

IML Information Note

on

The Principle of Non-refoulement

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“...[F]rom the perspective of people applying for protection, the content given to *non-refoulement* can be a question of life [or] death.”¹

INTRODUCTION AND PURPOSE

The purpose of this Information Note is to provide a general overview of the principle of *non-refoulement* and to explain how the principle applies to all migrants. To this end, the Information Note can be used as a tool by those dealing with border governance and management or returns of migrants, to prevent the violation of international obligations.

This Information Note also demonstrates the extent to which the principle of *non-refoulement* protects all migrant persons, regardless of their migration status, from expulsion and return to places where they may be at risk of serious human rights violations.

The Information Note provides an overview of the main issues and cases in the regional and international human rights framework. Preference has been given to binding international instruments and established lines of jurisprudence.² The list of cases covered in this Note is non-exhaustive, as the collective jurisprudence and commentary relating to *non-refoulement* cannot be distilled into a short document.

This Note is divided into four substantive sections. Section I provides an explanation of

the concept of *non-refoulement*, describes its theoretical origin and basis, and defines essential terms and standards used in the jurisprudence. Section II covers the general principles of *non-refoulement* and explains the differences between the protections guaranteed under international human rights law and that offered by the 1951 United Nations Convention Relating to the Status of Refugees.³ Section III divides the jurisprudence into the specific human rights that have triggered *non-refoulement* obligations and provides references to useful cases and judgments. Section IV deals with other subjects related to *non-refoulement*, such as the use of diplomatic assurances and the prohibition of collective expulsion.

The Note uses the word “migrant” in the broad sense of persons on the move, in line with the definition in the IOM Glossary.⁴

I. DEFINITION AND BASIC CONCEPTS

i. Definition

The principle of *non-refoulement* is defined in the IOM Glossary on Migration as the

“prohibition for States to extradite, deport, expel or otherwise return a person to a country where his or her life or freedom would be threatened, or where there are substantial grounds for believing that he or she would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being

¹ P. Leino-Sandberg, ‘Particularity as Universality: The Politics of Human Rights in the European Union’, *The Erik Castren Institute Research Reports*, No. 15/2005, 52, cited in J. Pirjola, ‘Shadows in Paradise—Exploring Non-Refoulement as an Open Concept,’ *International Journal of Refugee Law*, Vol. 19 (4), 2007, p. 656.

² It is worth noting that the decisions made by treaty monitoring bodies, such as the Committee against Torture, the Human Rights Committee, and the Committee on the Rights of the Child are not binding *per se*. However, the Human Rights Committee has found that there is a duty to cooperate with its decisions based on the principle of good faith in observance of all treaty obligations. See

Human Rights Committee, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, General Comment No. 33, 5 November 2008, UN Doc. CCPR/C/GC/33, in particular para. 15. Furthermore, the general comments provided by treaty-monitoring bodies are also not binding but provide a valuable source of information on the purpose and scope of non-refoulement protections.

³ United Nations Convention Relating to the Status of Refugees (1951) (hereinafter “1951 Refugee Convention”).

⁴ IOM, *Glossary on Migration*, International Migration Law Series No. 34, 2019, p. 132

*subjected to enforced disappearance, or of suffering another irreparable harm.”*⁵

The basis of *non-refoulement* is found in the Convention Relating to the Status of Refugees (1951 Refugee Convention).⁶ Similar provisions are also reflected under the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa,⁷ the 1984 Cartagena Declaration on Refugees,⁸ and the 2001 Bangkok Principles on the Status and Treatment of Refugees (“Bangkok Principles”).⁹

International human rights law has broadened the scope of this obligation and requires States to protect non-nationals from being returned to countries in which their life is threatened or where they risk to be subjected to torture or inhuman and degrading treatment, regardless of their immigration status.¹⁰ Under international human rights law, *non-*

refoulement is included explicitly in Article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances (ICPPED).¹¹ The obligation of *non-refoulement* can also be derived from several provisions enshrined in other international instruments. These instruments include the International Covenant on Civil and Political Rights (ICCPR),¹² the Convention on the Rights of the Child (CRC),¹³ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).¹⁴ Often, *non-refoulement* obligations are expressed in the general comments and/or jurisprudence adopted by the human rights treaty bodies that monitor the implementation of these treaties.¹⁵

⁵ IOM, *Glossary on Migration*, International Migration Law Series No. 34, 2019, p. 1498.

⁶ See Article 33(1) of the 1951 Refugee Convention which provides that: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”; The principle of *non-refoulement* is also enshrined, without any limitation on security grounds, in Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa and reaffirmed as a rule of *jus cogens* in the Cartagena Declaration on Refugees (para. 5). The principle also appears in Article 3(3) of the Principles concerning Treatment of Refugees adopted by the Asian–African Legal Consultative Committee in 1966, with a limitation on security grounds.

⁷ Article II(3) of the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa (1969).

⁸ Paragraph III(5) of the Cartagena Declaration on Refugees (1984); The declaration expanded the definition of refugee to include all who have fled their country “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.

⁹ See Article III of the Bangkok Principles. The declaration is a set of non-binding principles.

¹⁰ See Human Rights Committee (CCPR), General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 1 which states that “[...] each State party must ensure the rights in the Covenant to ‘all individuals within its territory and subject to its jurisdiction’ (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”; See also CCPR, General Comment No. 31: the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10: “The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status.”; CCPR, General Comment No. 36, Article 6: Right to Life, 3 September 2019, UN Doc. CCPR/C/GC/35; Inter-American Court of Human

Rights (IACtHR), Advisory Opinion OC-18/03, *Juridical Conditions and Rights of Undocumented Migrants*, 17 September 2003.

¹¹ Article 3(1) of the Convention Against Torture (CAT) provides that: “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”; Article 16[1] of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) states: “No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”

¹² See CCPR, General Comment No. 36, op. cit., which states that the “obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”; See CCPR, General Comment No. 31, op. cit., para. 12, according to which “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”; See CCPR, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 9.

¹³ See Art. 6 and 37 of the CRC, according to which “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.”; Committee on the Rights of the Child (CRC), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, UN Doc. CRC/GC/2005/6.

¹⁴ For example, Article 56(3) of the ICRMW states that “[i]n considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations”, which arguably includes non-refoulement.

¹⁵ CCPR, General Comment No. 20, op. cit., para. 9; CCPR, General Comment No. 31, op. cit., para. 12.

At the regional level, the principle is enshrined in several human rights treaties. It appears in Article 22 of the American Convention on Human Rights (ACHR), Article 19 of the Charter of Fundamental Rights of the European Union, Article 28 of the Arab Charter on Human Rights, and in Article 13 of the Inter-American Convention on the Prevention of Torture (IACPPT).¹⁶ It is also derived from regional instruments such as the European Convention on Human Rights (ECHR),¹⁷ and the African Charter on Human and Peoples' Rights (ACHPR).¹⁸ *Non-refoulement* is also a component of many extradition treaties.¹⁹

Non-refoulement clauses are also found under international humanitarian law as well as transnational criminal law. Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 contains a non-refoulement provisions. The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, also, prioritizes respect for existing rights, obligations and responsibilities under international law, specifically the principle of non-refoulement.²⁰

In addition, in the Global Compact for Safe, Orderly and Regular Migration (GCM), States have committed to upholding the principles of non-refoulement, in accordance with their obligations under international human rights law. Under Objective 21, States have committed to “facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the **prohibition of collective expulsion and of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law.**”²¹

The above-mentioned international and regional human rights instruments provide protection to migrants who would face violations of a variety of human rights, including the prohibition of torture and cruel, inhuman or degrading treatment or punishment and the right to life. The most serious violations of rights other than torture and cruel/ill/inhuman treatment can also trigger the application of this principle. These include the right not to be subjected to slavery and forced labour, the prohibition of enforced disappearances, the

¹⁶ Article 22(8) of the ACHR states: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”; Article 19(2) of the Charter of Fundamental Rights of the European Union states: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”; See also Article 21(1) of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which states: “Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.”; Article 28 of the Arab Charter on Human Rights states: “Political Refugees may not be extradited.”; Article 13(4) of the IACPPT states: “Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.”

¹⁷ See Art 3 of the ECHR; European Court of Human Rights (ECtHR), *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 1989, para. 88.

¹⁸ The African Commission on Human and Peoples' Rights (ACnHPR) has urged “States Parties to respect the principle of non-refoulement for all individuals, regardless of their migration status, and to refrain from returning them to a country where they face a real and

foreseeable risk of loss of life, torture or other cruel, inhuman or degrading treatment or punishment, enforced disappearance or other irreparable harm, in accordance with relevant obligations under international and regional law”, see Resolution on missing migrants and refugees in Africa and the impact on their families, 2021, ACHPR/Res. 486 (EXT.OS/XXXIII); ACnHPR, *Modise v. Botswana*, Communication No. 97/93, 23 October-06 November 2000, para. 88. The principle of non-refoulement is also enshrined in other regional instruments, such as the 2012 ASEAN Human Rights Declaration, which states that “no person shall be subject to torture, or to cruel, inhuman or degrading treatment or punishment” and that “[e]very person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements”, see paras. 14 and 16.

¹⁹ Article 3 of the European Convention on Extradition (ECE); Article 4(5) of the Inter-American Convention on Extradition; Article 3 of the Model Treaty on Extraditions adopted by UN General Assembly resolution 45/116.

