THE PRINCIPLE OF NON-REFOULMENT A CORNERSTONE OF REFUGEE PROTECTION OR A LEGAL FICTION?

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ABSTRACT

The principle of non-refoulement, enshrined in Article 33(1) of the 1951 Refugee Convention, is widely regarded as a cornerstone of international refugee protection. It prohibits states from expelling and returning individuals to territories where their life or freedom would be threatened due to race, religion, nationality, membership of a particular social group, or political ideology. The mentioned principle has been reinforced through several international human rights treaties and customary international law, emphasizing its universality and binding nature. However, its practical implementation often reveals significant challenges, leading some to question whether non-refoulement remains a robust legal safeguard or has devolved into a legal fiction in contemporary refugee governance.

Keywords: *Cross-border parenthood, judicial cooperation*

1. INTRODUCTION

As the States are the bearers of sovereignty, they have the kompetenz-kompetenz to provide some scope of rights to another subjects. Nevertheless, the jurisdiction always keeps its backbone decisive-rights regarding the persons who the state allows on its territory. With the emergence of international law and its obligations the freedom of states had been more and more restricted. The phenomena

of enhanced limitations had become stronger in Europe after the II.WW, with the creation of the international and European human rights system. Nevertheless, politics remained deeply ingrained in the framework of international refugee law and protection, fundamentally because the definition of a refugee itself arises from political considerations. There is no intrinsic quality of "refugeeness" that unambiguously differentiates one group of border crossers from another. Rather, the act of recognizing a particular group as especially vulnerable, in need of assistance, or deserving of protection is inherently a political choice. This process of constructing the category of refugees inevitably creates contrasts between forced and voluntary migration, as well as between political and economic motivations. Such distinctions tend to privilege certain forms of suffering while marginalizing others, thereby shaping societal perceptions and responses. Ultimately, this construction carves out a unique exception to the generally accepted principle that sovereign states have the right to control and restrict entry into their territories. By delineating who qualifies for protection, the process underscores the political nature of such determinations, further complicating the landscape of refugee law and humanitarian response.[1]

International asylum law is now a recognized field of international law. Since the Refugee Convention was adopted 70 years ago, it has evolved into a dynamic and continually challenging area of international law. This complexity is particularly evident as the relationship between refugee law and other branches of law, such as human rights law, international humanitarian law, and domestic legal frameworks, continues to be actively explored and understood. The ongoing development and interpretation of these interconnections highlight the adaptability and significance of the Refugee Convention in addressing contemporary issues faced by refugees and asylum seekers around the world.[2]

One of the achievements of the asylum protection is the principle of non-refoulment, being part of asylum provisions as well as the human rights framework. The principle obliges states not to return a person to another state, where there is a real risk that he may face persecution or be victim of some form of illicit treatment.[3] It is today understood as the cornerstone of the modern international refugee protection system.[4] In addition, the UNHCR stipulated it as one of the

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1 See Tuitt,P. *False Images: Law's Construction of the Refugee*, Pluto Press 1996.

2 UN Refugge Convention, 1951., [https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention], Accessed 10 April 2025.

3 The authors decided to use the male form of pronouns when they are reffering to an individual in general.

4 Rodger, J., *Defining the Parameters of the Non-Refoulment Principle*, Research Paper, International Law. Laws 509, 2016; Goodwin-Gill, G.S.; McAdam, J., *The Refugee in International Law*, Oxford Univer-

fundamental principles of international law.[5] Lastly, some scholars even claim that the principle is part of the jus cogens enhancing the nature of "absoluteleness" and non-derogation.[6] Consequently, its customary nature is without a doubt not a question in academic circles.

Notwithstanding the above-mentioned theoretical arguments, the authors deem to question the practical and real applicability of the principle at hand. In fact, there are very few states which are not bound by any treaty which includes the obligation of non-refoulment in certain special situations. Still, the international jurisprudence is the true indicator of the applicability of the principle in real-life situations. Which region is more suitable for a search for "good practices" of the use of principle, than the European human rights framework? Hence, the below observed research is devoted to the in-depth critical analysis of the framework which claims to be the most developed in questions of the rule of law and human rights.

2. CONVENTION RELATING TO THE STATUS OF REFUGEES

Art. 33 (1):

„*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."*[7]

The principle of non-refoulment is included in various influential universal and regional human rights instruments. It is understood as part of the right (not) to return person to its country of residence. The text seen upon enhances various human rights, such as right to life, prohibition of torture as well as in some way prohibition of discrimination. Numerous countries that are parties to the Convention impose restrictions, particularly affecting the rights of asylum seekers, who have not yet been recognized as refugees through a national refugee status determination process. Thus, these migrants who crossed the borders are in an especially vulnerable position. As there is no decision regarding their legal status, they have no direct access to social security, healthcare or education. Nonetheless,

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sity Press, 2007, Chapter V.

5 UNHCR, 'Note on Non-Refoulement, Submitted by the High Commissioner, No. EC/SCP/2'23, 1977.

6 Kalin; Caroni; Heim, in: Zimmermann, A. *et al,* The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, n 5, 2011, p. 1346.

7 Convention Relating to the Status of Refugees, UNGA resolution 2198 (XXI), 1951.

at the same time, the principle of non-refoulement is offering at least some level of protection from an arbitrary decision. The principle applies not only to recognized refugees, but also to those who have not had their status formally declared.[8] The policies of states are often implemented as a means of deterrence, frequently stemming from concerns that the economic migrants are exploiting asylum procedures to migrate for employment or to access welfare benefits. Thus, the most significant is to properly analyze the reason for exclusion, which are possible under section 2 of the article 33.[9]

Firstly, the principle does not apply to those who has committed international crimes, which we see in the Rome Statute, i.e. crime against peace, war crime or crime against humanity. There are various examples where either national authorities of states or international criminal tribunals, such as ICTY, determined that the refugee protection could not be awarded on the basis that the person seeking the protection is responsible for these crimes. Nevertheless, the Refugee convention is silent regarding the conditions of responsibility, which may lead to wide scope of possibilities for national legislators. Several western European countries has established the notion of personal and knowing participation of the crime as the fundamental element for setting up links to the person.[10] Generally, when looking for the proper interpretations of the responsibility, the countries should be influenced by the Rome Statute, declaring that the sole membership in a terrorist group is not sufficient for the establishment of connection. The situation is definitely different when the person has voluntarily taken part in the criminal activity. The ICC is taking into account numerous factors: organizations character, legality of the organization, recruiting process, duration of the membership and the conditions of leaving, knowledge of the activities and lastly personal involvement. Consequently, when states plan to use the exception set in article 33 (2) they shall consider all these circumstances. Lean links to criminal activity as a basis for extradition to an unsafe country would constitute violation of the principle of non-refoulment.[11]

Secondly, the subsection provides another exception, when the person seeking protection has committed serious non-political crime prior to his admission to

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8 UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 2007, para. 6.

