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MARIANA FEROLLA VALLANDRO DO VALLE

FLEEING DESTITUTION: DEDUCTION OF THE PRINCIPLE OF *NON-REFOULEMENT* FROM THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AND ITS APPLICATION

Belo Horizonte

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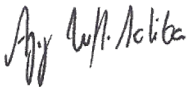

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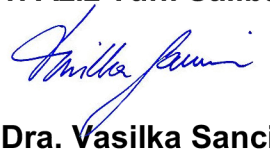

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MARIANA FEROLLA VALLANDRO DO VALLE

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Master's thesis presented before and approved by the Graduate Program of the Universidade Federal de Minas Gerais' Faculty of Law as a condition for obtaining the title of Master of Laws.

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ABSTRACT

This thesis seeks to answer the question of whether an obligation of *non-refoulement* can be autonomously deduced from the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and directly applied to this treaty. To guide this analysis, Chapter 1 discusses the legal basis of the principle of *non-refoulement* as implicitly deduced from other human rights treaties and the material scope of this obligation. After examining decisions of human rights bodies issued in relation to these different treaties—namely the European and American Conventions on Human Rights, the International Covenant on Civil and Political Rights, the African Charter of Human and Peoples' Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. The chapter concludes that the principle of *non-refoulement* is best understood as a positive obligation that may be triggered in relation to any human right as long as the harm risked in the receiving country attains a minimum level of severity. Chapter 2 then assesses the case-law of human rights bodies in which the application of the principle of *non-refoulement* to a civil and political right, the prohibition of ill-treatment, offered indirect protection to economic, social, and cultural rights, in order to ascertain whether this principle is compatible with the notion of socioeconomic harm. As this case-law shows, situations of severe socioeconomic destitution in the receiving State, contrary to guarantees such as the right to health, housing, food, and an adequate standard of living, have been deemed to constitute inhuman and degrading treatment, thus prohibiting *refoulement*. In light of these analyses, which point to the possibility of applying the principle of *non-refoulement* under any human rights treaty, Chapter 3 discusses the deduction of this principle directly from the ICESCR. This chapter analyses: (1) the distinctive characteristics of economic, social, and cultural rights and civil and political rights in order to confirm whether the former are compatible with the structure of the principle of *non-refoulement*; (2) the role of the obligation of international cooperation and assistance under the ICESCR as additional support for an obligation of *non-refoulement* under this Covenant; (3) how the principle of *non-refoulement* can effectively be applied to ICESCR provisions, focusing on obligations of immediate effect; and (4) two non-legal objections to the application of the principle of *non-refoulement* under the ICESCR, relating to floodgates and effectivity concerns. The conclusion reached is that the principle of *non-refoulement* can be applied directly to the ICESCR when the risk of harm in the receiving State concerns obligations of immediate effect and attains the threshold of irreparable harm. Admitting the application of the principle of *non-refoulement* to claims of harm under the ICESCR not only appears coherent

according to the rationale of the obligation construed by human rights bodies but can have positive effects to the consideration of socioeconomic claims in migration contexts as a whole.

Keywords: Principle of *non-refoulement*. Economic, social, and cultural rights. ICESCR. Migration.

RESUMO

Esta dissertação busca responder à pergunta de se uma obrigação de *non-refoulement* pode ser deduzido autonomamente do Pacto Internacional sobre Direitos Econômicos, Sociais e Culturais (PIDESC) e diretamente aplicado a esse tratado. Para guiar essa análise, o Capítulo 1 discute a base legal do princípio de *non-refoulement* deduzido implicitamente de outros tratados de direitos humanos e o escopo material dessa obrigação. Depois de examinar as decisões proferidas por órgãos de direitos humanos em relação a esses diferentes tratados – a saber, as Convenções Europeia e Americana de Direitos Humanos, o Pacto Internacional sobre Direitos Civis e Políticos, a Carta Africana de Direitos Humanos e dos Povos, a Convenção sobre os Direitos da Criança e a Convenção para a Eliminação de Todas as Formas de Discriminação contra a Mulher. O capítulo conclui que o princípio de *non-refoulement* é mais bem compreendido como uma obrigação positiva que pode ser acionada em relação a qualquer direito humano contanto que o risco de dano no país receptor atinja um nível mínimo de severidade. O Capítulo 2 então avalia a jurisprudência de órgãos de direitos humanos na qual a aplicação do princípio de *non-refoulement* a um direito civil e político, a proibição de maus tratos, ofereceu proteção indireta a direitos econômicos, sociais e culturais a fim de determinar se esse princípio é compatível com a noção de dano socioeconômico. Observa-se que situações de destituição socioeconômica severa no Estado receptor, contrariamente a garantias como o direito à saúde, moradia, comida e a um nível de vida adequado, foram consideradas tratamento desumano e degradante, proibindo, portanto, o *refoulement*. À luz dessas análises, que apontam para a possibilidade de aplicar o princípio de *non-refoulement* sob qualquer tratado de direitos humanos, o Capítulo 3 discute a dedução desse princípio diretamente do PIDESC. Esse capítulo analisa: (1) as características distintas de direitos econômicos, sociais e culturais e direitos civis e políticos para confirmar se os primeiros são compatíveis com a estrutura do princípio de *non-refoulement*; (2) o papel da obrigação de cooperação e assistência internacionais sob o PIDESC como suporte adicional a uma obrigação de *non-refoulement* sob esse Pacto; (3) como o princípio de *non-refoulement* pode ser efetivamente aplicado às disposições do PIDESC, focando em obrigações de efeito imediato; e (4) duas objeções não jurídicas à aplicação do princípio de *non-refoulement* sob o PIDESC, relacionadas a preocupações quanto a influxos massivos de migrantes e de efetividade. A conclusão alcançada é de que o princípio de *non-refoulement* pode ser aplicado diretamente ao PIDESC quando o risco de dano no Estado receptor envolve obrigações de efeito imediato e atinge o nível de dano irreparável. Admitir a aplicação do princípio de *non-refoulement* a alegações de dano sob o PIDESC não apenas

parece coerente de acordo com o raciocínio por trás da obrigação construída por órgãos de direitos humanos, mas pode ter efeitos positivos à consideração de pleitos socioeconômicos em contextos de migração como um todo.

Palavras-chave: Princípio de *non-refoulement*. Direitos econômicos, sociais e culturais. PIDESC. Migração.

TABLE OF ABBREVIATIONS

AATA	Administrative Appeals Tribunal of Australia
ACommHPR	African Commission of Human and Peoples' Rights
African Charter	African Charter on Human and Peoples' Rights
American Convention	American Convention on Human Rights
CAT	Convention against Torture and other and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social, and Cultural Rights
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
EC	European Community
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
European Convention	European Convention on Human Rights
FC	Federal Court of Canada
FCA	Federal Court of Australia
HCA	High Court of Australia
HRC	Human Rights Committee
IACommHR	Inter-American Convention of Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
IRB	Immigration and Refugee Board of Canada
NZCA	New Zealand Court of Appeal
NZHC	New Zealand High Court

OAS	Organisation of American States
ONCA	Ontario Court of Appeal
Refugee Convention	Convention relating to the Status of Refugees
Rep	Reports
RRTA	Refugee Review Tribunal of Australia
SCC	Supreme Court of Canada
Sess	Session
STF	Supremo Tribunal Federal (Brazilian Federal Supreme Court)
UKAIT	United Kingdom Asylum and Immigration Tribunal
UKHL	United Kingdom House of Lords
UN	United Nations
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
ZACC	South African Constitutional Court

Ogbuefi Akuebue, may you live, and all your people. I too will live with all my people. But life alone is not enough. May we have the things with which to live it well. For there is a kind of slow and weary life which is worse than death.

Chinua Achebe, *Arrow of God* (Portsmouth: Heinemann Ltd., 1989) at 95.

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INTRODUCTION

One of the topics international migration law and policy most seem to focus on is how to operate the distinction between people who deserve international legal protection in another State and those who do not. Those who belong to the first group are commonly referred to as refugees and asylum-seekers. Those of the second group, economic migrants—people who migrate not out of fear for their lives and of the need to leave their countries to survive but rather voluntarily, in search of better living conditions.

In addition to risking presenting a reductionist view of the array of factors that lead to international migration,[1] this terminology appears to reflect an ingrained belief that inadequate socioeconomic conditions are unfortunate effects of poverty, a situation that can exist anywhere and over which States have no control. Accordingly, no State should bear responsibility for people who cross borders seeking a better standard of living. International protection should focus on cases where people are being effectively threatened by their State of origin, which is either actively harming the individual or being neglectful in the face of harm perpetrated by private parties, instead of on situations in which the State does not have sufficient resources to comply with its obligations. In other words, the trend is to offer protection when civil and political rights are at stake.

This rationale is often reproduced in domestic authorities' political statements. In November 2019, a spokesman for the Greek government stated that Greece did not "invite any economic migrant to come to the country."[2] Earlier that year, the Italian Interior Minister complained that Italy had taken in "too many fake refugees," referring to migrants whose motivation for crossing borders had been primarily socioeconomic.[3] Similarly, in the United States, government officials expressed the need to deter economic migrants from "exploiting" the country's asylum system.[4] Statements like these are not merely rhetorical. They reflect domestic authorities' tendency to overlook claims for protection based on the socioeconomic harm faced in the country of origin as not severe or deliberate enough. Consequently, individuals labelled as "economic migrants" are often returned without a serious analysis of the

[1] See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (New York: Cambridge University Press, 2007) at 5-21 [*Foster*].
[2] "We Do Not Invite any Economic Migrant to Greece, Gov't Spokesman Petsas Says", *The National Herald*, 19 October 2019, last accessed: <https://www.thenationalherald.com/265058/we-do-not-invite-any-economic-migrant-to-greece-govt-spokesman-petsas-says/>, last accessed 15 December 2020.
[3] Crispian Balmer, "Naples mayor offers to welcome in stranded NGO migrant boat", *Reuters*, 3 January 2019, available at: <https://www.reuters.com/article/us-europe-migrants-ngo-italy/naples-mayor-offers-to-welcome-in-stranded-ngo-migrant-boat-idUSKCN1OX14L>, last accessed 15 December 2020.
[4] "US migrant crisis: Trump seeks to curb Central America asylum claims", *BBC News* 16 July 2019, available at: <https://www.bbc.com/news/world-latin-america-48991301>, last accessed 15 December 2020.

situation to which they would be subjected in the country of origin.[5] The borders are much more robust for migrants with an essentially socioeconomic motivation than for those claiming their civil and political rights are directly at risk.[6]

The call for taking economic, social, and cultural rights seriously in migratory proceedings has not been completely ignored. Many jurisdictions have recognised that persecution can take the form of socioeconomic deprivation and that people fleeing this kind of harm may qualify for refugee status under the 1951 Convention relating to the Status of Refugees[7] ("Refugee Convention"), though there is still need of improvement as to how this harm is factored in the refugee status determination analysis.[8] Moreover, in the past decades, some international bodies have held that extreme situations of socioeconomic destitution, particularly in relation to vulnerable individuals, may amount to inhuman or degrading treatment and hence trigger the application of the principle of *non-refoulement* under human rights law.[9] The Committee on Economic, Social, and Cultural Rights ("CESCR") has also devoted increasing attention to the enjoyment of economic, social, and cultural rights by refugees, asylum seekers, and undocumented migrants in host States.[10] However, amidst all of these developments, one question has remained largely unexplored: whether complementary

[5] Robin Emmott, Francesco Guarascio, "EU should repatriate more economic migrants, France, Germany, Italy say", *Reuters*, 4 September 2015, available at: <https://www.reuters.com/article/us-europe-migrants-border/eu-should-repatriate-more-economic-migrants-france-germany-italy-say-idUSKCN0R41PA20150904>, last accessed 15 December 2020.

[6] The idea that borders are a flexible concept, dependant on the particular circumstances of each person, was well analysed by Violeta Moreno-Lax when describing European Union border controls: "The border thus becomes status related, sensitive to nationality, security, and other personal features. It is no longer territory based. It is individualized, tailor-made to the specific migrant, her background, and the potential risk she may represent to the 'protection' of 'our external borders' and the 'integrity' of the Schengen area. In a sense, it is the migrant who personifies the border for herself." Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017) at 14 [*Moreno-Lax*].

[7] *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*].

[8] For discussions in this regard, see: *Foster*, *supra* note 1; Kate Jastram, "Economic harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution" in James C. Simeon, ed, *Critical Issues in International Refugee Law: Strategies toward interpretative harmony* (Cambridge: Cambridge University Press, 2010) 143; Imogen Little, "Out with the Old Approach: A Call to Take Socio-Economic Rights Seriously in Refugee Status Determination" (2018) 16 New Zealand Yearbook of International Law 145 [*Little*].

[9] See especially: *M.S.S. v. Belgium and Greece*, No 30696/09, ECtHR (21 January 2011) at para. 367-368 [*M.S.S. v. Belgium and Greece*]; *Warda Osman Jasin v. Denmark*, HRC, 114th Sess, UN Doc CCPR/C/114/D/2360/2014 (2015) 1 at para. 8.9-8.10 [*Warda Osman Jasin v. Denmark*].

[10] *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, CESCR, 60th Sess, UN Doc E/C.12/2017/1 (2017) 1. For a deeper analysis on the CESCR's involvement in the advancement of rights of people in migration contexts, see Renato Zerbini Ribeiro Leão, "O Regime de Proteção aos Migrantes, Refugiados e Solicitantes de Refúgio do Pacto Internacional de Direitos Econômicos, Sociais e Culturais das Nações Unidas" (2019) 27:57 REMHU 175.

protection[11] through the principle of *non-refoulement* can be directly applied to economic, social, and cultural rights, instead of relying on the indirect protection of civil and political rights.

The discussion as to the role of economic, social, and cultural rights in complementary protection has gained considerable relevance in the past years, given the vast numbers of people fleeing socioeconomic harm who do not always fit the traditional refugee definition, such as those affected by the political and economic crisis in Venezuela,[12] environmentally displaced persons,[13] and poverty-stricken communities.[14] The legal framework to which the principle of *non-refoulement* is currently applied, limited to civil and political rights, does not sufficiently take this socioeconomic harm into consideration. Firstly, because it only considers those forms of socioeconomic harm that amount to inhuman and degrading treatment, whereas not every serious violation of economic, social, and cultural rights can be reformulated as a violation of civil and political rights. Secondly, because it overstates the relevance of the receiving State's unavailability of resources for promoting economic, social, and cultural rights while downplaying the relevance of obligations of immediate effect that States have under the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[15] including non-

[11] As explained by Jane McAdam, "'complementary protection' describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework," usually through an application of the principle of *non-refoulement* under human rights law. Jane McAdam, "Complementary protection and beyond: How states deal with human rights protection", New Issues in Refugee Research, Working Paper No 118, UNHCR, 2005 at 1.

[12] "Venezuela : Le gouvernement s'en prend à ses détracteurs tandis que la crise s'aggrave", *Human Rights Watch*, 24 October 2016, available at: <https://www.hrw.org/fr/news/2016/10/24/venezuela-le-gouvernement-sen-prend-ses-detracteurs-tandis-que-la-crise-saggrave>, last accessed 15 December 2020. Although some Latin American countries have recognised refugee status to displaced Venezuelans, this has been done on the basis of expanded refugee definitions in domestic legislation, which attribute this status to individuals fleeing generalised violence and massive human rights violations. See, for example: "Refúgio em Números traz dados sobre a realidade do refúgio no Brasil", *Ministério da Justiça e Segurança Pública*, 25 July 2019, available at: <https://www.gov.br/mj/pt-br/assuntos/noticias/collective-nitf-content-1564080197.57>, last accessed 15 December 2020. These definitions are based on the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984 at para. 3. Nonetheless, in most cases these people are not persecuted due to one of the five grounds established under Article 1(A)(2) of the Refugee Convention, which prevents the application of this international instrument.

[13] ""Nobody Remembers Us": Failure to Protect Women's and Girls' Right to Health and Security in Post-Earthquake Haiti", *Human Rights Watch*, 19 August 2011, available at: <https://www.hrw.org/report/2011/08/19/nobody-remembers-us/failure-protect-womens-and-girls-right-health-and-security>, last accessed 15 December 2020; J.T. Quigley, "New Zealand "Climate Change Refugee" Rejected by High Court", *The Diplomat*, 27 November 2013, available at: <https://thediplomat.com/2013/11/new-zealand-climate-change-refugee-rejected-by-high-court/>, last accessed 15 December 2020.

[14] "Sudanese seek economic migration to Israel across Lebanon border", *The Arab Weekly*, 24 June 2020, available at: <https://thearabweekly.com/sudanese-seek-economic-migration-israel-across-lebanon-border>, last accessed 15 December 2020; Sarah Bermeo, "Could foreign aid help stop Central Americans from coming to the U.S.? Here's what you need to know", *The Washington Post*, 18 June 2019, available at: <https://www.washingtonpost.com/politics/2019/06/18/trump-administration-threatened-cut-foreign-aid-if-central-american-countries-dont-stem-migration/>, last accessed 15 December 2020.

[15] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [*ICESCR*].

discrimination and guaranteeing a minimum core of socioeconomic rights at any time.[16] Thus, time seems ripe for evaluating the possibility of applying the principle of *non-refoulement* directly to economic, social, and cultural rights.

This thesis will seek to answer the question of whether an obligation of *non-refoulement* can be autonomously deduced from the ICESCR and applied to it. The position adopted herein is that the answer is affirmative: from a legal standpoint, the principle of *non-refoulement* can be read into the ICESCR as a positive obligation to prevent violations of economic, social, and cultural rights and applied to those obligations of immediate effect under the Covenant. Moreover, objections of a non-legal character do not seem sufficient to bar such an application. The analysis leading to this conclusion will be divided into three parts.

Chapter 1 will begin by investigating the legal basis of the principle of *non-refoulement* as a rule implicitly deduced from international human rights instruments, namely the European Convention on Human Rights ("European Convention"),[17] the American Convention on Human Rights ("American Convention"),[18] the African Charter on Human and Peoples' Rights ("African Charter"),[19] the International Covenant on Civil and Political Rights ("ICCPR"),[20] the Convention on the Rights of the Child ("CRC"),[21] and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").[22] Doing so will require an examination of the case-law of each of the human rights bodies responsible for monitoring compliance with the above-mentioned instruments, in order to establish which legal grounds these bodies advance to justify reading the principle of *non-refoulement* into these treaties. After identifying these legal grounds, this thesis will assess which one of them fits the reasoning behind the rule of *non-refoulement* and the way human rights bodies have applied this principle most coherently. As will be seen, *non-refoulement* is best explained as a positive obligation to prevent a risk of harm to human rights from materialising.

The analysis will then turn to the material scope of the principle of *non-refoulement*, also through an assessment of the case-law of the European Court of Human Rights ("ECtHR"), the Inter-American Commission and Court of Human Rights ("IACommHR" and "IACtHR"),

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[16] *General Comment No 3*, CESCR, 5th Sess, UN Doc HRI/GEN/1/Rev.6 (2003) 14 at para. 7, 10 [*General Comment No 3*].
[17] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.
[18] *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [*American Convention*].
[19] *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 [*African Charter*].
[20] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [*ICCPR*].
[21] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [*CRC*].
[22] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13.

the African Commission of Human and Peoples' Rights ("ACommHPR"), the Human Rights Committee ("HRC"), the Committee on the Rights of the Child ("CRC Committee"), and the Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW Committee"). Although the principle of *non-refoulement* is often linked to the right to life and to the prohibition of inhuman and degrading treatment, most of these human rights bodies have been careful not to expressly limit the formulation of the rule to these specific rights. The ECtHR in particular has had the opportunity to apply the obligation of *non-refoulement* to other provisions of the European Convention, including non-absolute rights, such as the rights to fair trial and to liberty and security, where there was a risk of a "flagrant violation" of these guarantees.[23] Similarly, the HRC and the CRC Committee have linked the principle of *non-refoulement* to the notion of irreparable harm;[24] if removing an individual creates a real risk that they would be subjected to irreparable harm in the receiving State, *refoulement* is prohibited. Accordingly, the case-law of these bodies overall seems to support a broad material scope to the principle of *non-refoulement*, allowing this obligation to be applied to any right as long as the potential harm reaches a certain level of severity. This interpretation is compatible with the idea that *non-refoulement* is a positive obligation, since this kind of duty is intrinsic to all human rights.[25]

Next, Chapter 2 will address the extent to which economic, social, and cultural rights receive indirect protection from civil and political rights in removal contexts with the view of ascertaining whether this principle is *prima facie* compatible with the notion of socioeconomic harm. This will be done through an assessment of the case-law of human rights bodies that have already issued decisions or other pronouncements on this subject: the ECtHR, the IACommHR, the HRC, and the CRC Committee. These bodies have indirectly granted protection to socioeconomic rights in removal contexts by linking potential breaches of the latter to violations of the prohibition of inhuman and degrading treatment.[26] So far, this ricochet protection has

[23] *Othman (Abu Qatada) v. the United Kingdom*, No 8139/09, ECtHR (17 January 2012) at para. 198-205, 281-287 [*Othman (Abu Qatada) v. the United Kingdom*]; *Al Nashiri v. Romania*, No 33234/12, ECtHR (31 May 2018) at para. 596, 689-692 [*Al Nashiri v. Romania*].
[24] *General Comment No 31*, HRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) 1 at para. 12 [*General Comment No 31*]; *General Comment No 6*, CRC, 39th Sess, UN Doc CRC/GC/2005/6 (2005) 1 at para. 27 [*General Comment No 6*].
[25] Cathryn Costello & Michelle Foster, "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test" (2016) 46 NYIL 273 at 323 [*Costello & Foster*].
[26] *D. v. the United Kingdom*, No 30240/96, ECtHR (2 May 1997) at para. 53-54 [*D. v. the United Kingdom*]; *Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, HRC, 116th session, UN Doc CCPR/C/116/D/2409/2014 (2016) 1 at para. 7.7-7.9 [*Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*]; *Andrea Mortlock v. the United States* (2008), Inter-Am Comm HR, No 63/08 at para. 91 [*Andrea Mortlock v. the United States*].

arisen in relation to the right to health[27] and to extreme forms of deprivation of the rights to housing, to food, and to an adequate standard of living.[28] Although there are relevant criticisms as to how decisions of these human rights bodies have taken socioeconomic conditions into account, particularly in cases related to the right to health, this case-law shows that the application of the principle of *non-refoulement* to socioeconomic harm is not entirely unprecedented.

Lastly, Chapter 3 will draw from the preliminary conclusions in the previous chapters and discuss whether a principle of *non-refoulement* can be autonomously deduced from the ICESCR. In doing so, the chapter will analyse the main arguments commonly advanced in support of the idea that economic, social, and cultural rights have a distinct legal nature from civil and political rights—that is, that socioeconomic rights imply only positive obligations, that these obligations are necessarily subject to progressive realisation, and that they are not justiciable.[29] These distinctions do not survive deeper scrutiny, which shows that all human rights imply both positive and negative obligations, that the ICESCR also imposes obligations of immediate effects on States,[30] and that there is not a solid basis for denying justiciability to socioeconomic rights. Accordingly, these arguments are not sufficient for rejecting an application of the principle of *non-refoulement* under the ICESCR.

The obligation of international cooperation and assistance under Article 2(1) of the ICESCR[31] and to what extent this obligation supports a duty of *non-refoulement* under the Covenant will then be analysed. Article 2(1)'s provision on international cooperation and assistance reinforces the extraterritorial character of the duty to prevent harm that arises from the ICESCR's positive obligations.[32] Essentially, this provision emphasises that States-parties should pay due regard to the situation of economic, social, and cultural rights abroad and take this context into consideration in their conduct. This rationale offers indirect support to the principle of *non-refoulement*, since the latter concerns precisely the idea that States cannot knowingly send individuals to another State where they might be subjected to serious violations of their human rights.

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[27] *D. v. the United Kingdom*, *supra* note 26, at para. 53-54.
[28] *M.S.S. v. Belgium and Greece*, *supra* note 9.
[29] *Draft International Covenants on Human Rights: Annotation prepared by the Secretary-General*, UNGAOR, 10th Sess, UN Doc A/2929 (1955) 1 at 23, para. 9 [*Annotation prepared by the Secretary-General*].
[30] *General Comment No 3*, *supra* note 16, at para. 2, 7, 10.
[31] *ICESCR*, *supra* note 15, at art. 2(1).
[32] *General Comment No 24*, CESCR, 61st Sess, UN Doc E/C.12/GC/24 (2017) 1 at para. 27 [*General Comment No 24*].

After addressing these questions, which establish the legal basis supporting a principle of *non-refoulement* within the ICESCR, this work will turn to practical questions concerning to which obligations under the Covenant *non-refoulement* can be applied and how. It is submitted that the risk of harm in the receiving State can be assessed in relation to the ICESCR's obligations of immediate effect, namely: non-discrimination and protection of the minimum core of human rights. This section of the chapter will also advance the idea of minimum threshold obligations, that is, of a minimum level of rights that a State should realise based on its level of available resources.[33] This duty is then one of immediate effect but whose content is defined on the basis of the available resources of each specific State. As such, the minimum threshold may correspond to the minimum core or be higher than the latter, depending on the State under analysis. In some cases, depending on the level of proof furnished to the removing State, it may be possible to identify whether there is a risk of violation of this minimum threshold, especially by referring to a standard of reasonableness[34] and to the level of corruption within the receiving State.

The last section of Chapter 3 will address two objections of non-legal character to the recognition of a principle of *non-refoulement* under the ICESCR. The first objection relates to the concern that applying the *non-refoulement* rule to economic, social, and cultural rights would considerably increase the number of people seeking complementary protection and taking in these people would subject host States to an excessive burden, especially from a financial standpoint. The second objection is that an obligation of *non-refoulement* under the ICESCR would have no practical effect, since it would only apply to grave situations that already amount to inhuman or degrading treatment under civil and political rights instruments.

In response to these concerns, this thesis will highlight that host States would not be required to grant protection to all people claiming to risk socioeconomic deprivation in their country of origin, but only to those in relation to which there exists a real risk of irreparable harm, some of which are already covered by *non-refoulement* obligations in civil and political rights instruments. Furthermore, it does not seem possible to establish a necessary consequential nexus between the recognition of a *non-refoulement* rule within the ICESCR and an increase in migratory influxes, since the latter are affected by a variety of factors beyond legal ones. At the same time, one cannot ensure the opposite, that is, that migratory influxes

[33] Gregor T. Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Geneva: Université de Genève, 2013) at 243-244 [*Chatton*].
[34] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UN Doc A/RES/63/117 (2009) 1 at art. 8(4) [*ICESCR-OP*].

would not increase in light of such a legal development. In view of this uncertainty and considering that mass migratory influxes already happen in today's world and might well happen in the future, it seems that this concern is best addressed by efforts at burden-sharing among States, and not by seeking to prevent a coherent application of the principle of *non-refoulement* to other human rights treaties.

As for the second concern, it will be clarified that not every situation of irreparable socioeconomic harm amounts to inhuman and degrading treatment. A specific analysis of the obligations imposed under the ICESCR is necessary for comprehending what constitutes irreparable harm and avoiding possibly unsubstantiated presumptions about receiving States' inability to guarantee a given level of economic, social, and cultural rights. Encouraging such analyses under the ICESCR also contributes to familiarising domestic authorities with the legal framework of the Covenant, enabling them to render more reasoned and coherent decisions in other migratory cases relating to socioeconomic harm, such as asylum claims and *non-refoulement* claims under the ICCPR and other international instruments. Moreover, the recognition of *non-refoulement* as an implicit rule in the ICESCR could lead to the principle's being applied application to socioeconomic rights by other supervisory treaty bodies that have jurisdiction over this set of rights, such as the IACommHR, the IACtHR, the ACommHPR, the CRC Committee, and the CEDAW Committee.

1 THE PRINCIPLE OF NON-REFOULEMENT: AN OBLIGATION IMPLICIT IN HUMAN RIGHTS TREATIES

The idea that States' sovereign powers to expel foreigners from their territory should be limited to ensure respect for individual rights is not a new development, having begun to arise in the late 19th century.[35] In 1933, the principle of *non-refoulement* was first introduced in an international treaty—the Convention relating to the International Status of Refugees—through which the contracting parties undertook "not to remove or keep from [their] territory […] refugees who have been [authorised] to reside there regularly."[36] A similar rule was later incorporated into Article 33 of the 1951 Convention relating to the Status of Refugees ("Refugee Convention"), providing that a State-party may not return (*refouler*) refugees to territories where they might be subjected to persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.[37]

The notion of *non-refoulement* was dissociated from refugee law for the first time in a conventional text in the 1984 Convention against Torture and other and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"). According to Article 3 of the CAT, States-parties must not return a person to a State where there are "substantial grounds for believing that he would be in danger of being subjected to torture."[38]

It is clear from these provisions that there is not a univocal concept of the principle of *non-refoulement*. The rule's content and scope depend on the legal framework in which it is inserted. The *non-refoulement* principle set out in the Refugee Convention applies only in relation to refugees but has a wide material scope, encompassing the potential violation of several human rights to the extent that their breach may constitute persecution.[39] On the other hand, Article 3 of the CAT applies to any individual, irrespective of migratory status, but is limited to the risk of torture as defined in Article 1 of that Convention. The rationale behind

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[35] Institut de droit international, *Règles internationales sur l'admission et l'expulsion des étrangers*, Geneva, 1892 at art. 17, 28; Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique" (1927) 18:3 Recueil des cours de l'Académie de droit international 441 at 472.