²⁰ According to Article 14 of the Protocol on Trafficking and Article 19 of the Protocol on Smuggling, “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

²¹ United Nations General Assembly, Global Compact for Safe, Orderly and Regular Migration, 19 December 2018, UN Doc. A/RES/73/195, Objective 21.

prohibition of underage recruitment for military purposes, and the right to a fair trial.²²

The inclusion of the principle of *non-refoulement* in various international instruments, which have been ratified by a very high number of States and its general recognition as a cornerstone principle of both refugee and human rights law **has led to its acceptance as a norm of customary international law.**²³ Accordingly, the obligation of *non-refoulement* extends generally to all States in the international community. Many argue that *non-refoulement* can be considered as a norm of *jus cogens*,²⁴ meaning that it is “accepted and recognized by the international community of States as a whole as **a norm from which no derogation is permitted** and which can be modified only by a subsequent norm of general international law having the same character”.²⁵

ii. Real risk

The standard used to evaluate *non-refoulement* claims depends on the right that is likely to be violated if the migrant is expelled to another country. When considering claims related to the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and forced labor, as well as arbitrary deprivation of life, regional human

rights courts and the UN treaty bodies evaluate whether there is a “real risk” of violations. Both the Committee against Torture and the European Court of Human Rights (ECtHR) require “**substantial grounds for believing**” that the migrant would face a “**real risk**” of **human rights violations upon expulsion.**²⁶ The Human Rights Committee,²⁷ as well as the Inter-American Commission on Human Rights (Inter-American Commission) also relies on a “real risk” standard.²⁸

Both the Committee against Torture and the Human Rights Committee have further clarified that this means that the violation must be “the necessary and foreseeable consequence of deportation.”²⁹ The Committee against Torture has also stated that the grounds must “go beyond mere theory or suspicion,” but that “the risk does not have to meet the test of being highly probable.”³⁰ However, the standard before the Inter-American Court of Human Rights (IACtHR) seems to be lower, as the Court only requires “*algún riesgo de persecución* (a possibility the individual may risk persecution).³¹

Enforcement mechanisms consider a broad range of information to determine whether there are substantial grounds to believe there is a “real risk” of serious human rights violations. This often includes **general statements on the**

²² ECtHR, *Mohammed Lemine Ould Barar v. Sweden*, Application no. 42367/98, 19 January 1999, para. 1; ECtHR, *Soering v. the United Kingdom*, op. cit., para. 113; ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications No. 46827/99 and 46951/99, 4 February 2005, para. 88; ECtHR, *Harkins v. United Kingdom*, Application No. 71537/14, 15 June 2017, paras. 62-65; Committee against Torture (CAT), General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 4 September 2018, UN Doc. CAT/C/GC/4, para. 29(k).

²³ United Nations High Commissioner for Refugees (UNHCR), Executive Committee Programme, *Non-refoulement*, Conclusion No. 6 (XXVIII) (1977) states: “[T]he fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.” UNHCR, *The Principle of Non-refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2*, 31 January 1994, paras. 1, 3.

²⁴ J. Hathaway, ‘The Rights of Refugees under International Law’, 2005, pp. 363-7; J. Allain, ‘The Jus Cogens Nature of Non-refoulement’, 13 *International Journal of Refugee Law*, 2001, p. 533; Guy S. Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement’, 23 *International Journal of Refugee Law*, 2011, pp. 443-444; IACtHR, Advisory Opinion OC-18/03, op. cit., *Concurring Opinion of Judge A.A. Cançado Trindade*, para. 41.

²⁵ IOM, Glossary on Migration, op. cit., p. 119.

²⁶ CAT, *C.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005, para. 7.3; ECtHR, *Cruz Varas v. Sweden*, Application no. 15576/89, 20 March 1991, para. 75 (requiring “substantial grounds [...] for believing the existence of a real risk of treatment contrary to Article 3”).

²⁷ CCPR, *A.R.J. v. Australia*, Communication No. 692/1996, 11 August 1997, UN Doc. CCPR/C/60/D/692/1996, para. 6.9; CCPR, *G.T. v. Australia*, Communication No. 7061/1996, 4 December 1997, UN Doc. CCPR/C/61/D/706/1996, para. 8.2.

²⁸ Inter-American Commission on Human Rights (IACHR), *Haitian Centre for Human Rights et al. v. United States*, 13 March 1997, OEA/Ser.L/V/II.95 Doc. 7 rev. p. 550, para. 167 and *John Doe et al. v. Canada*, 21 July 2011, Report N. 78/11 - Case 12.586, paras. 110-112.

²⁹ CCPR, *A.R.J. v. Australia*, op. cit., para. 6.14; CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, UN Doc. CAT/C/18/D/34/1995, para. 9.5; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Applications No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 30 October 1991, para. 108.

³⁰ CAT, *S.M.R. and M.M.R. v. Sweden*, Communication No. 103/1998, 11 May 1999, UN Doc. CAT/C/22/D/103/1998, para. 9.4.

³¹ IACtHR, *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, para. 153. In the Spanish version, the Court refers to “un riesgo de violación”.

human rights situation in a country,³² reports from non-governmental and international organizations,³³ forensic medical reports,³⁴ and personal histories.³⁵ The ECtHR will consider “all the material placed before it” and, if necessary, will seek information on its own.³⁶ Similarly, the Committee against Torture determines whether substantial grounds exist based on “all relevant materials,” which may include the applicant’s ethnic background, political affiliation, history of detention and torture.³⁷ The Human Rights Committee usually does not carry out its own evaluation of whether a real risk of ill-treatment exists but will rely on the State party’s considerations. Only when the Committee finds that the “evaluation was clearly arbitrary or amounted to a manifest error or denial of justice” will it carry out an assessment itself.³⁸

The “real risk” must be assessed in light of both the general human rights situation in the receiving country as well as the individual’s personal circumstances.³⁹

Furthermore, the “real risk” must be based on an evaluation of the conditions and dangers as they exist at the time of foreseen expulsion.⁴⁰ An evaluation of a migrant’s history may help prove a real risk of torture or ill-treatment upon return to his or her State of origin.⁴¹ In addition, the existence of a real risk “may be based not only on acts committed in the country of origin [...] but also on activities undertaken by [a migrant] in the receiving country”.⁴²

A State may not be held responsible where an individual has left its jurisdiction voluntarily. Nevertheless, strict conditions still apply. Such return must be a result of free, prior and informed consent.⁴³ Accordingly, the conditions for voluntariness are not met if there is “the prospect of indefinite detention or detention in inadequate conditions”⁴⁴ or threats, or cases where the individual has no options of ever obtaining the right to reside legally or prospects of living in freedom in the receiving country, and no feasible third country options.⁴⁵

³² CAT, *Motumbo v. Switzerland*, Communication No. 13/1993, 27 April 1994, UN Doc. CAT/C/12/D/013/1993, paras. 7.4-7.5.

³³ CAT, *Karoui v. Sweden*, Communication No. 185/2001, 08 May 2002, UN Doc. A/57/44, para. 198.

³⁴ *Ibid.*, which relies on medical records showing torture trauma.

³⁵ CCPR, *Hamida v. Canada*, Communication No. 1544/2007, 11 May 2010, UN Doc. CCPR/C/98/D/1544/2007, para. 8.7.

³⁶ ECtHR, *Cruz Varas v. Sweden*, op. cit., para. 75, citing *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, para. 160.

³⁷ Art. 3(2) of the CAT prescribes that “the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”; CAT, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refolement and Communications), 21 November 1997, UN Doc. A/53/44 Annex IX, para. 8 provides a non-exhaustive list of relevant information.

³⁸ This approach has been followed by the Committee in recent cases, see e.g. CCPR F.A. v. *Russia*, Communication No. 2189/2012, 27 July 2018, UN Doc. CCPR/C/123/D/2189/2012, para. 9.3; See also W.A. Schabas, *Nowak’s CCPR Commentary*, 3rd edn. 2019, pp. 203-204; K. Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis on the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture*, Intersentia, 2009, p. 397; F. De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT*, Brill Nijhoff, 2017, p. 53.

³⁹ ECtHR, *Omar Othman v. the United Kingdom*, Application no. 8139/09, 17 January 2012, para. 187; *Hirsi Jaama and others v. Italy*, Application No. 27765/09, 23 February 2012, para. 117; *Sufi and Elmi v. the United Kingdom*, Applications No. 8319/07, 11449/07, 28 June 2011, paras. 293-296.

⁴⁰ ECtHR, *Chahal v. the United Kingdom*, Application No. 70/1995/576/662, 15 November 1996, para. 86; if expulsion has already occurred, then the enforcement mechanism will evaluate the facts as they were known or should have been known by the expelling State at the time of removal. See ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, 2 March 2010, para. 149.

⁴¹ CAT, *Motumbo v. Switzerland*, op. cit., para. 9.4 which relies on the history of detention.

⁴² CAT, *Aemei v. Switzerland*, op. cit., para. 9.5 which found that the applicant’s involvement in a political opposition group after his arrival in Switzerland contributed to the existence of a real risk of torture upon expulsion.

⁴³ See IOM, Policy on the Full Spectrum of Return, Readmission and Reintegration, 2021. “Free, prior and informed consent requires, among other things: “the absence of physical or psychological coercion, intimidation or manipulation; the provision of timely, unbiased and reliable information communicated in a language and format that is accessible and understood; sufficient time to consider other available options and to ready oneself for the return; and the possibility of withdrawing or reconsidering one’s consent if the proposed activities, circumstances, or available information change.”

⁴⁴ OHCHR, Recommended Principles And Guidelines On Human Rights At International Borders, Guideline 9(2)-(3); OHCHR and GMG, Principles and Guidelines migrants in vulnerable situations, Principle 6(3)

⁴⁵ ECtHR, *M.S. v. Belgium*, Application No. 50012/08, 31 January 2012, paras. 124-125.

II. GENERAL PRINCIPLES

i. *Non-refoulement applies to migrants regardless of status*

The principle of *non-refoulement* which represents a safeguard against the most flagrant violations of human rights **applies to every person subject to a State's jurisdiction, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not.** The Human Rights Committee has clarified that the ICCPR applies to all migrants regardless of status: "[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."⁴⁶ Furthermore, **the application of *non-refoulement* protection to migrants does not depend on their ability to gain or maintain status as a refugee.**⁴⁷

ii. *Non-refoulement and entry to a State's territory*

States have sovereignty to manage their borders and to regulate the entry, stay and exit from within their territory. Simultaneously, States have the duty to respect, protect and fulfill the human rights of all individuals within their jurisdiction, irrespective of their migration status. Therefore, under the principle of non-refoulement it can be assumed that States

cannot pushback a person who is at the border, without providing an opportunity to apply for asylum or without an evaluation of the individual circumstance of the migrant's case, as they are then considered under their effective control) or on their territory.⁴⁸

In this sense, the IACtHR has stated that the principle of *non-refoulement* applies to those who are "either at the border or crossing the border without being formally or legally admitted to the territory of the country, because, otherwise this right would become illusory and void of content, i.e. without any value or effect".⁴⁹ Similarly, the ECtHR held that "a State cannot deny access to its territory to a person presenting himself or herself at a border checkpoint who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring State, unless adequate measures are taken to eliminate such a risk".⁵⁰ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment also considers, in this regard, "summary rejection of migrants without individualized risk assessment [...] including through [...] border closures or 'pushback' operations" to be in breach with States' non-refoulement obligation."⁵¹ Furthermore, during the COVID-19 pandemic, UNHCR reaffirmed the continuous nature of this principle, and reminded States of their obligation to allow entry and to refrain from

⁴⁶ CCPR, General Comment No. 31, op. cit., para. 10; See also CCPR General Comment No. 15, op. cit., para. 1.