9 Mathew, P. *Constructive refoulement, Research handbook on international refugee law*, in Singh Satvinder, J. (ed), "Research Handbook on International Refugee Law", Edward Elgar Publishing, 2019, p. 209.

10 Canada, Australia, Belgium, the Netherlands or New Zealand. See Rikhof, J. *The Criminal Refugee: The Treatment of Asylum Seekers with a Criminal Background in International and Domestic Law*, 2012.

11 Rikhof, J., *The exclusion clauses in refugee law*, Research handbook on international refugee law, 2019, p. 393.

the safe country. The mentioned exception incorporates similarly ambiguities. Some questions arise whether the notion of crime includes international crime. Likewise, whether both the refuge and the residence country has to understand the committed act as falling under the notion of crime under their national legislation. Caution is advised also regarding the conviction. The conviction may be falsely imposed in the country of origin in order to expel those who are political refugees. Hence, the countries have to necessarily investigate the legal system of the country including the independence of the judiciary.

Usually the second exception is used for expulsion of those linked to terrorist activities. Some authors claim, that given the recent advancements in international law, there is a reasonable expectation that the approach toward activities categorized as terrorist will become more systematic and coherent, moving away from the ad hoc methods that characterized previous responses. This shift is anticipated to result in more standardized frameworks and guidelines, which will promote greater consistency in how such activities are addressed globally. After all, implementing a more organized approach, states and international bodies would likely enhance even their ability to combat terrorism more effectively while adhering to legal and human rights standards.[12] However, the authors of the research are less positive. Keeping in mind that terrorism is a very serious crime, which may affect the whole infrastructure of the state, the authorities are more likely to extradite anyone who has links to terrorist groups. Regularly even without profound investigation of the aspects of his complicity.

The third and last reason for exclusion is when the person is being guilty of acts which are contrary to the purposes and principles of the UN. The jurisprudence of some national courts provide examples when the reason was applied, however we may observe some overlapping. The decisions based on this exception were either expulsion for terrorist activities or for international crimes, as apartheid or war crimes.[13] At the first glance the provision seems as abundant as international crimes (apartheid as such is explicitly mentioned in the Rome Statute under crimes against humanity) are part of the first exception and terrorism is generally invoked under second exception. Nevertheless, the provision can be practical when the person has committed terrorism but the crime does not exist in the national legislation of the residence country.

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12 See Jore, S. H., *Is Resilience a Good Concept in Terrorism Research? A Conceptual Adequacy Analysis of Terrorism Resilience,* Studies in Conflict and Terrorism, Vol. 46/1, 2023.

13 Rikhof, J., *The exclusion clauses in refugee law*, Research handbook on international refugee law, 2019, p. 400.

The system of protection which is granted by the Refugee Convention is for various reasons different from the one which can be provided by the European Convention for the protection of Human Rights ("ECHR"). First, the Refugee Convention relies on the decisions of national court in each state which ratified the convention. Hence, the national authority has strong influence over the interpretation of its provisions. Second, the convention applies to those who fall either under the notion of a refugee or asylum-seekers waiting for their refugee status. Thus, those are not regarded under the restrictive definition have no rights under the convention. Third, the text of the convention in the second section of article 33 set exemption from the principle excluding it from non-derogatory norms. Last, there is no binding enforcement mechanism attached to the rules of the convention.[14]

3. EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS COURT

The principle of non-refoulment frequently appears in the case law of regional human rights courts, and these rulings have significantly helped to clarify its scope and content, while also emphasizing its various fundamental aspects.[15] There is no explicit provision setting up the principle of non-refoulment in the ECHR. Nevertheless, the case-law of the European Court of Human Rights ("ECtHR") has interpreted repeatedly, that article 3 declaring prohibition of torture and other forms of illicit treatment implicitly enhances the principle in its scope.[16][17] The El-Masri case declared, that the State's decision to extradite an individual, and indeed the actual act of deportation itself, can potentially give rise to concerns under the article 3. This determination may trigger the responsibility of that State under the ECHR if there are substantial grounds to believe that the person in question would, if expelled or extradited, encounter a real risk of being subjected to treatment that is incompatible with the Convention, in the country to which they are

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14 Lambert, H., *Protection against Refoulment from Europe: Human Rights Law comes to the rescue*, International and Comparative Law Quarterly, Vol. 48/3, 1999, p. 516.

15 Molnár, T., *The principle of non-refoulment under international law: Its inception and evolution in a nutshell,* Corvinus Journal of International Affairs, Volume I/1, 2017. p. 51-61.

16 Hassanová, R.L., *The Prohibition of Torture and its Implications in the European Legal Sphere,* Central European Journal of Comparative Law. Volume IV. 2023/1. ISSN 2732-0707. p. 51-73.