[36] *Convention relating to the International Status of Refugees*, 28 October 1933, 159 LNTS 3663at art. 3. See Olivier Delas, *Le principe de non-refoulement dans la jurisprudence internationale des droits de l'homme : de la consécration à la contestation* (Brussels: Bruylant, 2011) at 14 [*Delas*].

[37] *Refugee Convention*, *supra* note 7, at art. 33.

[38] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, at art. 3.

[39] Some domestic courts have had the opportunity to clarify that the principle of *non-refoulement* under Article 33 of the Refugee Convention applies to all situations covered by Article 1(A)(2). *Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening)*, [2005] NZSC 38 at para. 26; *Adan v Secretary of State for the Home Department and other appeals*, [1997] 2 All ER 723; *M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs*, [2003] FCAFC 131 at para. 38.

each of these norms, however, remains the same: States must not remove individuals to another State where they risk having their human rights violated.

The expansion of the obligation of *non-refoulement* to the field of human rights law, through human rights treaties of wider material scope in comparison to the CAT,[40] consolidated this reasoning, with an important particularity: this third kind of *non-refoulement* obligation is not explicitly provided in the text of these treaties. Instead, it is a jurisprudential construction by international human rights bodies,[41] initiated by the European Commission of Human Rights ("ECommHR") and consolidated with the ECtHR's judgment in *Soering v. the United Kingdom*.[42] To date, the notion of *non-refoulement* as an obligation implicit in human rights treaties has been endorsed and applied by the IACommHR, the IACtHR, the ACommHPR, the HRC, the CRC Committee, and the CEDAW Committee. These bodies began to interpret some of the obligations contained in their respective treaties as mandating States-parties both not to violate these provisions through their own conduct and not to knowingly send persons to the jurisdiction of other States where such violations were likely to occur.

In order to evaluate whether a similar principle of *non-refoulement* can be derived from the ICESCR (Chapter 3), it is thus relevant to assess: (1) what legal basis these bodies adopted to deduce the principle of *non-refoulement* from their respective human rights treaties and whether the same rationale can be applied to the ICESCR; and (2) how these human rights bodies have interpreted the material scope of the principle of *non-refoulement* and whether this material scope leaves room for deducing the *non-refoulement* rule from treaty provisions on economic, social, and cultural rights.

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[40] For a deeper analysis comparing different types of *non-refoulement* obligations, see David Weissbrodt & Isabel Hörtreiter, "The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties" (1999) 5 Buff Hum Rts Rev 1. For comparison between the *non-refoulement* provision in Article 33 of the Refugee Convention and Article 3 of the European Convention on Human Rights, see also: *Moreno-Lax*, *supra* note 6, at 249-259, 266-281.

[41] Although the principle of *non-refoulement* in human rights treaties as it is known and applied today was consolidated through the case-law of international human rights bodies, it is worth noting that one of the first decisions in which this principle was considered to be implicit in a human rights treaty actually came from a German domestic court. In analysing the claims of a man who sought to halt his removal to Czechoslovakia under Article 3 of the European Convention, the Administrative Court of Appeal of Berlin conceded that expulsion might be assimilated to inhuman and degrading treatment if he had been liable to the death penalty in Czechoslovakia or if "the sentence of imprisonment he was likely to incur had been out of proportion to that generally passed in Western countries." Nevertheless, the Administrative Court did not provide further explanations as to why harm that would potentially be incurred outside of German territory and perpetrated by another State could engage the application of Article 3. "Oberverwaltungsgericht Berlin (Administrative Court of Appeal, Berlin), Decision of 27th September 1960" (1960) 3 Yearbook of the European Convention on Human Rights 638.

[42] *Soering v. the United Kingdom*, No 14038/88, ECtHR (07 July 1989) [*Soering v. the United Kingdom*].

It is important to note that, although the American Convention contains an express prohibition against *refoulement* mirroring the Refugee Convention's,[43] unlike the other human rights instruments discussed herein, the IACommHR and the IACtHR have also deduced an implicit obligation of *non-refoulement* from other provisions of the American Convention. This has been done in particular in relation to the right to security (Article 5 of the American Convention and Article I of the American Declaration on the Rights and Duties of Man),[44] and to the right to life under the American Declaration.[45] Hence, it is also relevant to analyse how Inter-American institutions grounded their findings in this regard.

1.1 The legal basis of an implicit principle of *non-refoulement* in human rights treaties

This section will analyse the legal grounds international human rights bodies invoked to justify reading the principle of *non-refoulement* into their human rights instruments and attempt to delineate the most coherent basis for this principle.

When human rights bodies started to advance their interpretations of *non-refoulement* as an implicit rule in their respective treaties, their reasoning took inspiration from the decisions of the European human rights bodies, sometimes even expressly citing them. Accordingly, to establish on what legal grounds the principle of *non-refoulement* was deduced, the ECommHR and ECtHR decisions that first acknowledged the existence of such a rule are a useful starting point.

1.1.1 The development of the principle of *non-refoulement* by European human rights bodies

Starting in the 1960s, the ECommHR was seized in a series of cases in which the migrants sought to halt their removal from the host State by claiming they would be subjected to violations of Article 3 of the European Convention, which prohibits subjecting an individual

[43] *American Convention*, *supra* note 18, at art. 22 (8). According to this provision, "[i]n 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."
[44] *The Haitian Centre for Human Rights v. the United States*, (1997), Inter-Am Comm HR, No 10675 at para. 167-171 [*The Haitian Centre for Human Rights v. the United States*]; *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (interpretation and scope of articles 5, 22.7 and 22.8 in relation to article 1(1) of the American Convention on Human Rights)* (2018), Advisory Opinion OC-25/18, Inter-Am Ct HR (Ser A) No 25 at para. 181 [*The Institution of Asylum*].
[45] *The Haitian Centre for Human Rights v. the United* States, *supra* note 44, at para. 167-171.

to torture and to inhuman and degrading treatment, in their States of origin.[46] At first, when addressing these claims, the Commission limited itself to declaring that "the expulsion of an alien to a given country could, in exceptional cases, raise the question of whether there was inhuman treatment in the sense of Article 3 of the Convention."[47] However, the ECommHR did not clarify the basis for this interpretation or why it could only be applied in "exceptional cases."

The Commission eventually presented a clearer argument in *Kirkwood v. the United Kingdom*,[48] a case concerning the extradition of a suspected murderer to the United States and allegations that he would be subjected to ill-treatment there. The ECommHR stated that the obligation of *non-refoulement* arose from the unqualified terms of Article 3 read in conjunction with Article 1 of the European Convention, which mandates States-parties to protect "everyone within their jurisdiction."[49] This duty was considered to extend to the protection against risks of ill-treatment, even if the harm itself would be performed by persons other than the State.[50] Yet, in the end the ECommHR found there existed no such risk in the case.[51]

The ECommHR reiterated this reasoning as to the legal foundation of the principle of *non-refoulement* when deciding the case of *Soering v. the United Kingdom*,[52] concerning the extradition to the United States of a German national accused of murder, although ultimately dismissing the claims raised under Articles 3 and 6 (right to a fair trial, which would allegedly be violated in the receiving country).[53] Nevertheless, when *Soering* was referred to the ECtHR, giving the Court its first opportunity to decide on a *non-refoulement* case, different reasons were presented in support of this principle.

The ECtHR seemed to diminish the relevance of the obligation to secure human rights in Article 1 of the European Convention as a ground for a duty of *non-refoulement*, affirming that this provision sets a territorial limit on the reach of the European Convention and could not

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[46] *X. c. Belgique*, No 984/61, ECommHR (29 May 1961) at 8 [*X. c. Belgique*]; *X c. l'Autriche et la Yougoslavie*, No 2143/64, ECommHR (30 June 1964) at 6; *X v. the Netherlands*, No 1983/63, ECommHR (13 December 1965) at 12; *X v. the Germany*, No 3040/67, ECommHR (07 April 1967) at 3; *X v. the Federal Republic of Germany*, No 3110/67, ECommHR (19 July 1968) at 11; *X v. the Federal Republic of Germany*, No 4162/69, ECommHR (17 December 1969) at 6; *X v. the Federal Republic of Germany*, No 4314/69, ECommHR (02 February 1970) at 1-2; *Kemal Altun c. République fédérale d'Allemagne*, No 10308/83, ECommHR (3 May 1983) at 219-220; *M.C. France*, No 10078/82, ECommHR (13 December 1984) at 111.

[47] Original: "l'expulsion d'un étranger vers un pays déterminé pouvait, dans des cas exceptionnels, poser la question de savoir s'il y avait eu traitement inhumain au sens de l'article 3 de la Convention." *X. c. Belgique*, *supra* note 46, at 8.

[48] *Kirkwood v. the United Kingdom*, No 10479/83, ECommHR (12 March 1984) at 183 [*Kirkwood v. the United Kingdom*].

[49] *Ibid*, at 183.

[50] *Ibid*, at 190.

[51] *Ibid*.

[52] *Jens Soering v. the United Kingdom*, No 14038/88, ECommHR (19 January 1989) at para. 94-96.

[53] *Ibid*, at para. 154, 157.

be read as prohibiting removal to countries that may not be fully in conformity with the Convention's standards.[54] The Court appeared to rely on this provision by mentioning that States could be held responsible for foreseeable consequences of the extradition, even if the relevant harm took place outside their jurisdiction[55] but did not establish a clear link between this notion of foreseeability and Article 1. Instead, the ECtHR stressed the need to render the provisions of the European Convention "practical and effective," according to the treaty's object and purpose.[56] Allowing extradition to a State where a person would risk being subjected to inhuman and degrading treatment would, in the Court's view, "plainly be contrary to the spirit and intendment" of Article 3.[57] The ECtHR further noted that, whereas its function was usually to decide on violations of human rights that had already occurred, as opposed to the potential risk of a violation, "the serious and irreparable nature of the alleged suffering risked" justified a pronouncement from the Court.[58]

As can be seen, the ECtHR presented a series of considerations as to why an obligation of *non-refoulement* should be deduced from Article 3 but its reasoning in establishing the legal justification for that is far from clear.[59] Nor did the Court elucidate the matter in subsequent cases dealing with removal of aliens, resorting instead to citing *Soering* and its growing case-law on the subject.[60]

In light of this, it is worth analysing more in depth the three main elements to which the ECtHR alluded in justifying the application of Article 3 to removal cases: (1) the seriousness of violations of Article 3; (2) the need to render the European Convention's provisions practical and effective, taking into account the instrument's object and purpose; and (3) States' responsibility for the foreseeable consequences of their acts.

With regard to the gravity of the potential violation, it seems odd that this was one of the elements the ECtHR highlighted in attempting to construe the basis for a *non-refoulement*

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[54] *Soering v. the United Kingdom*, *supra* note 42, at para. 86.
[55] *Ibid*.
[56] *Ibid*, at para. 87.
[57] *Ibid*, at para. 88.
[58] *Ibid*, at para. 90.
[59] As noted by Vincent Chetail, "Le droit des réfugiés à l'épreuve des droits de l'homme : Bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants" (2004) 37:1 RBDI 155 at 159-165 [*Chetail*]. See also Colin Warbrick, "Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering Case" (1990) 11:4 Mich J Int'l L 1073 at 1090-1091 [*Warbrick*].
[60] For instance, *Cruz Varas and others v. Sweden*, No 15576/89, ECtHR (20 March 1991) at para. 69; *Vilvarajah and others v. the United Kingdom*, No 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECtHR (30 October 1991) at para. 103; *Chahal v. the United Kingdom*, No 70/1995/576/662, ECtHR (11 November 1996) at para. 74, 80 [*Chahal v. the United Kingdom*]; *Saadi v. Italy*, No 37201/06, ECtHR (28 February 2008) at para. 125, 127 [*Saadi v. Italy*].

obligation under Article 3. The fact that a violation of human rights entails serious harm does not render any State responsible for it wherever it occurs. Nor is there a relationship between the seriousness of the breach and the degree to which a State must have contributed to it in order to be held responsible. Moreover, the ECtHR itself admitted, later in the *Soering* judgment, that less serious violations could also give rise to a prohibition of removal, such as a flagrant denial of the right to fair trial[61]—which, unlike Article 3, is not an absolute provision under the European Convention. Hence, it seems that the seriousness of the violation does not in itself support an obligation of *non-refoulement*.[62]

As for the ECtHR's proposition that other rights and obligations may be read into a treaty provision to ensure its effectiveness, it is conceded that this practice is not entirely unusual. The ECtHR adopted such an interpretation in the judgment of *Golder v. the United Kingdom*, in which it held that, although the European Convention did not expressly guarantee a right to access courts within a State, this right could be deduced from Article 6 (right to a fair trial) in light of the Convention's object and purpose.[63] Otherwise, this provision could not be effectively ensured.[64] Moreover, in *Young, James and Webster v. the United Kingdom*, the ECtHR suggested that a negative right not to be compelled to join trade unions could be read into the right to freedom of association, even though the *travaux préparatoires* showed that the drafters had expressly decided not to include such a right in the Convention.[65] The International Court of Justice ("ICJ") admitted a similar possibility in the *Case concerning the Application of the Convention for the Prevention and Punishment for the Crime of Genocide* between Bosnia and Herzegovina and Serbia and Montenegro.[66] Even though the Genocide Convention did not contain a specific provision forbidding States from committing genocide or from being complicit to such acts, the ICJ considered that such a prohibition was implicit in Articles I and III of that Convention, under which States undertake to prevent and punish genocide.[67] Indeed, James Crawford and Amelia Keene indicate that this "principle of effectiveness" is part of the

[61] *Soering v. the United Kingdom*, *supra* note 42, at para. 113.
[62] *Chetail*, *supra* note 59, at 166.
[63] *Golder v. the United Kingdom*, No 4451/70, ECtHR (21 February 1975) at para. 34-36.
[64] *Ibid*.
[65] *Young, James and Webster v. the United Kingdom*, No 7601/76, ECtHR (13 August 1981) at para. 51-52. A violation of this "negative right" of freedom of association was later found in *Sigurdur A. Sigurjónsson v. Iceland*, No 16130/90, ECtHR (30 June 1993) at para. 41.
[66] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina. v. Serbia and Montenegro)*, [2007] ICJ Rep 43.
[67] *Ibid*, at para. 166-169.

general rules of treaty interpretation, dating at least from the drafting of the 1969 Vienna Convention on the Law of Treaties.[68]

Some authors advocate that interpretations of this sort are a legitimate way to put into practice the object and purpose of human rights treaties, in line with their drafters' general intention to promote and safeguard these rights.[69] Since the more concrete intentions of the drafters were necessarily constrained by political and moral considerations that, even if relevant in their time, may not be so today, expansive interpretative techniques on the part of adjudicators are arguably needed to ensure that the protection of rights remains effective in light of new developments and challenges.[70] It is not unlikely that, had discussions concerning *non-refoulement* arisen during the drafting of the European Convention and of the other human rights treaties discussed herein,[71] States' representatives would have been reluctant to admit an obligation not to return aliens, especially considering States' interests in maintaining a wide margin of discretion over immigration control.[72]

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[68] James Crawford & Amelia Keene, "Interpretation of the human rights treaties by the International Court of Justice" (2020) 24:7 IJHR 935 at 945.

[69] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (New York: Oxford University Press, 2007) at 70 [*Letsas*]; Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5:1 HRLR 57 at 78-79.

[70] *Letsas*, *supra* note 69, at 73-74.

[71] The *travaux préparatoires* of the European and American Conventions show that the issue of ill-treatment of a non-national after removal to another State was not debated among the drafters. "Preparatory Work on Article 3 of the European Convention of Human Rights", *Council of Europe*, European Commission on Human Rights, DH (56) 5 (1956), available at: <https://www.ECtHR.coe.int/LibraryDocs/Travaux/ECTHRTravaux-ART3-DH(56)5-EN1674940.pdf>, last accessed 15 December 2020 [*Preparatory Work on Article 3 of the European Convention*]; *Conferencia Especializada Interamericana sobre Derechos Humanos*, OR OEA/Ser.K/XVI/1.2 (1969) [*Conferencia Especializada Interamericana sobre Derechos Humanos*]. Regarding the European Convention, see also the analysis by Oliver Thurin, *Der Schutz des Fremden vor rechtswidriger Abschiebung: Das Prinzip des Non-Refoulement nach Artikel 3 EMRK* (Vienna: Springer, 2009) at 11-12.
In turn, the discussions during the drafting of the ICCPR focused more on the procedural safeguards in the process of expulsion, which crystallised into Article 13 of the Covenant, and fell short of addressing the risk of ill-treatment after the non-national's removal. *Annotation prepared by the Secretary-General*, *supra* note 29, at 40; *Summary Record of the Hundred and Sixth Meeting*, Commission on Human Rights, 5th Sess, UN Doc E/CN.4/SR.106 (1949) 1 at 12-14; *Summary Record of the Hundred and Fifty-Third Meeting*, Commission on Human Rights, 6th Sess, UN Doc E/CN.4/SR.153 (1950) 1; *Summary Record of the Hundred and Fifty-Fourth Meeting*, Commission on Human Rights, 6th Sess, UN Doc E/CN.4/SR.154 (1950) 1 at 7-13.

[72] When the drafting of the American Convention, States rejected several proposals restricting their powers to remove non-nationals from their territory (related to procedural guarantees and imperious circumstances as a basis for expulsion) and stressed their exclusive jurisdiction to decide such matters according to their domestic law. In the end, only the prohibition of *refoulement* mirroring Article 33 of the Refugee Convention (art. 22(8)) and the prohibition of collective expulsions (art. 22(9)) were included in the American Convention. OAS, General Assembly, *Conferencia Especializada Interamericana sobre Derechos Humanos*, *supra* note 71, at 41, 100, 246-250.
Likewise, when the CRC was drafted, the delegates voiced concerns about ensuring that States' powers over immigration control were not curtailed. Nonetheless, the delegates showed greater sensitivity to the protection needs of refugee children, which led to the adoption of Article 22 of the CRC. See: *Question of a Convention on the Rights of the Child: Report of the Working Group on a draft convention on the rights of the child*, Commission on Human Rights, 42nd Sess, UN Doc E/CN.4/1986/39 (1986) 1 at para. 9; *Question of a Convention on the Rights of the Child: Report of the Working Group on a draft convention on the rights of the child*, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/25 (1987) 1 at para. 134-138.

Although human rights treaties should not be treated as static instruments but rather respond to new situations and concerns, the idea that new obligations not expressly provided in the treaty's text may be subsequently imposed on States by means of expansive or evolutive[73] interpretations raises questions of legitimacy[74] and predictability that should not be readily dismissed. After all, these kinds of broad interpretations may not be in line with what States-parties understand to be the adequate international standards or with what they intended to commit to when entering into the treaty.[75] An interpretation that is seen by States as overly expansive may lead to backlash from States not only against the proposed interpretation but also against the international body itself.[76] Whereas criticism of the sort may be mitigated with the adoption of a solid legal reasoning and reference to State practice, a degree of caution is advisable.

These concerns are particularly relevant when assessing interpretations grounded on the "principle of effectiveness" as the legal basis for *non-refoulement* obligations. As some commentators have noted, the object and purpose of human rights treaties tend to be quite vague and reference to them does not allow States-parties to foresee what specific measures can be demanded for a right to be given practical effect.[77] Moreover, even if the need for a more effective interpretation of the European Convention is accepted, this method of interpretation alone does not explain how a State could be held responsible for a risk of harm outside of their

[73] Here it is considered that the evolutive interpretation of human rights treaties, based on the premise that they should be considered "living instruments", is actually a temporal dimension of the effectiveness interpretative principle. In this sense, see Daniel Rietiker, "The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis" (2010) 79 Nordic J Int'l L 245 at 261.

[74] As explained by professors Başak Çalı, Anne Koch, and Nicola Bruch, legitimacy is a complex concept relating to the "quality of the authoritativeness of an institution, action or actor." It encompasses an assessment of "whether an institution has a right to exist and demand obedience of others" and "whether an institution is 'living up' to the reasons for its existence through its everyday practices." Başak Çalı, Anne Koch & Nicola Bruch, "The Legitimacy of the European Court of Human Rights: the view from the ground" (2011) University College London.

[75] Discussions concerning the legitimacy of human rights courts, particularly the ECtHR, in the context of expansive interpretations are further undertaken in: Kanstantsin Dzehtsiarou & Alan Greene, "Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners" (2011) 12:10 GLJ 1707; Kanstantsin Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12:10 GLJ 1730; Lisa Sonnleitne, "The Democratic Legitimacy of Evolutive Interpretation by the European Court of Human Rights" (2019) 33:2 Temple Int'l & Comp LJ 279.

[76] For an analysis of instances of resistance on the part of domestic courts in implementing judgments of regional human rights courts and the legal implications thereof, see Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts" (2019) 30:4 EJIL 1129.

[77] Kathryn Greenman, "A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law" (2015) 27:2 IJRL 264 at 272, 278 [*Greenman*]; Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Leiden: Martinus Nijhoff, 2000) at 412-413 [*Noll*].

jurisdiction even if the harm never materialises in the receiving country.[78] After all, if no harm came to pass, it would be hard to argue that the guarantees enshrined in the European Convention were not given practical effect.

It is the third of the ECtHR's considerations in *Soering*—the State's responsibility for the foreseeable consequences of its acts—that seems to best address this question. Although in that judgment the Court did not fully develop its reasoning on the basis for this kind of responsibility, the ECtHR's case-law has consistently framed foreseeability as a component of positive human rights obligations, dictating that States must not place individuals in situations that are expected to lead to harm to their rights by third parties.[79] This duty results from Article 1 of the European Convention, as the ECommHR highlighted, albeit without much clarification, in *Kirkwood*.[80] By establishing that States must "secure" the Convention rights to all individuals under its jurisdiction, this provision implies a more proactive stance by States in preventing and remedying harm.[81]

The notion of positive obligations is also compatible with the ECtHR's rationale that the obligation of *non-refoulement* must be assessed by reference to the risk of harm in the receiving country, irrespectively of whether this harm actually occurs. For instance, in the case of *Buturugă v. Romania*, relating to claims of domestic violence, the ECtHR reiterated the position that States have a positive duty to prevent risks of harm to human rights of which they were or should have been aware, even if no harm materialised:

> In order to talk about a positive obligation, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk for a given individual of being subjected to ill-treatment resulting from criminal acts of a third party and that they failed to take, within the scope of their powers, measures that could have been reasonably considered of a nature to avoid this risk.[82]

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[78] *Greenman*, *supra* note 77, at 272. In this sense, Eric Wyler inquired whether individuals who had not been removed from the State's territory and not been subjected to harm in the State of origin could actually qualify as victims and claim reparation before the ECtHR: Eric Wyler, "Victime « actuelle » et victime « virtuelle » d'une violation des droits de l'homme dans la jurisprudence relative à l'art. 25 de la Convention européenne des droits de l'homme" (1993) 3 SZIER 3 at 38.

[79] *Rantsev v. Cyprus and Russia*, No 25965/04, ECtHR (7 January 2010) at para. 222 [*Rantsev v. Cyprus and Russia*]; *Opuz v. Turkey*, No 33401/02, ECtHR (9 June 2009) at para. 133-136; *Paul and Audrey Edwards v. the United Kingdom*, No 46477/99, ECtHR (14 March 2002) at para. 55 [*Paul and Audrey Edwards v. the United Kingdom*].

[80] *Kirkwood v. the United Kingdom*, *supra* note 48, at 183.

[81] As put by Hélène Lambert, "[the principle of *non-refoulement*] must be seen as a component of the more general obligation of a State to do everything that it could reasonably have been expected to do to protect an individual from a harm of which it knew or ought to have known." Hélène Lambert, "The European Convention on Human Rights and the Protection of Refugees: Limits and opportunities" (2005) 24:2 RSQ 39 at 41.

[82] *Buturugă c. Roumanie*, No 56867/15, ECtHR (11 February 2020) at para. 61. Original: "Pour que l'on puisse parler d'une obligation positive, il doit être établi que les autorités avaient ou auraient dû avoir connaissance à l'époque de l'existence d'un risque réel et immédiat pour un individu identifié de subir des mauvais traitements du fait des actes criminels d'un tiers et qu'elles sont restées en défaut de prendre, dans le cadre de leurs pouvoirs,

The idea that *non-refoulement* may be understood as a positive duty may, at first, seem contrary to the commonly-held view that positive obligations require action from the State, whereas negative obligations require abstention.[83] After all, the *non-refoulement* rule demands States to *refrain* from taking a specific action, namely, removing an individual from the country.[84] Nevertheless, the classification of an obligation as positive or negative is not necessarily done by reference to the concrete actions or inactions required of the State. Rather, the view taken herein is that this distinction depends on whether the State is preventing or remedying harm perpetrated by others or not.[85] This interpretation is consistent with the case-law of the ECtHR. For instance, in *Paul and Audrey Edwards v. the United Kingdom*, the ECtHR considered that the State had failed to comply with a positive obligation to protect a prisoner's life, even though the measure actually required in that case was to refrain from placing a dangerous prisoner in his cell.[86] Likewise, in *Rantsev v. Cyprus and Russia*, although the complaint was centred on the allegation that the State authorities should have *abstained* from releasing a Russian woman into the custody of a man who was later accused of human trafficking, the ECtHR framed the State's obligation as the positive duty to prevent a risk to the woman's life.[87]

Similar examples of cases in which a State should have refrained from action to comply with positive obligations of preventing a risk to human rights are also found in the case-law of the IACtHR. When assessing human rights violations committed by paramilitary armed groups in Colombia, the IACtHR held that the State had breached its positive obligations both by

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des mesures qui auraient raisonnablement pu être réputées de nature à éviter ce risque." See also *Fernandes de Oliveira v. Portugal*, No 78103/14, ECtHR (31 January 2019) at para. 108-109 [*Fernandes de Oliveira v. Portugal*]; *Budayeva and others v. Russia*, No 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECtHR (20 March 2008) at para. 148-149, 159-160.

[83] Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2007) at 11.

[84] *Greenman*, *supra* note 77, at 272; Fanny 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* (Leiden: Brill Nijhoff, 2017) at 137-138 [*de Weck*].

[85] Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed" (2009) 22:3 LJIL 583 at 602, 606. The possibility of such an interpretation was also acknowledged by Maarten den Heijer, "Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights" (2008) 10 European Journal of Migration and Law 277 at 290 [*den Heijer*].

[86] *Paul and Audrey Edwards v. the United Kingdom*, *supra* note 79, at para. 55.

[87] *Rantsev v. Cyprus and Russia*, *supra* note 79, at para. 218-223. See also: *Florea c. Roumanie*, No 37186/03, ECtHR (14 September 2010) at para. 61 (positive obligation to prevent risk to a prisoner's health by not making him share his cell with smokers); *Keenan v. the United Kingdom*, No 27229/95, ECtHR (3 April 2001) at para. 89-90, 100 (the applicant's contention that prison authorities should have refrained from applying the punishment of segregation to a particular prisoner, due to the risk of suicide, was analysed as a positive obligation to prevent harm) [*Keenan v. the United Kingdom*].

encouraging the creation of paramilitary groups and by later failing to restrain their violence.[88] In other words, the Court considered that, if States' positive actions created conditions that increased the risk of harm to human rights, they were acting contrary to their positive obligation to prevent such harm. Judge Sergio García Ramirez, of the IACtHR, explained this rationale by stating that conformity with positive obligations implies the adoption "of all the measures necessary to protect such right *and avoid putting it at risk*."[89] Hence, it seems there are no bars to recognising a duty to prevent harm by third parties that requires the State to refrain from acting as a positive one.

Despite these indications that the principle of *non-refoulement* stems from positive obligations, the ECtHR expressly rejected this classification in the 2016 judgment of *Paposhvili v. Belgium*.[90] In analysing the risk of deterioration of the health of a chronically ill Georgian national upon removal from Belgium, the Court stated that "what is in issue here is the *negative obligation* not to expose persons to a risk of ill-treatment proscribed by Article 3."[91] This conclusion, however, is at odds with the rationale applied for triggering the prohibition of removal.