⁴⁷ ECtHR, *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996, paras. 42, 47, state that the applicant lost refugee status because of criminal conviction, but was granted *non-refoulement*; IACtHR, *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, op. cit., para. 135 states that the Inter-American system recognizes the right of every foreign person regardless of legal or migratory status, and not only of asylum seekers and refugees, not to be returned to a place where his/her life, integrity and/or liberty risk being violated; See also CAT, *Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, UN Doc. A/49/44, paras. 2.5, 9.7; CCPR, *Hamida v. Canada*, op. cit., paras. 8.7, 9.

⁴⁸ ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012, para. 134; Special Rapporteur on the human rights of migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, 12 May 2021, UN Doc. A/HRC/47/30, paras. 5, 19; See also K. Wouters, *International Legal Standards for the protection from refoulement*, Antwerp, Oxford Portland, 2009, p. 569; CRC, General Comment No. 6, op. cit., para. 62 which states that "States should [...] take into

account that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child".

⁴⁹ IACtHR, Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, 19 August 2014, para. 210; Advisory Opinion OC-25/18 requested by the Republic of Ecuador, *The Institution of Asylum and its Recognition as a Human Rights in the Inter-American System of Protection*, 30 May 2018, para.187.

⁵⁰ ECtHR, *M.K. and Others v. Poland*, Applications No. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 178-9; See also ECtHR, *D.A. and Others v. Poland*, Application No. 51246/17, 8 July 2021, para. 64.

⁵¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 26 February 2018, UN Doc. A/HRC/37/50, para. 65(h); See also, Special Rapporteur on the human rights of migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, op. cit., para. 19.

forcibly removing an individual who is at risk of *refoulement*.⁵²

However, in some situations an alternative solution such as the referral of a person to a safe third country or provision of effective protection outside the territory of the host State (for example in a State's embassy), may also be considered in accordance with international obligations. This particularly relates to transfers of persons under the first country of asylum and the safe third country concept. Both concepts are not as such contrary to international law and the principle of non-refoulement but nevertheless need to be accompanied by strict safeguards to ensure the protection of the person's rights, including importantly protection from refoulement.⁵³

The concept of first country of asylum is used when an asylum-seeker has already been granted protection in another country, can return there and can avail themselves of such protection.⁵⁴ The safe third country is applied by some states when the asylum-seeker has already passed a safe country where they could and should already have requested asylum, while *en route* to the country where they have presently applied for asylum.⁵⁵ If the third country agrees to readmit the person and process his or her asylum request, the other State may decide not to examine the person's asylum request and instead transfer him or her back to the third country.

When no such solutions can be envisaged or when all solutions explored entail a risk for the protected individual to be subjected to the proscribed treatments or to be sent back to a country where the same types of risk exist, the

State has an obligation to admit the protected individual to its territory, at least temporarily.⁵⁶

In contrast, the practice of extraterritorial processing of asylum claims, where one country transfers asylum seekers and refugees to another country for the asylum process, in the absence of safeguards and standards, is strongly opposed by the UN, academics and practitioners.⁵⁷ As analyzed by the UNHCR, "extraterritorial processing is unlawful where it represents an attempt to avoid jurisdiction or international responsibilities, or to shift burdens, for example by no longer processing any asylum application on the State's territory; [it is also unlawful] if compliance with international and national standards cannot be guaranteed; or if durable solutions are not available for refugees, as well as other outcomes consistent with human rights for those without international protection needs; or if it has a negative impact on the quality of protection provided by the territorial State".⁵⁸

Overall, temporary admission is often the only way to verify whether the person is entitled to some form of protection, including protection from *refoulement*. In some cases, applications for admission and protection can be submitted and examined at border crossing points, embassies and consulates of the relevant State.⁵⁹

International standards do not expressly oblige States to grant a legal status to the person.⁶⁰ Nonetheless, the absence of any form of regularization may, over time, become contrary to the right to respect for private and family life.⁶¹

⁵² UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, paras. 3, 6.

⁵³ *Ibid.* p. 134.

⁵⁴ UNHCR, A Guide to international refugee protection and building State asylum systems, 2017, p. 134.

⁵⁵ *Ibid.* p. 135.

⁵⁶ CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 11.

⁵⁷ UNHCR, [Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection](#), 28 May 2021; UNHCR's [Press release](#) of 14 April 2022.

⁵⁸ UNHCR, [Annex to UNHCR Note on the "Externalization" of International Protection: Policies and practices related to the externalization of international protection](#), 28 May 2021 (See Para 6 and Para 10)

⁵⁹ ECtHR, *N.D. and N.T. v. Spain*, Applications No. 8675/15 and 8697/15, 23 February 2020, para. 222.

⁶⁰ CAT, *M.B.B. v. Sweden*, 21 June 1999, Application No. 104/1998, para. 6.4.

⁶¹ See, *mutatis mutandis*, ECtHR, *Kuric and others v. Slovenia*, Application No. 26828/06, 26 June 2012, paras. 358-359; ECtHR, *Slivenko v. Latvia*, Application no. 48321/99, 9 October 2003, paras. 96, 125, 128 and 129.

iii. *Non-refoulement can apply extraterritorially*

Non-refoulement “applies to the actions of [S]tates, wherever undertaken, whether at the land border, or in maritime zones, including the high seas.”⁶² The concept of “jurisdiction” is not limited to the territorial reach of a State, but also includes cases where a State performed actions or produced effects outside its territories.⁶³ The responsibility to ensure the rights of individuals, and in turn, to prevent *refoulement*, occurs “[w]henever the State through its agents operating outside its territory exercises control and authority over an individual”.⁶⁴ For example, *non-refoulement* protects migrants, who are taken aboard a ship or aircraft registered in the State party from being returned to a State where they face a risk of violations of their rights.⁶⁵

iv. *Indirect refoulement and expulsion to safe areas*

The protection offered by *non-refoulement* also **prevents a State from expelling a migrant to a second State where he or she would face expulsion to a third State and subsequent serious human rights violations.** This process is called “indirect *refoulement*.” The Human Rights Committee has stated that the “obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm [...] either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”⁶⁶ Similarly, the Committee against Torture and

the Committee on the Rights of the Child have interpreted the prohibition of *refoulement* to also prevent return “to any State to which the author may subsequently be expelled, returned or extradited.”⁶⁷ The IACtHR also prohibits indirect *refoulement*.⁶⁸

With regard to an expulsion to safe areas of a country, the ECtHR has applied the principle of non-refoulement, in cases where State’s have proposed to return a migrant to a “relatively safe” area of the receiving State or a location of the migrant’s choosing, when there is proof that the individual would be at risk of ill-treatment even in that area.⁶⁹ However, it must be noted that in some cases expulsion to another area of a country has been allowed when the applicant has shown that he or she would face ill-treatment only if returned to a specific region.⁷⁰

Moreover, the Committee against Torture established that in the context of the non-refoulement principle, State parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, which would compel persons in need of protection under Article 3 of the CAT to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there.⁷¹

Accordingly, if there are serious limitations to access to rights in the State of destination for

⁶² IACnHR, *Haitian Centre for Human Rights et al. v. United States*, op. cit., para. 171; ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 77-78; See also J. C. Hataway, “Refugee and asylum”, in *Foundations of International Migration Law*, B. Opeskin, R. Perruchoud, J. Redpath-Cross Eds., Cambridge, 2012, pp. 194-195: “[e]xtraterritorial deterrence is therefore as much a breach [of the State’s obligation] as expulsion from within a State’s territory.”

⁶³ ECtHR, *Bankovic and Others v. Belgium and Others*, Application No. 52207/99, 12 December 2001, para. 67; ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 72, 136.

⁶⁴ ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., para. 74; See also CAT, General Comment No. 4, op. cit., para. 10.

⁶⁵ ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 77-78; CAT, General Comment No. 4, op. cit., para. 10.

⁶⁶ CCPR, General Comment No. 31, op. cit., para. 12.

⁶⁷ CAT, General Comment No. 1, op. cit., para. 2; See also CAT, *S.M.R. and M.M.R. v. Sweden*, op. cit., para. 9.8. CRC, General Comment No. 6, op. cit., para. 27.

⁶⁸ IACtHR, *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, op. cit., para. 153.

⁶⁹ ECtHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 23 May 2007, para. 140-41, 149: The Court found that a Somali citizen belonging to the Ashraf minority could not be returned to a “relatively safe” area of Somalia, because even there he would face a real risk of ill-treatment due to his lack of clan protection in the area.

⁷⁰ CAT, *B.S.S. v. Canada*, Communication No. 183/2001, 17 May 2004, UN Doc. CAT/C/32/D/183/2001, para. 11.5, which states: “The Committee considers that the complainant has failed to substantiate that he would be unable to lead a life free of torture in another part of India.”

⁷¹ CAT, General Comment No. 4, op. cit.

people who cannot return to their country of origin, it may be considered as indirect refoulement.⁷²

v. Security exceptions under the 1951 Refugee Convention and human rights instruments

Article 33 (2) of the 1951 Refugee Convention allows exceptions to the principle of *non-refoulement* when the refugee represents a danger to the security of the country or has been convicted for a particularly serious crime.⁷³ In contrast, **international human rights instruments do not allow security exceptions when the expulsion of a migrant would create a real risk of human rights violations that would cause irreparable harm,**⁷⁴ notably in case of a real risk of torture and cruel, inhuman or degrading treatment or punishment and arbitrary deprivation of life.⁷⁵

The Committee against Torture, the ECtHR and the IACtHR do not recognize any exceptions to or derogations from the *non-refoulement* obligation as it applies to the prohibition of torture and inhuman or degrading treatment or punishment.⁷⁶ The ECtHR has repeatedly stressed that the guarantees provided under Article 3 of the ECHR “apply irrespective of the reprehensible nature of the conduct of the person in question”.⁷⁷ The Human Rights Committee has also stated in absolute terms that the *non-refoulement* principle “should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected

of.”⁷⁸ Accordingly, even if a State determines that a migrant poses a security threat to the sending State, “[t]he nature of the activities in which the person engaged is not a relevant consideration”⁷⁹ and the “nature of the offences allegedly committed by the applicant is therefore irrelevant.”⁸⁰

This interpretation derives from the absolute nature of the prohibition of torture and inhuman and degrading treatments.