17 The ECtHR regularly makes distinction between the three parts of the prohibition (from the most sever to the least one): torture, inhuman treatment and degrading treatment. Nevertheless, in asylum matters it does not make any distinction. It declared such approach in the Harkin and Edwards v United Kingdom case from 2012. Therefore, the authors similarly understand the right in this regard as one; Hassanová, R., *The Prohibition of Torture and its Implications in the European Legal Sphere*, Central European Journal of Comparative Law, Vol. IV. 2023/1, 2023, p. 59-60.

being sent. Such circumstances underscore the obligation of states to carefully assess the potential consequences of their actions in order to prevent any violation of the rights protected by the Convention, highlighting the critical importance of safeguarding individuals from harmful treatment in the receiving country.[18]

The principle was already invoked in the famous *Soering case* in 1989, when a German national who committed murder in the USA applied for protection from the possible capital punishment if extradited to the United States. The application established the death row phenomenon, whereas the prisoner suffers from a severe psychological pressure based on the fact that he is for a prolonged period waiting for his death. The claim included evidence of extreme stress and trauma as well as the risk of physical attack and abuse in cells of those who were on the death row. When the ECtHR decided that the extradition would constitute a violation of article 3 it significantly influenced asylum law. Consequently, the principle of non-refoulment would undoubtedly include the protection from severe physical and mental harm of those who face the real risk of it when returned to their country of residence.[19]

A good practices example for triggering the principle is the *Hirsii Jamaa case* later from 2012. The ECtHR in the pertinent situation involved 11 Somali and 13 Eitrean national who had been collective expelled by the Italian authorities. These persons' were captured on the sea and immediately returned to Libya upon a bilateral agreement between the two governments. The ECtHR ruled in favor of the applicants, who claimed that such arbitrary expulsion was not compatible with the article 3 of the ECHR. In addition, protocol 4. of the ECHR declares the prohibition of collective expulsion. Even though the situation was not preventative it presented the obligation of states to consider the situations of the repatriated state and keep in mind the principle of non-refoulment.[20]

The *case of Ilias and Ahmed* further highlights the fundamental role of the principle in safeguarding human rights during migration. The two men, seeking asylum in Hungary, entered from Serbia and tried to claim for protection. However, Hungarian authorities considered Serbia a safe third country and rejected their applications without examining the specific dangers they might face if returned. Instead of assessing the actual risks involved, Hungary expedited their deportation back to Serbia, believing that Serbia would process their asylum claims or accept their return under existing agreements. The applicants contested this, argu-

[18] ECtHR, Case of *El-Masri v Former Yugoslav republic of Macedonia*, Application No. 39630/09, 2012, para. 212.

[19] ECtHR, Case of Soering v United Kingdom, Application No. 14038/88, 1989, para. 105-106.

[20] ECtHR, Case of *Hirsi Jamaa and other v Italy*, Application No. 27765/09, 2012, para. 211.

ing that they faced a real threat of mistreatment in Serbia, especially because that country's asylum system was at the time unable to provide adequate protection. The ECtHR carefully reviewed whether Hungary had met its obligations under the non-refoulement rule. The Court stressed that this prohibition is absolute as individuals cannot be expelled to a country where there is a substantial likelihood they would suffer inhuman or degrading treatment. It noted with concern that Hungary had not sufficiently investigated the applicants' particular circumstances nor obtained credible guarantees from Serbian authorities about their safety.[21] The Court pointed out that relying solely on broad lists of safe third countries or general reports is not enough, each case must be handled with an individual assessment, considering the specific risks the asylum seekers face. Because Hungary fell short of these standards, the Court found a violation of the non-refoulement obligation under the Convention.[22]

Moreover, the landmark *case of M.S.S.* emphasized the vital importance of the principle. The applicant, a Syrian national, arrived in Greece and sought asylum, but due to systemic deficiencies in Greece's asylum procedures and detention conditions, the Court found that Greece was unable to guarantee effective protection against refoulement. When Belgium transferred him under the Dublin Regulation to Greece, the Court concluded that this transfer violated the applicant's rights because Greece's practices at the time risked returning him to a situation of ill-treatment or inaccessibility to fair asylum procedures. The Court emphasized that the de facto risks of illicit treatment or inadequate protection constitute substantial grounds for prohibiting removal, and that States must conduct individual assessments explicitly considering these risks prior to expelling or transferring asylum-seekers.[23]

Further reinforcing the core principle, the Court clarified that the obligation of non-refoulement extends beyond formal legal protections and requires States to ensure, through concrete and individualized evaluations, that asylum-seekers will not be subjected to treatment contrary to article 3 in the country of onward transfer. Relying solely on general reports about systemic deficiencies, without a specific assessment of the individual's circumstances, is insufficient. The Court highlighted that failure to undertake such assessments, especially in the context of recognized systemic abuses and persistent violations in the receiving country, breaches the fundamental protections owed to asylum-seekers. Consequently, the

21 ECtHR, Case of *Ilias and Ahmed v Hungary*, Application No. 47287/15, 2019, para. 128-138.

22 Drinóczi, T.; Mohay, Á., *Has the Migration Crisis Challenged the Concept of the Protection of the Human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary,* in: Kuzelewska, E.; Weatherburn, A.; Kloza, D. (eds),. Irregular Migration as a Challenge for Democracy, 2018, p. 97-112.

23 ECtHR, Case of *M.S.S. v Belgium and Greece,* Application No. 30696/09, 2011, para. 258-260.

Court found that both Greece's and Belgium's acts of transferring the applicant without proper safeguards violated the absolute obligation of non-refoulement, resulting in a violation of article 3.[24]

The scholarly works related to refugee law usually refers to the above-mentioned and similar jurisprudence, which offer light for asylum-seekers. In these cases, as the ECtHR found violation, the protection was achieved through the principle of non-refoulment, hence the refugee status had to be granted. Although, the jurisprudence is wide where ECtHR found violations, the jurisprudence presents also vast amount of cases where the states did not violate and had the possibility to send the applicant to the residence country. We may mention the *Abu Qatada case* decision from 2012, which involves a Jordanian national, who arrived in the United Kingdom in 1993 and after fulfilling the national requirements was granted asylum protection. Nonetheless, later he was detained as he became to be associated with an extremist group. The charges were based on evidence that he was linked to activities that were considered as preparatory to committing terrorist acts.[25] As he posed security threat to the country, the UK government sought to deport him back to Jordan. In 2005, the UK and Jordan signed a memorandum of understanding containing assurances that international human rights standards would be upheld upon his return. The treaty included commitments for regular monitoring visits by an independent body, the Adaleh Centre for Human Rights Studies.[26] Despite the applicant's appeal against deportation being dismissed by domestic courts, concerns were raised about the risk of ill-treatment in Jordan, given reports of widespread torture. The ECtHR assessed the quality of the assurances provided, considering factors such as their specificity, binding nature, and the Jordanian government's track record on human rights. It concluded that both governments had made significant efforts to ensure that Abu Qatada would not face ill-treatment. The Memorandum was detailed, formal, and backed by high-ranking Jordanian officials, considering the strong bilateral relations between the UK and Jordan. Given his high profile, the decision declared that the Jordanian authorities would be particularly cautious to avoid violations of article 3 including prevention of negative repercussions.[27]

The Abu Qatada case proves that when the member state is able to sufficiently argue that the cooperation between the two states regarding the matter is effective and honest the states have possibility to expel a person on the basis of national

[24] *Ibid*, para. 321.