Negative obligations are applied when the State interferes with a certain aspect of life that individuals are normally entitled to—such as moving freely within a country, associating with other persons, or accessing courts. The fact that the State authorities directly interfered when they were supposed to have refrained from doing so implies the existence of a concrete prejudice to a right. Otherwise, there was no actual interference, but only a possibility thereof, which does not amount to a violation of human rights. In contrast, where there is a risk that a third party will interfere with an individual's human right—a *potential* harm—the State's obligation is one of preventing this risk from materialising, be it by action or inaction. As put by one author, "the state is responsible because it fails to satisfy an obligation to protect. By transferring the person, the duty-holding State substantially enables an external actor to violate rights."[92] Accordingly, the idea that a State cannot remove a person to another where there is a

[88] *Valle Jaramillo et al. (Colombia*) (2008) Inter-Am Ct HR (Ser C) No 192 at para. 76 [*Valle Jaramillo v. Colombia*]; *Pueblo Bello Massacre (Colombia)* (2006) Inter-Am Ct HR (Ser C) No 140 at para. 126; *Merchants (Colombia)* (2004) Inter-Am Ct HR (Ser C) No 109 at para. 126.
[89] *Concurring Opinion of Judge Sergio García Ramírez in relation to the Judgment of the Inter-American Court of Human Rights in the Case of Anzualdo Castro v. Peru* (2009), Inter-Am Ct HR (Ser C) No 202 at para. 21 (emphasis added). See also: Laurens Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights" (2014) 7 Inter-American and European Human Rights Journal 94 at 99.
[90] *Paposhvili v. Belgium*, No 41738/10, ECtHR (13 December 2016) [*Paposhvili v. Belgium*].
[91] *Ibid*, at para. 188 (emphasis added).
[92] Monica Hakimi, "State Bystander Responsibility" (2010) 21:2 EJIL 341 at 366.

risk of treatment contrary to the European Convention rights does not fit adequately into the concept of negative obligations but rather of positive ones.[93]

1.1.2 The legal basis of the principle of *non-refoulement* according to other human rights bodies

The characterisation of *non-refoulement* as a positive obligation has been expressly endorsed by the CEDAW Committee. In dealing with the application of a Chinese woman who feared harm if she were returned to her country of nationality, the CEDAW Committee stated that States-parties have a positive obligation to protect women under their jurisdiction from being exposed to a real, personal, and foreseeable risk of violence, regardless of where the potential harm may occur.[94]

The position of the ACommHPR, the IACtHR, the HRC, and the CRC Committee on the matter is less clear. So far, the ACommHPR has not detailed the basis for the *non-refoulement* rule and has simply applied the prohibition of inhuman treatment to a context of expulsion.[95] In turn, the IACtHR,[96] the HRC,[97] and the CRC Committee[98] seem to have adopted a middle ground, indicating that the duty of *non-refoulement* flows from both positive (protect, fulfil) and negative (respect) obligations.

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[93] Vladislava Stoyanova, "How Exceptional Must 'Very Exceptional' Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*" (2017) 29:4 IJRL 580 at 593 [*Stoyanova*]; *Chetail*, *supra* note 59, at 168-169; *Noll*, *supra* note 77, at 473; *Warbrick*, *supra* note 59, at 1092.

[94] *Y.W. v. Denmark*, CEDAW, 60th Sess, UN Doc CEDAW/C/60/D/51/2013 (2015) 1 at para. 8.7 [*Y.W. v. Denmark*].

[95] *John K. Modise v. Botswana*, No 97/93_14AR, ACommHPR (6 November 2000) at para. 92 [*John K. Modise v. Botswana*].

[96] "[T]he principle of non-refoulement *derives from the fundamental obligations to respect and ensure rights* under Article 1(1) of the Convention assumed in relation to each of the protected rights and, in this case, with regard to the right of everyone to seek and receive asylum." *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Argentina, Brazil, Paraguay, Uruguay)* (2014), Advisory Opinion OC-21/14, Inter-Am Ct HR (Ser A) No 21 at para. 212, 225-226 [*Rights and Guarantees of Children*] (emphasis added). See also *Wong Ho Wing (Peru)* (2015), Inter-Am Ct HR (Ser C) No 313 at para. 127 [*Wong Ho Wing v. Peru*].

[97] "[…] the article 2 obligation requiring that States Parties *respect and ensure the Covenant rights* for all persons in their territory and all persons under their control entails an 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." *General Comment No 31*, *supra* note 24, at para. 12 (emphasis added).

[98] "The Committees highlight that the principle of non-refoulement has been interpreted by international human rights bodies, regional human rights courts and national courts to be *an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights*". *Joint general comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW, CRC, UN Doc CMW/C/GC/3-CRC/C/GC/22 (2017) 1 at para. 45 [*Joint general comment No 3*] (emphasis added).

Maarten den Heijer in particular endorses this hybrid classification.[99] According to the author, positive obligations of *non-refoulement* relate to the conduction of an assessment of the risks of removal, whereas the negative obligation is to refrain from removing the individual.[100] The argument may seem persuasive at first when considering the distinction between positive and negative obligations under the "acting/refraining from acting" dichotomy. Nonetheless, it does not explain why a State is not held responsible where ill-treatment has indeed occurred in the receiving State, despite the fact that the removing State had previously conducted an appropriate risk assessment. If the act of removal engages a negative obligation, then what matters should be only whether the harm materialised or not, regardless of the risk assessment's effectiveness. These difficulties in applying the framework of negative obligations to *non-refoulement* reinforces the view adopted herein that the prevention of risks necessarily qualifies as a positive duty, even if States should refrain from adopting certain measures in order to comply with it. The case-law of human rights bodies seems to support such a framing of the duty to prevent. In addition to the ECtHR's position analysed above, the IACtHR,[101] the ACommHPR,[102] and the HRC[103] all have linked the prevention of a risk of harm to human rights to the concept of positive obligations.

There are some decisions of the HRC and the CRC Committee in which the Committees employed a language more compatible with the notion of positive obligations when addressing the prohibition of removal. Notably, in *D.D. v. Spain*, the CRC Committee employed the term "ensure," which is usually used to refer to positive duties, to describe States' obligations concerning the prohibition of ill-treatment in return cases.[104] Similarly, the HRC has referred to the obligation to ensure in relation to the duty of *non-refoulement* in one case[105] and framed this principle as an obligation of due diligence in another.[106]

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[99] *den Heijer*, *supra* note 85, at 291.
[100] *Ibid*.
[101] *Velásquez Paiz y Otros (Guatemala)* (2015) Inter-Am Ct HR (Ser C) No 307 at para. 109 [*Velásquez Paiz y Otros v. Guatemala*]; *Valle Jaramillo v. Colombia*, *supra* note 88, at para. 78-79, 92; *Sawhoyamaxa Indigenous Community (Paraguay)* (2006), Inter-Am Ct HR (Ser C) No 146 at para. 155 [*Sawhoyamaxa Indigenous Community v. Paraguay*].
[102] *Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Ethiopia*, No 341/07, ACommHPR (16 November 2015) at para. 124-125 [*EWLA v. Ethiopia*]; *Zimbabwe Human Rights NGO Forum v Zimbabwe*, No 245/02, ACommHPR (15 May 2006) at para. 143, 147.
[103] *Norma Portillo Cáceres et al v. Paraguay*, HRC, 126th Sess, UN Doc CCPR/C/126/D/2751/2016 (2019) 1 at para. 7.3, 7.5 [*Norma Portillo Cáceres et al v. Paraguay*]; *General Comment No 36*, HRC, 124th Sess, UN Doc CCPR/C/GC/36 (2018) 1 at para. 21; *Mamatkarim Ernazarov v. Kyrgyzstan*, HRC, 113th Sess, UN Doc CCPR/C/113/D/2054/2011 (2015) 1 at para. 9.4.
[104] *D.D. v. Spain*, CRC, 80th Sess, UN Doc CRC/C/80/D/4/2016 (2019) 1 at para. 14.4-14.8 [*D.D. v. Spain*].
[105] *A.R.J. v. Australia*, HRC, 60th Sess, UN Doc CCPR/C/60/D/692/1996 (1997) 1 at para. 6.8-6.9 [*A.R.J. v. Australia*].
[106] *Mansour Ahani v. Canada*, HRC, 80th Sess, UN Doc CCPR/C/80/D/1051/2002 (2004) 1 at para. 10.6.

Some authors have suggested that the HRC seems to have framed the duty of *non-refoulement* as a negative obligation in *Judge v. Canada*, when qualifying removal as a "crucial link in the causal chain"[107] that would have led to the harm alleged by the applicant.[108] That is because the removal itself appears to have been regarded as a prohibited inhuman treatment, rather than the treatment the applicant would potentially be subjected to if returned.[109] Nevertheless, the question of whether the removal proceedings lead to a violation of human rights still depends on the existence of a risk of harm, instead of the concrete harm ascertained when a negative obligation is at stake. Even if the notion of foreseeability was not mentioned by the HRC in that occasion, it is a necessary part of any analysis concerning the application of the *non-refoulement* principle. Moreover, the HRC also noted in that case that *non-refoulement* consisted of the duty "not to expose a person to the real risk" of application of certain treatment,[110] thus confirming that the relevant harm is the one that would potentially occur in the receiving country. As such, it seems possible to interpret this decision as generally not departing from the rationale detailed above for qualifying *non-refoulement* as a positive obligation.

Accordingly, aside from the CEDAW Committee, other human rights bodies have refrained from establishing a clear legal basis for the principle of *non-refoulement*. Nevertheless, considering the way these bodies have dealt with the notion of positive duties and with the application of *non-refoulement*, this category of obligations seems to provide a solid basis for this principle.

1.1.3 Problems with the classification of the principle of *non-refoulement* as a positive obligation

Although the theory of positive obligations appears to provide the strongest legal basis among those discussed for deducing the principle of *non-refoulement* from human rights treaties, some have questioned whether this is a perfect fit. It is important to address this question so as to later assess whether a coherent rule of *non-refoulement* can be derived from the ICESCR.

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[107] *Roger Judge v. Canada*, HRC, 78th Sess, UN Doc CCPR/C/78/D/829/1998 (2003) 1 at para. 10.6 [*Roger Judge v. Canada*].

[108] Michelle Foster, "Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law" (2009) 2 New Zealand Law Review 257 at 271 [*Michelle Foster*].

[109] *Ibid*, at 271. A similar interpretation of some decisions of the ECtHR was presented by *Stoyanova*, *supra* note 93, at 587.

[110] *Roger Judge v. Canada*, *supra* note 107, at para. 10.4.

One of the main criticisms to the idea that *non-refoulement* is a positive obligation is that it actually imposes a duty for the State to abstain from doing something rather than taking action to protect a right.[111] Nevertheless, as shown above, the prevention of risks has been considered a positive duty in the case-law of human rights bodies, even when the appropriate preventive measures require the State's inaction. Accordingly, it seems that this objection can be overcome by considering another concept of positive and negative obligations, more in line with this case-law.

Concerns have also been voiced regarding the understanding that positive obligations are necessarily limited due to their financial implications and must not impose impossible disproportionate burdens on States.[112] The ECtHR has upheld this rationale in various cases concerning the duty to prevent risk,[113] a path followed by the IACtHR.[114] Accordingly, it could be argued that the duty of *non-refoulement* should be balanced against the State's competing interests, admitting instances in which, even where a risk of harm has been found, the State may still proceed with the removal.[115] This argument was brought by the United Kingdom as a third-party intervener in *Saadi v. Italy*, raising interests of national security related to the prevention of terrorism.[116] However, the ECtHR rejected this balancing of interests by invoking the absolute nature of Article 3 of the European Convention, which admits no derogation under any circumstances.[117]

Some considerations must be made on this point. Firstly, positive obligations should not be interpreted as always requiring significant public expenditures from States, especially if one accepts the interpretation adopted herein that, depending on the circumstances, the positive obligation to prevent may be fulfilled when States abstain from acting in a certain way. Not removing an individual imposes no significant cost *per se*. Although one may argue that the costs refer to the consequences of allowing the individual to remain in the country, such as

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[111] *den Heijer*, *supra* note 85, at 290; Bilal Khan, "From D. v. U.K. to Paposhvili v. Belgium: Assessing the Strasbourg Court's Legal and Institutional Approach to the Expulsion of Seriously Ill Migrants under Article 3 of the European Convention on Human Rights" (2019) 25 Colum J Eur L 222 at 234 [*Khan*].

[112] *Khan*, *supra* note 111, at 233; *Greenman*, *supra* note 77, at 281-282.

[113] *Osman v. the United Kingdom*, No 87/1997/871/1083, ECtHR (28 October 1998) at para. 116 [*Osman v. the United Kingdom*]; *R.R. and others v. Hungary*, No 19400/11, ECtHR (4 December 2012) at para. 29 [*R.R. and others v. Hungary*]; *Mukhitdinov v. Russia*, No 20999/14, ECtHR (21 May 2015) at para. 69 [*Mukhitdinov v. Russia*].

[114] *Xákmok Kásek Indigenous Community (Paraguay)* (2010) Inter-Am Ct HR (Ser C) No 214 at para. 188 [*Xákmok Kásek Indigenous Community v. Paraguay*]; *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 101, at para. 155.

[115] This balancing is supported by Susanne Zühlke & Jens-Christian Pastille, "Extradition and the European Convention – *Soering* Revisited" (1999) 59 ZAÖRV 749 at 769.

[116] *Saadi v. Italy*, *supra* note 60, at para. 120-122.

[117] *Ibid*, at para. 138. This understanding was also endorsed by the IACtHR in relation to the prohibition of torture: *The Institution of Asylum*, *supra* note 44, at para. 181.

providing for social assistance and public services, it seems rather speculative to presuppose that the person in question would require so much assistance as to strain the removing State's resources. It might as well happen that, after securing their stay in the country, the individual will seek work and contribute to the economy.

This balancing does not appear to be easier to sustain in cases of mass influx. Even though it can be argued that such situations will inevitably lead to significant costs to the host country, due to the volume of people it will have to provide for at once, one must bear in mind that removal risk assessments are necessarily individual. Accordingly, on what parameters can the host State determine which individuals will face the risk of ill-treatment in the State of origin and which will not, which people it would be more financially burdensome to host and which would not? One can suppose that those who are in a situation of particular vulnerability, such as children and people with health conditions, will have the greatest economic impact in host States. At the same time, they are likely to suffer a more severe level of harm if removed, precisely due to such vulnerable condition. In such scenarios, does the balancing between these economic constraints and the severity of the harm risked truly favour removal? Or the balancing between the rights of people who are not in a situation of vulnerability—and hence risk less severe harm if removed—but who may not themselves generate such an economic burden to the host State? This assessment is further complicated due to the fact that the obligation of *non-refoulement* is triggered by risks of violations of human rights that entail serious harm similar to the one arising from ill-treatment, as Section 1.2 will explore further. Given the severity of harm risked, which may even involve non-derogable rights such as the prohibition of ill-treatment, it is disputable whether purely economic concerns would be enough to justify removal in any given case. Thus, invoking strain in financial resources as a concern that should be weighed against the application of *non-refoulement* does not seem a strong argument.

Secondly, and most importantly, in cases relating to the prevention of ill-treatment or of threats to life, the need not to impose a disproportionate burden on States mentioned by the ECtHR and the IACtHR seems to relate more to the *practical impossibility* of requiring that States prevent all risks of violations of human rights, and not to a balancing of State and individual interests.[118] It has never been held, for instance, that a State did not have an obligation to prevent harm to an individual's rights because they were considered a threat to national security or due to a general allegation of lack of resources. Instead, decisions finding no

[118] *Greenman, supra* note 77, at 281-283.

violations of the duty to prevent have been based on the lack of foreseeability of the risk[119]—according to what the State authorities knew or should have known—and on the fact that the State had adopted reasonable measures to prevent the risk, even if the harm occurred in the end.[120] These operational difficulties are taken into account in the context of *non-refoulement*. Whereas States should conduct a risk assessment of the situation the individual might face in the receiving country, they are not required to be absolutely certain as to the existence of risks, or to refrain from *refoulement* unless conditions in the receiving country fully comply with human rights standards. However, if a real risk of harm is found, there are no operational difficulties that would render not returning the individual an impossible or disproportionate burden.

Another objection to talking about a positive duty of *non-refoulement* is that positive obligations usually apply on a sliding scale: the greater the risk, the stricter States' obligations to prevent it.[121] On the other hand, the duty of *non-refoulement* seems to apply in an all-or-nothing fashion: if a real risk of harm is not proven, States have nothing to prevent; if it is, the obligation to prevent removal is absolute.[122] This again can be explained by reference to the kind of practical measures that are appropriate to prevent the risk from materialising. When a real risk upon removal has not been identified, no positive obligations arise; the individual may simply be returned. On the other hand, when such a risk exists, removing States' options are very limited. They may either refrain from removing, remove to a safe third country,[123] or seek assurances from the country of origin that the risk will not materialise. These last two options are often very limited. Even if deemed safe, third countries must still accept receiving the individual, so the choice to remove the individual is not entirely within the removing State's discretion. As for seeking assurances from the State of origin, human rights bodies often regard

[119] *Ceesay v. Austria*, No 72126/14, ECtHR (16 November 2017) at para. 119; , No 30500/11, ECtHR (1 June 2017) at para. 75 [*Malik Babayev v. Azerbaijan*]; *Hiller v. Austria*, No 1967/14, ECtHR (22 November 2016) at para. 53-54; *Van Colle v. the United Kingdom*, No 7678/09, ECtHR (13 November 2012) at para. 96-105; *Rantsev v. Cyprus and Russia*, *supra* note 79, at para. 222-223.

[120] *Watts v. the United Kingdom*, No 53586/09, ECtHR (4 May 2010) at para. 92; *Keenan v. the United Kingdom*, *supra* note 87, at para. 99-102.

[121] *Greenman*, *supra* note 77, at 280.

[122] *Ibid*.

[123] The legality of safe third country arrangements, particularly within the framework of the Refugee Convention, is contested by Violeta Moreno-Lax, "The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties", in Guy S. Goodwin-Gill & Philippe Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Leiden/Boston: Martinus Nijhoff, 2015) 665 at 696-697. Other commentators indicate the lawfulness of this practice as long as a proper risk assessment is conducted and the asylum-seeker has access to effective protection in the third State. See: Hemme Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publihers, 2006) at 418; Francesco Cherubini, *Asylum Law in the European Union* (Oxon: Routledge, 2015) at 86, 248; Michelle Foster, "Responsibility Sharing or Shifting? "Safe" Third Countries and International Law" (2008) 25:2 Refuge 64 at 66.

them with scepticism, since they may not be sufficiently concrete to constitute a reasonable measure to prevent harm.[124] Not removing is by far the safest—and often the only—option for compliance with the principle of *non-refoulement*.

Despite these considerations, the main problem with viewing positive obligations as the legal basis of *non-refoulement* obligations is the lack of coherence in the decisions of human rights bodies.[125] As seen above, aside from the CEDAW Committee, these bodies have refrained from committing themselves to a specific explanation as to how this rule was deduced from human rights treaties. Instead, vague references are made to the absoluteness of the rights involved and to the object and purpose of those treaties, without clarifying if and how these elements are relevant grounds for the norm. Moreover, the application of the principle of *non-refoulement* has been immersed in inconsistencies. Despite having adopted a rationale of risk prevention typical of positive obligations, the ECtHR stated, with no further explanation, that *non-refoulement* was a negative duty.[126] After affirming that this principle was not subject to a balancing of interests, the ECtHR expressly allowed such balancing to be made in *N. v. the United Kingdom*, where the risk upon removal related to the lack of treatment for the applicant's medical condition in the receiving State was weighed against receiving States' burden of hosting people seeking medical treatment.[127]

These inconsistencies and contradictions seem to suggest that human rights bodies' main focus in reading a principle of *non-refoulement* into their respective treaties was to ensure that the prohibition of ill-treatment could apply to as many situations as possible rather than building a coherent legal foundation for this rule. Although the activity of judges is always marked by some creativity,[128] one must ask whether these inconsistencies are so grave to compromise the deduction of a similar rule from other human rights treaties, such as the ICESCR. This does not seem to be the case. Even if certain pronouncements on the principle of *non-refoulement* by international bodies may be subject to criticism, the rationale of the principle as a whole is satisfactorily explained by reference to positive human rights obligations, as detailed above. Therefore, from a legal standpoint, it is contended that this is the legal basis on which the principle of *non-refoulement* should be considered.

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[124] *Saadi v. Italy*, *supra* note 60, at para. 148; *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 187; *Nikolai Valetov v. Kazakhstan*, HRC, 110th Sess, UN Doc CCPR/C/110/D/2104/2011 (2014) 1 at para. 14.5-14.7.

[125] *Greenman*, *supra* note 77, at 280, 284-285.

[126] *Paposhvili v. Belgium*, *supra* note 90, at para. 188.

[127] *N. v. the United Kingdom*, No 26565/05, ECtHR (27 May 2008) at para. 44 [*N. v. the United Kingdom*]. Concerns regarding the ECtHR's approach to health cases will be further analysed in section 2.1.

[128] Sir Hersch Lauterpacht, *The Function of Law in the International Community*, 2nd ed (Oxford: Oxford University Press, 2011) at 131-134.

1.2 Material scope of the principle of *non-refoulement* in human rights treaty law

In the majority of cases, the principle of *non-refoulement* is invoked in connection to a risk of torture or cruel, inhuman, and degrading treatment. However, there has been some recognition by human rights bodies, mainly the ECtHR, that the obligation not to return persons to a country where their rights would be at risk also arises in relation to other human rights. This is consistent with the view exposed above that *non-refoulement* is a positive obligation, since all human rights entail this category of duties.[129]

Nevertheless, the question of which specific rights may trigger a *non-refoulement* obligation and how to identify them is still debated. Some commentators reject the idea that this principle could be read into all human rights, for it is centred on the concept of torture and other kinds of ill-treatment.[130] Vincent Chetail, in turn, suggests that "identifying the specific human rights triggering the principle of *non-refoulement* remains a largely academic and arguably sterile exercise," since violations of human rights trigger *non-refoulement* as soon as they reach the threshold of degrading treatment.[131]

The severity of the harm is indeed an essential factor for determining whether the prohibition *refoulement* is engaged, for not every lack of conformity with human rights standards in the receiving country will prohibit removal.[132] Nonetheless, it does not seem to follow that every risk of serious harm will necessarily fall into the category of torture or inhuman, cruel, and degrading treatment. Notably, in a case concerning allegations that the applicant would be subjected to human rights violations if returned to Jordan, the ECtHR concluded that, although there was not a risk of violation of Article 3 of the European Convention, the removal was unacceptable due to the risk of a flagrant violation of the right to fair trial (Article 6 of the European Convention).[133] In another case concerning alleged breaches

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[129] See generally *Costello & Foster*, *supra* note 25, at 323.

[130] Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement: A legal analysis of 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* (PhD thesis, Leiden University Law School, 2009) at 26; *Greenman*, *supra* note 77, at 280. Mariagiulia Giuffré also presents a restrictive definition of the principle of *non-refoulement*, centring it on the prohibition of torture and of cruel, inhuman, and degrading treatment. Nonetheless, she notes that "the ECHR provides tremendous opportunity for development of fundamental rights (other than the prohibition of torture) in cases concerning expulsion." It thus seems that she does not outright reject a broad material scope to the obligation of *non-refoulement*. Mariagiulia Giuffré, *The Readmission of Asylum-Seekers under International Law* (Oxford: Hart Publishing, 2020) at 45, footnote 50.

[131] Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law" in Ruth Rubio-Marín, ed, *Human Rights and Immigration* (New York: Oxford University Press, 2014) 19 at 35 [*Vincent Chetail*].

[132] *Soering v. the United Kingdom*, *supra* note 42, at para. 86.

[133] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 198-205, 281-287.

of the right to liberty and security in the context of an extraordinary rendition, the ECtHR found a violation of Article 6 independently from Article 3 and on the basis of different considerations.[134] Therefore, a deeper analysis on the material scope of the *non-refoulement* principle holds relevance for the subsequent assessment of whether this rule may also be read into treaty provisions concerning economic, social, and cultural rights.

1.2.1 European Human Rights Bodies

In *Soering v. the United Kingdom*, one of the elements the ECtHR highlighted when formulating the principle of *non-refoulement* was the absolute character of the protection against ill-treatment under Article 3 of the European Convention.[135] In this vein, the ECtHR has extended the application of the principle of *non-refoulement* to other absolute rights under the European Convention, namely the right to life[136] and the prohibition of slavery and forced labour.[137]

Moreover, the ECtHR has admitted that non-absolute rights may trigger a duty of *non-refoulement* if the potential harm in the receiving State amounts to a "flagrant violation" of these rights.[138] In other words, only situations in which the non-derogable right at hand has its essence completely denied or nullified in the receiving country is removal prohibited under the European Convention.[139] The ECtHR has so far admitted this reasoning in relation to the right

[134] *Al Nashiri v. Romania*, *supra* note 23, at para. 670-675, 690-692.
[135] *Soering v. the United Kingdom*, *supra* note 42, at para. 87-88.
[136] *Bader v Sweden*, No 13284/04, ECtHR (8 November 2005).
[137] *Ould Barar v. Sweden*, No 42367/98, ECtHR (19 January 1999) at 6.
[138] For an analysis of the ECtHR's case-law regarding flagrant violations of the European Convention in the context of the *non-refoulement* principle, see: Cathryn Costello, "The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches", in Bruce Burson & David James Cantor, eds, *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Leiden: Brill Nijhoff, 2016) 180 at 197-205 [*Costello*].
[139] For instance, the ECtHR has clarified that a flagrant violation of the right to a fair trial could occur in the following scenarios: conviction *in absentia* with no subsequent possibility to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed and deliberate and systematic denial of access to a lawyer, especially for an individual detained in a foreign country. See: *Husayn (Abu Zubaydah) v. Poland*, No 7511/13, ECtHR (24 July 2014) at para. 553 [*Husayn (Abu Zubaydah) v. Poland*]; *Al Nashiri v. Poland*, No 28761/11, ECtHR (24 July 2014) at para. 563 [*Al Nashiri v. Poland*].

to liberty and security,[140] the right to a fair trial,[141] the right to private and family life,[142] and the freedom of thought, conscience, and religion.[143]

The difference in the thresholds of harm required for a real risk to arise in relation to absolute and non-absolute rights can be explained by reference to the foreseeability of the harm. As noted by the United Kingdom's House of Lords, harm to human rights that do not admit derogations or limitations will always amount to a violation, precisely because there is no justification for lack of compliance with such rights.[144] Non-absolute rights, on the other hand, are subject to limitations in the receiving States, which means that some kinds of interference with them may be justified under human rights law.[145] Hence, only in a situation of flagrant denial of these rights can the removing State ascertain that a violation upon removal was foreseeable.[146]

Furthermore, requiring a risk of harm to be flagrant when dealing with non-absolute rights is compatible with the operational limitations of positive obligations. As frequently mentioned by the ECtHR, not every risk of harm necessarily gives rise to a duty of prevention from the State, given the operational impossibility of such a scenario, including in terms of allocation of resources.[147] It would be impossible in practice to demand States to only remove persons to countries that fully comply with the standards of the European Convention. Not only would this demand a risk assessment of unimaginable complexity but also put into question

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[140] *Al Nashiri v. Romania*, *supra* note 23, at para. 596, 689-692; *Nars et Ghali c. Italie*, No 44883/09, ECtHR (23 February 2016) at para. 244, 299-303 [*Nars et Ghali c. Italie*]; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 139, at para. 452, 525-526; *Al Nashiri v. Poland*, *supra* note 136, at para. 455, 530-532; *El-Masri v. the Former Yugoslav Republic of Macedonia*, No 39630/09, ECtHR (13 December 2012) at para. 239-241 [*El-Masri v. Macedonia*]; *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 233.

[141] *Al Nashiri v. Romania*, *supra* note 23, at para. 597, 719-722; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 139, at para. 453, 556-561; *Al Nashiri v. Poland*, *supra* note 136, at para. 456, 565-569; *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 250-251, 287; *Al-Moayad v. Germany*, No 35865/03, ECtHR (20 February 2007) at para. 100; *Mamatkulov and Askarov v. Turkey*, No 46827/99 and 46951/99, ECtHR (4 February 2005) at para. 14; *Einhorn v. France*, No 71555/01, ECtHR (16 October 2001) at para. 32; *Drozd and Janousek v. France and Spain*, No 12747/87, ECtHR (26 June 1992) at para. 110; *Soering v. the United Kingdom*, *supra* note 42, at para. 113.

[142] *Al Nashiri v. Romania*, *supra* note 23, at para. 698-699; *Nars et Ghali c. Italie*, *supra* note 140, at para. 308-310, 324-326; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 139, at para. 533-534; *Al Nashiri v. Poland*, *supra* note 136, at para. 538-540; *El-Masri v. Macedonia*, *supra* note 140, at para. 249-250. British courts also had the opportunity to find a violation of this provision in removal contexts: *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

[143] *Z and T v. the United Kingdom*, No 27034/05, ECtHR (28 February 2006) at 7-8 [*Z and T v. the United Kingdom*].

[144] *R v. Special Adjudicator ex parte Ullah* [2004] UKHL 26 at para. 24 [*Ex parte Ullah*]; *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 at para. 111 [*Devaseelan*].

[145] *Ex parte Ullah*, *supra* note 144, at para. 24; *Devaseelan*, *supra* note 144, at para. 111.

[146] *Ex parte Ullah*, *supra* note 144, at para. 24; *Devaseelan*, *supra* note 144, at para. 111. See also: *Michelle Foster*, *supra* note 108, at 277-278.

[147] *Malik Babayev v. Azerbaijan*, *supra* note 119, at para. 66; *Keenan v. the United Kingdom*, *supra* note 87, at para. 90.