States remain bound by international human rights law also regarding refugees. Therefore, they are barred to expel or interdict the entry of a refugee when there is a real risk of serious human rights violations in the country of expulsion, even if the refugee has committed a serious crime or represents a threat to national security.

vi. Violations can arise from non-State actors

Most international and regional human rights instruments allow *non-refoulement* claims based on the risk of torture, cruel, inhuman or degrading treatment or punishment as well as for violations of the right to life, even when these actions are committed by non-State actors.⁸¹

This is the case where the non-State entity acts as the *de facto* government, for instance, when the State lacks a central government and factions have assumed a quasi-governmental role.⁸² Additionally, States should also not

⁷² OHCHR & DLA Piper, Admission and stay based on human rights and humanitarian grounds: A mapping of national practice, December 2018, p. 5.

⁷³ Article 33(2) reads as follows: “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

⁷⁴ CCPR, General Comment No. 31, op. cit., para. 12; CCPR, General Comment No. 20 op. cit., para. 9.

⁷⁵ CAT, *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, UN Doc. CAT/C/18/D/39/1996, para. 14.5; CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 & 1477/2006, 31 July 2008, UN Doc. CCPR/C/93/D/1461,1462,1476 & 1477/2006, paras. 12.4-12.6.

⁷⁶ ECtHR, *Chahal v. the United Kingdom*, op. cit., para. 80; IACtHR, *Caso Familia Pacheco Tineo v. Estado Plurinacional de Bolivia*, op. cit., paras. 151; CAT, *Aemei v. Switzerland*, op. cit., para. 9.8.

⁷⁷ See, for instance, ECtHR, *D. v. the United Kingdom*, Application No. 30240/96, 2 May 1997, para. 47.

⁷⁸ CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.4.

⁷⁹ CAT, *Aemei v. Switzerland*, op. cit., para. 9.8.

⁸⁰ ECtHR, *Saadi v. Italy*, Application No. 37201/06, 28 February 2008, para. 137. See also CAT, Concluding Observations on Canada, 07 July 2005, UN Doc. CAT/C/CR/34/CAN, para. 4.

⁸¹ CCPR, *Dawood Khan v. Canada*, Communication No. 1302/2004, 10 August 2006, UN Doc. CCPR/C/87/D/1302/2004, para. 5.6; ECtHR, *H.L.R. v. France*, Application No. 11/1996/630/813, 29 April 1997, para. 40.

⁸² CAT, *Elmi v. Australia*, Communication No. 120/1998, 25 May 1999, UN Doc. CAT/C/22/D/120/1998, para. 6.5: “For a number of years Somalia has been without a central government” and where “factions operating in Mogadishu have set up quasi-governmental institutions” and “members of those factions can fall [...] within the phrase ‘public officials of other persons acting in an official capacity’”; CAT General Comment No. 4, op. cit., para. 30.

return individuals to situations where the receiving country is unwilling or unable to obviate the risk posed by non-state actors, by providing protection to the applicant.⁸³ The Committee against Torture has, for example, so far applied this to cases of “gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking” when it established that the State of return was not able to protect the person from those risks.⁸⁴

The ECtHR has held explicitly that “[o]wing to the absolute character of the right guaranteed, Article 3 of the Convention [ECHR] [from which it derives the principle of non-refoulement] may also apply where the danger emanates from persons or groups of persons who are not public officials”.⁸⁵ The Court has also found violations of the principle where the source of risk emanates from a “general situation of violence”.⁸⁶

Along the same lines, the Committee on the Rights of the Child declares that “*non-refoulement* obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.”⁸⁷

vii. *Judicial remedies and suspensive effect*

Most international and regional human rights instruments guarantee the right to an effective remedy against decisions which would violate the principle of *non-refoulement*.⁸⁸

At the international level, in an extradition case where there was a real risk that the person would be submitted to torture and to the death penalty in the requesting State, **the Human Rights Committee held that effective review of an extradition order must take place before the order is enforced, “in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.”**⁸⁹ If not, the State may be held responsible for a violation of Article 2(3)(a) of the ICCPR, which protects the right to an effective remedy, read together with Article 6 (right to life), and with Article 7 (prohibition of torture and inhuman and degrading treatment or punishment). The same view was reiterated in a number of other cases concerning expulsions.⁹⁰ Furthermore, according to Rule 92 of its Rules of Procedure, the Human Rights Committee can inform the concerned State party of its view as to whether interim measures are desirable to avoid irreparable damage before forwarding its final views on the communication. If such interim measures are not respected, the Committee can declare the State party to be in breach of its

⁸³ ECtHR, *H.L.R. v. France*, op. cit., para. 40; See also CCPR, *Dawood Khan v. Canada*, op. cit., para. 5.6. The Inter-American Court of Human Rights held States responsible in the case of violations committed by non-State actors, however, the Court has not ruled on the principle of *non-refoulement* in the context of violence by non-State actors, see *inter alia*, IACtHR, *González et al. (“Cottonfield”) v. Mexico*, 16 November 2009, Series C No. 205, paras. 389, 402 and 409-11; IACtHR, Advisory Opinion OC-18/03, op. cit., para. 149; CAT, General Comment No. 4, op. cit., para. 30.

⁸⁴ CAT, General Comment No. 2, Implementation of article 2 by States parties, 24 January 2008, UN Doc. CAT/C/GC/2, para. 18; See e.g. CAT *Njamba and Balikosa v. Sweden*, Communication No. 322/2007, 3 June 2010, UN Doc. CAT/C/44/D/322/2007; CAT *F.B. v. Netherlands*, Communication No. 613/2014, 20 November 2015, UN Doc. CAT/C/56/D/613/2014.

⁸⁵ ECtHR, *Salah Sheekh v. the Netherlands*, op. cit., para. 137; ECtHR, *D. v. the United Kingdom*, op. cit., para. 49 which finds that the risk of inhuman or degrading treatment or punishment may arise from lack of access to medical care in certain circumstances; ECtHR, *T.I. v. the United Kingdom*, Application No. 43844/98, 7 March 2000, para. 14; ECtHR, *Bensaid v. the United Kingdom*, Application No. 44599/98, 6 February 2001, para. 33.

⁸⁶ ECtHR, *Sufi and Elmi v. the United Kingdom*, op. cit., paras. 225, 226 and 241-250; See also ECtHR, *L.M. and Others v. Russia*, Applications

No. 40081/14, 40088/14 and 40127/14, 15 October 2015, para. 119; ECtHR, *S. K. v. Russia*, Application No. 52722/15, 14 February 2017, paras. 60-61.

⁸⁷ CRC, General Comment No. 6, op. cit., para. 27.

⁸⁸ For example, CAT, *Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, UN Doc. CAT/C/34/D/233/2003, paras. 13.6 and 13.7; CCPR, *Jonny Rubin Byahuranga v. Denmark*, Communication No. 1222/2003, 9 December 2004, UN Doc. CCPR/C/82/D/1222/2003, para. 13; CoE, Recommendation No. R (98) 13 of the Committee of Ministers on the right of rejected asylum-seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, 18 September 1998.

⁸⁹ See CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.7.

⁹⁰ CCPR, *Choudhary et al. v. Canada*, Communication No. 1898/2009, 28 October 2013, UN Doc. CCPR/C/109/D/1898/2009, paras. 10 and 11. Usually, if the Committee finds the right to life to be violated, it will also find a violation of the prohibition of torture and inhuman or degrading treatment or punishment. There are few exceptions, see for example, CCPR, *Novaković v. Serbia*, Communication No. 1556/2007, 21 October 2010, UN Doc. CCPR/C/100/D/1556/2007, para. 8, where the Committee found a violation of article 2(3)(a) in conjunction with article 6.

obligations under the Optional Protocol⁹¹ to avoid irreparable damages.⁹²

At the regional level, the ECtHR also considers that a remedy must have suspensive effect to be effective.⁹³ In various cases the Court has pointed to the lack of automatic suspensive effect as a reason to find a violation of article 3.⁹⁴ To prevent irreparable harm, the Court can also indicate interim measures according to Rule 39 of the Rules of the Court and order the suspension of a return procedure until its final judgment is issued.⁹⁵

The IACtHR also stated that the protection against *refoulement* applies to every migrant, regardless of legal or migratory status.⁹⁶ As a consequence, if a migrant alleges to be at risk if returned to his or her country of origin, a State party is under the obligation to interview the person concerned and evaluate the risk that person would face if expelled.⁹⁷ Under article 63 (2) of the ACHR and Rule 25 of the Rules of Procedure of the Court, the Court can indicate provisional measures to prevent an irreparable damage to persons,⁹⁸ including in cases where the principle of *non-refoulement* is at stake.

III. SPECIFIC HUMAN RIGHTS TRIGGERING THE APPLICATION OF THE PRINCIPLE OF NON-REFOULEMENT

i. Prohibition of torture and Cruel, Inhuman or Degrading Treatment or Punishment

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that “[o]ne of the bedrock principles of international law is the express prohibition against *refoulement* of persons to where there are substantial grounds to believe there is a risk of torture.”⁹⁹ Many different international and regional human rights instruments set forth an absolute prohibition of torture and other ill-treatment,¹⁰⁰ from which the equally absolute obligation of *non-refoulement* derives subsequently.¹⁰¹ Under no circumstances may a migrant be expelled to a State when there are substantial grounds to believe that there is a real risk that he or she will face torture or cruel, inhuman or degrading treatment or punishment.¹⁰²

The distinction between torture and other ill-treatments depends on the intensity of suffering inflicted on the victim.¹⁰³ The finding of **torture** attaches to cases of “deliberate inhuman treatment causing very serious and cruel suffering.”¹⁰⁴ **Ill-treatment**, falling short of torture, must still reach “a minimum level of

⁹¹ CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 8.1.

⁹² Ibid., para. 8.2; Rule 114, formerly Rule 108, states: “At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations.”

