational State of Bolivia*, 2013.

205 Ibid.

4.4. The Decisions of the National Courts

The Constitutional Court of the Republic of Slovenia established in its *judgment Up-613/16* that EU Member States are required to thoroughly evaluate all relevant factors pertaining to the principle of non-refoulement when making decisions regarding a Dublin transfer to a designated Member State. Given the absolute nature of the protection provided by the principle of non-refoulement, this evaluation must encompass all aspects of the specific case, including the applicant's individual circumstances in the country of transfer. Additionally, it is necessary to consider whether the mere act of transferring an individual to another country based on their health condition contravenes the obligations imposed by the principle of non-refoulement.²⁰⁶

The Civil Court of Italy, determined in the case: *Applicant v Ministry of the Interior, Ministry of Foreign Affairs, and Ministry of International Cooperation*, that refusing to allow entry to the Afghan unaccompanied minor constituted a violation of the principle of non-refoulement. The Tribunal of Rome ruled against the denial of access to the asylum procedure and mandated that the authorities permit the minor to enter and apply for protection.²⁰⁷

In *Applicant v Federal Republic of Germany* The Higher Administrative Court of Lower Saxony ruled that, despite the concerning humanitarian conditions reported in Ethiopia, the applicant did not provide sufficient evidence to demonstrate that any returnee would face a genuine risk of violating Article 3 of the ECHR. Consequently, the criteria for imposing a deportation ban on humanitarian grounds were not satisfied. As a result, the court dismissed the application for leave to appeal as both inadmissible and without merit.²⁰⁸

In *A.Y. v. Commander of the Border Guard*, the Supreme Administrative Court of Poland determined that the principle of non-refoulement must be taken into account when making return decisions for individuals apprehended after unlawfully crossing the border, irrespective of their asylum application status. The Court emphasised that the factual assessment of each case should be connected to the evaluation of the risk of refoulement, in accordance with Articles 3(a)(b) and 4 of the Schengen Regulation, Article 4:4 (b) of the Return Directive, and the stipulations outlined in the 1951 Refugee Convention. Furthermore, the court highlighted the obligation of Member States to ensure that affected individuals can effectively exercise their right to apply for international protection.²⁰⁹

In conclusion, the principle of non-refoulement stands as a fundamental tenet of international refugee and human rights law, which forbids states from returning individuals to nations or regions where they may encounter persecution, torture, or other violations of human rights. The jurisprudence of regional international courts,

206 The Constitutional Court of the Republic of Slovenia, judgment on the case N: Up-613/16, 2016.

207 *Applicant v. Ministry of the Interior, Ministry of Foreign Affairs, and Ministry of International Cooperation*, Civil Court, N.R.G. 21667/2023, 2023.

208 *Applicant v. Federal Republic of Germany*, 2023.

209 *A.Y. v Commander of the Border Guard*, II OSK 1735/22, 2023.

including the Court of Justice of the European Union and the Inter-American Court of Human Rights, along with national courts, has consistently underscored the significance of maintaining this principle.

The CJEU has developed a comprehensive framework for safeguarding asylum seekers and refugees, highlighting the necessity for detailed assessments of individual situations and risks, as well as the critical nature of procedural protections. The Inter-American Court of Human Rights has similarly emphasised the obligation of states to thoroughly evaluate asylum requests and uphold the principle of non-refoulement.

National courts have also played an essential role in enforcing the principle of non-refoulement, stressing the importance of meticulous evaluations and consideration of individual circumstances. These rulings reflect the continuous efforts to ensure that states adhere to their international responsibilities to shield individuals from persecution, torture, and other human rights abuses.

Ultimately, the principle of non-refoulement continues to be a fundamental aspect of international protection, and its application in case law acts as a crucial safeguard for individuals seeking refuge from harm.

5. Conclusion

The principle of non-refoulement is a cornerstone of international refugee and human rights law, protecting individuals from being returned to countries where they may face serious harm or persecution. The extensive interpretation and application of this principle by various international bodies, including the UNHCR, ECtHR, CJEU, and Inter-American Court of Human Rights, as well as national courts, underscore its importance and universality.

The jurisprudence of these bodies has consistently emphasised the absolute nature of the principle, prohibiting states from deporting or extraditing individuals to countries where they may face a real risk of torture, inhuman or degrading treatment. The principle's application extends to both recognised refugees and asylum seekers, and its effective implementation is essential for ensuring the safety and dignity of individuals seeking refuge.

As the global refugee crisis continues to evolve, it is imperative that states and international organisations uphold their commitments to non-refoulement and work towards finding durable solutions for those in need of protection. The principle of non-refoulement remains a fundamental aspect of international protection, and its application in case law acts as a crucial safeguard for individuals seeking refuge from harm. Ultimately, the continued adherence to and development of this principle are vital for protecting human rights and preventing harm to vulnerable individuals worldwide.

List of Keywords/Abbreviation

art.	article
et al.	and others
etc.	and so on
vol. / vols.	volume / volumes
c.	approximately
ms.	manuscript
edn.	edition
ed. / eds.	editor / editors
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
e.g.	for example
pt. / pts.	part / parts
cf.	compare
ibid.	at the same place
ip.	in press
UNHCR	UN High Commissioner for Refugees
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNESCO	United Nations Economic and Social Council
Res	Resolution
CSR	1951 Convention Relating to the Status of Refugees
ICCPR	International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICJ	International Court of Justice
ACHR	African Charter of Human Rights
ExCom	Executive Committee
OAU	Organisation of African Unity
CoE	Council of Europe
AALCO	Asian-African Legal Consultative Organization
VCLT	Vienna Convention on the Law of Treaties
HRC	Human Rights Committee
CAT	Committee of Torture
UNCAT	United Nations Convention on Torture

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