States' sovereign prerogatives concerning immigration control, since it would render any removal unfeasible. Even the removing State may not completely conform to such standards. Thus, the threshold of "flagrant violation" takes into account a level of severity comparable to the one resulting from violations of the prohibition of cruel and degrading treatment, which is within States' powers to verify.[148]

The question then is if this rationale is applicable to all provisions of the European Convention. At first, the ECtHR seemed to imply it was not. In the 2004 judgment of *F. v. the United Kingdom*, concerning whether the return of a homosexual man to Iran entailed a risk of violation of his right to private life, the ECtHR stated the following:

> The Court observes that its case-law has found responsibility attaching to Contracting States in respect of expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice (see e.g. *Soering v. the United Kingdom*, cited above, § 88). Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.[149]

Despite this pronouncement, as noted above, in following years the ECtHR adopted a much more open stance towards the application of the duty to prevent return, extending it to several rights that were not absolute and hence did not have the same "fundamental importance" as Articles 2 and 3 of the European Convention. The very right to private and family life, discussed in *F. v. the United Kingdom*, was deemed to trigger *non-refoulement* in cases where there was a risk that the individual would be completely deprived of contact with their family in the receiving country.[150] This change in the position of the ECtHR can also be seen in relation to the right to liberty and security: whereas in 2003 the ECtHR expressed doubts as to whether a real risk of harm concerning this right could raise a duty not to return,[151] in 2012 the Court recognised this possibility, as long as the potential harm amounted to a flagrant violation.[152]

The ECtHR's real concern in *F. v. the United Kingdom* seems rather to have been to avoid a scenario in which any real risk of harm, irrespective of its severity, would result in a prohibition of removal. This concern appears to have been overcome by the development of the

[148] Even though the nature of the harm is distinct. In other words, not every flagrant violation of other provisions of the European Convention will be equated to inhuman and degrading treatment. *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 198-205, 281-287.
[149] *F. v. the United Kingdom*, No 17341/03, ECtHR (22 June 2004) at 12.
[150] *Al Nashiri v. Romania*, *supra* note 23, at para. 698-699; *Nars et Ghali c. Italie*, *supra* note 140, at para. 308-310, 324-326; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 139, at para. 533-534; *Al Nashiri v. Poland*, *supra* note 136, at para. 538-540; *El-Masri v. Macedonia*, *supra* note 140, at para. 249-250.
[151] *Tomic v. the United Kingdom*, No 17837/03, ECtHR (14 October 2003) at 12.
[152] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 232-233.

"flagrant violation" standard. The reasoning is not that some rights cannot trigger an obligation of *non-refoulement* but instead that the harm arising from their potential breach would hardly, if ever, reach the required level of severity. This understanding was adopted in the 2006 judgment of *Z. and T. v. the United Kingdom*.[153] In assessing the risk of harm to the applicants' freedom of religion in case they were returned to Pakistan, the ECtHR concluded that, although an obligation of *non-refoulement* could in principle arise in connection with this right, "it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention."[154] Indeed, given that freedom of religion has an important internal component—a person's intimate beliefs, even if they are not manifested externally—it may be argued that a nullification of this right could only occur if the individual were subjected to more extreme forms of religious persecution, such as threats of harm to their physical integrity or life, thus also engaging Article 3 of the European Convention.

Accordingly, it seems that the ECtHR has not linked the applicability of *non-refoulement* to specific rights but instead to the intensity of the harm risked in a given situation. From this perspective, any right protected under the European Convention could be invoked with a view to prevent removal to a country where there is a risk of harm.[155] Whether the claim will be successful only depends on the evidence showing that the required level of severity was attained.[156]

1.2.2 Inter-American Human Rights Bodies

Article 22(8) of the American Convention on Human Rights provides that no one shall be returned to a State "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."[157] Even though the scope of this provision is expressly limited to cases of violation of the rights to life and personal liberty, the IACtHR has indicated that the prohibition of *refoulement* is also

[153] *Z and T v. the United Kingdom*, *supra* note 143.
[154] *Ibid*, at 7.
[155] This understanding was expressed by the United Kingdom's House of Lords: *Ex parte Ullah*, *supra* note 144, at para. 21-25 (Lord Bingham), 40–50 (Lord Steyn), 67-69 (Lord Carswell). See also: *Noll*, *supra* note 77, at 473; Stephan Breitenmoser & Gunter E. Wilms, "Human Rights v. Extradition: the *Soering* Case" (1990) 11:4 Mich J Int'l L 845 at 883.
[156] *Ex parte Ullah*, *supra* note 144, at para. 21-25 (Lord Bingham), 40–50 (Lord Steyn), 67-69 (Lord Carswell).
[157] *American Convention*, *supra* note 18, at art. 22(8). Despite the similarity between this provision and Article 33 of the Refugee Convention, the IACtHR clarified that the protection under Article 22(8) applies to any individual, regardless of their migratory status. See: *Rights and Guarantees of Children*, *supra* note 96, at para. 216.

intrinsic to the right to personal integrity, both according to the interpretation of Article 5 of the American Convention and to customary international law.[158]

Moreover, in the case of the *Pacheco Tineo Family v. Bolivia*, concerning the removal of a family composed of two parents and three children to Peru, the IACtHR held that Bolivia had breached the rights of the family (Article 17) and of the child (Article 19), since the domestic authorities should have taken measures to ascertain in which State family unity would best be preserved.[159] This was a special concern in the case, since an arrest warrant had been issued for the parents in Peru, creating a risk that the family would be separated if sent to that country. Curiously, the IACtHR did not use the traditional language of *non-refoulement* when assessing this claim, not referring to whether there existed a real risk of harm or to the foreseeable consequences of expulsion. Still, the Court did not make any reservations to applying Articles 17 and 19 of the American Convention to removal or contexts and did not indicate different standards on the risk of harm, which suggests that the IACtHR is open to a broad material scope of the principle of *non-refoulement*.

Further evidence in this sense is found in the IACtHR's Advisory Opinion OC-25/18 on the institution of asylum. Although at first the IACtHR described the principle of *non-refoulement* as a guarantee of "various *non-derogable* human rights,"[160] in its next paragraph it adopted a broader formulation, indicating that "under the American Convention, other human rights provisions *such as* the prohibition of torture and other cruel, inhuman or degrading treatment or punishment […], provide a solid basis for protection against *refoulement*."[161] Moreover, in its Advisory Opinion 21/14 on the rights of children in the context of migration, the IACtHR stated that it agreed with the CRC Committee's considerations that a child should not be returned to a country where there was a reasonable risk of violation of their fundamental rights[162]—a broader formulation than simply referring to the right to life and the prohibition of ill-treatment. Thus, even though the IACtHR has yet to deliver a clear pronouncement on its understanding about the material scope of the principle of *non-refoulement*, there are relevant indications in its case-law that this obligation should not be restricted to a particular set of rights.

[158] *Wong Ho Wing v. Peru*, *supra* note 96, at para. 127; *Rights and Guarantees of Children*, *supra* note 96, at para. 224-226.
[159] *Familia Pacheco Tineo (Bolivia)* (2013), Inter-Am Ct HR (Ser C) No 272 at para. 226-229 [*Familia Pacheco Tineo v. Bolivia*].
[160] *The Institution of Asylum*, *supra* note 43, at para. 180 (emphasis added).
[161] *Ibid*, at para. 181 (emphasis added).
[162] *Rights and Guarantees of Children*, *supra* note 96, at para. 231.

1.2.3 African Human Rights Bodies

So far, the African human rights bodies have had few opportunities to pronounce on the principle of *non-refoulement*. The only contentious case in which this concept was applied was *John K. Modise v. Botswana*,[163] involving a man who had been deported from Botswana to South Africa on several occasions, despite contending that he was a Botswanan national. The ACommHPR understood that this *refoulement* had exposed him to considerable suffering, breaching the prohibition of cruel, inhuman, and degrading treatment[164] (Article 5 of the African Charter).[165] Aside from this case, the Commission indicated in its General Comment No 3 that the right to life also entailed an obligation of *non-refoulement*.[166]

Given the little case-law on the matter, it not possible to draw any conclusions as to the position of the ACommHPR regarding the material scope of the principle of *non-refoulement*.[167]

1.2.4 Human Rights Committee

Like other human rights bodies, the HRC first expressed the idea of an obligation of *non-refoulement* as implicit in Article 7 of the ICCPR, which concerns the prohibition of torture and cruel, inhuman, and degrading treatment.[168] Subsequently, in its General Comment No 31, the HRC adopted a broader language, indicating that the return of a person to a State where there is a real risk of irreparable harm, "such as that contemplated by articles 6 [right to life]

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[163] *John K. Modise v. Botswana*, *supra* note 95. The ACommHPR also found a violation of Article 5 of the African *Charter in Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, in the context of widespread violations of human rights against refugees in Guinea, among which mass expulsions. Nevertheless, in holding the State accountable, the ACommHPR did not specify which acts and omissions were deemed to breach Article 5. Accordingly, it did not link the expulsions to this provision and, consequently, did not clearly deal with *non-refoulement* obligations in its decision. See: *Charter in Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, No 249/02, ACommHPR (7 December 2004). Similarly, a case against Rwanda, the ACommHPR assessed the expulsion of Burundian refugees only in relation to the specific provisions of the African Charter that prohibited arbitrary and mass expulsions of non-nationals (Articles 12(4) and 12(5)) and did not address the risk of human rights violations in the receiving country. Hence, it cannot be said that the principle of *non-refoulement* was applied in this case. *Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda*, No 27/89-46/91-49/91-99/93, ACommHPR (31 October 1996) at para. 30-33

[164] *Ibid*, at para. 92.

[165] *African Charter*, *supra* note 19, at art. 5.

[166] *General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)*, ACommHPR, 57th Sess (2015) at para. 40.

[167] It is interesting to note that the Constitutional Court of South Africa interpreted the principle of *non-refoulement* as arising out of the rights to life, to protection against ill-treatment, and to human dignity. However, this interpretation concerned Article 7(2) of South Africa's Constitution, not the African Charter, and thus has limited value for the interpretation of this treaty. See: *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16 (27 July 2012) at para. 66-67.

[168] *General Comment No 20*, HRC, 44th Sess, UN Doc HRI/GEN/1/Rev.6 (2003) 159 at para. 9.

and 7 of the Covenant," is prohibited.[169] This formula was later repeated in several of the HRC's decisions adopted under the complaints mechanism established under Optional Protocol No 1 to the ICCPR.[170] The Committee's reference to the notion of irreparable harm suggests that, as long as this threshold is attained, the duty to prevent removal may arise in relation to any right under the ICCPR. The use of the term "such as" before referring to Articles 6 and 7 also corroborates the idea that these provisions are merely exemplificative of situations in which such harm occurs.

Although to date the HRC has never found a real risk of irreparable harm in connection with provisions other than Articles 6 and 7, neither has it ever held that claims in this sense were incompatible with the ICCPR. Instead, claims relating to the right to a fair trial,[171] the right to liberty in security,[172] and freedom of thought, conscience, and religion[173] were either rejected in the merits due to the absence of a real risk of harm or declared inadmissible as manifestly ill-founded.

In 2013, while discussing the adoption of a general comment regarding the right to liberty and security of person, the HRC considered including the following statement: "The Committee has never found that a State party would violate article 9 if it returned an individual to a country where a real risk of a violation of article 9 existed."[174] Accordingly, risks of irreparable harm to this right should be assessed under Articles 6 and 7 of the ICCPR.[175] This paragraph was ultimately deleted from the final version of General Comment No 35, which nevertheless maintained the mention of Article 7 as a point of reference for analysing *non-refoulement* obligations related to a person's liberty and security.[176] This reflects the tendency observed in the HRC's decisions to evaluate alleged breaches of rights in cases of removal in

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[169] *General Comment No 31*, *supra* note 24, at para. 12.
[170] For instance: *Ali Aarrass v. Spain*, HRC, 111th Sess, UN Doc CCPR/C/111/D/2008/2010 (2014) 1 at para. 10.3; *Maksudov et al. v. Kirghizstan*, HRC, 93th Sess, UN Doc CCPR/C/93/D/1461, 1462, 1476 and 1477/2006 (2008) 1 at para. 12.6
[171] *A.R.J. v. Australia*, *supra* note 105, at para. 6.6, 6.15. At the domestic level, however, the Court of Appeal of New Zealand has recently found that the ICCPR imposed on the State an obligation not to extradite individuals if they would risk a violation of their right to fair trial in the receiving State. *Kyung Yup Kim v. Minister of Justice of New Zealand and Attorney-General of New Zealand*, [2019] NZCA 209 at para. 8, 172 [*Kyung Yup Kim*]. The New Zealand's Supreme Court's final on decision on this case is currently pending.
[172] *S.Z. v. Denmark*, HRC, 117th Sess, UN Doc CCPR/C/117/D/2443/2014 (2016) 1 at para. 8.4; *Fan Biao Lin v. Australia*, HRC, 107th Sess, UN Doc CCPR/C/107/D/1957/2010 (2013) 1 at para. 9.3-9.5 [*Fan Biao Lin*].
[173] *B.L. (represented by Balmain for Refugees) v. Australia*, 112th Sess, UN Doc CCPR/C/112/D/2053/2011 (2014) 1 at para. 7.3-7.5; *C.L. and Z.L. v. Denmark*, HRC, 122nd Session, UN Doc CCPR/C/122/D/2753/2016 (2018) 1 at para. 7.4.
[174] *Draft General Comment No 35*, HRC, 107th Sess, UN Doc CCPR/C/107/Rev.3 (2013) 1 at para. 66.
[175] *Ibid*.
[176] "Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant." *General Comment No 35*, HRC, 112th Sess, UN Doc CCPR/C/GC/35 (2014) 1 at para. 57.

conjunction with Articles 6 and 7.[177] Despite this, Committee members Sarah Cleveland and Sir Nigel Rodley, in their joint concurring opinion in the case *A.S.M. and R.A.H. v. Denmark*, stressed that the HRC had not foreclosed the possibility of recognising *non-refoulement* obligations in relation to other ICCPR provisions, "nor [had] it taken the position that non-refoulement claims based on other articles are per se incompatible *ratione materiae* with the Covenant."[178] Some leading commentators share this interpretation[179] as well as the Federal Court of Australia in *Minister for Immigration and Citizenship v Anochie and Administrative Appeals Tribunal*[180] and seemingly the Supreme Court of Argentina[181] and some Canadian courts.[182]

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[177] See, for instance, *M.M. v. Denmark*, HRC, 125th Sess, UN Doc CCPR/C/125/D/2345/2014 (2019) 1 at para. 7.7; *Merhdad Mohammad Jamshidian v. Belarus*, HRC, 121st Sess, CCPR/C/121/D/2471/2014 (2017) 1 at para. 8.8. It is worth noting that the New Zealand Immigration and Protection Tribunal, when assessing a removal case concerning a risk of violation of Article 9 of the ICCPR, also framed the situation under the prohibitions of arbitrary deprivation of life and of cruel, inhuman and degrading treatment. *EX (Sri Lanka)* [2018] NZIPT 801296-301 at para. 53, 91-93.

[178] *A.S.M. and R.A.H. v. Denmark*, Annex II, Joint opinion of Committee members Sarah Cleveland and Sir Nigel Rodley (concurring), HRC, 117th Sess, UN Doc CCPR/C/117/D/2378/2014 (2017) 1 at para. 6.

[179] Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007) at 308 [*Goodwin-Gill & McAdam*]; *Michelle Foster*, *supra* note 108, at 273; *Vincent Chetail*, *supra* note 131, at 35.

[180] *Minister for Immigration and Citizenship v Anochie and Administrative Appeals Tribunal (joining)*, Trial judgment, [2012] FCA 1440 (18 December 2012) at para. 68-70. It should be noted, however, that this position is not unanimous within Australian domestic courts. In *Honourable Brendan O'Connor v Adamas* [2013] FCAFC 14 (15 February 2013) at para. 477, the Federal Court held that "there is, at this point in time, at best disputed opinion as to whether Australia has any non-refoulement obligations with respect to the rights under Art 14 of the ICCPR, for the reasons advanced on behalf of the Minister." This situation illustrates the caution that must be taken in assuming that *obter dicta* like the one issued in *Anochie* will be applied to subsequent cases. This warning is made in particular by Juan Pedro Machado, "El procedimiento y proceso administrativos en la jurisprudencia de la Corte Interamericana de Derechos Humanos" in Christian Steiner, ed, *Procedimiento y Justicia Administrativa en América Latina* (Mexico City: Konrad Adenauer Stiftung, 2010) 123 at 129-130.

[181] Although not alluding to a specific international instrument, in analysing a *non-refoulement* claim, the Argentinian Supreme Court referred to the case-law of the ECtHR and of the HRC when affirming that the State could not return an individual to another where there was an effective risk that their "fundamental human rights" would be violated. It mentioned particularly the risk of a flagrant denial of justice. *Borelina, Rosana Claudia s/ extradición*, B. 3456. XXXVIII, Fallo, Corte Suprema de Justicia de la Nación Argentina (30 August 2005) at para. 16. The qualification "fundamental" does not appear to intend to create a hierarchy between human rights or to be restrictive, however, considering that the Argentinian Supreme Court implied in other cases that all human rights established in international instruments are fundamental rights. *Institutos Médicos Antártida s/ quiebra s/ inc. de verificación (R.A.F. y L.R.H. de F)*, CSJ 344/2011 (47-I)/CS1, Fallo, Corte Suprema de Justicia de la Nación Argentina (26 March 2018) at para. 12; *Asociación Francesa Filantrópica y de Beneficencia s/ quiebra s/ incidente de verificación de crédito por L.A.R. y otros*, CON 8283/2006/34/CS1, Fallo, Corte Suprema de Justicia de la Nación Argentina (6 November 2018) at para. 10. Accordingly, the Argentinian Supreme Court appears to have recognised a broad material scope in relation to the principle of *non-refoulement*.

[182] In referring to the ICCPR, the CAT, and the European Convention, the Ontario Court of Appeal stated that *non-refoulement* is "complemented, and enlarged beyond its application to refugees, by international human rights law prohibitions on the removal of a person to a real risk of torture or other cruel, inhuman or degrading treatment or punishment *or other forms of serious harm*." *A.M.R.I. v. K.E.R.*, 2011 ONCA 417 (CanLII) at para. 55 (emphasis added). Moreover, when addressing the prohibition of *refoulement* contained in its domestic law (namely s. 97 of the Immigration and Refugee Protection Act and s. 7 of the Canadian Charter of Rights and Freedoms), which mentions only torture and cruel and unusual treatment or punishment, the Supreme Court of Canada and the Federal Court have referred to the *non-refoulement* principle as encompassing the duty not to return a person to

1.2.5 Committee on the Rights of the Child

The CRC Committee's formulation of the principle of *non-refoulement* is very similar to the HRC's, referring to the duty not to return a child to a country where they might face a risk of irreparable harm.[183] However, the CRC Committee was clearer in stating that this kind of harm was not limited to that arising under Articles 6 (right to life) and 37 (prohibition of ill-treatment) of the CRC.[184] The CRC Committee further observed that, in decisions concerning the removal of migrant children, States should take into account the particularly serious consequences for minors resulting from the insufficient provision of food or health services,[185] access to which is also guaranteed under the CRC.[186]

With regard to its case-law, so far the CRC Committee has found a violation of the principle of *non-refoulement* in relation to the protection against physical and mental abuse (Article 19 of the Convention on the Rights of the Child)[187] and to the prohibition of cruel, inhuman and degrading treatment (Article 37 of the Convention on the Rights of the Child).[188] Furthermore, the CRC Committee had the opportunity to consider a claim that some economic, social, and cultural rights guaranteed under the CRC—namely, the right to health, to an adequate standard of living, and to education—would be breached if the applicant children were returned to Albania.[189] Although the CRC Committee found the claims inadmissible due to lack of substantiation, it did not reject the possibility that a risk of irreparable harm could arise in relation to these rights.[190] As such, the CRC Committee has shown itself to be quite open to the idea that any right may entail an obligation of *non-refoulement*, if a risk of irreparable harm is found.

"gross human rights violations" and to "serious harm," even though such broad conceptions are not expressed in these domestic instruments. *India v. Badesha*, 2017 SCC 44 (CanLII), [2017] 2 SCR 127 at para. 38; *Lozano Navarro v. Canada (Citizenship and Immigration)*, 2011 FC 768 at para. 31. More specifically, the Court of Appeal of Ontario established that s. 7 of the Canadian Charter of Rights and Freedoms prohibited removal where there was a real risk that the individual would be submitted in the receiving State to a trial where torture-derived evidence would be used. *France v. Diab*, 2014 ONCA 374 (CanLII) at para. 234-238.

[183] *General Comment No 6*, *supra* note 24, at para. 27.

[184] *Ibid*; *Joint general comment No 3*, *supra* note 98, at para. 45-46.

[185] *General Comment No 6*, *supra* note 24, at para. 27.

[186] *CRC*, *supra* note 21, at art. 24.

[187] *I.A.M. v. Denmark*, CRC, 77th Sess, UN Doc CRC/C/77/D/3/2016 (2018) 1 at para. 11.3, 11.10.

[188] *D.D. v. Spain*, *supra* note 104, at para. 14.4-14.8.

[189] *Z.H. and A.H. v. Denmark*, CRC, 82nd Sess, UN Doc CRC/C/82/D/32/2017 (2019) 1 [*Z.H. and A.H. v. Denmark*].

[190] *Ibid*, at para. 8.7-8.8.

1.2.6 Committee on the Elimination of All Forms of Discrimination against Women

The CEDAW Committee first alluded to the existence of a duty not to *refouler* in the Convention on the Elimination of all Forms of Discrimination against Women in General Recommendation No 32, by mentioning the HRC's position on the matter.[191] Oddly, though, it referred only to Articles 6 and 7 of the ICCPR as encompassing a *non-refoulement* obligation.[192] Then, in order to justify the fact that a similar obligation existed under the CEDAW, the CEDAW Committee stated that civil and political rights, including the right to life and the prohibition of ill-treatment, were implicitly covered by the CEDAW.[193]

Later in the General Recommendation the CEDAW Committee adopted a seemingly broader formulation, describing the obligation of *non-refoulement* in terms of a risk of irreparable harm.[194] Accordingly, it affirmed that States must not return a person "to a jurisdiction in which he or she may face serious violations of human rights, *notably* arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment."[195] Specifically with regard to the CEDAW, the CEDAW Committee indicated that removal is prohibited where there is a risk that a woman would suffer "serious forms of discrimination" or gender-based violence.[196] Gender-based violence, in turn, is described as "a form of discrimination against women and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."[197]

As can be seen, despite its reference to the notion of irreparable harm as guiding the application of *non-refoulement*, similarly to the position of the HRC and the CRC Committee, the CEDAW Committee seems to imply that some kind of ill-treatment is necessary for triggering the prohibition of removal. The express mention to civil and political rights as a justification for deriving *non-refoulement* obligations from the CEDAW also indicates a restrictive interpretation of the principle's material scope. This is particularly strange, since the CEDAW Committee is the only human rights body to expressly frame *non-refoulement* as a positive obligation[198] and such obligations exist in relation to all rights, including socioeconomic ones.

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[191] *General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW, UN Doc CEDAW/C/GC/32 (2014) 1 at para. 19.
[192] *Ibid*.
[193] *Ibid*, at para. 21.
[194] *Ibid*.
[195] *Ibid* (emphasis added).
[196] *Ibid*, at para. 23.
[197] *S.O. v. Canada*, CEDAW, 59th Sess, UN Doc CEDAW/C/59/D/49/2013 (2014) 1 at para. 9.5 [*S.O. v. Canada*].
[198] *Y.W. v. Denmark*, *supra* note 94, at para. 8.7.

The CEDAW Committee's decisions have not indicated a more open position as to the material scope of *non-refoulement* obligations either, especially given that all complaints analysed to date involved some kind of physical or psychological violence against women that could be interpreted as ill-treatment. Most of them have been rejected as unsubstantiated[199] and only in one case was the removing State held responsible for having exposed the authors to a risk of harm in the receiving country.[200]

1.3 Preliminary conclusions

Obligations of *non-refoulement* are today recognised as implicit in the provisions of several human rights treaties. However, human rights bodies have not provided a clear explanation as to the legal grounds of these obligations, often alluding to vague notions such as the need to guarantee the effectiveness of the rights protected under their respective instruments or to the duty to respect and ensure human rights. Through an analysis of how these bodies effectively apply the principle of *non-refoulement*, it is possible to conclude that this rule is based on a positive obligation, namely the duty to prevent foreseeable risks of human rights violations. This classification is not entirely uncontroversial; since human rights bodies have failed to provide a clear basis for the principle of *non-refoulement*, some specific pronouncements run contrary to the idea of positive obligations. The most notable example is the ECtHR's statement in *Paposhvili v. Belgium* that this principle entails a negative duty not to remove a person. Despite these inconsistencies, the approach of positive obligations seems to be the one that best explains the rationale adopted by human rights bodies regarding the principle of *non-refoulement*.

In general, human rights bodies seem to determine the situations in which an obligation to prevent return may arise not in connection to specific rights, but by reference to the severity of the potential harm. The ECtHR is the best example of how such a reasoning may operate, since the Court has found a duty not to remove in relation to a plethora of rights, such as the rights to liberty and security, fair trial, and family and private life. The HRC and the CRC Committee have also worded *non-refoulement* obligations in broad terms, indicating that they may be triggered in relation to different human rights, even though the case-law in this sense is still underdeveloped, particularly in the HRC. Although some variations are found in the

[199] *Y.W. v. Denmark*, *supra* note 94, at para. 8.9; *Y.C. v. Denmark*, CEDAW, 59th Sess, UN Doc CEDAW/C/59/D/59/2013 (2014) 1 at para. 6.6; *S.O. v. Canada*, *supra* note 197, at para. 9.8; *S.J.A. v. Denmark*, CEDAW, 68th Sess, UN Doc CEDAW/C/68/D/79/2014 (2017) 1 at para. 7.10; *A.S. v. Denmark*, CEDAW, 69th Sess, UN Doc CEDAW/C/69/D/80/2015 (2018) 1 at para. 8.9.

[200] *R.S.A.A. et al v. Denmark*, CEDAW, 73rd Sess, UN Doc CEDAW/C/73/D/86/2015 (2019) 1 at para. 8.9.

IACtHR's formulation of the principle of *non-refoulement*, this Court also appears to generally acknowledge a broad material scope to this rule. The CEDAW Committee seems to be the only body going expressly against this tendency, seeking to rely on civil and political rights and, more precisely, on the prohibition against ill-treatment as a justification for the *non-refoulement* principle. Accordingly, it seems appropriate to conclude that, although the breach of some human rights is more susceptible, on a practical level, to give rise to severe harm, the obligation of *non-refoulement* may be engaged in relation to any right.[201]

The question of defining the level of severity required to trigger *non-refoulement* obligations is not yet clear. So far, the ECtHR, the HRC, and the CRC Committee are the only international human rights bodies that have developed their views on the matter. The ECtHR uses the concept of "flagrant violations" when rights other than the prohibition of ill-treatment are involved, whereas the HRC and the CRC Committee refer to a risk of "irreparable harm" similar to that arising from violations of the right to life and the prohibition of ill-treatment. As of yet, the Committees have not clarified what exactly constitutes this irreparable harm. Still, in many cases, these notions seem to coincide. After all, if the very essence of a right is denied, the situation will likely lead to irreparable harm to the victim. For instance, a flagrant violation of the right to fair trial, in which a person is detained without being brought before an impartial judge, denied access to a lawyer, and tried *in absentia*,[202] leading to an unlawful prison sentence, brings harm both in relation to the unrecoverable period spent in detention and to the psychological stress suffered. Due to the intensity of this harm and its lasting effects, the prejudice may be deemed irreparable.

One could inquire, however, if irreparable harm such as that arising from the prohibition of ill-treatment may flow from a breach of rights that is not considered "flagrant". One can think of a situation in which a child is sent by the State to live with another family, for arbitrary reasons, and is only allowed to have contact with their parents once a week. It could be argued that the right to family life was not flagrantly violated, as the child still meets their parents periodically, but that this situation results in irreparable harm to the child's psychological

[201] A conclusion to this effect was reached in the Expert Meeting on Protecting the human rights of migrants in the context of return organised by the Office of the United Nations Commissioner for Human Rights in March 2018: "Participants agreed that the principle of *non-refoulement* applies to a range of human rights violations beyond persecution and torture, and noted that the full scope of the principle of *non-refoulement* has not yet been fully explored by courts and/or human rights treaty bodies. The scope of the principle should, therefore, not be understood restrictively and State practice should honour the progressive interpretation of the principle so as to avoid any possible violations." OHCHR, Expert Meeting on Protecting the human rights of migrants in the context of return, Informal Summary, 6 March 2018 at 6.

[202] The ECtHR analysed similar circumstances in *Othman* and considered they constituted a flagrant violation of the right to fair trial. See *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 259-287.

development. Nevertheless, the distinction between the two standards remains nebulous, since neither the HRC nor the CRC Committee have developed what they mean by irreparable harm.

A discussion as to the level of harm required to trigger *non-refoulement* under the ICCPR arose before the New Zealand Court of Appeal ("NZCA") in its June 2019 judgment of *Kyung Yup Kim v. Minister of Justice of New Zealand and Attorney-General of New Zealand*.[203] The case concerned the extradition of a Korean national to the People's Republic of China and allegations that the removal would place him at risk of being subject to an unfair trial, contrary to Article 14 of the ICCPR. The Minister of Justice proposed that the NZCA should apply the "flagrant breach" standard to assess the legality of the removal, referencing to the case-law of the ECtHR.[204] Nevertheless, the NZCA rejected this threshold, considering that it would constitute an excessively high test.[205] Instead, it held that "the appropriate threshold is whether there is a real risk of a departure from the standard such as to deprive the defendant of a key benefit of the right in question."[206] Curiously, the NZCA did not mention the HRC's "irreparable harm" standard. Whether the NZCA's decision can be understood as an interpretation of "irreparable harm" or as a new standard entirely is not clear.