⁹³ Suspensive effect : “A consequence of an appeal, which suspends the enforceability of a challenged decision allowing the appellant to remain in a host country pending the outcome.” European Migration Network Asylum and Migration Glossary

⁹⁴ See, inter alia, ECtHR, *Hirsi Jamaa and others v. Italy*, op. cit., para. 200.

⁹⁵ See, for example, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 40. ECtHR, *Chahal v. the United Kingdom*, op. cit., para. 145-47. Furthermore, the Court found that they were violations of the right to an effective remedy under Article 13, which gives an applicant the possibility to challenge a decision violating the principle of *non-refoulement*

⁹⁶ IACtHR, *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, 2013 op. cit., para. 135.

⁹⁷ Ibid., para. 136.

⁹⁸ IACtHR, Order for Provisional Measures in the matter of Haitians and Haitians origin Dominicans in the Dominican Republic, 18 August 2000, Series E, No. 3, cons. 8.

⁹⁹ Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 30 Aug 2005, UN Doc. A/60/316, para. 30.

¹⁰⁰ See Article 7 of the ICCPR; Article 3 of the ECHR; Article 2 of the CAT; Article 5(2) of the ACHR.

¹⁰¹ See, ex multis, ECtHR, *Vilvarajah and Others v. the United Kingdom*, op. cit., para. 108; CAT, *Paez v. Sweden*, op. cit., para. 14.5; CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.4.

¹⁰² CAT, *Mutombo v. Switzerland*, op. cit., para. 9.3; CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.4; IACtHR, *Lori Berenson-Mejía v. Peru*, 25 November 2004, Series C No. 119, para. 100.

¹⁰³ ECtHR, *Saadi v. Italy*, op. cit., para. 134; ECtHR, *Chahal v. the United Kingdom*, op. cit., para. 74.

¹⁰⁴ ECtHR, *Saadi v. Italy*, op. cit., para. 13; The CAT provides a slightly different definition of torture, see also Article 2(1) of the CAT.

severity” that is based on all relevant circumstances of the case, including the duration of treatment, the physical or mental effects, and the sex, age, and state of health of victim.¹⁰⁵

Inhuman treatment includes treatment that is premeditated, lasts for a significant period of time, and causes bodily injury or “at least intense physical and mental suffering.”¹⁰⁶ The ECtHR has defined **degrading treatment** to include acts that “arouse in [its] victims feelings of fear, anguish and inferiority, capable of humiliating and debasing [the victim] and possibly breaking their physical or moral resistance.”¹⁰⁷ The suffering or humiliation resulting from inhuman or degrading treatment or punishment must “go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”¹⁰⁸ The IACtHR has defined the “concept of inhuman treatment as including that of “degrading treatment”, and torture as “an aggravated form of inhuman treatment, committed with an objective: that of obtaining information or confessions or inflicting punishment”.¹⁰⁹

Under certain circumstances, a risk of torture, inhuman or degrading treatment can exist in the context of the deprivation of certain social and economic rights, such as the right to the enjoyment of the highest attainable standard of physical and mental health, the right to an adequate standard of living and the right to life with dignity. In this sense, the Human Rights Committee found that “intolerable living

conditions” in the receiving country, a lack of access to medical treatment, and “hardship and destitution” could lead to inhuman or degrading treatment.¹¹⁰ Moreover, the Committee on the Rights of the Child considered that returning a child to a country where they would face serious difficulties in gaining access to “education, employment, housing, medical care and other services” necessary for a child’s physical and psychological recovery and social reintegration,¹¹¹ is a violation of the principle of the best interests of the child and of the obligation of States to ensure that no child be subjected to torture, cruel, inhuman or degrading treatment.

International bodies and monitoring mechanisms have found violations of the principle of *non-refoulement* based on the prohibition of torture, cruel, inhuman or degrading treatment or punishment in a variety of settings, including:

- degrading detention conditions in the receiving State,¹¹²
- a death sentence,¹¹³
- life imprisonment sentences if there is no possibility *de jure* and *de facto* to review the life sentence in domestic law,¹¹⁴
- indiscriminate violence in the country of return,¹¹⁵

¹⁰⁵ ECtHR, *Ireland v. the United Kingdom*, op. cit., para. 162.

¹⁰⁶ Ibid., para. 167; ECtHR, *Soering v. the United Kingdom*, op. cit., para. 162; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit., para. 121.

¹⁰⁷ ECtHR, *Soering v. the United Kingdom*, op. cit., para. 162; See also ECtHR, *Ireland v. the United Kingdom*, op. cit., para. 167; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit., para. 121.

¹⁰⁸ ECtHR, *Saadi v. Italy*, op. cit., para. 135; ECtHR, *Labita v. Italy*, Application No. 26772/95, 6 April 2000, para. 120.

¹⁰⁹ IACtHR, *Tibi v. Ecuador*, 7 September 2004, Series C No. 114, para. 139 (Pleadings of the Commission).

¹¹⁰ CCPR, *R.A.A. and Z.M. v. Denmark*, Communication No. 2608/2015, 28 October 2016, UN Doc. CCPR/C/118/D/2608/2015, paras. 7.7 and 7.9.

¹¹¹ CRC, *A.M. v. Switzerland*, Communication No. 95/2019, 22 September 2021, UN Doc. CRC/C/88/D/95/2019, paras. 10.7 and 11.

¹¹² ECtHR, *M.S.S. v. Belgium and Greece*, op. cit., paras. 230-35, 363-68.

¹¹³ ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit., paras. 120, 137. For the Human Rights Committee, the use of painful and humiliating methods of execution, the lack of a timely notification about the execution date, and extreme delays in the implementation of the death penalty sentence, which exhaust any reasonable period of time necessary to exhaust all legal remedies may render an execution arbitrary and entail a violation of Article 7 of the Covenant. See CCPR, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, UN Doc. CCPR/C/GC/36, para. 40; See also CAT A.S. v. *Sweden*, Communication No. 149/1999, 24 November 2000, UN Doc. CAT/C/25/D/149/1999, paras. 8.4-9.

¹¹⁴ ECtHR, *Trabelsi v. Belgium*, Application No. 140/10, 4 September 2014, para. 112; ECtHR, *Vinter and Others v. the United Kingdom*, Applications No. 66069/09, 130/10, and 3896/10, 9 July 2013, paras. 119-122.

¹¹⁵ ECtHR, *Sufi and Elmi v. the United Kingdom*, op. cit., paras. 225, 226 and 241-250; See also ECtHR, *L.M. and Others v. Russia*, op. cit., para. 119; ECtHR, *S. K. v. Russia*, op. cit., paras. 60-61.

- harmful practices such as female genital mutilation,¹¹⁶
- multiple rapes,¹¹⁷ sexual and gender-based violence,¹¹⁸
- living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basic needs,¹¹⁹
- “situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk [...] of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.”¹²⁰ This also includes mental illnesses when the deportation results in the abrupt withdrawal of medical and family support.¹²¹

Whether a treatment falls within the prohibition of ill-treatment and thus *non-refoulement* usually depends on an individualized and subjective assessment of the facts.¹²² Absolute consistency is not required in an applicant’s retelling of past ill-treatment or in the migrant’s reasons for fearing expulsion to a State.¹²³ The Committee against Torture has held that “complete accuracy is seldom to be expected by victims of torture, especially when

the victim suffers from post-traumatic stress syndrome” and that “the principle of strict accuracy does not necessarily apply when inconsistencies are of a material nature.”¹²⁴

ii. Right to life

Non-refoulement also prevents a State from returning a migrant to a State where he or she faces a real risk of a violation of the right to life, for example through the **imposition of a death sentence**.¹²⁵ The existence of a real risk does not necessarily have to come from the possibility of a death sentence, but may also arise from **extrajudicial killings**.¹²⁶

In situations that involve the imposition of the death penalty, it must be demonstrated that the death penalty would apply to the specific crimes alleged¹²⁷ and that the punishment is usually carried out.¹²⁸ The Human Rights Committee has deduced this from “the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases.”¹²⁹ However, it is “not necessary to prove [...] that the [migrant] ‘will’ be sentenced to death, but only that there is a ‘real risk’ that the death penalty will be imposed”.¹³⁰

Under the ICCPR, if a State party has abolished the death penalty it may not remove a migrant

¹¹⁶ CCPR, *Kaba and Kaba v. Canada*, Communication No. 1465/2006, 21 May 2010, UN Doc. CCPR/C/98/D/1465/2006, paras. 10.1, 10.4.

¹¹⁷ CAT, *V.L. v. Switzerland*, Communication No. 262/2005, 20 November 2006, UN Doc. CAT/C/37/D/262/2005, para. 8.10.

¹¹⁸ ECtHR, *N. v. Sweden*, Application No. 23505/09, 20 July 2010, para. 60-2; CAT, *Njamba and Balikosa v. Sweden*, Communication No. 322/2007, 3 June 2010, UN Doc. CAT/C/44/D/322/2007, para. 9.5.

¹¹⁹ ECtHR, *M.S.S. v. Belgium and Greece*, op. cit., paras. 254-264; See also CCPR, *Jasin et al. v. Denmark*, Communication No. 2360/2014, 22 July 2015, UN Doc. CCPR/C/114/D/2360/2014.

¹²⁰ ECtHR, *Paposhvili v. Belgium*, Application No. 41738/10, 13 December 2016, para. 183; ECtHR, *Savran v. Denmark*, Application No. 57467/15, 7 December 2021, paras. 133-134. This Grand Chamber judgment confirms the threshold set by the *Paposhvili* decision, however the Court found that the threshold for the application of Article 3 had not been reached in this particular case; IACtHR, Advisory Opinion OC-21/14, para. 229; See also CCPR, *A.H.G. and M.R. v. Canada*, Communication No. 2091/2011, 25 March 2015, UN Doc. CCPR/C/113/D/2091/2011, para. 10.4.

¹²¹ Ibid.

¹²² See, e.g. CCPR, *Y. v. Canada*, Communication No. 2280/2013, 22 July 2015, UN Doc. CCPR/C/114/D/2280/2013, para. 7.2; CCPR, *P.T. v. Denmark*, Communication No. 2272/2013, 1 April 2015, UN Doc.

CCPR/C/113/D/2272/2013, para. 7.2; CAT, General Comment No. 4, op. cit., para. 11.

¹²³ CAT, *Haydin v. Sweden*, Communication No. 101/1997, 16 December 1998, UN Doc. CAT/C/21/D/101/1997, para. 6.6.