[25] United Kingdom Anti-terrorism, Crime and Security Act. 2001 c. 24, sec. 21, 23, 28, 31.

[26] Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation.11.08.2005.

[27] ECtHR, Case of *Othman (Abu Qatada) v United Kingdom*, App. No. 8139/09, 2012.

security. Certainly, the decision was supported by the overall estimation of the human rights protection in the third country, yet these decisions raise concerns for asylum-seekers. Consequently, even though the protection provided for refugees seems as more extensive than the protection provided by the Refugee Convention, there are still possibilities that the ECtHR will take into account arguments rested upon international relations, such as those in the Abu Qatada case.

The refoulment cases are those which consider future possible actions which are hypothetical and would be considered as violation of human rights. The court acts already preventively and stops countries from performing their rights arising from their sovereignty.[28] Such understanding seems from the legal point of view as extraordinary and odd. However, on the one hand, the preventive approach arises from the heightened level of right which is protected at hand. The prohibition of torture, being a peremptory norm, enjoys absolute nature and states are obliged to abide by it. Indeed, the logical approach would be to demand the obligation from the country where the person is going to be sent. Although the peremptory norm applies everywhere the ECtHR admitted the weakness of these norms by acknowledging that various African and Asian countries do not properly stick to their obligations. Additionally, general international law declares, that the regional framework has no right to establish responsibility of the receiving country. Thus, the ECtHR shifts the responsibility to those countries where the person is actually present.[29] On the other hand, the countries have the obligation to properly investigate the objective and subjective elements of the risk of acts of violation. Thus, if there is no evidence proving real risk of ill-treatment the non-refoulment principle is not triggered and the country is free to expel.

4. THE PRINCIPLE OF NON-REFOULEMENT IN THE LEGAL FRAMEWORK OF THE EUROPEAN UNION AND THE CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The European Union ("EU"), through its primary law, explicitly commits itself to the observance of international law[30]. Nonetheless, the principle of non-refoule-

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[28] Suntinger, W., *The Principle of Non-Refoulment: Looking Rather to Geneva than to Strasbourg?,* Austrian Journal of Public and International Law, Vo. 49, 1995, p. 204.

[29] De Weck, F., *Non-refoulment 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.Leiden, Boston, 2017, p. 20.

[30] Art. 21 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) (hereafter referred to as „TEU").

ment arises not only from international legal instruments but also constitutes a binding principle within the legal order of the European Union *per se.* At the EU level, its key legal basis can be found in primary law, which stands at the top of the hierarchy of EU *acquis*. In this context, article 78[31] is of particular importance, as it links EU asylum law to the Geneva Convention already at the level of primary law. Similarly, the article 19(2) of the Charter of Fundamental Rights of the European Union ("Charter"), which, following the Lisbon revision, has acquired the status of primary EU law, cannot be omitted. Article 19(2) expressly enshrines the principle of non-refoulement, stating that: „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."[32] It is important to note that the enshrinement of the non-refoulement principle in primary law triggers its application as a binding standard. In accordance with the general rule of interpretation, whereby norms of lower legal force must be interpreted in conformity with those of higher legal force, principle of non-refoulment must serve as a referential interpretative framework in the interpretation of relevant provisions of secondary EU legislation. The Court of Justice clarifies: „Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard."[33]

As noted by the European Union Agency for Fundamental Rights, a key procedural safeguard for ensuring compliance with the prohibition of refoulement and collective expulsion lies in the obligation to conduct an individualised assessment of each person's specific circumstances. This must be carried out on a case-by-case basis prior to the adoption of any return or refusal of entry decision. In line with this approach, Member States are required, particularly in the context of transfers to designated return hubs, to verify not only the legal permissibility of transferring an individual to a third country, but also to establish with sufficient clarity that no

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31 Art. 78 (1) of the TFEU: „The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) ("TFEU").

32 Art. 19 (2) of the Charter of Fundamental Rights of the European Union

33 Judgment of the Court of 21 December 2011, C- 411/10, *N. S. and Others*, EU:C:2011:865, para. 78.

legal obstacles exist which would prevent the return of the third-country national to their country of origin or habitual residence.[34]

This principle is also affirmed in a number of secondary EU legislative instruments, including Regulation Dublin III[35], the Qualification Directive[36], and others. Notably, Article 5 of the Return Directive directly requires compliance with the principle of non-refoulement.[37] A thorough analysis of the complexities inherent in the legal framework underpinning this principle is essential to properly assess potential breaches of its application.[38]

It is particularly noteworthy that several of these instruments make explicit reference, primarily in their preambles, to key sources of international law, e.g. the Geneva Convention relating to the Status of Refugees. While such preambular references are not, strictly speaking, legally binding,[39] they serve a crucial interpretative function, especially within a teleological interpretation of the relevant legal provisions.[40]

Although the European Convention on Human Rights might be formally external to the EU legal order, this cannot be accepted in a substantive sense. Fundamental rights and general principles of EU law, as recognised in Article 6 TEU, include constitutional traditions common to the Member States,[41] many of which are

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34 European Union Agency for Fundamental Rights, 2025. Planned return hubs in third countries. Available at:
[https://fra.europa.eu/sk/publication/2025/return-hubs], Accessed 01 April 2025.

35 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29/06/2013, s. 31 – 59) ("Regulation Dublin III").

36 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, s. 9 – 26) ("Qualification Directive").

37 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, s. 98 – 107) ("Return Directive").

38 Mungianu R. The Principle of Non-Refoulement in the EU Legal Setting. In: Frontex and Non-Refoulement: The International Responsibility of the EU. Cambridge Studies in European Law and Policy. Cambridge University Press; 2016:89-135.