[203] *Kyung Yup Kim*, *supra* note 171.
[204] *Ibid*, at para. 168.
[205] *Ibid*, at para. 179.
[206] *Ibid*.

2 SOCIOECONOMIC CONSIDERATIONS IN THE APPLICATION OF THE PRINCIPLE OF *NON-REFOULEMENT*: INDIRECT PROTECTION THROUGH CIVIL AND POLITICAL RIGHTS

The principle of *non-refoulement* as an implicit rule in human rights treaties was developed as a means to ensure the effective protection of civil and political rights, especially of the prohibition of torture and cruel, inhuman, and degrading treatment. This is not surprising, given that this category of rights is the focus of the European and American[207] Conventions on Human Rights as well as of the ICCPR, whose monitoring bodies have been seized more often to decide on *non-refoulement* claims. Although the African Charter, the CRC, and the CEDAW contain a number of provisions directly concerning economic, social, and cultural rights, their respective bodies have been called on a limited number of occasions to pronounce on removal cases.

Despite this focus on civil and political rights, some of these bodies have had the opportunity to consider cases in which the risk of harm arose in connection to the receiving State's socioeconomic situation. In these cases, guarantees such as the right to health and to an adequate standard of living received indirect protection, as the level of harm resulting from non-compliance with these guarantees was deemed to violate the prohibition of ill-treatment. This is not uncommon in the more general framework of human rights law, as international bodies have long recognised the indivisibility, interdependence, and interrelatedness between these two categories of rights.[208] Of course, this protection is not interchangeable. Not every breach of economic, social, and cultural rights can be understood as a violation of civil and political rights,[209] especially considering that full realisation of the former is subject to progressive development.[210] Following this rationale, the ECtHR has indicated that it tends to accord less weight to assessments on the general socioeconomic situation of receiving countries, since they

[207] It was only in 2017 that the IACtHR adopted a firmer interpretation in the sense that economic, social, cultural, and environmental rights provided under the OAS Charter are protected under Article 26 of the American Convention and that, as a result, the IACtHR has jurisdiction to adjudicate alleged violations of these rights. See notably: *Lagos del Campo (Peru)* (2017) Inter-Am Ct HR (Ser C) No 340 at para. 141-149, 153 [*Lagos del Campo v. Peru*]; *Cuscul Piraval (Guatemala)* (2018), Inter-Am Ct HR (Ser C) No 359 at para. 75-102 [*Cuscul Piraval v. Guatemala*].

[208] For instance, *Airey v. Ireland*, No 6289/72, ECtHR (9 October 1979) at para. 26 [*Airey v. Ireland*]; *Vera Vera (Ecuador)* (2011), Inter-Am Ct HR (Ser C) No 226 at para. 43 [*Vera Vera v. Ecuador*]; *Womah Mukong v. Cameroon*, HRC, 51st Sess, UN Doc CCPR/C/51/D/458/1991 (1994) 1 at para. 9.3 [*Womah Mukong v. Cameroon*]. For a deeper discussion on the meaning of each of these terms and their impact in this research, see Section 3.1.

[209] In this sense, the *travaux préparatoires* of Article 3 of the European Convention on Human Rights observe that "the word 'treatment' [in the prohibition of cruel and degrading treatment] should not apply to degrading situations which might be due to general economic and social factors." *Preparatory Work on Article 3 of the European Convention*, *supra* note 71, at 18.

[210] *ICESCR*, *supra* note 15, at art. 2(1).

"do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3."[211]

For the purposes of analysing whether a rule of *non-refoulement* can be independently deduced from the ICESCR, it is thus relevant to examine to what extent human rights bodies have already granted indirect protection to economic, social, and cultural rights in removal cases. This chapter will analyse if and how the decisions of human rights bodies in these cases offer support to the proposition of applying *non-refoulement* directly to economic, social, and cultural rights. Since the African human rights bodies and the CEDAW Committee have not yet commented on the consideration of socioeconomic conditions in the application of the principle of *non-refoulement*, decisions of these bodies will not be examined in this chapter.

2.1 European Human Rights Bodies

The ECtHR has developed two approaches for considering socioeconomic conditions in removal scenarios: (1) the so-called "health cases," in which the Court considers that the risk of inhuman treatment derives from the applicant's personal health conditions, and not directly from the receiving State's conduct; and (2) the extreme poverty approach, applied when the receiving State's omission is identified as the direct cause of the precarious socioeconomic conditions to which the applicant risks being subjected. This section will discuss each of them in turn.

2.1.1 Health cases approach

The ECtHR's approach to health cases was first developed in *D. v. the United Kingdom*,[212] which concerned the return to Saint Kitts and Nevis of an HIV-positive man. Medical reports had indicated that, were removal to take place, the applicant's life expectancy would be significantly shortened, since he would not have access to the same kind of treatment for the disease in the receiving State.[213] In assessing whether removal would amount to ill-treatment, the ECtHR took into account the terminal stage of the disease,[214] the lack of health treatment in Saint Kitts and Nevis according to the same standards as the one provided in the United Kingdom,[215] and the absence of family members that could support the applicant in the

[211] *N.A. v. the United Kingdom*, No 25904/07, ECtHR (17 July 2008) at para. 122.
[212] *D. v. the United Kingdom*, *supra* note 26.
[213] *Ibid*, at para. 14-16, 20.
[214] *Ibid*, at para. 13-15, 51.
[215] *Ibid*, at para. 17, 52.

receiving country.[216] In the end, the ECtHR concluded that, when taken together, these considerations gave rise to an exceptional scenario in which removal would breach Article 3 of the European Convention.[217]

One of the most interesting aspects of this case is that the ECtHR did not link the risk of ill-treatment resulting from the probable deterioration of the applicant's health to the conduct of the receiving State. The Court did not even allude to the possibility of an omission on the part of the receiving State in providing an adequate level of health care to persons under its jurisdiction. Instead, the ECtHR considered that the risk of ill-treatment arose directly from the applicant's personal health conditions: "[a]lthough it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3 (art. 3), his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment."[218] The justification the ECtHR gave for such a reasoning was that limiting the application of Article 3 to circumstances in which the responsibility of the receiving State was directly or indirectly engaged would undermine the absolute character of the provision.[219] In this sense, the ECtHR seemed to accept that, no matter the source of the harm—States' actions or omissions, private parties, or naturally occurring circumstances—if States expose an individual to a real risk that this harm may take place, they will be in violation of Article 3.

Despite this initially broad approach, the ECtHR was careful to stress the exceptionality of the situation and the compelling humanitarian considerations that had influenced its decision,[220] seemingly attempting to limit the scope of its own judgment. This intention became even clearer in the judgments that followed *D. v. the United Kingdom*. Several health claims brought under Article 3 were rejected because the ECtHR considered either that the medical care sought was in principle available in the receiving country—even though the Court did not scrutinize whether the applicants themselves would have access to this care—or that the stage

[216] *Ibid*, at para. 18, 52.
[217] *Ibid*, at para. 53-54.
[218] *Ibid*, at para. 53.
[219] *Ibid*, at para. 49.
[220] *Ibid*, at para. 54.

of the disease was not yet critical.[221] Accordingly, the ECtHR held that the applicants' circumstances were not so exceptional as to prevent removal.[222]

The pinnacle of this restrictive interpretation came in *N. v. the United Kingdom*,[223] concerning the removal of a woman with AIDS to Uganda. Seeking to mitigate the effects of its dictum in *D.*, the ECtHR stressed that the prohibition of *refoulement* under Article 3 of the European Convention arose mostly in cases where the ill-treatment had been caused by intentional actions or omissions of State authorities[224] and that, despite the interdependence between rights, the European Convention aimed at protecting civil and political rights, and not economic, social, and cultural ones.[225] The ECtHR then stated that Article 3 did not impose an obligation on European States to provide health care to all aliens without a right to remain in their jurisdiction; otherwise, this provision would "place too great a burden on the Contracting States."[226] The only exception was when there existed compelling humanitarian grounds against the removal, such as those recognised in *D.*—namely, absence of family support and medical treatment in the receiving State and the gravity of the applicant's health condition.[227] The ECtHR alluded to these considerations to justify requiring a higher degree of severity of the harm risked in comparison to *non-refoulement* claims where the harm resulted from the receiving State's actions or omissions. Although only half of HIV-positive persons had access to antiretroviral medication in the receiving country, and despite the fact that the applicant had maintained she did not have resources to purchase this medication,[228] the ECtHR majority concluded that the stage of the disease was not critical.[229] Therefore, removal to Uganda would not breach Article 3.[230]

The reasoning of the ECtHR in health cases, culminating in *N.*, raises several questions as to its compatibility with the general logic of *non-refoulement* enounced by the Court in other removal cases. Firstly, as seen above, the ECtHR's emphasis on the need for "exceptional"

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[221] *S.C.C. v. Sweden*, No 46553/99, ECtHR (15 February 2000) at 8; *Bensaid v. the United Kingdom*, No 44599/98, ECtHR (6 February 2001) at para. 39-40; *Arcila Henao v. the Netherlands*, No 13669/03, ECtHR (24 June 2003) at 8; *Ndangoya v. Sweden*, No 17868/03, ECtHR (22 June 2004) at 12; *Amegnigan v. the Netherlands*, No 25629/04, ECtHR (25 November 2004) at 9.

[222] A rare finding of a violation occurred in *B.B. v. France*, in which the ECommHR concluded that the applicant would not have access to antiretroviral treatment in the Democratic Republic of the Congo and that the disease was at an advanced stage, similarly to the situation in *D. v. the United Kingdom*. See: *B.B. c. France*, No 30930/96, ECommHR (9 March 1998) at para. 55-56.

[223] *N. v. the United Kingdom*, *supra* note 127.

[224] *Ibid*, at para. 31.

[225] *Ibid*, at para. 44.

[226] *Ibid*.

[227] *Ibid*, at para. 42.

[228] *Ibid*, at para. 48.

[229] *Ibid*, at para. 50.

[230] *Ibid*, at para. 50-51.

circumstances implies that the level of harm required to prohibit removal in health cases is more severe than in cases where the harm may be linked to an action or omission of the receiving State. This assertion was laid out in clearer terms in *Babar Ahmad and others v. the United Kingdom*:

> However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in Wellington that the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States (see, as a recent authority, Al-Skeini and Others v. the United Kingdom [GC], No 55721/07, § 141, 7 July 2011). This being so, *treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case*. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context (compare the denial of prompt and appropriate medical treatment for HIV/AIDS in Aleksanyan v. Russia, No 46468/06, §§ 145–158, 22 December 2008 with N. v. the United Kingdom [GC], No 26565/05, 27 May 2008).[231]

However, it is not clear why a more severe level of harm would be required when the risk results from diseases and other "naturally occurring circumstances." After all, the prohibition of removal is not dependent upon responsibility of the receiving State for human rights violations,[232] as the ECtHR has reiterated since *Soering*.[233] The only question is whether the removing State is exposing a person to a real risk of harm, whatever the source of this harm is.[234] This logic is often applied in domestic cases, for instance, when the State authorities fail

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[231] *Babar Ahmad and others v. the United Kingdom*, No 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ECtHR (10 April 2012) at para. 177 (emphasis added). See also: Natasa Mavromcola & Francesco Messineo, "Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK" (2013) 76 MLR 589 at 600-603 [*Mavromcola & Messineo*].
Cathryn Costello suggested that the ECtHR might have gone back in its position concerning the different thresholds of harm for domestic and removal cases in *Travelsi v. Belgium*, since the Court adopted the standards established in a domestic ill-treatment case (*Vintner v. the United Kingdom*) in order to assess the severity of the potential harm upon extradition. *Costello*, *supra* note 138, at 188-189. Indeed, it seems that the same level of harm is adopted by the ECtHR in domestic and removal cases when said harm is seen as resulting from the action or omission of State authorities. However, when health cases are at stake, not only has the ECtHR not contradicted its dictum in *Babar Ahmad* but it continues to insist on the need for "exceptional circumstances" for triggering the application of Article 3. More recently, the ECtHR has noted that "the threshold for the application of Article 3 of the Convention is high in cases concerning the removal of aliens suffering from serious illness," thus indicating that the difference in the thresholds of harm remains. *Savran v. Denmark*, No 57467/15, ECtHR (1 October 2019) at para. 65 [*Savran v. Denmark*].
[232] *Michelle Foster*, *supra* note 108, at 299-300; Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Brill Nijhoff, 2016) at 20, 22; *Delas*, *supra* note 36, at 137, 151, 238-239.
[233] *Soering v. the United Kingdom*, *supra* note 42, at para. 91.
[234] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2016) at 187; Céline Bauloz, "Foreigners: Wanted Dead or Alive? Medical Cases before European Courts and the Need for an Integrated Approach to Non-Refoulement" (2016) 18:4 EJML 409 at 421 [*Bauloz*]. A similar

to take the necessary steps to prevent persons under their control from committing self-harm[235] or to prevent the deterioration of the individual's health.[236] Thus, the adoption of two different thresholds of harm in *non-refoulement* cases does not seem coherent from a legal standpoint.

Secondly, the ECtHR's suggestion that allowing aliens to remain in a State in order to benefit from health care would impose an excessive burden on the host State appears to be equally misplaced. Such a reasoning contradicts the ECtHR's previous decisions in *Chahal*[237] and *Saadi*,[238] which rejected the contention that Article 3 might be subject to a balancing of interests.[239] Nor could this balancing be allowed in light of operational difficulties, since, as seen in Section 1.1.3 above, merely not removing a person does not place an impossible or disproportionate burden of States in terms of resource allocation. Whereas it is true that not every sick alien will have a right to remain in a country for the duration of their treatment, this is due to the fact that not every removal will pose a real risk of harm so significant as to amount to cruel or degrading treatment, rather than to the potential burden on States. Otherwise, this balancing of interests would have to be applied to every removal case under Article 3, since admitting a large number of persons fleeing violence could also be considered a great "burden" on States. This was particularly highlighted by judges Tulkens, Bonello, and Spielman in their dissenting opinion in *N.*, who considered the majority's floodgates concern misconceived.[240]

Thirdly, it seems contradictory that the ECtHR, on one hand, adopted a higher threshold to the harm in health cases based on the view that this harm did not stem from the receiving State's actions or omissions but, on the other, did not inquire whether this supposition was actually true. In none of the health cases did the ECtHR consider that the lack of adequate medical treatment or the difficulties in accessing it might be linked to State conduct, such as practices of discrimination or misallocation of resources due to corruption. Had the Court adopted a uniform threshold of harm for all cases involving *non-refoulement*, this assessment

observation was made by Fanny de Weck: "In other words, the act that is prohibited under the principle of non-refoulement is not the ill treatment abroad, but the removal or decision to remove despite the real risk of ill treatment." *de Weck*, *supra* note 84, at 138.

[235] *Fernandes de Oliveira v. Portugal*, *supra* note 82, at para. 110; *Renolde v. France*, No 5608/05, ECtHR (16 October 2008) at para. 80, 104-110. It is worth noting that the ECtHR classified the risk of self-harm under the health cases approach: *Balogun v. the United Kingdom*, No 60286/09, ECtHR (10 April 2012) at para. 31.

[236] *Gheorghe Predescu v. Romania*, No 19696/10, ECtHR (25 February 2014) at para. 47-57; *Oprea v. Moldova*, No 38055/06, ECtHR (21 December 2010) at para. 38-42.

[237] *Chahal v. the United Kingdom*, *supra* note 60, at para. 80.

[238] *Saadi v. Italy*, *supra* note 60, at para. 138.

[239] *Bauloz*, *supra* note 234, at 421-422.

[240] As put by these judges, "[a] glance at the Court's Rule 39 statistics concerning the United Kingdom shows that, when one compares the total number of requests received (and those refused and accepted) as against the number of HIV cases, the so-called "floodgate" argument is totally misconceived." *N. v. the United Kingdom*, *supra* note 127, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielman, at para. 8.

might not be relevant. However, since the ECtHR did establish a different threshold for cases of "naturally-occurring diseases," a deeper analysis in this regard could have altered the outcome of some cases. The clearest example is perhaps that of *Yoh-Ekale Mwanje v. Belgium*, in which the applicant submitted that the antiretroviral treatment available in Cameroon was granted randomly to less than 2% of the HIV-positive individuals who needed this treatment.[241] Without confronting this argument, the ECtHR stated that Article 3 would not be violated upon removal because the applicant's health was not in critical condition at the time.[242] If a lower threshold of harm had been adopted, the ECtHR could have found that the robust evidence indicating that the applicant's health would severely deteriorate in Cameroon was enough to trigger the application of Article 3.[243]

The ECtHR's refusal to investigate more in depth the source of the harm in health cases perhaps may be due to the position expressed in *N.* that the European Convention is meant to protect civil and political rights rather than economic, social, and cultural rights. This view was heavily criticised by the minority as incomplete, since it ignored the interdependence between these rights, as highlighted in other cases decided by the Court.[244] The ECtHR has had the opportunity to deal with State allegations of insufficiency of resources for providing better socioeconomic conditions to persons under its direct control, such as individuals placed in detention, and even rejected some of them.[245] Nothing prevented the ECtHR from also having regard to information on the receiving State's compliance with economic, social, and cultural rights when assessing the risk of harm.

In spite of these criticisms, the approach established in *N.* continued to be followed in health cases.[246] Although the ECtHR recognised the stringency of this approach in the 2016 judgment of *Paposhvili v. Belgium* and decided to extend the protection of Article 3 to aliens who are not at death's door at the time of removal,[247] the standards applied did not change substantially from those set in *N.*[248] The ECtHR retained the idea that only exceptional

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[241] *Yoh-Ekale Mwanje c. Belgique*, No 10486/10, ECtHR (20 December 2011) at para. 81 [*Yoh-Ekale Mwanje c. Belgique*].
[242] *Ibid*, at para. 83.
[243] Several judges hinted at this possibility in a joint partially concurring opinion to the judgment. *Ibid*, Opinion partiellement concordante commune aux juges Tulkens, Jočienė, Popović, Karakaş, Raimondi and Pinto de Albuquerque, at para. 6.
[244] *N. v. the United Kingdom*, *supra* note 127, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielman, at para. 6.
[245] *Kalashnikov v. Russia*, No 47095/99, ECtHR (15 July 2002) at para. 94-102 [*Kalashnikov v. Russia*].
[246] *Yoh-Ekale Mwanje c. Belgique*, *supra* note 241; *S.H.H. v. the United Kingdom*, No 60367/10, ECtHR (29 January 2013).
[247] *Paposhvili v. Belgium*, *supra* note 90, at para. 205-206.
[248] See the analysis by *Stoyanova*, *supra* note 93.

circumstances could trigger a *non-refoulement* obligation in health cases and that a high threshold of harm should be applied.[249] Moreover, the judgment fell short of recognising a potential link between lack of accessible medical care in the receiving State and the latter's conduct, particularly by omission.

Still, one important merit in *Paposhvili* is the fact that the ECtHR recognised that the risk of harm is not eluded by the mere general availability of care in the receiving State.[250] The removing State must ascertain that the care available is appropriate and sufficient for treating the applicant's illness and that the applicant will have effective access to it.[251] This is consistent with the obligations required of States in complying with the right to health under the ICESCR.[252] However, the ECtHR did not make this connection between the different kinds of State obligations and the categories of rights involved in health cases or to socioeconomic conditions in general. Instead, the Court continued to refer to the potential harm as resulting exclusively form the applicant's personal conditions.

From the above, it can be seen that the ECtHR's approach to health cases does not take into consideration States' obligations to provide a certain level of medical care in order to alleviate the suffering of individuals under their jurisdiction or the corresponding right of the individual to receive such care, even though these considerations also relate to positive obligations under Article 3 of the Convention. Rather, the ECtHR takes the applicants' health conditions in removal cases as an isolated factor, as though States have no obligation to provide any sort of treatment. As expressed in *D. v. the United Kingdom*, the Court's logic for applying Article 3 in these cases was founded on humanitarian considerations[253] and not quite on positive obligations.[254]

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[249] *Paposhvili v. Belgium, supra* note 90, at para. 183.
[250] *Ibid*, at para. 189.
[251] *Ibid*, at para. 189-190. These observations were reiterated in *Savran v. Denmark, supra* note 231, at para. 46-47. For domestic case-law on the matter since *Paposhvili*, see: *Recours formé par Madame ..., contre des décisions du ministre de l'Immigration et de l'Asile en matière de protection internationale (art. 35 (3), L.18.12.2015)*, N° 43536, Tribunal administratif du Grand-Duché de Luxembourg (6 November 2019) at 10.
[252] *General Comment No 14*, CESCR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) 1 at para. 12 [*General Comment No 14*].
[253] *D. v. the United Kingdom*, *supra* note 26, at para. 54.
[254] As observed by Yutaka Arai-Takahashi, "the case of *D* vs *United Kingdom* should be treated as an exceptional case of a humanitarian nature. There the risk of irreparable damage to the applicant's health and life was well-established on medical grounds. This argument accords with the cautious statement made by judge Pettiti that the decisive element in the case of *D vs United Kingdom* was not the lower standard of hospital treatment in St. Kitts but rather the applicant's personal circumstances, namely, the final stage of an incurable disease." Yutaka Arai-Takahashi, "'Uneven, but in the Direction of Enhanced Effectiveness' – A Critical Analysis of 'Anticipatory Ill-Treatment' under Article 3 ECHR" (2002) 20 Neth Q HR 5 at 12.
The opposite view is held by Vladislava Stoyanova, according to whom "[t]he source of the risk was the *inability of the state* to provide basic facilities." Vladislava Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights" (2011) 3:2 GOJIL 777 at 799.

2.1.2 Extreme poverty approach

The idea that the failure to provide minimum living conditions for vulnerable persons under the State's jurisdiction violates the prohibition of ill-treatment was first enounced in the judgment of *M.S.S. v. Greece and Belgium*, concerning an Afghan man who had requested asylum in Belgium.[255] However, since he had entered Europe through Greece, the Belgian authorities considered that Greece should be responsible for analysing the asylum application under the Dublin Regulation[256] and returned him to that country. In Greece, the applicant was detained for some time in an overcrowded reception centre and, after his release, was subjected to precarious living conditions—living on the streets without adequate access to food, hygiene, and shelter.[257]

In its decision, the ECtHR observed that, in general, Article 3 of the European Convention could not be interpreted as imposing an obligation to provide all persons within a State's jurisdiction with a home or to give financial assistance to enable refugees to maintain a certain standard of living.[258] Nonetheless, the ECtHR found that Greece had specific obligations in providing for asylum-seekers under Article 3, due to two main factors: (1) the particular vulnerability of asylum-seekers,[259] since they are completely dependent on the support of the host State;[260] and (2) the positive obligations established under European Union law to provide minimum standards for the reception of asylum-seekers.[261] Since Greece had failed to act in order to ensure these minimum standards in relation to the applicant, his situation of extreme poverty in Greece was held to breach Article 3.[262] Furthermore, since the unsatisfactory general situation of asylum-seekers in Greece was or should have been known by the Belgian authorities

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[255] *M.S.S. v. Belgium and Greece*, *supra* note 9.
[256] EC, *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*, [2003] OJ, L 50/1.
[257] *M.S.S. v. Belgium and Greece*, *supra* note 9, at para. 37, 168-172, 238.
[258] *Ibid*, at para. 249.
[259] It is beyond the scope of this thesis to analyse the concept of vulnerability and its impact on international human rights law. Accordingly, the term will only be used to reference the considerations made by international human rights bodies in decisions in removal cases. For discussions on the concept of vulnerability in human rights law, see: Bryan S. Turner, *Vulnerability and Human Rights* (University Park: Pennsylvania State University Press, 2006); Roberto Adorno, "Is Vulnerability the Foundation of Human Rights?" in Aniceto Masferrer & Emilio García-Sánchez (eds.), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Basel: Springer International Publishing AG, 2016) 257; Sylvie Da Lomba, "Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights" (2014) 21:4 EJHL 339; Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) 20:1 YJLF 1.
[260] *M.S.S. v. Belgium and Greece*, *supra* note 9, at para. 251, 259.
[261] *Ibid*, at para. 250. Despite the fact that the ECtHR itself has no jurisdiction to assess the obligations imposed by European communitarian norms.
[262] *Ibid*, at para. 263.

at the time of the removal,[263] the applicant's return to Greece was also incompatible with this provision.[264] With this approach, the ECtHR recognised for the first time that unfavourable socioeconomic conditions may be linked to a State's omission and constitute inhuman treatment.[265]

This reasoning was replicated in *Sufi and Elmi v. the United Kingdom*, concerning the return of a group of asylum-seekers to Somalia.[266] Despite recognising the seriousness of the armed conflict taking place in Somalia, the ECtHR stressed that this situation did not in itself prohibit the removal, given that not every situation of generalised violence was capable of entailing a real risk in the sense of Article 3.[267] The ECtHR deemed it necessary to take into consideration the specific conditions of the zones to where the applicants would be sent. In doing so, the Court concluded that the humanitarian conditions in the camps of internally displaced persons were so pitiful in relation to access to water, food, medical care, and shelter that, when added to the country's generalised violence, return to Somalia would violate the prohibition of inhuman treatment.[268] The ECtHR also took the opportunity to emphasise the fact that the humanitarian crisis in Somalia had been directly caused by human action, and not by natural phenomena.[269] In the ECtHR's view, "[i]f the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought," the health cases approach would have been the appropriate one.[270]

Curiously, despite this attempt at distinguishing the applicable approach depending on the source of the harm, the ECtHR cited *N.*'s "exceptional circumstances" standard in a case where the applicant had complained that Italy had not provided her with minimum living conditions in conformity with its positive obligations towards asylum-seekers.[271] According to

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[263] *Ibid*, at para. 352, 358.
[264] *Ibid*, at para. 367-368.
[265] Veronika L. B. Flegar, "Can extreme poverty protect against refoulement? "Economic refugees" in the light of recent case law of the European Court of Human Rights" (2015) Conference Paper: Human Rights and Migration at 10.
[266] *Sufi and Elmi v. the United Kingdom*, No 8319/07 and 11449/07, ECHR (28 June 2011).
[267] *Ibid*, at para. 217-218.
[268] *Ibid*, at para. 255, 282, 292-293. The same reasoning was adopted in *Tarakhel v. Switzerland*, concerning the poor conditions of migrant reception centres in Italy. *Tarakhel v. Switzerland*, No 29217/12, ECHR (4 November 2014) [*Tarakhel v. Switzerland*].
[269] *Ibid*, at para. 282.
[270] *Ibid*. On the other hand, in another case in which the applicant had complained against his removal to Italy due to the conditions in reception centres, on the basis of the *M.S.S.* standard, the ECtHR applied the health cases approach, considering that the risk of deterioration of the applicant's mental health was the prevailing potential harm in his case. The claim under Article 3 was rejected because circumstances were not deemed exceptional enough. *A.S. v. Switzerland*, No 39350/13, ECtHR (30 June 2015) at para. 31-38. For an analysis of the ECtHR's position on how to differentiate between these approaches, see *de Weck*, *supra* note 84, at 183-188.
[271] *Mohammed Hussein and others v. the Netherlands and Italy*, No 27725/10, ECtHR (2 April 2013) at para. 71.

the Court, "[i]n the absence of exceptionally compelling humanitarian grounds against removal, the fact that the applicant's material and social living conditions would be significantly reduced if he or she were to be removed" from the Netherlands was not sufficient to amount to a breach of Article 3.[272] However, it seems that the ECtHR did not pursue this standard further in subsequent cases in which claims of poor material conditions in the receiving State were linked to its omission.[273] In the recent judgment of *N.H. and others v. France*, the ECtHR highlighted the fact that the socioeconomic destitution faced by a group of asylum-seekers in Paris had not occurred in the context of an exceptional situation or crisis and held the State responsible for not providing minimum material conditions to prevent the applicants from being subjected to inhuman and degrading treatment.[274]

The extreme poverty approach is not completely without criticism. A comparison between the ECtHR's assessment in *M.S.S.* and *Sufi and Elmi* shows that the Court imposed stricter standards on the positive action required of European receiving States bound by European Union Regulations than on other States. The appropriateness of this distinction is disputable. Since the prohibition of Article 3 is absolute, the kind of harm deemed to breach this provision does not vary among States.[275] Moreover, as mentioned previously, responsibility for breaching the principle of *non-refoulement* lies in the removing State's act of exposing a person to a foreseeable risk of harm. Although the removal must be assessed in relation to the risk of harm in the receiving State, it takes into account the extent of the obligations of the removing State only.

Nonetheless, this approach is relevant from the standpoint of economic, social, and cultural rights as it recognises that, in given circumstances, States have positive obligations to guarantee a certain standard of living, which includes the provision of socioeconomic conditions. Exposing individuals to a risk that these minimum conditions are not satisfied may thus trigger the protection of Article 3 if the level of severity for inhuman and degrading treatment is met. Whereas the ECtHR has recognised this positive duty only in relation to vulnerable groups that are completely dependent on State support, treaties dealing directly with economic, social, and cultural rights provide obligations of the sort in a broader scope, to all

[272] *Ibid*.
[273] *Tarakhel v. Switzerland*, *supra* note 268. Although the application was found inadmissible as insufficiently substantiated, see also *A.M.E. v. the Netherlands*, No 51428/10, ECtHR (13 January 2015).
[274] *N.H. et autres c. France*, No 28820/13, 75547/13, and 13114/15, ECtHR (2 July 2020) at para. 182, 184-186 [*N.H. et autres c. France*].
[275] Fanny de Weck presented criticism in this sense when comparing the ECtHR's decisions in *M.S.S. v. Belgium and Greece* and *S.H.H. v. the United Kingdom*: *de Weck, supra* note 84, at 186. Warning against this potential double standard had been made decades before by Terje Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum" (1990) 2:3 IJRL 361 at 368-369.

individuals under a State's jurisdiction.[276] Furthermore, the ECtHR's case-law shows that socioeconomic conditions may be objectively assessed in the context of *non-refoulement* and that it is possible to identify a minimum standard that should be complied with, regardless of the receiving State's available resources.