¹²⁴ Ibid., para. 6.7; CAT, *Kioski v. Sweden*, Communication No. 41/1996, 12 February 1996, UN Doc. CAT/C/16/D/41/1996, para. 9.3; CAT, *C.T. and K.M. v. Sweden*, op. cit., para. 7.6.

¹²⁵ ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, op. cit., para. 143.

¹²⁶ CCPR, *Baboeram et al. v. Suriname*, Communication 146/1983, 4 April 1985, UN Doc. CCPR/C/24/D/146/1983, para. 14.3; See also IACtHR, *The Haitian Centre for Human Rights et al. v. United States*, op. cit., para. 168.

¹²⁷ CCPR, *Kwok Yin Fong v. Australia*, Communication No. 1442/2005, 23 November 2009, UN Doc. CCPR/C/97/D/1442/2005, para. 9.5; ECtHR, *Bader and Kanbor v. Sweden*, Application No. 13284/04, 8 November 2005, paras. 44-48.

¹²⁸ Ibid.

¹²⁹ CCPR, *G.T. v. Australia*, Communication No. 7061/1996, 4 December 1997, U.N. Doc. CCPR/C/61/D/706/1996, at 8.4.

¹³⁰ CCPR, *Kwok Yin Fong v. Australia*, op. cit., para. 9.6; See also CCPR, *G.T. v. Australia*, op. cit., paras. 8.1, 8.4.

to a State where the person will face the death penalty.¹³¹

The principle of *non-refoulement* also prevents migrants from being expelled to a State where they face violations of the right to life that come from **non-State actors**. For example, the Human Rights Committee found that the expulsion of a Somali national who had never visited or resided in the country, to Somalia would put him at a “real risk of irreparable harm”, including of the right to life, because he did not speak the local language, had never lived there, and had no clan support or family in the region.¹³² There, the receiving State would have been unable to provide protection from the generalized violence perpetrated by non-State actors in the area.¹³³

The Inter-American Commission has stated that while the immigration policy of each State is part of its sovereign powers, it is subject to limitations; *inter alia*, it must respect the right to life and to **physical and psychological integrity**.¹³⁴ The Commission found a violation of the right to life, liberty and security, of the American Declaration on the Rights and Duties of Man in the case of the pushback of migrants on the high seas to a place where they risked being exposed to acts of brutality by the military.¹³⁵

The Human Rights Committee as well as the ECtHR have also regarded the expulsion of a seriously ill person to a State where the necessary healthcare is not available and where they are at a real risk of “serious, rapid and irreversible decline in health resulting in intense suffering or to a significant reduction in life

expectancy” to fall within the scope of the prohibition of *non-refoulement*.¹³⁶

Further, the Human Rights Committee has also recognized in the landmark case *Teitiota*, that non-refoulement may apply to situations where an individual is to be expelled to a country where the **impact of climate change** pose a real risk to their lives.¹³⁷ However, the threshold to apply the principle in this situation, which depends in particular on the probability and the temporal proximity of the specific climate change impact, has not yet been met by a case in front of the Committee.¹³⁸

iii. Other rights which may trigger the application of the principle

a. Prohibition of slavery and Forced Labor

It is also possible that a real risk of slavery and forced labor upon expulsion engages a State’s *non-refoulement* obligation. However, the nature of slavery and forced labor makes it more likely that an enforcement mechanism or regional court would find this situation to be a violation of the prohibition on inhuman or degrading treatment or punishment rather than slavery or forced labor.¹³⁹

To determine whether a real risk of enslavement or forced labor exists, consideration should be given to both the general existence and practice of slavery and forced labor in a State as well as the existence of a risk which is personal to the individual. Additionally, account will also be given to the existence of a law prohibiting the practice in the receiving State.¹⁴⁰

¹³¹ CCPR, *Kwok Yin Fong v. Australia*, op. cit., para. 9.4; CCPR, *G.T. v. Australia*, op. cit., paras. 8.2-8.3.

¹³² CCPR, *Warsame v. Canada*, Communication No. 1959/2010, 1 September 2011, UN Doc. CCPR/C/102/D/1959/2010, para. 8.3.

¹³³ *Ibid.*, para. 8.2.

¹³⁴ IACtHR, *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Order of the President of the Inter-American Court of Human Rights, 14 September 2000, Series E No. 3, para. 11(a), referring to the Commission’s request to adopt interim measures.

¹³⁵ IACnHR, *Haitian Centre for Human Rights v. United States*, 13 March 1997, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550, para. 171.

¹³⁶ ECtHR, *Paposhvili v. Belgium*, op. cit., para. 183; CCPR, *A.H.G. and M.R. v. Canada*, op. cit., para. 10.4.

¹³⁷ CCPR, *Ioane Teitiota v. New Zealand*, Communication No. 2728/2016, 24 October 2019, UN Doc. CCPR/C/127/D/2728/2016, para. 9.11.

¹³⁸ In the *Teitiota* case, the Committee accepted the author’s claim that sea level rise is likely to render his country of origin, the Republic of Kiribati, uninhabitable in 10 to 15 years. Nevertheless, it held that this scenario was too far into the future to establish an imminent threat to life as within this period the State could still adopt intervening measures, to protect and, where necessary, relocate its population. CCPR, *Ioane Teitiota v. New Zealand*, *ibid.*, para. 9.12.

¹³⁹ ECtHR, *Mohammed Lemine Ould Barar v. Sweden*, op. cit., para. 1.

¹⁴⁰ *Ibid.*, paras. 1-2.

Furthermore, because it is likely that the enslavement or forced labor would arise from the actions of non-State actors, it is also necessary to demonstrate that the receiving State authorities are unwilling or unable to obviate the risk by providing protection to the applicant.¹⁴¹

b. Right to a fair trial

The risk of a “**flagrant denial**” of the right to a **fair trial** may also prohibit a State from expelling or extraditing a migrant to another State.¹⁴²

Regional human rights courts (in particular the ECtHR and the IACtHR) have noted that the right to a fair trial is especially important in circumstances where the death penalty is a possibility.¹⁴³ More generally, the IACtHR found that immigration policy should ensure an individual decision for each case with due process guarantees.¹⁴⁴ However, because situations where a flagrant denial of the right to a fair trial are likely to occur often also involve a demonstrated real risk of torture or ill-treatment, courts and enforcement mechanisms often do not reach the issue of fair trial.¹⁴⁵ As a result, this aspect of *non-refoulement* jurisprudence is not as developed as that related to torture and cruel, inhuman, or degrading treatment or punishment.

The standard used to determine whether a State would violate the *non-refoulement* principle by expelling or extraditing a migrant to another country to face a flagrant denial of the right to a fair trial is different than the standard used in domestic situations.¹⁴⁶ It must go “beyond mere irregularities or lack of safeguards in the trial procedure” and **the**

breach must be “so fundamental as to amount to a nullification, or destruction of the very essence, of the right”.¹⁴⁷

A flagrant denial may result from “a trial which is summary in nature and conducted with a total disregard for the rights of the defense,”¹⁴⁸ when there is “detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed,”¹⁴⁹ or when there is “deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country”.¹⁵⁰ The ECtHR has also found that the admission of evidence that was obtained through torture for the purposes of a criminal trial amounts to a flagrant denial of justice and bars an individual’s extradition to another State.¹⁵¹

The applicant must show that there are substantial grounds to believe that there is a “real risk” of a flagrant denial of the right to a fair trial.¹⁵² The history of violations and procedural protections guaranteed in the State, such as membership in the ECHR, may help determine whether a risk of a flagrant denial of the right to a fair trial exists.¹⁵³

c. Freedom of Thought, Conscience, and Religion

The obligation to not expose an individual to violations of their human rights may also apply to the right to freedom of thought, conscience, and religion, but to a different degree. The ECtHR has stated that it will “not rule out the possibility that the responsibility of a returning State might in **exceptional circumstances** be engaged under Article 9 [freedom of thought, conscience, and religion] of the Convention

¹⁴¹ CCPR, *Dawood Khan v. Canada*, op. cit., para. 5.6; ECtHR, *H.L.R. v. France*, op. cit., para. 40.

¹⁴² ECtHR, *Soering v. the United Kingdom*, op. cit., para. 113; ECtHR, *Mamatkulov and Askarov v. Turkey*, op. cit., para. 88.

¹⁴³ ECtHR, *Tomic v. the United Kingdom*, Application No. 17837/03, 14 October 2003, para. 3; IACtHR, *Case of Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, 1 September 2001, Series C, No. 94, para. 148; See also IACtHR, Advisory Opinion OC-16/99, *The right to information on consular assistance in the framework of the guarantees of due process of law*, 1 October 1999, paras. 134-36.

¹⁴⁴ IACtHR, *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Order of the President of the Inter-American Court of Human Rights, op. cit., para. 11.

¹⁴⁵ CCPR, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006, UN Doc. CCPR/C/88/D/1416/2005,

para. 11.9 ECtHR, *Bayasakov and Others v. Ukraine*, Application No. 54131/08, 18 February 2010, para. 61.

¹⁴⁶ ECtHR, *Othman v. the United Kingdom*, op. cit., para. 260.

¹⁴⁷ *Ibid.*, para. 260.

¹⁴⁸ ECtHR, *Bader and Kanbor v. Sweden*, op. cit., paras. 46-48.

¹⁴⁹ ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, 13 February 2003, para. 101.

¹⁵⁰ *Ibid.*, para. 101; See also ECtHR, *Othman v. the United Kingdom*, op. cit., para. 259.

¹⁵¹ ECtHR, *Othman v. the United Kingdom*, op. cit., para. 267.

¹⁵² *Ibid.*, para. 261.