39 Judgment of the Court of 19 November 1998, C-162/97, *Nilsson and Others*, EU:C:1998:554, para. 54.

40 Moravcová, D. 2024. Účinky preambúl medzinárodných zmlúv v úniovom práve (Effects of preambles to international treaties within the EU). In: Právník, Praha (ČR): Akademie věd České republiky, Ústav státu a práva AV ČR, Roč. 163, č. 8 (2024), s. 865-876.

41 Art. 6(3) TEU: „Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

rooted in the human rights standards enshrined in the ECHR. Furthermore, the Charter itself mandates that where a Charter right corresponds to a right guaranteed by the ECHR, such right must be interpreted in accordance with the minimum standard provided by the ECHR. The Court of Justice of the European Union ("CJEU" or "Court of Justice"), fully aware of the foundational role of the ECHR as a central human rights instrument on the European continent, regularly draws on the case-law of the European Court of Human Rights in its own reasoning.[42] In this respect, the jurisprudence of the ECtHR is highly relevant to the interpretation and application of EU law.

Finally, it must be stressed that the exclusive authority to deliver binding interpretations of EU law lies with the CJEU.[43] Through the preliminary ruling procedure established in Article 267 TFEU, the CJEU provides authoritative guidance on the interpretation of EU legal order, thereby ensuring the uniform and effective application of Union law across all Member States. Despite the fact that this principle is enshrined in all the aforementioned sources, and in addition to those, further instruments exist addressing more specific aspects, its application in practice may, notwithstanding the existing jurisprudence of the CJEU and the ECtHR, still pose significant challenges. As some authors point out, in light of increasingly unmanageable migratory pressures, states may in practice resort to a restrictive interpretation of these obligations.[44] Whether such an approach should be subject to reproach is a politico-legal question which, in our view, ought to remain firmly within the legal domain.

In order to grasp selected aspects of the application of the principle of non-refoulement in EU law, we have chosen several cases from the case-law of the Court of Justice, through which we aim to demonstrate how the Court defines and interprets this principle for the purposes of its practical application.

We shall commence with one of the most well-known decisions in this area, *M'Bodji,* selecting only those aspects that are directly relevant to the topic under examination. Mr M'Bodji arrived in Belgium in 2006, and at the time the proceedings were initiated, he was in possession of an open-ended residence permit

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42 E.g. Judgment of the Court of 20 May 2003, C-465/00, Österreichischer Rundfunk a i., EU:C:2003:294, paras 71,72.

43 Siman, M., Slašťan, M. 2012. Súdny systém Európskej únie. 3. vyd. Bratislava: EUROIURIS, 2012. 786 s. ISBN 978-80-8940-607-4.

44 Saliba, S. 2015. Non-refoulement, push-backs and the EU response to irregular migration. Available at: [https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/], Accessed 01 April 2025.

granted on medical grounds.[45] The case arose primarily in connection with the interpretation of provisions of EU law concerning access to social security and healthcare. Nevertheless, the Court of Justice seized this opportunity to elaborate on several legally significant factual and normative considerations of broader relevance. Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees[46] lays down in Article 15 three categories of serious harm that may justify the granting of subsidiary protection. In this context, the Court engaged in an in-depth interpretation of the terms torture, inhuman, and degrading treatment or punishment in the country of origin. Furthermore, the Court considered the concept of serious harm within the meaning of the Directive, referring explicitly to Article 6, which enumerates the potential actors responsible for such harm. The Court clarified that the relevant conduct must be attributable to a third party and cannot arise merely from general shortcomings in the healthcare infrastructure of the applicant's country of origin.[47] General deficiencies of this kind affect the population at large and, as such, cannot be regarded as giving rise to an individualised risk necessary to trigger protection under Article 15(b) of the Directive.[48]

The Court of Justice further emphasised that this interpretation is also teleological in nature, aligned with the overarching objective of the Directive to complement the protection afforded by the 1951 Geneva Convention by identifying individuals genuinely in need of subsidiary protection. Accordingly, the scope of this protection does not extend to persons who have been granted residence permits in a Member State on other grounds. This interpretation is not in conflict with the Charter, in particular Article 19(2).[49] The Court also addressed relevant case law of the European Court of Human Rights, specifically referencing the judgment in *N. v. the United Kingdom*[50]. It reaffirmed that individuals cannot, as a rule, claim a right to remain in a Member State solely for the purpose of receiving medical treatment. Nonetheless, CJEU acknowledged that, in line with ECtHR jurisprudence, "a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are

45 Judgment of the Court, 18 December 2014, C-542/13, *M'Bodj*, EU:C:2014:2452, para. 21.

46 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 (OJ L 304, 30.9.2004, s. 12 – 23).

47 Judgment of the Court, 18 December 2014, C-542/13, *M'Bodj*, EU:C:2014:2452, para. 35.

48 *Ibid*., para. 36.

49 *Ibid.,* paras. 37,38.

50 ECtHR, judgment in *N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008.

compelling."[51] The Court of Justice reached a similar conclusion in the *Abdida* judgment, wherein it further elaborated that, in those highly exceptional circumstances where the removal of a third-country national suffering from a serious illness to a state lacking adequate medical treatment would constitute a breach of the principle of non-refoulement, such removal is impermissible.[52]

Another noteworthy judgment in this context is the *Bevándorlási és Menekültügyi Hivatal (Tompa)* case, in which the Court of Justice interpreted selected provisions of the Asylum Procedures Directive.[53] In addition to addressing a procedural question concerning the availability of remedies, the Court, from our perspective, examined what may initially appear to be a straightforward matter, though not one explicitly resolved by the wording of the relevant provisions, whether under national law an application for international protection may be declared inadmissible solely on the basis that the applicant entered the country via a third country in which they were not exposed to the relevant risks and where an adequate level of protection is guaranteed. The Court ruled that such an interpretation is precluded by Directive, specifically Article 33. [54] It must be emphasised that a contrary interpretation would be entirely unacceptable, as its application could, in principle, exclude from protection all individuals who do not arrive directly from a country where they are at risk. Such an approach would, in effect, shift the burden of international protection exclusively onto states bordering conflict or high-risk regions. The Court further clarified that a third country may only be regarded as a "first country of asylum" if the individual has been formally recognised as a refugee there and enjoys sufficient protection, including compliance with the principle of non-refoulement.[55]

In the *M a i.* judgment, the Court of Justice of the European Union addressed the issue of cumulative protection granted by multiple Member States. The applicants' request for international protection was declared inadmissible in the Netherlands on the grounds that they had already been granted protection in other Member States. The preliminary question referred to the Court concerned whether the Re-

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51 C-542/13, *M'Bodj*, Judgment of the Court, 18 December 2014, EU:C:2014:2452, para. 39.