2.2 Inter-American Human Rights Bodies

The Inter-American human rights bodies have had few opportunities so far to decide on the application of the principle of *non-refoulement* where the risk emanated from socioeconomic conditions in the receiving State. All of them were decided by the IACommHR and involved concerns as to the deterioration of the applicant's health in the event of removal.

The first application of this sort, *Andrea Mortlock v. the United States*, concerned risks to the health of an HIV-positive woman if she were deported from the United States to Jamaica.[277] The petitioners alleged that removal would entail a violation not only of the prohibition of ill-treatment but also of the applicant's right to health, protected under Article XI of the American Declaration on the Rights and Duties of Man.[278] The IACommHR took much of its reasoning from *D. v. the United Kingdom*, especially by referring to the existence of exceptional circumstances[279] and to "whether the humanitarian appeal of the case is so powerful that it could not reasonably be resisted by the authorities of a civilized State."[280] Although the threshold of harm adopted was lower than *D.*'s and similar to the ECtHR's later development in *Paposhvili*, the IACommHR also linked the risk of harm exclusively to the applicant's personal conditions and did not engage in considerations as to the receiving State's positive obligations concerning either the prohibition of ill-treatment or the right to health itself. Indeed, the IACommHR expressly avoided commenting on the right to health, despite its having been invoked by the petitioners, under the argument that the applicant had not been denied access to medical care in the United States.[281] This was an odd reading of the petitioners' argument, since the claim relating to the right to health had been presented not in view of the treatment in the United States but rather of the risk of lack of adequate health care in Jamaica. Since the IACommHR recognised an obligation not to expose the applicant to a risk of ill-treatment,

[276] The fact that some of the obligations regarding economic, social, and cultural rights are subject to progressive realisation to the maximum of available resources and the impact of this method of implementation on the principle of *non-refoulement* will be discussed in Chapter 3.
[277] *Andrea Mortlock v. the United States*, *supra* note 26.
[278] *Ibid*, at para. 23.
[279] *Ibid*, at para. 89.
[280] *Ibid*, at para. 91.
[281] *Ibid*, at para. 95.

nothing in principle prevented the Commission from finding a similar risk in connection to the right to health.

After this case, the IACommHR decided on four occasions on requests of provisional measures to stay the removal of sick aliens hailing from El Salvador,[282] Haiti,[283] Cuba,[284] and Venezuela.[285] In all of these decisions, the IACommHR mentioned the need to avoid risks to the applicants' life and physical integrity as grounds for granting the provisional measures.[286] It was only in the last case, decided in 2018, that the IACommHR made express reference to the right to health.[287] Nonetheless, the IACommHR's reasoning in in deciding on these measures was too brief to allow for a conclusion as to the approach adopted in considering the socioeconomic conditions in the receiving country.

Accordingly, the decisions of Inter-American human rights bodies so far in the context of *non-refoulement* seem to have taken inspiration from the ECtHR's health cases approach, focusing more on the risk of ill-treatment deriving from the individual's personal circumstances than on States' positive obligations to guarantee certain minimum living conditions.

2.3 Human Rights Committee

The first case in which the HRC addressed socioeconomic conditions in a removal context was *C. v. Australia*, concerning the return of a man who suffered from mental illnesses to Iran.[288] The HRC decided that the author would be unlikely to have access to adequate medical treatment for his illnesses there and that removing him would thus breach Article 7 of the ICCPR.[289] Unlike the ECtHR and the IACommHR, the HRC did not qualify the risk of ill-treatment as deriving from the author's personal health conditions but rather linked it to the absence of appropriate medical care in the receiving country. Even though the HRC did not refer to positive obligations, the rationale adopted supports the idea that States must ensure a

[282] *Edwin A. Márquez González v. the United States* (2011), Inter-Am Comm HR, PM 171-11.
[283] *Gary Resil et al v. the United States* (2011), Inter-Am Comm HR, PM 5/11. The Commission extended these provisional measures to other beneficiaries, most recently in 2016: *Gary Resil et al v. the United States* (2016), Inter-Am Comm HR, Resolution 6/2016.
[284] *Carl E. Vincent v. the United States* (2013) Inter-Am Comm HR, PM 347/14, Resolution 8/2014.
[285] *M.B.B.P. v. Panama* (2018) Inter-Am Comm HR, PM 490/18, Resolution 81/2018 [*M.B.B.P. v. Panama*].
[286] In domestic practice, the protection of physical integrity was also considered as the relevant right in a discussion before the Argentinian Supreme Court concerning the extradition to Uruguay of a man who suffered from a cardiovascular disease. See: *Koremblit, Hugo Alberto s/ extradición*, K. 43. XLIV, Fallo, Corte Suprema de Justicia de la Nación Argentina (27 May 2009) at para. 5; *Koremblit, Hugo Alberto s/ extradición*, C.S. K. 43. XLIV, Dictámen, Procuración General de la Nación (16 July 2008) at 6-7.
[287] *M.B.B.P. v. Panama*, *supra* note 285, at para. 22-25, 27.
[288] *M.C. v. Australia*, HRC, 76th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) 1 [*M.C. v. Australia*].
[289] *Ibid*, at para. 8.5.

minimum level of care to persons in order to avoid subjecting them to inhuman or degrading treatment.

One particularity in this case was the fact that the author's mental illnesses had resulted from the conditions of his detention in Australia, which were also found unlawful by the HRC.[290] Accordingly, it is not entirely clear if the preponderant factor in the Committee's decision against removal was the lack of adequate health care in the receiving State or the fact that the host State had been directly responsible for causing the illness.[291] Nonetheless, the HRC's later decision in *A.H.G. v. Canada* corroborates the view that, even when a person's poor health conditions did not derive from State conduct, removal to a State where there is no possibility of accessing minimal health care is incompatible with the ICCPR.[292]

It should be noted that, in the communications of *Fan Biao Lin v. Australia* and *Z. v. Australia*, both of which dealt with the removal of Chinese nationals, the HRC dismissed the claims on Article 7 on the ground that the authors' medical condition was not of such exceptional nature in itself to trigger the State-party's *non-refoulement* obligations.[293] This seems to depart from the HRC's previous reasoning, falling in line with the ECtHR's health cases approach. In the specific case of *Fan Biao Lin*, the HRC's position may be explained by the fact that the applicant did not mention he was under any specific medical treatment for his illness or that he would not find adequate care in China.[294] The complaint was rather that, because mental illness carried a stigma in the country, and because he was also a Falun Gong practitioner, he could be confined to a mental institution, a situation the Committee found unlikely to happen.[295] Since States' obligations to provide minimum socioeconomic conditions to persons with health problems were not under discussion, that left the HRC only with the question of whether the disease in itself was enough to give rise to ill-treatment. On the other hand, in *Z.*, where the applicant had a serious heart condition and alleged he would not be able

[290] *Ibid*, at para. 8.4.
[291] Olivier Delas considers that the determinant reason was indeed the disease and the lack of treatment in Iran. *Delas*, *supra* note 36, at 145-146. The Federal Court of Australia, in turn, understood that an obligation of *non-refoulement* had arisen in the case only because Australia had been responsible for causing the author's mental health issues. *AJI16 v Minister for Immigration and Border Protection* [2019] FCA 1769 (31 October 2019) at para. 30 [*AJI16*].
[292] *A.H.G. v. Canada*, HRC, 113th Sess, UN Doc CCPR/C/113/D/2091/2011 (2015) 1 at para. 10.4 [*A.H.G. v. Canada*].
[293] *Fan Biao Lin v. Australia*, *supra* note 172, at para. 9.4; *Z. v. Australia*, HRC, 111th session, UN Doc CCPR/C/111/D/2049/2011 (2014) 1 at para. 9.5 [*Z. v. Australia*].
[294] *Fan Biao Lin v. Australia*, *supra* note 172, at para. 3, 9.4.
[295] *Ibid*, at para. 9.4.

to afford health care in China,[296] it is not clear why the HRC did not address issues concerning the receiving State's ability to provide adequate and accessible medical treatment.

Despite these decisions, in subsequent similar complaints, the HRC did not refer to exceptional circumstances or personal health conditions. Instead, the Committee assessed whether the author needed specific medical care and whether this care was available and accessible in the receiving State.[297] Thus, this seems to be the HRC's prevalent approach for dealing with claims relating to health issues.

The HRC has also addressed communications in which claims of *non-refoulement* arose in connection to more general socioeconomic conditions in the receiving country, such as lack of access to shelter, food, health care, and employment. The first of these cases was *Jasin v. Denmark*, in which a Somali woman and her three minor children complained they risked ill-treatment if returned to Italy.[298] Similarly to what occurred in *M.S.S.*, the author had been forced to live in the streets with her children for years due to the lack of assistance from the Italian State in finding accommodation.[299] She had also been denied health care in several occasions, including in the birth of her second child.[300] The HRC concluded that removal under these circumstances would foreseeably subject the author and her children to treatment contrary to Article 7 of the ICCPR.[301]

Like the ECtHR in its case-law applying the extreme poverty approach, the HRC highlighted the situation of particular vulnerability of the author as an asylum-seeker accompanied by three minor children.[302] According to two Committee members, Mr. Yuval Shany and Mr. Konstantine Vardzelashvili, the finding of a violation of Article 7 of the ICCPR due to poor socioeconomic conditions was only possible due to this vulnerable status.[303] Their position was expressed as follows:

> Although we are of the view that the very harsh conditions experienced by the author and her family in Italy may amount to a violation of a number of rights under the Covenant, they do not, in themselves, cross the high threshold for non-refoulement

[296] *Z. v. Australia*, *supra* note 293, at para. 2.7.
[297] *S.Y.L. v. Australia*, HRC, 108th session, UN Doc CCPR/C/108/D/1897/2009 (2013) 1 at para. 8.4; *A.H.G. v. Canada*, *supra* note 292, at para. 10.4; *K.S. and M.S. v. Denmark*, HRC, 121st session, UN Doc CCPR/C/121/D/2594/2015 (2017) 1 at para. 7.5-7.7.
[298] *Warda Osman Jasin v. Denmark*, *supra* note 9.
[299] *Ibid*, at para. 2.7-2.9, 2.11.
[300] *Ibid*, at para. 2.10.
[301] *Ibid*, at para. 8.9-8.10.
[302] *Ibid*, at para. 8.4. For a broader analysis comparing the approach of United Nations Treaty Bodies' decisions in their respective complaints procedures in relation to the principle of *non-refoulement* with the approach of the ECtHR, see Başak Çalı, Cathryn Costello & Stewart Cunningham, "Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies" (2020) 21 German Law Journal 355.
[303] *Warda Osman Jasin v. Denmark*, *supra* note 9, Individual opinion of Committee members Yuval Shany and Konstantine Vardzelashvili (concurring), at para. 1, 3-4.

> under the Covenant, namely, a real risk of a serious violation of the most basic rights under the Covenant, such as deprivation of life or torture. Hence, *had the author been an Italian national, or even a foreign national whose basic rights were not at risk of being seriously violated at the country of origin, we would not consider Denmark to be under a legal obligation not to deport her and her family to Italy*.[304]

Although the HRC did not go as far as expressly endorsing this stringent view, it did emphasise the vulnerable condition of asylum-seekers and children in subsequent decisions in similar cases.[305] Furthermore, in cases where the *non-refoulement* claims were rejected, the HRC's justification was that the authors had not demonstrated they were in a special situation of vulnerability, especially in comparison to other refugee and asylum-seeker families.[306] Accordingly, the HRC seemed to imply that, in cases of socioeconomic destitution, harm will reach the threshold of ill-treatment only if the victim belongs to a significantly vulnerable segment of the population. This rationale seems more restrictive than the one adopted in cases concerning lack of medical treatment in the receiving State, where the HRC did not refer to any notions of vulnerability.[307] One can imagine, in light of some individual opinions,[308] that this

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[304] *Ibid*, Individual opinion of Committee members Yuval Shany and Konstantine Vardzelashvili (concurring), at para. 1, 3 (emphasis added). Although this position may be disputed in relation to the level of harm required for socioeconomic conditions to amount to inhuman and degrading treatment, the logic that the threshold for constituting ill-treatment may vary depending on the specific circumstances of the case, including the victim's personal conditions, is accepted in human rights law. To quote the example given by Natasa Mavromcola and Francesco Messineo: "The imprisonment, for lawful reasons, in a regular police cell of a healthy adult person will not be considered inhuman or degrading. The imprisonment in such a cell of a severely disabled Thalidomide victim will." *Mavromcola & Messineo*, *supra* note 231, at 593-594. See also *Ireland v. the United Kingdom*, No 5310/71, ECtHR (18 January 1978) at para. 162; *Ilias and Ahmed v. Hungary*, No 47287/15, ECtHR (21 November 2019) at para. 188.

[305] *Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, *supra* note 26, at para. 7.7-7.9; *R.A.A. and Z.M. v. Denmark*, HRC, 118th session, UN Doc CCPR/C/118/D/2608/2015 (2016) 1 at para. 7.7-7.9 [*R.A.A. and Z.M. v. Denmark*]; *Hibaq Said Hashi v. Demark*, HRC, 120th session, UN Doc CCPR/C/120/D/2470/2014 (2017) 1 at para. 9.9-9.11 [*Hibaq Said Hashi v. Demark*]; *O.A. v. Denmark*, HRC, 121st session, UN Doc CCPR/C/121/D/2770/2016 (2017) 1 at para. 8.11-8.12; *Bayush Alemseged Araya v. Denmark*, HRC, 123rd session, UN Doc CCPR/C/123/D/2575/2015 (2018) 1 at para. 9.9-9.12 [*Bayush Alemseged Araya v. Denmark*].

[306] *B.M.I. and N.A.K. v. Denmark*, HRC, 118th session, UN Doc CCPR/C/118/D/2569/2015 (2016) 1 at para. 8.6; *R.I.H. and S.M.D. v. Denmark*, HRC, 120th session, UN Doc CCPR/C/120/D/2640/2015 (2017) 1 at para. 8.6; *M.A.S and L.B.H. v. Denmark*, HCR, 121st session, UN Doc CCPR/C/121/D/2585/2015 (2017) 1 at para. 8.12; *Fahmo Mohamud Hussein v. Denmark*, HRC, 124th session, UN Doc CCPR/C/124/D/2734/2016 (2018) 1 at para. 9.9.

[307] Although it should be noted that Committee member Yuval Shany, in his individual opinion to *A.H.G. v. Canada*, expressed the view that the HRC's findings of a violation were due to the author's vulnerable position. "I cannot exclude the possibility that in other circumstances, involving a less vulnerable individual, posing a greater risk to society, and who cannot be treated in the territory of a State party, the Committee would not find the decision to deport to violate article 7 of the Covenant." *A.H.G. v. Canada*, *supra* note 292, Individual opinion of Committee member Yuval Shany (concurring), at para. 4. It seems, however, that the vulnerability of the author in this case related specifically to his mental health condition (paranoid schizophrenia). A less vulnerable author would thus be less ill and the risk of suffering significant harm as a result of lack of specific medical care would also be lesser.

[308] *R.A.A. and Z.M. v. Denmark*, *supra* note 305, Joint opinion of Committee members Yuval Shany, Yuji Iwasawa, Photini Pazartzis, Anja Seibert-Fohr and Konstantin Vardzelashvili (dissenting), at para. 2-3; *Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, *supra* note 26, Individual opinion of Committee members Yuval Shany, Konstantine Vardzelashvili and Sir Nigel Rodley (dissenting), at para. 2-3; *Hibaq Said Hashi v. Demark*, *supra*

resulted from floodgates concerns of overstretching the application of the *non-refoulement* principle, although the HRC never expressly referred to this issue in its decisions.

Interestingly, when assessing the relevant circumstances for triggering the principle of *non-refoulement* in *Ioane Teitiota v. New Zealand*, the HRC made no mention to the need for the author to belong to a vulnerable group. The Committee seemed to accept that environmental degradation can lead to a real risk to the right to life in relation to any person, insofar as it resulted to adverse impacts to the individual's well-being, such as lack of food and potable water.[309] However, in that case, the HRC found there was not enough evidence indicating that the author would personally face such a risk.[310]

From the above analysis, it is possible to conclude that the HRC has recognised the possibility of invoking *non-refoulement* in cases where the risk of harm flows from socioeconomic conditions in the receiving State, as long as the level of severity amounts to ill-treatment. In cases where the harm stems from a more generalised difficulty in accessing social services (housing, food, health care, education, work), the HRC has given indications that reaching the necessary level of harm requires a person to prove their particular vulnerability in the receiving country.

2.4 Committee on the Rights of the Child

As of yet, the CRC Committee has not issued merit decisions in which socioeconomic considerations were involved in the context of *non-refoulement*. The only complaint submitted on the matter so far was found inadmissible due to lack of substantiation.[311] Nevertheless, the CRC Committee has indicated that factors related to economic, social, and cultural rights must be taken into account when assessing the application of *non-refoulement* with respect to children in its General Comment No 6.[312] More specifically, the Committee mentioned that States should consider "the particularly serious consequences for children of the insufficient provision of food or health services."[313]

Thus, the CRC Committee appears support the idea that the failure of receiving States to provide for some socioeconomic needs of children can lead to the prohibition of removal.

note 305, Joint opinion of Committee members Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting), at para. 4-5.

[309] *Ioane Teitiota v. New Zealand*, HRC, 127th Sess, UN Doc CCPR/C/127/D/2728/2016 (2020) 1 at para. 9.4-9.5, 9.8-9.9, 9.11.

[310] *Ibid*, at para. 9.8-9.10, 9.12-9.14.

[311] *Z.H. and A.H. v. Denmark*, *supra* note 189, at para. 8.7-8.8.

[312] *General Comment No 6*, *supra* note 24, at para. 27.

[313] *Ibid*.

Further development of the CRC Committee's case-law will help enlighten the specific contours of *non-refoulement* in these cases, such as the level of severity of the potential harm and the factors necessary for assessing it.

2.5 Preliminary conclusions

Among the pronouncements analysed above, the ones that hold most relevance for an assessment of a potential *non-refoulement* principle under the ICESCR are those of the ECtHR applying the extreme poverty approach and those of the HRC. These decisions recognise that the risk of harm arises from the receiving State's failure—regardless of what motivated this failure, be it inability or unwillingness—in providing for socioeconomic needs of persons subject to its jurisdiction, and not from natural circumstances. In other words, failure to take positive measures to ensure economic, social, and cultural rights may lead to harm so severe as to engage the prohibition of removal under the right not to be subjected to ill-treatment. Although the ECtHR and the HRC, in cases relating to more general socioeconomic issues, recognised that the vulnerability of the affected persons is an important factor for the level of harm to reach the threshold of inhuman and degrading treatment, this reasoning is linked to the object of the prohibition of ill-treatment, which was not formulated with the view to offer direct protection against socioeconomic destitution. Economic, social, and cultural rights, on the other hand, require the State to guarantee a minimum standard of living to all persons under its jurisdiction. If this category of rights is directly considered in the application of *non-refoulement*, the level of harm to these rights may be reached regardless of a special situation of vulnerability.

This set of decisions is also relevant in showing that the consideration of available resources is not a necessary condition for assessing all situations of socioeconomic harm. Ultimately, this issue will depend on the primary obligation involved and whether it is one of progressive or immediate realisation—such as the prohibition of inhuman and degrading treatment. As Chapter 3 will explore in detail, the ICESCR contains a number of obligations of immediate effect. Accordingly, this case-law may be used to support the application of the principle of *non-refoulement* in relation to this sort of obligations.

As for the decisions issued under the health cases approach, which is reflected in the case-law of the ECtHR, the IACommHR, and in a minority of decisions of the HRC, their relevance for assessing a potential *non-refoulement* obligation within the ICESCR is limited, since they considered the harm as arising solely from the applicants' personal conditions. There was no question of minimum living conditions receiving States should guarantee and thus no

case of an indirect breach of economic, social, and cultural rights. Even the right to health could not be invoked under this logic, since it does not encompass a right to be healthy[314] and thus does not prevent suffering resulting from naturally occurring circumstances. Had the harm been linked to the receiving State's failure in providing a certain level of health care, as done in the extreme poverty approach, there would be a case of indirect protection of economic, social, and cultural rights and the considerations made above would be applicable.

[314] *General Comment No 14*, *supra* note 252, at para. 8.

3 THE PRINCIPLE OF NON-REFOULEMENT DEDUCED FROM THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The preceding chapters reached the following conclusions: (1) the legal basis that best fits the reasoning behind the principle of *non-refoulement* is that of positive human rights obligations, since such obligations encompass the duty to prevent a risk of harm to an individual's human rights from materialising; (2) human rights bodies usually avoid defining the obligation of *non-refoulement*'s material scope in restrictive terms, which suggests that this rule is not connected to specific rights but rather to the level of severity of the potential harm. If the harm is severe enough, any right may give rise to a *non-refoulement* obligation; and (3) poor socioeconomic conditions have already been recognised as capable of triggering *non-refoulement* obligations by reaching a level of severity that amounts to inhuman and degrading treatment. These conclusions point to a broad possibility of reading the principle of *non-refoulement* into human rights treaties compatible with the theory of positive duties.

The ICESCR is no different. Since the drafting of the human rights Covenants, it has been recognised that the ICESCR creates positive obligations to States-parties.[315] The CESCR has reiterated this category of obligations in relation to different provisions, including the duty to prevent third parties from interfering with the rights established in the ICESCR.[316] In removal contexts, this duty to prevent may well be read as requiring States-parties not to expose individuals to the risk of treatment contrary to the duties established by the ICESCR, similarly to what the aforementioned human rights bodies have done in relation to civil and political rights.

As for whether the risk in the receiving State can reach a level of severity sufficient for the prohibition of removal to arise, this also seems to be the case. As seen in Chapter 2, the ECtHR and the HRC have recognised that socioeconomic deprivation may in certain cases amount to inhuman and degrading treatment, a threshold of harm that is recognised by all human rights bodies as capable of triggering *non-refoulement* duties. Furthermore, even in cases in which there is no correlation between breaches of the ICESCR and the prohibition of ill-treatment, it is possible to refer to the notion of flagrant violations of economic, social, and

[315] *Annotation prepared by the Secretary-General*, *supra* note 29, at 23.
[316] *General Comment No 19*, CESCR, 39th Sess, UN Doc E/C.12/GC/19 (2008) 1 at para. 45 [*General Comment No 19*]; *General Comment No 15*, CESCR, 29th Sess, UN Doc E/C.12/2002/11 (2003) 1 at para. 20, 23 [*General Comment No 15*]; *General Comment No 14*, *supra* note 252, at para. 33; *General Comment No 13*, CESCR, 21st Sess, UN Doc E/C.12/1999/10 (1999) 1 at para. 47 [*General Comment No 13*]; *General Comment No 12*, CESCR, 20th Sess, UN Doc E/C.12/1999/5 (1999) 1 at para. 15 [*General Comment No 12*].

cultural rights (ECtHR) or of irreparable harm (HRC and CRC Committee) to assess whether the severity of the potential harm is sufficient for the duty not to remove to arise.[317] Accordingly, by applying to the provisions of the ICESCR the same standards human rights bodies adopt in relation to civil and political rights, there seems to be a good basis for recognising that ICESCR States-parties have a positive duty not to expose persons to risks of violations of economic, social, and cultural rights that entail irreparable harm.

Nonetheless, it may be inquired whether the transposition of the *non-refoulement* formula to the ICESCR is appropriate or even possible in light of the distinctions between economic, social, and cultural rights and civil and political ones. Historically, some have questioned the legally binding status of economic, social, and cultural rights, contending that they should be seen as goals or aspirations rather than legal entitlements.[318] Although the past two decades have witnessed a strengthening of the view that this category of rights does create binding legal obligations upon States, there is still reluctance in viewing situations of socioeconomic deprivation as violations of international human rights law instead of an unfortunate lack of resources.[319] This is due to the understanding that economic, social, and cultural rights are necessarily subject to progressive realisation and that ensuring them implies significant constraints on States' resources. For those reasons, one may contend that States cannot be required to fully comply with these rights in all occasions. Moreover, there are still instances of States that deny or restrict the justiciability of economic, social, and cultural rights, thereby limiting the possibility of individual remedies for potential breaches.[320]

Indeed, there are relevant differences between the methods of implementation of civil and political rights and of economic, social, and cultural rights. Even though these distinctions

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[317] Since it is not clear whether there is a difference as to the level of severity implied in each of these two standards and what that would be (see Section 1.3), for the purposes of this analysis, considerations as to specific violations of the ICESCR reaching the required threshold of harm will presume these standards adopt the same threshold of harm. Accordingly, the determination of what can be considered sufficient harm in order to trigger *non-refoulement* will be assessed taking into account the relevant case-law of the ECtHR, the HRC, and the CRC.
Furthermore, given that the supervisory bodies of other United Nations human rights treaties adopt the expression "irreparable harm," in order to preserve uniformity and coherence within the UN system, this thesis will use only this term when referring to *non-refoulement* under the ICESCR.

[318] E. W. Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" (1978) 9 NYIL 69 at 80-103; *Annotation prepared by the Secretary-General*, *supra* note 29, at 23.

[319] See *Foster*, *supra* note 1, at 137-147.

[320] *Concluding observations on sixth periodic report of Denmark*, CESCR, 66th Sess, UN Doc E/C.12/DNK/CO/6 (2019) 1 at para. 5 [*Concluding observations – Denmark* 2019]; *Concluding observations on the fourth periodic report of New Zealand*, CESCR, 63rd Sess, UN Doc E/C.12/NZL/CO/4 (2018) 1 at para. 5-6; *Concluding observations on the sixth periodic report of the Netherlands*, CESCR, 61st Sess, UN Doc E/C.12/NLD/CO/6 (2017) 1 at para. 5 [*Concluding observations – Netherlands 2017*]; *Concluding observations on the initial report of Pakistan*, CESCR, 61st Sess, UN Doc E/C.12/PAK/CO/1 (2017) 1 at para. 5 [*Concluding observations – Pakistan 2017*]; *Concluding observations on the fifth periodic report of Australia*, CESCR, 61st Sess, UN Doc E/C.12/AUS/CO/5 (2017) 1 at para. 5 [*Concluding observations – Australia 2017*].

should not be overlooked, they are not so significant as to prevent the recognition of a *non-refoulement* principle within the ICESCR. Rather, they require that the application of this rule be adapted to the Covenant's normative framework. Furthermore, the reference to the need for international cooperation and assistance in realising the rights enshrined in the ICESCR[321] may be seen as an additional legal basis supporting the existence of an obligation of *non-refoulement* under the Covenant.

This chapter will explore these issues, seeking to reach a definitive conclusion on whether an implicit principle of *non-refoulement* can be read into the ICESCR and how it can be coherently applied. Section 3.1 will address some common arguments used to emphasise the distinction between civil and political rights and economic, social and cultural rights, showing that these differences do not run so deep to the point of rendering *non-refoulement* incompatible with or impracticable in relation to the ICESCR. Section 3.2 will analyse the ICESCR's provision on international cooperation and assistance in Article 2(1) and to what extent it offers support to a duty to prevent removal within the Covenant. Section 3.3 will then discuss what substantive obligations in the ICESCR may trigger the duty of *non-refoulement* in practice, especially taking into account the obligations of immediate effect enshrined in the ICESCR. Lastly, Section 3.4 will address some objections of non-legal character as to the recognition of a principle of *non-refoulement* directly applicable under the ICESCR.