¹⁵³ ECtHR, *Tomic v. the United Kingdom*, op. cit., para. 3.

where the person concerned ran a real risk of flagrant violation.”¹⁵⁴

d. Prohibition on Enforced Disappearances

The ICPPED states that: “No State Party shall expel, return (*‘refouler’*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”¹⁵⁵ According to Article 2 of the Convention, an enforced disappearance is the: “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.¹⁵⁶

Whether a person is in danger of being subjected to enforced disappearance is determined in a similar way to other *non-refoulement* obligations: “the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, or serious violations of international humanitarian law.”¹⁵⁷

iv. Specific protection for children

While all the previously discussed principles and protection provided by *non-refoulement* also apply to migrant children, the CRC provides further protection specific to children. **The CRC requires a State to make a child’s best interest**

the primary concern and consideration in all decisions, including the decision to expel.¹⁵⁸ A State should only return a child to a country of origin when it is in the “best interests of the child.”¹⁵⁹

A formal best interest determination must therefore always take place before a decision to return a migrant child is taken, in view of the particular circumstances of each child. In the case of an unaccompanied or separated child, a multidisciplinary panel must determine the best interest and issue the formal decision. The Committee for the Rights of the Child has further explained that with regard to unaccompanied or separated children: “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child[...].”¹⁶⁰ The Committee has also clarified that “[r]eturn to a country of origin is not an option if it would lead to a ‘reasonable risk’ that such return would result in the violation of fundamental human rights of the child [...]”.¹⁶¹ In this respect, the risk of being exposed to insufficient provision of food or health services also poses a violation of their fundamental human rights.¹⁶² These obligations “apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.”¹⁶³

Similarly, States are forbidden from “returning a child in any manner whatsoever to the borders of a State where there is a real risk of **underage recruitment**”.¹⁶⁴ This prohibition extends to risks of “recruitment not only as a combatant but also to provide sexual services

¹⁵⁴ ECtHR, *Z. and T. v. the United Kingdom*, Application No. 27034/05, 28 February 2006, para. 1.

¹⁵⁵ Article 16(1) of the ICPPED; See also Article 8(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992, General Assembly resolution 47/133. For a definition of enforced disappearances see IACTHR, *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C No. 4, paras. 155-57.

¹⁵⁶ Article 2 of the ICPPED.

¹⁵⁷ Article 16(2) of the ICPPED; See also Article 8(2) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, op. cit..

¹⁵⁸ Article 3(1) of the CRC stating: “In all actions concerning children, whether undertaken by public or private social welfare institutions,

courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

¹⁵⁹ Ibid.

¹⁶⁰ CRC, General Comment No. 6, op. cit., para. 27, specifically mentioning Arts. 6, [right to life] and 37 [torture or other cruel, inhuman or degrading treatment or punishment, liberty], but not limiting application of *non-refoulement* to those rights.

¹⁶¹ Ibid., para. 84.

¹⁶² Ibid., para. 27.

¹⁶³ Ibid., para. 27.

¹⁶⁴ Ibid., para. 28.

for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.”¹⁶⁵

IV. OTHER ISSUES RELATED TO NON-REFOULEMENT

i. Diplomatic assurances

When a State initiates expulsion or extradition proceedings against a migrant, the expelling State will often attempt to obtain assurances from the receiving State that the individual will not face ill-treatment or other violations of his or her rights. These promises are often called “diplomatic assurances.” Diplomatic assurances frequently arise in situations where a migrant is to be extradited to another country to stand trial for an offense and may receive the death penalty as a result of a conviction,¹⁶⁶ or when a receiving State has a history of torture, ill-treatment, or arbitrary detention.¹⁶⁷ Similarly, diplomatic assurances are solicited when there is the danger that a migrant will not receive a fair trial.¹⁶⁸

However, these assurances do not release the returning State from their obligations under international human rights, humanitarian and refugee law, and in particular from the principle of *non-refoulement*.¹⁶⁹

Consequently, according to the Working Group on Arbitrary Detention, “[diplomatic]

assurances are only acceptable if very stringent conditions are met.”¹⁷⁰ First, the diplomatic assurance cannot be used to circumvent a higher standard or obligation, such as the terms of an extradition treaty.¹⁷¹ Second, the sending State must have reason to believe that the assurance is reliable and that it is being offered by an authority in the receiving State that can ensure compliance with the terms.¹⁷² Third, there must be a **mechanism for monitoring and enforcing** the receiving State’s compliance with the assurance.¹⁷³

However, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has found that “post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”¹⁷⁴ The Working Group on Arbitrary Detention is similarly skeptical of the ability of diplomatic assurances to protect individuals from ill-treatment.¹⁷⁵

The ECtHR has clarified the path that should be followed in determining whether diplomatic assurances can be relied upon by taking into account, among others, the following specific factors: whether the assurances are **specific** or are general and vague; the **length and strength of bilateral relations** between the sending and receiving States, including the **receiving State’s record in abiding by similar assurances**; whether **compliance** with the assurances can be **objectively verified** through diplomatic or other

¹⁶⁵ Ibid.

¹⁶⁶ CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.5.

¹⁶⁷ CCPR, *Alzery v. Sweden*, op. cit., para. 11.5; ECtHR, *Kaboulov v. Ukraine*, Application No. 41015/04, 19 November 2009, para. 113.

¹⁶⁸ ECtHR, *Klein v. Russia*, Application No. 24268/08, 1 April 2010, paras. 59-61.

¹⁶⁹ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Working Group on Arbitrary Detention and Working Group on Enforced or Involuntary Disappearances, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 20 May 2010, UN Doc. A/HRC/13/42, para. 43; UN General Assembly, Resolution 63/166, Torture and other cruel, inhuman or degrading treatment or punishment, 18 December 2008, para. 15; Human Rights Council, Resolution 8/8, Torture and other cruel, inhuman or degrading treatment or punishment, 18 June 2008, para. 6 (d); See also Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, 9 January 2007,

UN Doc. A/HRC/4/40, paras. 52-56; Special Rapporteur on the question of torture, Civil and Political Rights, including the Question of torture and Detention, 23 December 2005, UN Doc. E/CN.4/2006/6.

¹⁷⁰ Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, op. cit., para. 52 referring specifically to assurances in situations involving detention or questions of fair trials.

¹⁷¹ Ibid., para. 53.

¹⁷² Ibid., para. 54.

¹⁷³ CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., para. 12.; CCPR, *Alzery v. Sweden*, op. cit., para. 11.

¹⁷⁴ Report of Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, op. cit., para. 46.

¹⁷⁵ Working Group on Arbitrary Detention, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, op. cit., para. 55.

monitoring mechanisms, including providing unfettered access to the applicant's lawyers; whether there is an **effective system of protection against torture** in the receiving State, including whether it is **willing to cooperate with international monitoring mechanisms** (including international human rights NGOs), whether the applicant has previously been ill-treated in the receiving State; and **whether the reliability of the assurances has been examined by the domestic courts of the returning State**.¹⁷⁶ Finally, the presence of international protection or activities of agencies, such as UNHCR and IOM, within a receiving State does not act as an assurance that the migrant will not face violations of his or her rights.¹⁷⁷

The Inter-American Commission stated that where there are "substantial grounds" for believing that there is a danger of torture or other mistreatment, the State should ensure that the detainee is not transferred and that diplomatic assurances are not used to circumvent the State's *non-refoulement* obligation.¹⁷⁸

ii. Collective Expulsions

The general prohibition of collective expulsions is also related to the issue of *non-refoulement*.

The ECtHR has defined "collective expulsion" as: "[A]ny measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and

objective examination of the particular cases of each individual alien of the group".¹⁷⁹ The lack of an individualized assessment of the situation prevents States from adequately verifying whether reasons exist not to expel or return a migrant, in observance of the principle of *non-refoulement*. The collective expulsion of migrants therefore violates their rights and may support a claim against the expelling State.¹⁸⁰

Many international and regional instruments set out an explicit prohibition of the collective expulsion of non-nationals.¹⁸¹ The prohibition of collective expulsion can also be inferred from other treaty provisions that require individualized decisions on each migrant's claim to remain in the country. The Human Rights Committee has stated that the guarantees provided in Article 13 of the ICCPR¹⁸² "entitles each alien to a decision in his own case and, hence, Article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions."¹⁸³ In principle, Article 13 only applies to migrants lawfully present on the territory of the State. However, the Human Rights Committee stated that: "discrimination may not be made between different categories of aliens in the application of article 13."¹⁸⁴

Further, the IACtHR, for example, condemned the practice of massive expulsions by ordering provisional measures to avoid, among others, violations of the rights to life and personal integrity in case of deportation.¹⁸⁵ Similarly, the African Commission on Human and People's Rights held that "it is unacceptable to deport

¹⁷⁶ ECtHR, *Othman v. the United Kingdom*, op. cit., paras. 189 and 118.

¹⁷⁷ ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., paras. 97, 130-31.

¹⁷⁸ IACHR, *Extension of PM 259/02 – Detainees held by the United States in Guantánamo Bay*, 28 October 2005, para. 10.

¹⁷⁹ See, ex multis, ECtHR, *Hirsi Jamaa and Others v. Italy*, op. cit., para. 166.

¹⁸⁰ ECtHR, *Čonka v. Belgium*, Application No. 51564/99, 5 February 2002, paras. 62-63; ECtHR, *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, 21 October 2014, paras. 223-5 and 242-3; ACnHPR, *Institute for Human Rights and Development in Africa* (on behalf of Esmaila Connateh & 13 others) v. *Angola*, Communication 292/2004, May 2008, paras. 66-70, 85.

¹⁸¹ Article 22(1) of the ICRMW which states: "Migrant workers and members of their families shall not be subject to measures of collective expulsion."; Protocol 4, Article 4 of the European Convention on Human Rights which states: "Collective expulsion of aliens is prohibited."; Article 22(9) of the ACHR which states: "The collective expulsion of aliens is prohibited."; Article 12(5) of the African Charter on Human and Peoples' Rights which states: "The mass expulsion of non-nationals shall be prohibited. Mass expulsion

shall be that which is aimed at national, racial, ethnic or religious groups."; Article 26(2) of the Arab Charter of Human Rights which states: "Collective expulsion is prohibited under all circumstances."; Article 19(1) of the Charter of Fundamental Rights of the European Union which claims that "collective expulsions are prohibited."

¹⁸² Article 13 of the ICCPR states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

¹⁸³ CCPR, General Comment No. 15, op. cit., para. 10.

¹⁸⁴ CCPR, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, at 10.