52 C-562/13, *Abdida*, Judgment of the Court 18 December 2014, EU:C:2014:2453, para. 48.

53 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, s. 60 – 95).

54 Judgment of the Court of 19 March 2020, C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tompa),* EU:C:2020:218.

55 EDAL, 2020. CJEU: Judgment on the grounds for issuing an admissibility decision and imposition of time-limits in such decisions. Available at: [https://www.asylumlawdatabase.eu/en/content/cjeu-judgment-grounds-issuing-admissibility-decision-and-imposition-time-limits-such], Accessed 01 April 2025.

turn Directive precludes the administrative detention of a third-country national who is unlawfully staying in the territory of a Member State, without a prior return decision, where the purpose of such detention is to enforce the transfer of that person to the Member State that has granted protection, and the individual has refused to comply voluntarily with an invitation to return to that Member State.[56] These procedures of forced transfer do not fall under the common legal framework as such; however, the Court of Justice emphasised that individuals who have been granted refugee status in other Member States cannot be returned to their country of origin. Doing so would constitute a violation of the principle of non-refoulement, a cornerstone of both international and Union law.[57] The Court of Justice held that the relevant Directive does not per se preclude such a procedure. However, it clarified that any forced transfer and detention must fully comply with fundamental rights, in particular the rights enshrined in the ECHR.[58]

Case *Ministero dell'Interno (Brochure commune - Refoulement indirect)* was extremely wide-ranging as it concerned the interpretation of several acts related to the analysis of the policy. The referring courts ask whether Article 3 of the Dublin III Regulation, in conjunction with Article 27 of that regulation and Articles 4, 19, and 47 of the Charter, allow a national court to assess the risk of indirect refoulement when the applicant, after being transferred to the requested Member State, faces a rejected asylum application there, even if that Member State does not have systemic flaws in its asylum procedure or reception conditions. Specifically, the courts inquire whether this is possible when the national court interprets „internal protection" (under Article 8 of the Qualification Directive) differently than the requested Member State, or believes that an armed conflict exists in the applicant's country of origin. In these cases, the referring courts are concerned with the risk of so-called indirect refoulement.[59] It must be assumed that the treatment of applicants for international protection in all Member States adheres to the standards set forth by the Charter, the Geneva Convention and the ECHR. However, it is not entirely improbable that, in practice, a Member State's system may face significant operational issues, leading to a considerable risk that asylum seekers transferred to that Member State could be subjected to treatment that violates their fundamental rights. The Court concluded that the relevant provisions must be interpreted to mean that the court or tribunal of the requesting Member State,

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56 C-673/19, *M and Others (Transfert vers un État membre)*, Judgment of the Court of 24 February 2021, EU:C:2021:127, para. 27.

57 *Ibid.,* paras 40, 45.

58 *Ibid.,* paras 47,49.

59 C-228/21, *Ministero dell'Interno (Brochure commune - Refoulement indirect),* Judgment of the Court of 30 November 2023, EU:C:2023:934, para. 129.

when reviewing an action contesting a transfer decision, cannot assess whether there is a risk in the requested Member State of breaching the principle of non-refoulement to which the applicant for international protection would be exposed during or after their transfer, unless that court or tribunal determines the existence of systemic deficiencies in the asylum procedure and reception conditions in the requested Member State. Disagreements between the authorities and courts of the requesting and requested Member States regarding the interpretation of the material conditions for international protection do not, by themselves, constitute evidence of such systemic deficiencies.[60]

In the submitted article, we have already referred to the proceedings before the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece*,[61] which concerned the return of an asylum seeker to Greece. A comparable factual situation was also addressed by the Court of Justice of the European Union, and the intersection of international law and EU law in such cases is undeniable. Accordingly, similar cases may fall within the jurisdiction of both the CJEU and the ECtHR, despite the procedural divergences inherent in their respective mechanisms. In the landmark judgment of *N. S. and Others*, the CJEU considered the situation of an Afghan national who, in the course of his journey to the United Kingdom, transited through Greece and was subsequently returned there under the Dublin II[62] Regulation. This case exemplifies the complex interaction between the European Union's asylum acquis and the standards enshrined in international human rights instruments, particularly where systemic deficiencies in the asylum system of a Member State give rise to potential violations of fundamental rights as protected under the Charter of Fundamental Rights of the European Union. The case concerned joined proceedings involving five applicants with similar factual circumstances, originating from Afghanistan, Iran, and Algeria. Although unrelated to each other, each applicant had transited through Greece, where they were detained for unlawful entry. They subsequently traveled to Ireland and applied for asylum. Three of them failed to disclose their prior presence in Greece, while the remaining two did. The Eurodac system later confirmed that all five had previously entered Greek territory, though none had lodged an asylum claim there. The Common European Asylum System is premised on the full and comprehensive application of the Geneva Convention and its 1967 Protocol, particularly the

60 *Ibid*., paras. 129-142.

61 ECtHR, Case of *M.S.S. v Belgium and Greece*, Application No. 30696/09, 2011, para. 258-260.

62 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p. 1–10) ("Regulation Dublin II").

guarantee of non-refoulement and protection from persecution. As reaffirmed by the CJEU[63], this obligation is enshrined in Article 18 of the Charter of Fundamental Rights and Article 78 TFEU. While the system is built on mutual trust that all participating states, both EU and third countries, uphold fundamental rights, the Court has acknowledged that serious deficiencies in individual Member States may endanger asylum seekers' rights, warranting an exception to automatic application of the Dublin mechanism. The CJEU has clarified that systemic deficiencies in the asylum procedure, such as those found in Greece during the *M.S.S. v. Belgium* case, preclude the automatic application of the Dublin mechanism. In such instances, Member States, including their national courts, must refrain from transferring an applicant to the designated responsible Member State under Dublin II, where there are substantial grounds to believe that such transfer would expose the applicant to a real risk of inhuman or degrading treatment contrary to Article 4 of the Charter. Consequently, the presumption that all Member States respect fundamental rights is rebuttable, and the transferring state is obligated either to continue the hierarchy of criteria under Chapter III of the Regulation or to examine the application itself under Article 3(2).[64] In this context, some scholars have criticised the Court for its reluctance to engage fully with the fifth preliminary question, namely whether the protection conferred by the general principles of EU law and the rights enshrined in Articles 1, 18, and 47 of the Charter may, in certain respects, afford broader safeguards than those guaranteed under Article 3 of the ECHR.[65] This omission is seen as a missed opportunity to delineate the potentially autonomous scope of fundamental rights protection within the EU legal order, which, as we have already mentioned, must be at least up to the standard guaranteed by the Convention.