3.1. Beyond indivisibility: considerations as to the extent of differences and similarities between economic, social, and cultural rights and civil and political rights for the purposes of *non-refoulement*

The connection between economic, social, and cultural rights and civil and political rights is commonly expressed by reference to the Vienna Declaration and Program of Action: "[a]ll human rights are universal, indivisible and interdependent and interrelated."[322] This formula has been invoked throughout decades in debates within the United Nations ("UN")—albeit with some variation in the terms adopted—usually as an attempt to reinforce the significance and legal character of economic, social, and cultural rights in relation to civil and political ones.[323] However, the meaning of each of these concepts and their practical relevance

[321] *ICESCR*, *supra* note 15, at art. 2(1).
[322] *Vienna Declaration and Program of Action*, adopted by the World Conference on Human Rights, 25 June 1993 at para. 5.
[323] *Indivisibility and interdependence of economic, social, cultural, civil and political rights*, GA Res 43/113, UNGAOR, 75th Sess, UN Doc A/RES/44/130 (1989) 1 at preamble; *Realization of economic, social and cultural rights*, Res 1987/19, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/60 (1987) 65 at preamble;

in the interpretation and implementation of human rights is rarely addressed, even among scholars.[324] This has led to Antonio Cassese's warning against the Vienna Declaration formula: "this convenient catchphrase serves to dampen the debate while leaving everything the way it was."[325]

The most comprehensive attempt at clarifying what is meant by "indivisible, interdependent, and interrelated" rights is perhaps Daniel J. Whelan's. In a 2008 study on the subject, he presented the following definitions: (1) the interdependency between rights implies that one set of rights cannot be fully enjoyed without the enjoyment of others;[326] (2) "interrelated" means that rights are "brought into a situation of mutual relationship or connectedness," sharing common characteristics such as provenance from UN bodies and their legal character as treaties, among others;[327] and (3) indivisibility has a more symbolic value,

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Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Res 1987/20, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/60 (1987) 68 at preamble; *Proclamation of Teheran*, Final Act of the International Conference on Human Rights, UN Doc A/CONF. 32/41 (1968) 3 at para. 13; *Draft International Covenants on Human Rights*, UNGAOR, 21st Sess, 1495th meeting, UN Doc A/PV.1495 (1966) 1 at para. 9; *Draft International Covenants on Human Rights*, UNGAOR, 18th Sess, 1273th meeting, UN Doc A/C.3/SR.1273 (1963) 1 at para. 33; *Draft International Covenants on Human Rights*, Report of the Third Committee, UNGAOR, 9th Sess, UN Doc A/2808 (1954) 1 at para. 29; *Draft international covenants on human rights and measures of implementation*, Commission on Human Rights, 9th Sess, UN Doc E/CN. 4/SR.390 (1953) 9 at 23-24. For a detailed analysis on the discussions of States concerning the interdependence between economic, social, and cultural rights and civil and political rights at the time of the drafting of the human rights covenants, see Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27:3 Osgood Hall LJ 769 at 789-804 [*Scott*].

[324] Some authors seem to refer to these three concepts as something close to synonyms, employing them always as a group to convey a single general idea on how human rights should be interpreted "together". For instance, Evadné Grant, "Accountability for human rights abuses: Taking the universality, indivisibility, interdependence and interrelatedness of human rights seriously" (2007) 32 S Afr YB Int'l L 158 at 167-168 mentions that the ACommHPR has relied on interdependency and interrelatedness to interpret other rights into the provisions of the African Charter. Nonetheless, the ACommHPR's analysis seems to rely only on the interdependency between rights as described by Daniel J. Whelan (*infra* note 320), reading additional rights into the Charter or connecting its provisions by considering that one right cannot be realised without the other. Similarly, there is Peggy Ducoulombier, "Interaction between human rights: Are all human rights equal?" in Christophe Geiger, ed, *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar Publishing Limited, 2015) 39 at 40-41, who claims that "[t]he principles of interdependence and indivisibility of human rights […] remain political and philosophical ideas, which do not resist the test of practice." Her argument, however, seems to focus on indivisibility, criticising the fact that human rights were separated into different instruments with different degrees of efficiency. Indeed, she mentions that socioeconomic rights can only be adjudicated before the ECtHR if they can be interpreted into one of the civil and political rights provided in the European Convention, which is precisely the idea of interdependency put into practice. This tendency of using "indivisibility", "interrelatedness" and "interdependency" interchangeably is noted as well as endorsed by *Scott*, *supra* note 323, at 779, note 26.

[325] Antonio Cassese, "Are Human Rights Truly Universal?", in Obrad Savić, ed, *The Politics of Human Rights* (London and New York: Verso, 1999) 149 at 159.

[326] Daniel J. Whelan, "Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights", Economic Rights Working Paper Series, 2008 at 4.

[327] *Ibid*, at 5-6.

suggesting that it would be wrong to set rights apart from each other.[328] Adopting these definitions, it seems that the concept of interdependency[329] holds the greatest practical relevance, whereas interrelatedness and indivisibility serve a more rhetorical purpose of stressing that equal attention should be paid to all categories of human rights. After all, it is the notion of interdependency that supports the indirect adjudication of economic, social, and cultural rights by human rights bodies whose constitutive instruments only provide for civil and political rights and even vice-versa.[330] Chapter 2 explored some of these situations of interdependency in connection to removal cases, though this reasoning applies to many other contexts.[331] The analysis of human rights bodies' case-law on the matter showed that, because the content of some socioeconomic rights was indirectly protected through the application of the principle of *non-refoulement* to the prohibition of inhuman and degrading treatment, recognising the interdependency between human rights offers support to the idea that *non-refoulement* could directly apply to economic, social, and cultural rights, instead of relying on ricochet protection.

Nevertheless, relying solely on interdependency is not sufficient for such a contention, since this concept does not address the points of divergence between these categories of human rights. One could argue that, in situations where *non-refoulement* was indirectly applied to socioeconomic claims, this occurred only because the case touched on a core element of the

[328] *Ibid*, at 8. It should be acknowledged that some authors present different definitions of these terms, particularly in relation to indivisibility. For instance, Lanse Minkler and Shawna Sweeney state that indivisibility refers to rights that are "indispensible to one another and also equally necessary for the enjoyment of any other right," which conveys an idea closer to Whelan's definition of "interdependence". Lanse Minkler & Shawna Sweeney, "On the Indivisibility and Interdependence of Basic Rights in Developing Countries" (2011) 33 Hum Rts Q 351 at 354. Similarly, James Nickel argues that "[i]ndivisibility is a very strong form of interdependence (or bidirectional support)". James W. Nickel, "Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights" (2008) 30 Hum Rts Q 984 at 987, 990. For an analysis on how the concept of indivisibility started being adopted to describe human rights and on the evolution of this rhetoric, see: Daniel J. Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010).

[329] This concept is developed in depth as "permeability" by *Scott*, *supra* note 323.

[330] In the CESCR's inaugural session in March 1987, one Committee member suggested that economic and social rights could only be fully guaranteed if individuals were free to express themselves on the matter and that, accordingly, ensuring freedom of speech—a typical civil and political right—was relevant for compliance with socioeconomic rights. *Report on the First Session*, CESCR, 1st Sess, UN Doc E/C.12/1987/5 (1987) 1 at para. 227. Further analysis on how the promotion of economic, social, and cultural rights may contribute to the advancement of civil and political rights was conducted by Ioana Cismas, "The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 448 at 458-460.

[331] See, notably: *Airey v. Ireland*, *supra* note 208, at para. 26; *Kalashnikov v. Russia*, *supra* note 245, at para. 102; *F.H. Zwaan-de Vries v. the Netherlands*, HRC, 29th Sess, UN Doc CCPR/C/29/D/182/1984 (1987) 1 at para. 6.3, 12.1-12.5, 15; *S. W. M. Broeks v. the Netherlands*, HRC, 29th Sess, UN Doc CCPR/C/29/D/172/1984 (1987) 1 at para. 6.3, 12.1-12.5, 15; *Womah Mukong v. Cameroon*, *supra* note 208, at para. 9.3; *Comunidad indígena Yakye Axa (Paraguay)* (2005), Inter-Am Ct HR (Ser C) No 125 at para. 162; *Vera Vera v. Ecuador*, *supra* note 208, at para. 43.

economic, social or cultural right that was also common to a civil or political right. In other words, the duty not to remove solely arose in connection to the specific characteristics of civil and political rights, which are not shared by economic, social, and cultural rights on their own.

The idea that the two categories of rights possess irreconcilable differences was what led to the separation of the human rights Covenants[332] in the first place. In a report sent to the UN General Assembly, the then UN Secretary-General summarised the matter as follows:

> Those in favour of drafting two separate covenants argued that civil and political rights were enforceable, or justiciable, or of an 'absolute' character, while economic, social and cultural rights were not or might not be; that the former were immediately applicable, while the latter were to be progressively implemented; and that, generally speaking, the former were rights of the individual 'against' the State, that is, against unlawful and unjust action of the State, while the latter were rights which the State would have to take positive action to promote.[333]

In sum, the later successful position in favour of diving the human rights Covenant into two instruments rested on three considerations: (1) civil and political rights required States to abstain from acting (negative duties), whereas economic, social, and cultural rights required positive action from States; (2) civil and political rights were to be given immediate effect, whereas economic, social, and cultural rights should be realised progressively; and (3) civil and political rights were justiciable, whereas economic, social, and cultural rights were not. However, on a closer analysis and taking into account the normative developments since the drafting of the ICCPR and the ICESCR, these differences between the two sets of rights are not as deep as initially thought and do not hinder the recognition and application of a principle of *non-refoulement* within the ICESCR.

3.1.1. Positive X negative obligations

With regard to the argument that civil and political rights entail negative obligations and economic, social, and cultural rights entail positive ones, it is widely accepted today that the positive/negative dichotomy is not fit for distinguishing between the two categories of rights. As seen in the preceding chapters, full compliance with civil and political rights also requires positive measures from States,[334] including the ones stemming from the principle of *non-*

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[332] *Preparation of two Draft International Covenants on Human Rights*, UNGAOR, 6th Sess, Supp. No 20, UN Doc A/RES/543(VI) (1952) 36.

[333] *Annotation prepared by the Secretary-General*, *supra* note 29, at 23, para. 9. See also: James Simsarian, "Progress in Drafting Two Covenants on Human Rights in the United Nations" (1952) 46 AJIL 710 at 710–712; Mashood A. Baderin & Robert McCorquodale, *Economic, Social and Cultural Rights in Action* (New York: Oxford University Press, 2007) at 6-7.

[334] Mirja Trilsch, "Les droits sociaux et les instruments de droits de la personne relatifs aux droits civils et politiques : une relecture de la *Convention européenne de sauvegarde des droits de l'homme et des Libertés*

refoulement, which relate to the duty to prevent human rights violations. If anything, the idea that economic, social, and cultural rights are more linked to positive obligations supports the deduction of a *non-refoulement* duty from these rights. Nevertheless, it would be wrong to link a certain category of rights to only one type of obligation. The realisation of economic, social, and cultural rights also mandates States to refrain from interfering with or depriving persons of these rights.[335] Therefore, even if *non-refoulement* is seen as a negative obligation (contrary to the view supported herein), this does not prevent an autonomous duty not to remove from being deduced from economic, social, and cultural rights.

Another variation of this attempted distinction is the idea that economic, social, and cultural rights demand a higher cost of implementation from States than civil and political rights. Again, this assertion cannot be held as true in every situation. To the extent that all rights require positive measures of implementation, all rights imply costs.[336] Training State officials to observe civil and political rights and monitoring compliance with the latter may entail considerable public expenditures depending on the State's pre-existent human rights culture.[337] Moreover, realisation of civil and political rights may require a State to provide certain equipment or infrastructure to make enjoyment of the right accessible to all. This is the case, for instance, of ensuring that polling places are well distributed and accessible to different communities during elections or of providing means for people with physical disabilities to use public transportation, guaranteeing their freedom of movement without discrimination.[338] On the other hand, realising economic, social, and cultural rights does not necessarily put a heavy strain on public budget in all occasions. For instance, a State may deem it more appropriate to pursue a regulatory framework that allows private parties to move in the direction of certain

fondamentales et du *Pacte international des Nations Unies relatif aux droits civils et politiques*", in Pierre Bosset & Lucie Lamarche, eds, *Droit de cité pour les droits économiques, sociaux et culturels : La Charte québécoise en chantier* (Cowansville: Éditions Yvon Blais, 2011) 331 at 339-342; Antônio Augusto Cançado Trindade, "A Questão da Implementação dos Direitos Econômicos, Sociais e Culturais: Evolução e Tendências Atuais" (1990) 71 Revista Brasileira de Estudos Políticos 7 at 15 [*Trindade*].

[335] *General Comment No 12*, *supra* note 316, at para. 15; *General Comment No 21*, CESCR, 43rd Sess, UN Doc E/C.12/GC/21 (2009) 1 at para. 48 [*General Comment No 21*].

[336] Philip Alston & Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9:2 Hum Rts Q 156 at 172 [*Alston & Quinn*]; José Ricardo Ferreira Cunha & Vinicius Scarpi, "Os direitos econômicos, sociais e culturais: a questão da sua exigibilidade" (2007) 31:2 Direito, Estado e Sociedade 69 at 80-81.

[337] Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009) at 17.

[338] The Constitutional Court of Colombia handed down a decision ordering public transportation services to be made accessible to disabled people in order to safeguard their freedom of movement in Sentencia T-595/02, expediente T-444377, Corte Constitucional (2002) [*Sentencia T-595/02*].

rights, such as housing. As long as these measures improve individuals' enjoyment of these rights, the State is fulfilling its obligations.[339]

It is thus impossible to state with certainty that observance of a given socioeconomic right will be more costly than that of a civil and political right in any given scenario. Abstract allusions as to the purported inherent cost of implementing economic, social, and cultural rights hence do not seem to be able to prevent the direct application of the principle of *non-refoulement* to this set of rights.

3.1.2. Progressive realisation X immediate effect

The greatest distinction between economic, social, and cultural rights and civil and political rights relates the methods of implementation of their respective obligations. The satisfaction of civil and political rights is understood as all or nothing; the State either fully conforms to its obligations or it does not. Moreover, the standards for monitoring compliance are the same among all States-parties, regardless of their financial conditions.[340] In turn, full realisation of economic, social, and cultural rights can only be achieved progressively, subject to the State's available resources.[341] In other words, the extent of a State's obligations in relation to this latter category of rights can only be defined after ascertaining what resources this State has at its disposal.

The standard of progressive realisation may be problematic in the context of *non-refoulement*. The trigger for this principle is that the removing State knew or should have known that there existed a real risk that the individual would be subjected to irreparable harm to their rights in the receiving State. If the removing State does not have detailed information on what resources are available for the receiving State, it will not be able to verify whether there is a risk of violation of progressive duties related to economic, social, and cultural rights. This is often the case, especially since the receiving State usually is not party to the immigration procedures and will not be called to clarify the circumstances awaiting the individual who faces removal.

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[339] Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (New York: Routledge, 2014) at 67 [*O'Connell et al.*].

[340] *Yubraj Giri v. Nepal*, HRC, 101st Sess, UN Doc CCPR/C/101/D/1761/2008 (2011) 1 at para. 7.9 [*Yubraj Giri v. Nepal*]. Despite this general understanding, it is worth noting that the ECtHR has recognised that different compliance standards may apply when the State is faced with an exceptional situation that creates objective difficulties of an organisational, logistic, and structural character. *Khlaifia et autres c. Italie*, No 16483/12, ECtHR (15 December 2016) at para. 180-185; *N.H. et autres c. France*, *supra* note 274, at para. 182.

[341] *ICESCR*, *supra* note 15, at art. 2(1).

However, the ICESCR contains some obligations that States-parties must observe immediately.[342] The CESCR has considered this to be the case notably in relation to obligations whose observance does not depend on States' available resources, such as the duty to start taking steps to realise the Covenant's rights[343] and the obligation of non-discrimination.[344] Moreover, States are required to ensure minimum levels of satisfaction of economic, social, and cultural rights regardless of financial concerns.[345] When these obligations are engaged, the standards of compliance are the same among all States. Verifying whether a risk of irreparable harm exists in these cases is as straightforward as it is in relation to civil and political rights. Nonetheless, failure to recognise the existence of immediate obligations under the ICESCR has frequently hampered a proper analysis of migrants' and asylum-seekers' claims involving socioeconomic harm, leading to an erroneous notion that breaches of economic, social, and cultural rights are less serious than those of civil and political rights.[346]

Therefore, since all categories of human rights contain some obligations that must be implemented immediately, there does not seem to be grounds for distinguishing between the application of the principle of *non-refoulement* to civil and political rights and to ICESCR obligations of immediate effect. Section 3.3 will undertake a more detailed analysis of how the duty of *non-refoulement* can effectively be applied to these kinds of obligations under the ICESCR.

3.1.3 Non-justiciable X justiciable rights

Since the drafting of the human rights Covenants, one of the key concerns regarding the implementation of economic, social, and cultural rights was the issue of justiciability. Whereas civil and political rights were recognised as immediately justiciable in States' domestic legal orders, a group of States understood that claims concerning economic, social, and cultural had no place before courts,[347] a position that some continue to hold today.[348] The rationale behind

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[342] *Trindade*, *supra* note 334, at 10.
[343] *General Comment No 3*, *supra* note 16, at para. 2.
[344] *Ibid*, at para. 1; *General Comment No 20*, CESCR, 42th Sess, UN Doc E/C.12/GC/20 (2009) 1 at para. 7 [*General Comment No 20*].
[345] *General Comment No 3*, *supra* note 16, at para. 10.
[346] This issue is well explored in the context of asylum claims by *Foster*, *supra* note 1, at 137-151.
[347] *Annotation prepared by the Secretary-General*, *supra* note 29, at 13.
[348] *Concluding observations on the sixth periodic report of Norway*, CESCR, 67th Sess, UN Doc E/C.12/NOR/CO/6 (2020) 1 at para. 4; *Concluding observations – Denmark 2019*, *supra* note 320, at para. 5; *Concluding observations – Netherlands 2017*, *supra* note 320, at para. 5; *Concluding observations – Pakistan 2017*, *supra* note 320, at para. 5; *Concluding observations – Australia 2017*, *supra* note 320, at para. 5; *Concluding observations on the sixth periodic report of Poland*, CESCR, 59th Sess, UN Doc E/C.12/POL/CO/6 (2016) 1 at para. 5. Christine Vézina suggests that a State's degree of openness to the justiciability of economic, social, and

this view was elaborated on in the session of the now-extinct UN Commission on Human Rights that discussed the creation of a complaints mechanisms to the ICESCR through the drafting of an Optional Protocol.[349] Some States that opposed the justiciability of economic, social, and cultural rights argued that the content of these rights was too vague and difficult to define in any concrete case.[350] Moreover, the progressive realisation standard could open the door for domestic courts to interfere with budgetary and policy decisions, which are usually under the responsibility of other branches of government.[351] However, these concerns do not appear to be sufficient to impose a bar on the justiciability of socioeconomic claims.

Civil and political rights are as vague and imprecise as socioeconomic ones but their content has been elaborated on much more by domestic and international bodies.[352] One of the most glaring examples is the notion of torture and inhuman and degrading treatment. These are quite abstract concepts and even today human rights bodies continue to develop standards on how to distinguish between each of these terms and how to determine whether a given situation constitutes treatment of this sort. Notably, it was only in 2011, in the judgment of *M.S.S. v. Belgium*, that the ECtHR clarified the circumstances under which socioeconomic deprivation could fall into the scope of inhuman treatment.[353] On the other hand, the content of economic, social, and cultural rights has also been elaborated on by the CESCR in its General Comments, Concluding Observations and, most recently, views adopted in its complaints procedure.[354] Contributions to clarifying what each economic, social, and cultural right requires of States

cultural rights is linked to the human rights culture prevalent in the country. Christine Vézina, "Culture juridique des droits de la personne et justiciabilité des droits économiques, sociaux et culturels : tendances à la Cour suprême du Canada" (2020) 61:2 Les Cahiers de droit 495 at 504, 538.

[349] *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, Commission on Human Rights, 60th Sess, UN Doc E/CN.4/2004/44 (2004) 1.

[350] *Ibid*, at para. 20, 59.

[351] *Ibid*, at para. 61.

[352] Philip Alston, "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 Hum Rts Q 332 at 351.

[353] *M.S.S. v. Belgium and Greece*, *supra* note 9, at para. 263.

[354] *ICESCR-OP*, *supra* note 34. For considerations as to how petition mechanisms contribute to the clarification and implementation of human rights law, see D. J. Harris, *The European Social Charter* (Charlottesville: University Press of Virginia, 1984) at 267-268.

have also been advanced by some domestic courts[355] and by other international bodies that have jurisdiction *ratione materiae* over these rights, such as the ACommHPR[356] and the IACtHR.[357]

As for the argument that the implementation of economic, social, and cultural rights involves policy and budgetary decisions that cannot be subject to judicial scrutiny, it should be stressed that the fact that States have a margin of discretion to decide on which measures to adopt does not mean that anything goes. Firstly, as seen above, States have a number of obligations under the ICESCR to which immediate effect must be given, which allows courts to determine whether or not there has been a violation without having to consider the allocation of public resources.[358] Secondly, obligations of progressive realisation can be assessed against certain standards in order to evaluate whether the State is truly using the maximum of its resources to realise economic, social, and cultural rights as Article 2(1) of the ICESCR dictates.[359] In other words, it is possible for courts to determine whether these obligations are being observed without necessarily establishing a specific course of public policy or of allocation of resources the State should follow.

One of the most well-known judicial cases in this regard is the Constitutional Court of South Africa's judgment in *Government of the Republic of South Africa and others v. Grootboom and others*.[360] The case discussed the question of whether South Africa had violated a group of homeless families' right to access to adequate housing and their children's right to shelter. In order to assess whether the State's housing programs had been enough to ensure the progressive realisation of these rights, the Constitutional Court adopted a standard of reasonableness, delineating some characteristics a given governmental measure should have in

[355] For a compilation of analyses on the application of economic, social, and cultural rights by domestic courts, see: Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York, Cambridge University Press, 2008) [*Langford*].

[356] Since the African Charter was the first regional human rights treaty to include a list of provisions expressly guaranteeing economic, social, and cultural rights, the ACommHPR has had ample opportunities to decide on claims on this matter. For an overview of this case-law, see Manisuli Ssenyonjo, "Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter" (2011) 29:3 Neth Q HR 359.

[357] *Lagos del Campo v. Peru, supra* note 207, at para. 141-149, 153; *San Miguel Sosa y otras (Venezuela)* (2018), Inter-Am Ct HR (Ser C) No 348 at para. 221-222 [*San Miguel Sosa y otras v. Venezuela*]; *Poblete Vilches y otros (Chile)* (2018), Inter-Am Ct HR (Ser C) No 349 at para. 118-143 [*Poblete Vilches y otros v. Chile*]; *Cuscul Piraval v. Guatemala, supra* note 207, at para. 75-102; *Empregados da Fábrica de Fogos de Santo Antônio de Jesus e seus Familiares (Brazil)* (2020), Inter-Am Ct HR (Ser C) No 407 at para. 160-174 [*Empregados da Fábrica de Fogos v. Brazil*].

[358] The relevance of obligations of immediate effect to effectively ensure justiciability of these rights, more specifically those obligations relating to the minimum core of economic, social, and cultural rights, was highlighted by George Jotham Kondowe, "Implementing economic and social rights in 'domestic' jurisdictions: understanding the minimum core obligations approach" (2020) Commonwealth Law Bulletin 1 at 6-8 [*Kondowe*].

[359] *ICESCR, supra* note 15, at art. 2(1).

[360] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00), [2000] ZACC 19.

order to meet this standard in light of available resources.[361] The Constitutional Court held that the State had failed to adopt reasonable measures to guarantee the right to access to housing because it had not provided short-term alternatives to people in desperate need.[362] Nonetheless, it highlighted that "the precise allocation is for national government to decide in the first instance."[363] This way, although the Constitutional Court decided that South Africa had not discharged itself from its obligations of progressive realisation and established some parameters on which the State's actions should be based, the Court ultimately left it to the South African executive and legislative branches to determine exactly how to achieve compliance.[364]

The fact that *Grootboom* included only a declaratory order does not mean that cases in which a court awards some form of material reparation to the applicant—ordering the State to provide a specific medical treatment, housing or enrolment in school, among others—should be seen as interfering with the government's decisions on the allocation of public resources. Rather, they are a means of reparation to a concrete case of violation of human rights. The judiciary is not compelling the other government branches to adopt a specific public policy nor is it dictating how much of the State's budget should be allocated to a certain area. How to render the State's conduct compatible with human rights in order to avoid further unfavourable decisions is part of the State's own discretion as to how to manage its available resources.

Any judicial decision can have implications on the public budget,[365] even when adjudicating claims relating to civil and political rights. One can think of a case where, in adjudicating an individual claim of ill-treatment brought by a person detained by the State, a domestic court identifies that the ill-treatment results from systematic deficiencies in the conditions of detention and in the training of State agents. Although the court's decision may be limited to ordering reparation in that particular case, if the State wishes to avoid further complaints and possibly costly awards of compensation, it should review its detention policies. Doing so would imply allocating more resources to improving detention conditions and educating its agents on how to ensure respect for human rights. Another example is illustrated by the decision of the Colombian Constitutional Court in Judgment T-595/02, concerning the accessibility of people with disabilities to public transportation services provided by a utility

[361] *Ibid*, at para. 38-44, 46.
[362] *Ibid*, at para. 65-69.
[363] *Ibid*, at para. 66.
[364] *Ibid*, at para. 96.
[365] As the CESCR observed in its General Comment No 9: "While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications." *General Comment No 9*, CESCR, 19th Sess, UN Doc E/C.12/1998/24 (1998) 1 at para. 10 [*General Comment No 9*].

company in Bogotá.[366] In essence, the case dealt with the positive obligations arising from the right to freedom of movement, a civil and political right.[367] The Constitutional Court highlighted that "[t]he progressive character of the benefit cannot be invoked to justify the State's continued, much less absolute, inaction"[368] and ordered the company to design a plan to guarantee the applicant's access to the public transportation service.[369] The order undoubtedly had a considerable economic impact, since it required adaptations to be made to all vehicles and infrastructure related to public transportation in the capital.

The budgetary consequences of claims relating to civil and political rights and their irrelevance to the issue of justiciability of these rights was noted by the Constitutional Court of South Africa when deciding on the justiciability of economic, social, and cultural rights under the 1996 South African Constitution:

> The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on CP II [Constitutional Principle II] which provides that all universally accepted fundamental rights shall be protected by "entrenched and justiciable provisions in the Constitution". It is clear, as we have stated above, that the socio-economic rights entrenched in NT [the New Text of the Constitution of the Republic of South Africa, 1996] 26 to 29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their "justiciability" is required by CP II. Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the NT does not result in a breach of the CPs.[370]

The question then is not whether courts can establish a violation of progressive obligations concerning economic, social, and cultural rights but what method of evaluation they should adopt and what remedies should be awarded to the victims.

In addition to the reasonableness test adopted in South Africa,[371] various other methodologies have been advanced by domestic courts. To mention a few examples, Brazilian domestic courts have referred to the concept of "reservation of what is feasible" (*reserva do*

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[366] *Sentencia T-595/02*, *supra* note 338.
[367] *ICCPR*, *supra* note 20, at art. 12; *American Convention*, *supra* note 18, at art. 22.
[368] *Sentencia T-595/02*, *supra* note 338, at para. 5.4. Original: "El carácter progresivo de la prestación no puede ser invocado para justificar la inacción continuada, ni mucho menos absoluta, del Estado."
[369] *Ibid*, at para. 6.3.
[370] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (CCT 23/96), 1996 (4) SA 744 (CC), at para. 78.
[371] After *Grootboom*, this standard was reiterated in *Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02)*, [2002] ZACC 15 at para. 36, 38.

possível) to assess the limits of what the State can effectively do in practice to promote economic, social, and cultural rights as well as to the notion of an "existential minimum" (*mínimo existencial*) that should be guaranteed regardless of the State's alleged resource constraints.[372] Similarly, the Colombian Constitutional Court has referred to the concept of a "vital minimum" (*mínimo vital*) that should be fulfilled when States implement socioeconomic rights.[373] The Peruvian Constitutional Court, in turn, has assessed whether the State has adopted concrete measures in a reasonable amount of time to implement socioeconomic rights and whether it has accorded priority to situations of higher gravity or of emergency.[374] These examples support the view that the particular characteristics of socioeconomic rights, including the progressive realisation standard, are not an impediment to their justiciability.

The argument in favour of justiciability is further reinforced by the entry into force of the Optional Protocol to the ICESCR in May 2013,[375] allowing the CESCR to receive individual communications against States and issue views on whether an ICESCR provision was breached.[376] Moreover, as previously mentioned, the ACommHPR and the IACtHR also deliver judgments on claims concerning socioeconomic rights.

In light of the above, economic, social, and cultural rights do not seem to have any particular characteristics that could render their adjudication impracticable or even inadequate. In removal contexts, the socioeconomic nature of the purported risk of harm cannot prevent judicial or administrative bodies from assessing and deciding on whether the principle of *non-refoulement* is engaged.

In conclusion, the preceding analysis has demonstrated that the traditional arguments used to differentiate economic, social, and cultural rights from civil and political ones should not be taken at face value. Deeper scrutiny shows that the only real distinction between these categories of rights concerns their methods of implementation and that even this distinction is not absolute, since economic, social, and cultural rights also impose obligations of immediate effect. Accordingly, the objection to applying the principle of *non-refoulement* to obligations of progressive realisation does not prevent its application to other duties arising from economic, social, and cultural rights.

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[372] ARE 745745 AgR/MG, Second Chamber, STF (2014).
[373] Sentencia T-833/10, expediente T-2709592, Corte Constitucional (2010).
[374] EXP. N° 2016-2004-AA/TC, Tribunal Constitucional de Perú (2004) at para. 34-36. For further discussions on how economic, social, and cultural rights are adjudicated in different jurisdictions, see: *Langford*, *supra* note 355; Claudio Nash Rojas, "Los derechos económicos, sociales y culturales y la justicia constitucional latinoamericana: tendencias jurisprudenciales" (2011) 9:1 Estudios Constitucionales 65.
[375] *ICESCR-OP*, *supra* note 34.
[376] As of December 2020, the CESCR had adopted views on the merits of seven individual communications.