¹⁸⁵ IACtHR, Order for Provisional Measures in the matter of Haitians and Haitians origin Dominicans in the Dominican Republic, op. cit., para. 9, p. 11.

individuals without giving them the possibility to plead their case before the competent national courts.”¹⁸⁶

The European Court of Human Rights has also condemned pushback practices and found them to be in violation of the ECHR.¹⁸⁷ However, in the case of *N.D. and N.T. v Spain*, concerning the summary expulsion of two men from Mali and Côte d’Ivoire from Spain to Morocco, the ECtHR established for the first time a widely critiqued test according to which a collective expulsion does not violate Article 4 of Protocol No. 4 to the ECHR,¹⁸⁸ where (1) there is an irregular land border crossing that deliberately employs large numbers and the use of force, “such as to create a clearly disruptive situation which is difficult to control and endangers public safety”; (2) the State provides “genuine and effective access to legal entry”; and (3) the applicants provide no cogent reasons they have not used them.¹⁸⁹ However, it was reiterated by the ECtHR that the above finding does not exempt States from the obligations to protect their border in line with their international obligations, specifically the obligation of non-refoulement.¹⁹⁰ The Court further established in the case of *M.K. and Others v. Poland* and *Shahzad v. Hungary*, this application is supported only in **exceptional circumstances**.¹⁹¹ Thus, in cases where individuals sought to make use of the procedure of lodging applications for international protection at border checkpoints, the fact that decisions refusing entry into the

country were taken without proper regard to each individual’s situation has been considered as collective expulsion by the Court.¹⁹² States have the obligation to provide “genuine and effective access to means of legal entry”.¹⁹³ Similarly, where an irregular border crossing did not create a situation compromising public safety or where such individuals did not use any force or resisted border officials, the Court refused to apply the test from *N.D and N.T v. Spain*.¹⁹⁴

Collective expulsions often take the form of “pushbacks”, which has been defined by the Special Rapporteur on the human rights of migrants as an “**overarching term for all such measures, actions or policies effectively resulting in the removal of migrants, individually or in groups, without an individualized assessment in line with human rights obligations and due process guarantees**”.¹⁹⁵ The Special Rapporteur has noted that pushbacks are widespread among States, may lead to the use of excessive force against migrants, and occur in a context of impunity, as internal oversight mechanisms guaranteeing migrants’ human rights protection are often lacking or not functioning.¹⁹⁶

Several national courts have also found violations by State authorities of the principle of non-refoulement and of the prohibition of collective expulsions in the context of pushbacks.¹⁹⁷ The Special Rapporteur on the human rights of migrants has expressed

¹⁸⁶ ACnHPR, Union Inter Africaine des Droits de l’Homme, Federation Internationale des Ligues des Droits de l’Homme and Others v. Angola, Communication No. 159/96, 1997, para. 20; See also ACnHPR, Rencontre Africaine pour la Défense des Droits de l’Homme (RADDHO) v. Zambia, Communication No. 71/92, October 1996, para. 31, referring to a flagrant violation of the Charter.

¹⁸⁷ ECtHR, *Hirsi Jaama and others v. Italy*, op. cit., ; ECtHR, [M.H. v Croatia, op. cit.](#); *M.K. and Others v. Poland*, op. cit., (found pushbacks violated Article 4 of Protocol No 4 to the ECHR); see also ECtHR, *D v. Bulgaria*, Application No. 29447/17, 20 July 2021; see also H. Hakiki, D. Rodrik, [M.H. v. Croatia: Shedding Light on the Pushback Blind Spot](#), *Verfassungsblog*, 29 November 2021.

¹⁸⁸ According to Article 4, “Collective expulsion of aliens is prohibited.” ; see also M. Pichl, D. Schmalz, [“Unlawful” may not mean rightless.: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.](#), *Verfassungsblog*, 14 February 2020; H. Hakiki, [N.D. AND N.T. V. Spain: Defining Strasbourg’s Position On Push Backs At Land Borders?](#), *Strasbourg Observers*, 26 March 2020.

¹⁸⁹ ECtHR, *N.D. and N.T. v. Spain*, op. cit., para. 201; H. Hakiki, D. Rodrik, [M.H. v. Croatia: Shedding Light on the Pushback Blind Spot](#), op. cit., .

¹⁹⁰ ECtHR, *N.D. and N.T. v. Spain*, op. cit., para. 232; For an illustration of different possible interpretations of the ECtHR decision’s meaning for future cases see: N. Markard, ‘A Hole of Unclear Dimensions: Reading ND and NT v. Spain’, *Migration & Asylum Law & Policy in Europe Blog of the Odysseus Network*, 01 April 2020.

¹⁹¹ ECtHR, *M.K. and Others v. Poland*, op. cit., para. 207; ECtHR, *Shahzad v. Hungary*, op.cit. para. 61.

¹⁹² ECtHR, *M.K. and Others v. Poland*, op. cit., paras. 207-211.

¹⁹³ ECtHR, *M.H. and Others v. Croatia*, Applications No. 15670/18 and 43115/18, 18 November 2021, paras. 294 and 303.

¹⁹⁴ ECtHR, *Shahzad v. Hungary*, op. cit. para 61

¹⁹⁵ Special Rapporteur on the human rights of migrants, Report on means to address the human rights impact of pushbacks of migrants on land and at sea, op. cit., para. 34.

¹⁹⁶ Ibid, paras. 45 and 103.

¹⁹⁷ Special Rapporteur on the human rights of migrants, Human rights violations at international borders: trends, prevention and accountability, 26 April 2022, UN Doc. A/HRC/50/31, paras. 57-69.; Constitutional Court of Ecuador, Judgment: No. 639-19-JP/20, 2020

concern on the continuation of a trend among States to legitimize pushback practices, including through the implementation of state-of-emergency measures, as well as border closures and emergency measures taken in the context of the Covid-19 pandemic, effectively suspending the international law obligations of States.¹⁹⁸

V. CONCLUSION

The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian and customary law. It is considered, under customary law as absolute. As a consequence, all States are bound by the principle of non-refoulement, even those who have not ratified the 1951 Refugee Convention. States cannot derogate from this principle even in a state of emergency or any crisis, be it a conflict, pandemic, disaster or other similar contexts.¹⁹⁹

¹⁹⁸ Ibid, paras. 27, 33, 40.

¹⁹⁹ J. Allain, 'The jus-cogens Nature of non-refoulement', *International Journal of Refugee Law*, Vol. 13, 2001, p. 557; C. Costello, M. Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test', *Netherlands Yearbook of International Law*, Vol. 46, 2015, p. 309; A. Orakhelashvili, *Peremptory Norms in international law*, Oxford University Press, 2006, p. 56; Brazil Declaration, "A Framework for Cooperation and Regional Solidarity

to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014; Note also the concurring opinion of Judge Pinto of Albuquerque on ECtHR, *Hirsi Jaama and others v. Italy*, op. cit., para. 64.

SUMMARY OF KEY PRINCIPLES

General Principles

- The *non-refoulement* principle prohibits States from returning an individual in **any manner whatsoever** to a country or territory in which their lives, physical integrity or freedom may be threatened, or in which they risk being submitted to torture or inhuman and degrading treatment or punishment.
- The *non-refoulement* principle is widely accepted as a **peremptory norm of customary international law**.
 - In other words, derogation or exceptions to this principle are neither allowed nor possible.
 - The principle of *non-refoulement* in human rights law has an absolute character: **security concerns, including conviction for serious crimes**, cannot be invoked to limit its application.
- The principle of *non-refoulement* applies to **all migrants**:
 - Regardless of their status in the returning country.
 - Its application does not depend on the ability to be granted or maintain the **refugee** status.
 - It also applies to **internally displaced individuals** who have **not** crossed international borders.
- The risk faced by the individual can derive from non-State actors.
- The principle also prevents a State from expelling a migrant to a second State where he or she would face expulsion to a third State and subsequent human rights violations. This process is called “**indirect refoulement**.”
- *Non-refoulement* can apply **extraterritorially**, when the States’ authorities have an effective control over the migrant, such as when a person is temporarily taken aboard a State’s vessel.

A person cannot be returned or expelled to a country where he or she risks to suffer a violation of the following rights:

- Prohibition of torture and cruel, inhuman or degrading treatment or punishment, including in case of:
 - Indiscriminate violence in the country of return;
 - Death sentences, or death sentences under specific circumstances depending on the case law of the relevant human rights body;
 - Life imprisonment sentences if there is no possibility *de jure* and *de facto* to review it under domestic law;
 - Multiple rapes, domestic, sexual and gender-based violence;
 - Harmful practices such as female genital mutilation;
 - Inhuman and degrading conditions of detention;
 - Living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basic needs;
 - Expulsion of a person facing a real risk of being exposed to a serious, rapid, and irreversible decline in his or her state of mental and physical health resulting in intense suffering or to a significant reduction in life expectancy.
- Right to life, including in case of:
 - Death sentences;
 - Extrajudicial killings;
 - Indiscriminate violence;
 - Threats to life by non-State actors;
 - Risk of irreparable harm caused by environmental degradation, climate change and unsustainable development.
- Prohibition of enforced disappearances
- The best interests of the child.²⁰⁰
- In exceptional cases:
 - Prohibition of slavery and forced labor;
 - Flagrant denial of the right to a fair trial;
 - Freedom of thought, conscience and religion.

²⁰⁰ UNHCR, UNHCR BIP GUIDELINES: Assessing and Determining the Best Interests of the Child, (2021); EMM 2.0. Safeguarding and protecting migrant children, 2022

SELECTED INSTRUMENTS AND DOCUMENTS

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
- International Covenant on Civil and Political Rights, 16 December 1966.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.
- Convention on the Rights of the Child, 20 November 1989.
- International Convention for the Protection of All Persons from Enforced Disappearance, 23 December 2010.
- United Nations Convention and Protocol Relating to the Status of Refugees, 28 July 1951.
- Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.
- United Nations High Commissioner for Refugees, Executive Committee Programme, *Non-refoulement*, Conclusion No. 6 (XXVIII) (1977).
- Human Rights Committee, General Comment No. 36: Article 6: right to life, 3 September 2019.
- Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986.
- Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7)), 10 March 1992.
- Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (*Refoulement* and Communications), 21 November 1997.
- Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 01 September 2005.
- Guiding Principles on Internal Displacement, UN Human Rights Commission, Resolution 1998/50 of 17 April 1998.
- United Nations General Assembly, Global Compact for Safe, Regular and Orderly Migration, Resolution 73/195 of 19 December 2018.

Regional Instruments

- European Convention on Human Rights, 4 November 1950.
- American Convention on Human Rights, 22 November 1969.
- African Charter on Human and Peoples' Rights, 27 June 1981.
- Charter of Fundamental Rights of the European Union, 2 October 2000.
- Arab Charter on Human Rights (revised), 22 May 2004.

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