In general, it can be stated that several authors also highlight the disparities in the approaches of individual Member States. As countries are confronted with progressively overwhelming migratory pressures, they frequently resort to a more restrictive interpretation of their international obligations.[66] Goldner Lang and Lang state, that: „member states gradually started to exploit legal uncertainties and they occasionally committed direct breaches of human rights obligations, includ-

63 E.g. C-175/08, *Salahadin Abdulla and Others*, Judgment of the Court of 2 March 2010, EU:C:2010:105.

64 C-411/10, *N. S. and Others,* Judgment of the Court of 21 December 2011, EU:C:2011:865.

65 Buckley, J. 2012. *Case Comment: N.S v Secretary of State for the Home Department (C-411/10).* Available at: [https://eutopialaw.wordpress.com/2012/01/25/case-comment-n-s-v-secretary-of-state-for-the-home-department-c-41110/], Accessed 22 May 2025.

66 Saliba, S., *Non-refoulement, push-backs and the EU response to irregular migration*, 2015, Available at: [https://epthinktank.eu/2015/05/13/non-refoulement-push-backs-and-the-eu-response-to-irregular-migration/], Accessed 01 April 2025.

ing refoulement."[67] From our perspective, this shift in approach arises from the growing challenges associated with managing the influx of migrants and refugees, prompting states to adopt narrower interpretations of their legal commitments in order to mitigate the impact of such pressures on their national systems. Consequently, the application of international legal standards may be subject to reinterpretation in a way that seeks to balance state interests with the practical realities of migration management.

In our perspective, the approach of individual states is also significantly influenced by their experiences with migration flows, as well as whether they are primarily destination countries or merely transit countries through which migrants pass. States that function as primary destinations often face different challenges and may develop policies that reflect a need for greater control over immigration and asylum processes. In contrast, countries that are transit points may focus more on managing the temporary presence of migrants, resulting in a distinct set of legal and procedural responses. These varying roles within the migration route can shape national policies and influence the interpretation and application of international legal obligations.

In this regard, it is essential to point out that this policy is subject to a number of changes, some of which are already on the table. However, PICUM points out in this regard he EU Pact on Migration and Asylum is predicated on the premise that individuals who enter or reside irregularly within the EU and whose asylum claims are unsuccessful should be swiftly returned or deported. They point out that a number of planned amendments, including, for example, the amended Asylum Procedures Regulation or the recast Return Directive[68], build upon this foundation, seeking to institutionalise and operationalise this principle within the EU. These proposals are currently in the final stages of negotiation between the European Parliament and the Council but should the provisions under discussion be approved, they may jeopardize the full application of the principle of non-refoulement.[69]

The final topic addressed in this paper concerns the externalisation of border and migration control, a concept that has gained significant legal and political rel-

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67 Goldner Lang, I.; Nagy, B., *External Border Control Techniques in the EU as a Challenge to the Principle of Non- Refoulement,* European Constitutional Law Review, 2021, pp. 1-29.

68 In the explanatory memorandum of the Return Directive, it is stated that the effective return of third-country nationals who lack the right to remain in the EU is a crucial element of the European Agenda on Migration.

69 PICUM, *Non-refoulement in the context of the EU Pact on Migration and Asylum*, 2025, Available at: [https://picum.org/blog/non-refoulement-in-the-context-of-the-eu-pact-on-migration-and-asylum/], Accessed 01 April 2025.

evance in recent years, particularly in light of increasing migratory flows, and which refers to the European Union's practice of delegating migration management functions beyond its territorial borders, primarily through agreements with third countries aimed at intercepting or containing migration before individuals reach EU territory. We can refer here to a legal concept aimed at managing and controlling migratory flows through mechanisms which, as noted by certain scholars, may circumvent the application of stricter, and in some cases more protective, legal safeguards in the destination state, from EU perspective Member State. This is achieved by outsourcing migration control to other states or external authorities, rather than by applying such mechanisms through domestic means. Scholars also rightly point out that such practice no longer represents a novelty but has rather become a widespread and systematic approach at both EU and extra-EU global levels.[70] A frequently cited example in this context is the EU-Turkey Statement[71], which, due to its legal effects and nature, became the subject of review by the Court of Justice of the European Union, specifically by the General Court. The EU-Turkey Statement, while aiming to curb irregular migration through returns from Greek islands to Turkey, explicitly affirmed compliance with EU and international law, emphasising that all measures would be taken in accordance with the principle of non-refoulement and that no collective expulsions would occur. In the context of assessing this so-called agreement, the General Court ultimately held that: "independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement…cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure. For the sake of completeness, with regard to the reference in the EU-Turkey statement to the fact that 'the EU and [the Republic of] Turkey agreed on … additional action points', the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, which has been denied by the European Council, the Council and the Commission in the present case, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime

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70 Nicolosi, S.F., *Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law,* Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9].

71 Also e.g. Memorandum of Understanding on a strategic and comprehensive partnership between the EU and Tunisia.

Minister."[72] We acknowledge that a range of complex challenges may arise, particularly those that deepen the tension between state security objectives and the protection of fundamental rights of migrants. Indeed, we agree with the scholarly consensus that externalization measures—whereby states seek to manage migration flows beyond their borders—often reflect an intentional strategy to circumvent direct accountability for the treatment of migrants under their jurisdiction. Such measures, while purportedly justified by the imperatives of border control and national security, increasingly prioritize securitization at the expense of legal obligations stemming from international human rights law. This legal-political dynamic raises serious normative concerns, as it becomes increasingly difficult to reconcile these practices with the principle of non-refoulement.[73]

5. CONCLUSION

Specific responsibilities stem from the broader duty to respect and safeguard human rights, with strategies adapted to address the unique protection needs of individuals based on their personal situations. Undocumented migrants and asylum-seekers are especially susceptible to rights violations, often lacking sufficient safeguards. Although states are entitled to take measures against migrants who break laws, they remain obligated to uphold human rights and provide equal protection to all individuals, regardless of their legal status, nationality, race, or gender. When asylum-seekers are unsuccessful in securing residency through national regulations, they look for any possible grounds to ensure their safety. The core protections for refugees are derived from the Refugee Convention, however, this treaty only offers safeguards against persecution based on unjustified reasons. The individual's legal status does influence the scope of protection. But what occurs if a person has no specific personal fear of persecution, yet the circumstances of their return could expose them to a real and imminent risk of torture? In such cases, the principle of non-refoulement, which originates from both UNCAT and the ECHR, serves as a crucial safeguard and can be invoked as a last resort. This principle applies universally to all individuals, meaning that even those considered undesirable or potentially dangerous have a fundamental human right to protection against forcible return.

In scenarios where an individual expresses a reluctance to return to their home country, it is essential for state authorities to conduct a thorough assessment to

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[72] Order of the General Court of 28 February 2017, *NF v European Council*, T-192/16, EU:T:2017:128, paras 71,72.

[73] Nicolosi, S.F., Externalisation of Migration Controls: A Taxonomy of Practices and Their Implications in International and European Law, Netherlands International Law Review, 2024, 71:1–20, [https://doi.org/10.1007/s40802-024-00253-9].

confirm that there are no obstacles hindering the individual's safe return to their country of origin. This verification process must be completed before the authorities exercise their power to deport or expel the individual. Ensuring that no obstacles exist is crucial in safeguarding the rights and well-being of the individual prior to any actions taken to facilitate their departure.

In the European framework the states have imposed obligations from the Refugee Convention and the ECHR. The first offer variety of exceptions. As these exceptions are vague the countries abusing the legal gaps have possibilities to extradite even those who fear risk of persecution. Nevertheless, the reasons to protect the national security override the fears of an individual asylum-seeker. In fact, the UN system has its UN High Commissioner for Refugees, which has the right to oversee the treatment of refugees including complaint mechanism. However, the reports of the commissioner have no binding nature. On the other hand the Council of Europe's framework offers an enforcement mechanism. Even though, the system through the ECtHR is definitely more effective and offers great possibilities of protection (including interim measures). The Abu Qatada case presents, that even today, the states may deport persons to questionable countries on the basis of promises.

The application of the non-refoulement principle is typically viewed as an exception, underscoring its critical importance and the fact that these protections are absolute. The case law of ECtHR clarifies that restrictions on the expulsion of foreign nationals do not automatically apply to other rights guaranteed by the ECHR. The Court has noted that the international human rights framework does not require states to suspend all forms of expulsion, especially when an individual can be safely returned to a country that fully respects and protects all fundamental rights and freedoms. Nevertheless, the Court has acknowledged that certain rights, specifically the right to a fair trial under article 6 and the right to liberty and security under article 5, may be applicable beyond territorial borders under limited circumstances. It has also indicated that this scope might be broadened in the future if societal changes demand a different interpretation of the principle.

In this regard, the case law of the European Court of Human Rights and the Court of Justice of the European Union seem to be closely interconnected. Notably, in the case law of the CJEU, we frequently find references to well-known decisions of the ECtHR, as the rights guaranteed by the Convention, as demonstrated in the presented paper, are of indispensable significance even in the application of Union acquis. In several judgments of the CJEU, we have attempted to illustrate that the legal foundation of the principle of non-refoulement is established both in the EU primary law and in acts adopted within the framework of the analysed

policy. However, the implementation and materialization of these formal guarantees in practice presents numerous challenges and questions. Whether these can be resolved by the planned amendments to key regulations within secondary law remains uncertain.

In final section, the article has also opened the chapter on externalisation within the context of the examined topic, drawing attention to the emergence of various forms of what may be termed agreements with third countries. Scholars have expressed concerns regarding the potential erosion of human rights protections in the course of implementing externalisation measures in third states. These concerns are well-founded, as such practices frequently occur in legal and institutional environments with weaker safeguards for fundamental rights. We acknowledge these risks and emphasise that the European Union must, to the greatest extent possible within the bounds of legal competence, ensure that external cooperation frameworks are subject to robust legal oversight and incorporate binding human rights guarantees. This is essential to uphold the Union's foundational values and prevent the displacement of legal responsibility beyond its borders through practices that may otherwise circumvent its normative commitments. We maintain that, notwithstanding the perception that such agreements may be considered as concluded not by the European Union *per se*, but rather by the heads of its Member States, the substantive effects and implementation of these arrangements often operate within the framework of EU law.

Although the principle of non-refoulement as articulated in human rights law is broader in scope than that defined in the Refugee Convention, states have yet to fully recognize and apply the implications of human rights law as a means of international protection. This inconsistency highlights a double standard that fails to account for the reality that, when evaluated against the framework of human rights law, refugee law stands to benefit significantly from the insights and protections offered by the former. It is important to acknowledge that human rights law provides a more comprehensive foundation for ensuring the safety and dignity of individuals facing expulsion, and states should consider integrating these broader protections into their understanding and application of refugee principles. By doing so, they would not only enhance the effectiveness of their legal frameworks but also uphold their obligations to protect vulnerable populations in a more meaningful way.[74]

[74] Costello, C.; Foster, M.; McAdam, J., *The Oxford handbook of international refugee law,* Oxford University Press: New York, 2021, p. 215.

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4. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, s. 9 – 26) ("Qualification Directive")
5. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, s. 98 – 107) ("Return Directive").
6. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, s. 60 – 95)
7. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25.2.2003, p. 1–10) ("Regulation Dublin II")
8. 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 (OJ L 304, 30.9.2004, s. 12 – 23)
9. Treaty on European Union (OJ C 326, 26.10.2012, p. 13–390) (hereafter referred to as „TEU")
10. Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390) ("TFEU")

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