Taking this into account, it appears that the characteristics of civil and political rights that are relevant for the existence of an obligation of *non-refoulement* are also common to socioeconomic rights, namely: (1) both sets of rights are capable of giving rise to positive and negative obligations; (2) a State may effectively assess another State's behaviour against these rights and verify whether there appears to be a violation of them; and (3) potential breaches of both sets of rights are susceptible to being ascertained by States' administrative and judicial organs. Therefore, there does not seem to be a solid legal basis to exclude economic, social, and cultural rights from the material scope of the principle of *non-refoulement*.

3.2. International cooperation and assistance under the ICESCR

Article 2(1) of the ICESCR establishes that States must "take steps, individually and through international assistance and co-operation, especially economic and technical," to progressively achieve the full realisation of the rights protected under the Covenant.[377] The question of whether this provision can be read as establishing a legal obligation for States to cooperate with one another to the promotion of economic, social, and cultural rights is the subject of extensive academic debate.[378]

Through its General Comments, the CESCR has expressed the view that the provision of international cooperation and assistance constitutes a binding obligation under the ICESCR.[379] According to the Committee, this obligation is owed especially by those States that possess more economic resources and are therefore in position to assist other States.[380] Considering the tripartite structure of obligations it adopts—obligations to respect, protect, and

[377] *ICESCR*, *supra* note 15, art. 2 (1).
[378] See, notably: *Alston & Quinn*, *supra* note 336; Magdalena Sepúlveda Carmona, "The obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8" (2009) 13:1 IJHRL 86; Sigrun I. Skogly & Mark Gibney, "Economic Rights and Extraterritorial Obligations" in Shareen Hertel & Lanse Minkler, eds, *Economic Rights: Conceptual, Measurement, and Policy Issues* (New York: Cambridge University Press, 2007) 267 [*Skogly & Gibney*]; Malcolm Langford, Fons Coomans & Felipe Gómez Isa, "Extraterritorial Duties in International Law" in Malcolm Langford et al., eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) 51 at 71 [*Langford, Coomans & Isa*]; Ashfaq Khalfan, "Division of Responsibility amongst States" in Malcolm Langford et al., eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) 299 at 323-324; Takhmina Karimova, "The Nature and Meaning of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 163 [*Karimova*].
[379] *General Comment No 3*, *supra* note 16, at para. 13-14.
[380] *Ibid*.

fulfil human rights[381]—the CESCR has translated cooperation and assistance into three duties for States: (1) not to contribute to breaches of the ICESCR abroad; (2) not to allow private persons under their control or influence acting extraterritorially to violate the Covenant's rights;[382] and (3) to actively promote and facilitate the enjoyment of economic, social, and cultural rights abroad.[383]

One cannot help but note the similarity of the first two duties mentioned above to the positive obligation to take reasonable measures within a State's power to prevent the materialisation of risks of human rights violations that the State knew or should have known about.[384] A State that is acting not to contribute to violations and to stop persons under its control and influence from committing violations is essentially adopting preventive measures. The effect of international cooperation and assistance is then one of reinforcing and perhaps even extending the extraterritorial character of this obligation.[385] As the Guiding Principles on Extreme Poverty and Human Rights observe, in complying with the duty to cooperate under the ICESCR, States should avoid "conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders" and should

[381] The idea of a tripartite typology to human rights obligations was first enounced by Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980) at 52-53. More specifically, Shue referred to duties to avoid depriving, duties to protect from deprivation, and duties to aid the deprived. The specific terms "respect", "protect", and "fulfill" were later advanced by Asbjørn Eide, who popularised the tripartite typology among international human rights bodies. *The New International Economic Order and the Promotion of Human Rights: Report on the right to adequate food as a human right submitted by Mr. Asbjørn Eide, Special Rapporteur*, Commission on Human Rights, 39th Sess, UN Doc E/CN.4/Sub.2/1987/23 (1987) 1 at para. 66.

[382] *General Comment No 24*, *supra* note 32, at para. 27. See also *General Comment No 19*, *supra* note 316, at para. 52-54; *General Comment No 15*, *supra* note 316, at para. 31-33; *General Comment No 14*, *supra* note 252, at para. 39; *General Comment No 12*, *supra* note 316, at para. 36-37.

[383] *General Comment No 24*, *supra* note 32, at para. 37; *General Comment No 19*, *supra* note 316, at para. 55; *General Comment No 18*, CESCR, 35th Sess, UN Doc E/C.12/GC/18 (2006) 1 at para. 30 [*General Comment No 18*]; *General Comment No 15*, *supra* note 316, at para. 34; *General Comment No 14*, *supra* note 252, at para. 39. See also: Manisuli Ssenyonjo, *Economic, social and Cultural Rights in International Law* (Portland: Hart Publishing, 2009) at 72-76 [*Ssenyonjo*].

[384] In relation to the first duty, it is worth clarifying that contribution to breaches of the ICESCR abroad may be performed directly by the State or indirectly, by creating conditions that allow or facilitate breaches by third parties. In the case of direct contribution, the obligation is essentially to refrain from effectively violating a right, that is, a negative obligation to respect. Where the case is one of indirect contribution, however, the State is responsible for creating a situation that poses risk of harm, or actual harm, to an individual. Hence, in this latter scenario, the corresponding obligation is best understood under the duty to prevent harm.

[385] Some commentators have argued that the reference to international cooperation, cumulated with the absence of a jurisdictional clause in the ICESCR, renders the concept of jurisdiction inapplicable to the Covenant, so that there are no limits to states' extraterritorial obligations. See: Ibrahim Kanalan, "Extraterritorial State Obligations Beyond the Concept of Jurisdiction" (2018) 19:1 GLJ 43 at 47-48; *The right to food: Report of the Special Rapporteur on the right to food, Jean Ziegler*, Commission on Human Rights, 61st Sess, UN Doc E/CN.4/2005/47 (2005) 1 at para. 43-45.

perform "assessments of the extraterritorial impacts of laws, policies and practices."[386] It is easier to frame cooperation and assistance as a legal duty in this sense, as part of the more general obligation to prevent breaches of the ICESCR.

The third duty indicated by the CESCR, namely facilitating and promoting the enjoyment of economic, social, and cultural rights abroad, is subject to greater controversy regarding its legal status and precise scope. The circumstances and extent to which a State should be required to provide cooperation and assistance, or whether the State could be held internationally responsible for not doing so when asked, are not clear. The *travaux préparatoires* of the ICESCR indicate that, although the drafters saw cooperation as key for fully realising the Covenant's rights,[387] they did not intend to establish a general obligation to cooperate and assist one another whenever a State-party complained about lack of resources for promoting socioeconomic rights.[388] Even with the development of means and institutions through which cooperation among States can be achieved, there still no uniform recognition of cooperation and assistance to fulfil human rights as compulsory under the ICESCR.[389]

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[386] *Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, Human Rights Council, 21st Sess, UN Doc A/HRC/21/39 (2012) 1 at para. 92.

[387] *Draft International Covenants on Human Rights*, UNGAOR, 9th Sess, 573rd meeting, UN Doc A/C.3/SR.573 (1954) 1 at para. 24 (Uruguay); *Draft International Covenants on Human Rights*, UNGAOR, 11th Sess, 740th meeting, UN Doc A/C.3/SR.740 (1957) 1 at para. 25 (Japan); *Draft International Covenants on Human Rights*, UNGAOR, 11th Sess, 742nd meeting, UN Doc A/C.3/SR.742 (1957) 1 at para. 16 (Israel), 18 (Greece), 24 (Chile), 25 (Romania), 32 (Pakistan), 41 (India); *Draft International Covenants on Human Rights*, UNGAOR, 12th Sess, 795th meeting, UN Doc A/C.3/SR.795 (1957) 1 at para. 7 (Czechoslovakia); *Draft International Covenants on Human Rights*, UNGAOR, 12th Sess, 796th meeting, UN Doc A/C.3/SR.796 (1957) 1 at para. 16 (Ukraine); *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1202nd meeting, UN Doc A/C.3/SR.1202 (1962) 1 at para. 15 (Chile), 30 (Ecuador); *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1203rd meeting, UN Doc A/C.3/SR.1203 (1962) 1 at para. 21 (Iraq) [*UN Doc A/C.3/SR.1203*]; *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1204th meeting, UN Doc A/C.3/SR.1204 (1962) 1 at para. 7 (Denmark) [*UN Doc A/C.3/SR.1204*]; *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1207th meeting, UN Doc A/C.3/SR.1207 (1962) 1 at para. 4 (Philippines), 5 (Nepal); *Draft International Covenants on Human Rights*, UNGAOR, 21st Sess, 1398th meeting, UN Doc A/C.3/SR.1398 (1966) 1 at para. 7 (Spain).

[388] Only the Chilean delegate expressly advanced the idea that international assistance and cooperation had become mandatory in light of the UN framework. *UN Doc A/C.3/SR.1203*, *supra* note 387, at para. 10. Several States opposed this assertion: *Ibid*, at para. 14 (Soviet Union); *UN Doc A/C.3/SR.1204*, *supra* note 387, at para. 14 (Greece), 19 (New Zealand); *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1205th meeting, UN Doc A/C.3/SR.1205 (1962) 1 at para. 12 (France); *Draft International Covenants on Human Rights*, UNGAOR, 21st Sess, 1455th meeting, UN Doc A/C.3/SR.1455 (1966) 1 at para. 31 (United States). Other states had also previously expressed their understanding that international cooperation and assistance should not be compulsory: *Draft International Covenant on Human Rights*, UNGAOR, 11th Sess, 742nd meeting, UN Doc A/C.3/L.586 (1957) 1 at para. 33 (Syria), 40 (Japan); *UN Doc A/C.3/SR.1203*, *supra* note 387, at para. 5 (Saudi Arabia). Philip Alston and Gerard Quinn, in an in-depth analysis of the *travaux préparatoires*, also concluded that the latter do not indicate a general obligation to provide international cooperation and assistance within the ICESCR. *Alston & Quinn*, *supra* note 336, at 191. In this sense, see also: *Skogly & Gibney*, *supra* note 378, at 272; Karimova, *supra* note 378.

[389] When discussing the drafting of an Optional Protocol to the ICESCR, the United Kingdom, France, the Czech Republic, Canada, and Portugal expressed their understanding that international cooperation and assistance was only a moral obligation and not a legal entitlement. Open Ended Working Group on an Optional Protocol to the

Nevertheless, one important aspect on which the drafters agreed is that the kind of cooperation States should engage in for the progressive realisation of the ICESCR should be interpreted as widely as possible and should not be limited to economic and technical assistance.[390] The message that the commitment to realise the Covenant's rights through cooperation and assistance essentially conveys is that the situation of economic, social, and cultural rights around the world concerns all States-parties and deserves their attention.[391]

Accordingly, it is not unreasonable to think that one of the means for a State to conform to its duties of cooperation and assistance may be translated into the relationship between the State and the individual. Since these duties highlight the extraterritorial character of the ICESCR's obligations, they reinforce the fact that States must prevent risks of violations of human rights even if the prospective harm is to occur outside of their territories.[392] Although cooperation and assistance alone cannot be seen as the legal basis of a *non-refoulement* principle in the ICESCR, this commitment offers support to the duty not to return by emphasising that States-parties should be mindful of the situation of economic, social, and cultural rights abroad. This additional support is absent from other treaties from which *non-refoulement* has already been deduced, with the exception of the CRC.[393] Hence, the extraterritorial character that the ICESCR's obligations may assume in view of the duties of international cooperation and assistance is an additional factor corroborating that the principle of *non-refoulement* may be coherently read into the ICESCR.

International Covenant on Economic, Social and Cultural Rights, *Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session*, Commission on Human Rights, 61st Sess, UN Doc E/CN.4/2005/52 (2005) 1 at para. 76. On the other hand, Egypt, China, Angola, Ghana, Indonesia, Iran, Morocco, Nigeria, South Africa, and India indicated that cooperation should be seen as a legal obligation: *Ibid*, at para. 77; *Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, Commission on Human Rights, 62nd Sess, UN Doc E/CN.4/2006/47 (2006) 1 at para. 78; *Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session*, Human Rights Council, 6th Sess, UN Doc A/HRC/6/8 (2007) 1 at para. 164. This is far from constituting uniformity for purposes of either subsequent practice relevant for the interpretation of the ICESCR (Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331) or customary international law.

[390] *UN Doc A/C.3/SR.1203*, *supra* note 387, at para. 8 (Tunisia); *UN Doc A/C.3/SR.1204*, *supra* note 387, at para. 14 (Greece), 40 (Brazil), 49 (United States).

[391] *Ssenyonjo*, *supra* note 383, at 72. This was highlighted by the CESCR notably in *General Comment No 21*, *supra* note 335, at para. 57.

[392] The possibility of a similar interpretation was mentioned by Marlies Hesselman, though the author did not further develop this idea: "An important question that remains for present purposes is that it is not completely clear whether the obligation of 'international cooperation and assistance' exists solely between states, or whether it could ultimately also be invoked by persons of third countries directly vis-à-vis foreign States - for example, by a migrant who is about to be expelled or who lives in poverty abroad. This is a matter that deserves further attention but is not discussed here." Marlies Hesselman, "Sharing International Responsibility for Poor Migrants? An Analysis of Extra-Territorial Socio-Economic Human Rights Law" (2013) 15:2 Eur J Soc Sec 187 at 191-192.

[393] *CRC*, *supra* note 21, at art. 4, 24(4), 28(3).

3.3. The application of the *non-refoulement* principle within the ICESCR: the role of obligations of immediate effect

As previously seen, the greatest hurdle for recognising a principle of *non-refoulement* as implicit in the ICESCR is the fact that the full realisation of the Covenant's rights is subject to progressive realisation, to the maximum of States-parties' available resources.[394] As such, circumstances that may constitute a violation of economic, social, and cultural rights if taken place in a given State may not be so in another, where less resources are available for the State to promote these rights. This contrasts with the rationale of civil and political rights, which represent minimum standards that States are required to comply with, regardless of their budgetary concerns.[395]

In this scenario, questions arise as to the standards against which States' obligations of *non-refoulement* are to be measured. A State that removes a person to another where the socioeconomic conditions, say, access to health care, are significantly less favourable, may be exposing this person to the risk of a breach of Article 14 of the ICESCR[396] when considering its own standards for the realisation of economic, social, and cultural rights. On the other hand, these conditions may not constitute a breach of the ICESCR in the receiving State, in light of its available resources. Whose available resources should be considered?

One might be tempted to argue that, since the legality of the removal under human rights law takes into account solely the obligations of the removing State, regardless of those of the receiving State, the factual standards against which these obligations are to be assessed is also that of the removing State. Removal should then consider the level of realisation of economic, social, and cultural rights expected according to the removing State's available resources. However, this reasoning does not seem to adequately solve the issue. It is not contested that the responsibility of the receiving State is not at stake in removal cases and that the violation of the *non-refoulement* principle lies in the exposure of the individual to a risk of harm. In other words, it is correct to say that only the human rights obligations of the removing State are relevant in this context. Nevertheless, these obligations must be applied to the factual situation in the receiving State in order to verify whether there exists a foreseeable risk of harm contrary to human rights. One must analyse the case as if the receiving State were bound by the same

[394] *ICESCR*, *supra* note 15, at art. 2(1).
[395] *Yubraj Giri v. Nepal*, *supra* note 340, at para. 7.9; *Vélez Loor (Panamá)* (2010), Inter-Am Ct HR (Ser C) No 218 at para. 198; *Kalashnikov v. Russia*, *supra* note 245, at para. 94-102.
[396] *ICESCR*, *supra* note 15, at art. 14.

human rights obligations of the removing State and then apply these norms to the reality of the *receiving* State, examining if the circumstances in there are contrary to these obligations.[397]

This reasoning seems to have been adopted in the context of civil and political rights by the United Kingdom's Immigration Tribunal to explain the "flagrant violation" standard under the European Convention, in the case of *Devaseelan v. Secretary of State for the Home Department*.[398] Since some rights are absolute, such as the prohibition of torture, a situation contrary to them cannot be excused under any factual circumstances, constituting a violation wherever and whenever it occurs.[399] In turn, interferences with non-absolute rights may be justified under human rights law as limitations and derogations. A situation that may at first seem incompatible with human rights in the receiving State could thus constitute a lawful limitation or even derogation, considering the factual circumstances in that State.[400] If this incompatibility can in principle be justified in light of the conditions in the receiving State, the risk of harm is not foreseeable.[401] Otherwise, there would be no reason for a specific level of severity of harm in applying the principle of *non-refoulement*, since the removal would be assessed against the circumstances found in the removing State itself. Every removal to a country where the situation of human rights was less favourable than in the removing State would thus breach this principle, a result which has not been accepted by any international human rights bodies nor by States.

Applying this rationale to the ICESCR means that, while the removal should comply with the obligations of the *removing* State under the Covenant, the legality of this measure is assessed by reference to the factual standards in the *receiving* State, including issues of available resources. This way, even if the receiving State is not a party to the ICESCR, the removing State may incur in a violation of *non-refoulement* by exposing a person to circumstances which, if they were its own, would be contrary to the Covenant.

This gives rise to another difficulty: how to effectively evaluate if the conditions in the receiving State are compatible with the ICESCR in light of its available resources. As previously mentioned, in most cases the receiving State is not a party to the removal

[397] As explained by Violeta Moreno-Lax with regard to the European human rights framework, "[t]he establishment [of responsibility for a breach of the obligation of *non-refoulement*] involves an assessment of conditions *in the requesting country* against the standards of Article 3 of the [European] Convention." (emphasis added) *Moreno-Lax*, *supra* note 6, at 269.
[398] *Devaseelan*, *supra* note 144.
[399] *Ibid*, at para. 111.
[400] *Ibid*, at para. 109-111.
[401] *Michelle Foster*, *supra* note 108, at 277-278.

proceedings and cannot clarify whether and how it is complying with the ICESCR.[402] Removing States usually only have the information provided by the applicant, third-party interveners—commonly non-governmental organisations—and general country reports to rely on. It is thus quite difficult, if not impossible, to get the full picture of what another State's available resources are and whether they are being adequately employed according to the provisions of the ICESCR. This kind of assessment is further hindered by the lack of consensus on the appropriate methodology for evaluating compliance with obligations of progressive realisation under the ICESCR.[403]

Given that positive obligations require States to adopt reasonable measures to prevent risk of harm and cannot impose a disproportionate operational burden on States,[404] these practical difficulties present a strong argument against applying the principle of *non-refoulement* to the ICESCR's obligations that are exclusively subjected to progressive realisation. Furthermore, it is disputable whether a risk of harm tied to this kind of obligation may reach the level of severity required for triggering *non-refoulement*. If a certain level of socioeconomic rights is ensured in the receiving State but the latter falls short of dedicating all of its available resources to further the promotion of said rights, it could be argued that the situation does not present a risk of irreparable harm similar from that arising from breaches of the right to life and of the prohibition of ill-treatment. Of course, the assessment of what constitutes irreparable harm can only be performed against the circumstances of a concrete case. If a person's level of enjoyment of a right is just above that which is considered the minimum core and the State has the means to provide more, this situation could be held to constitute

[402] This was particularly highlighted by the United Kingdom's Immigration Appeal Tribunal in relation to *non-refoulement* claims under the European Convention on Human Rights. *Devaseelan, supra* note 144, at para. 109-111.

[403] The CESCR has taken note of the different methodologies used by States in their reports to the Committee and has preferred to establish general guidelines for measuring compliance with the ICESCR instead of endorsing a specific approach. *General Comment No 9, supra* note 365, at para. 6-7. For discussion on approaches for monitoring compliance with the progressive realisation of economic, social, and cultural rights, see: Roberto Cuéllar, "Actividades sobre Indicadores de Derechos Económicos, Sociales y Culturales (DESC)" (2011) 21 Vox Juris 111 at 112 [*Cuéllar*]; Eitan Felner, "Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, social, and Cultural Rights" (2009) 1:3 Journal of Human Rights Practice 402 at 407-408 [*Felner*]; Audrey R. Chapman, "The Status of Efforts to Monitor Economic, Social, and Cultural Rights" in Shareen Hertel & Lanse Minkler, *Economic Rights: Conceptual, Measurement, and Policy Issues* (New York: Cambridge University Press, 2007) 143 [*Chapman*].

[404] *Osman v. the United Kingdom*, *supra* note 113, at para. 116; *R.R. and others v. Hungary*, *supra* note 113, at para. 29; *Xákmok Kásek Indigenous Community v. Paraguay*, *supra* note 114, at para. 188. As put by Vladislava Stoyanova: "Harm which is more predictable and more immediate might imply a stronger protection claim on behalf of the victim. Harm that is more difficult to causally link to state omission and knowledge about risk might imply less-demanding obligations upon the state since it may not be reasonable to expect it to act." Vladislava Stoyanova, "Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights" (2020) 33 LJIL 601 at 619.

irreparable harm. Nonetheless, the difficulties for removing States to ascertain whether the receiving State is in condition to further realise economic, social, and cultural rights remain.

Due to these considerations, removing States will rarely, if ever, be in position to establish a real risk of irreparable harm to socioeconomic rights by reference only to obligations of progressive realisation. Accordingly, it is submitted that the application of *non-refoulement* duties under the ICESCR should focus on the obligations of States-parties that must be ensured immediately, where there is no question of whether the receiving State is acting to the maximum of its available resources.

Of relevance to the principle of *non-refoulement* are the duties of non-discrimination[405] and of guaranteeing the minimum core of economic, social, and cultural rights.[406] Each of these obligations will be examined in turn in order to discuss how the principle of *non-refoulement* can be effectively applied to them.

Although the obligation to start taking steps to realise socioeconomic rights is also one of immediate effect,[407] failure to comply with it does not in itself disclose a situation that may give rise to irreparable harm triggering the principle of *non-refoulement*. Therefore, the duty to take steps will not be further analysed as a potential scenario for the application of *non-refoulement*.

3.3.1 Non-discrimination

The obligation of non-discrimination is enshrined in Article 2(2) of the ICESCR, which provides a non-exhaustive list of the prohibited grounds for discrimination, such as race, religion, political opinion and social origin, "or other status."[408] As noted by the CESCR, non-discrimination encompasses any distinction of treatment based on one of the prohibited grounds,[409] be it formal or material, direct or indirect.[410]

In its General Comment No 20, the CESCR elaborated on the content of this obligation, especially by clarifying what sort of differential treatment is acceptable under the ICESCR. According to the Committee, a distinction is lawful if it is founded on reasonable and objective criteria, which in turn will require examination on whether the differential measures pursue a

[405] *General Comment No 20*, *supra* note 344, at para. 7.
[406] *General Comment No 3*, *supra* note 16, at para. 10.
[407] *Ibid*, at para. 2.
[408] *ICESCR*, *supra* note 15, at art 2 (2).
[409] *General Comment No 20*, *supra* note 344, at para. 7.
[410] *Ibid*, at para. 8, 10.

legitimate goal and are proportional to said goal.[411] These are essentially the same parameters adopted by other human rights bodies, despite a few differences in the terminology used.[412]

Both the drafters of the ICESCR[413] and later the CESCR[414] considered that States should immediately comply with the obligation of non-discrimination.[415] Accordingly, States-parties cannot justify discrimination solely by claiming that their resources were only enough to guarantee the right to a given portion of the population.[416] Any resources directed at furthering the realisation of economic, social, and cultural rights should be applied in a way that benefits those within the State as uniformly as possible, seeking to eliminate discrimination as a matter of priority.[417] For instance, as the CESCR clarified in General Comment No 14, concerning the right to health, "investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population."[418] Restrictions to the enjoyment of economic, social, and cultural rights in relation to part of the

[411] *Ibid*, at para. 13.

[412] Whereas the ECtHR adopts the same formulation as the CESCR, the IACtHR and the ACommHPR indicate proportionality as parameter independent from reasonableness and objectiveness. The HRC's formulation, on the other hand, is that distinctions must be "reasonable and objective" and their aim must be to achieve a purpose that is legitimate under the ICCPR. The HRC does not mention whether these standards also encompass the need for the measure to be proportionate. However, these differences in wording do not create different standards against which the lawfulness of a distinction must be assessed, especially given that human rights bodies do not tend to ascribe an independent test for each of these terms. In substance, they mean that not every goal and not every measure taken to achieve said goal will be compatible with human rights law. See, notably: *Khamtokhu and Aksenchik v. Russia*, No 60367/08 and 961/11, ECtHR (24 January 2017) at para. 64; *I.V. (Bolivia)* (2016) Inter-Am Ct HR (Ser C) No 329 at para. 240-241; *Kenneth Good v. Republic of Botswana*, No 313/05, Afr Comm HR (26 May 2010) at para. 219; *General Comment No 18*, HRC, 37th Sess, UN Doc HRI/GEN/1/Rev.1 (1994) 26 at para. 13.

[413] *Draft International Covenants on Human Rights*, UNGAOR, 17th Sess, 1206th meeting, UN Doc A/C.3/SR.1206 (1962) 1 at para. 10-11, 17; *Report of the Third Committee*, UNGAOR, 17th Sess, UN Doc A/5365 (1962) 1 at para. 64.

[414] *General Comment No 20*, *supra* note 344, at para. 7.

[415] It is interesting to note the position of Sandra Ratjen and Manay Satija, who express concerns as to the immediate character of the obligation of non-discrimination under the ICESCR regarding the elimination of substantive discrimination. The argument is that, while formal discrimination may be supressed immediately, in a sense of equality before the law, this may not be enough to guarantee prompt and equal access to economic, social, and cultural rights and their full enjoyment. Guaranteeing substantive equality would then depend on further investments and policies in a progressive manner. Sandra Ratjen & Manav Satija, "Realizing Economic, Social, and Cultural Rights for All" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 111 at 116. The difficulties in achieving a scenario of substantive non-discrimination are a valid concern for economic, social, and cultural rights as much as for civil and political rights, especially when considering issues such as racism and religious intolerance and their impacts on the effective enjoyment of human rights. One point to consider, however, is that recognising this obligation as one subject to progressive realisation might provide States with too wide a margin of discretion as to which groups will benefit from the advancement of certain rights, ultimately excusing States from complying with substantive non-discrimination.

[416] *General Comment No 20*, *supra* note 344, at para. 13.

[417] *Ibid*.

[418] *General Comment No 14*, *supra* note 252, at para. 19.

population can only be justified in light of the criteria mentioned above—the pursuit of a legitimate goal and the proportionality of the distinctive measures.

Non-discrimination thus does not raise the question of whether the measures taken by States to realise economic, social, and cultural rights are adequate in quantity or quality but merely if there exists an unjustified distinction of treatment in relation to the access to and enjoyment of these rights. The lawfulness of this distinction may be ascertained much in the same way as it is done in relation to civil and political rights.

In removal contexts, the existence of discrimination in relation to an individual or group has been acknowledged as an element that may evince the risk of treatment contrary to human rights.[419] The question then is only whether the discriminatory measure leads to irreparable harm. If so, removal is prohibited under the principle of *non-refoulement*.

One may contend that, even if non-discrimination is an immediate obligation under the ICESCR, determining whether certain actions or omissions on the part of the receiving State are indeed discriminatory depends on further information about its available resources and that information may not be available to the removing State. After all, the fact that certain economic, social, and cultural rights are not ensured to certain groups in the same level as to others may only be a reflection of how the receiving State opted to prioritise the use of its resources. The idea of according States a wide margin of discretion in deciding which groups should have access to certain social benefits has been particularly endorsed by the ECtHR,[420] which has held that "the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."[421]

However, this does not mean that it is impossible for a removing State to ascertain whether a potential denial or limitation of socioeconomic rights in the receiving State is discriminatory. Rather, it only shows that the removing State must determine what kind of evidence is relevant for its decision on removal. The removing State may well conclude that the information brought to it does not disclose a discriminatory treatment or even irreparable harm and that, accordingly, the principle of *non-refoulement* is not applicable to the case at

[419] *M.C. v. Australia*, *supra* note 288, at para. 8.5; *Makhmudzhan Ergashev v. Russia*, No 49747/11, ECHR (16 October 2012) at para. 72.
[420] According to the ECtHR: "a wide margin is usually allowed to the Contracting State under the Convention when it comes to general measures of economic or social strategy." *Ponomaryovi v. Bulgaria*, No 5335/05, ECtHR (28 November 2011) at para. 52; *Bah v. the United Kingdom*, No 56328/07, ECtHR (27 September 2011) at para. 37 [*Bah v. the United Kingdom*]; *Stec and others v. the United Kingdom*, No 65731/01 and 65900/01, ECtHR (12 April 2006) at para. 52 [*Stec and others v. the United Kingdom*].
[421] *Bah v. the United Kingdom*, *supra* note 420, at para. 37; *Stec and others v. the United Kingdom*, *supra* note 420, at para. 52.

hand. This is not to say that there will never be enough information or other evidence for the removing State to find a risk of irreparable harm due to discriminatory measures.

Strong evidence that removing States are in condition to determine whether a risk of prohibited discrimination exists in the receiving State is the fact that this assessment is routinely undertaken in refugee status determination procedures. The existence of persecution in relation to socioeconomic rights is often established by reference to whether the asylum-seeker might suffer discrimination in accessing or enjoying these rights.[422] Invoking *non-refoulement* in relation to non-discrimination obligations under the ICESCR would follow much of the rationale applied under the Refugee Convention. The only differences are essentially the threshold of harm capable of triggering the duty not to remove ("irreparable harm" instead of "persecution"), the applicable evidentiary standard ("real risk" instead of less rigorous standards used in the assessment of asylum claims[423]), and the fact that the ICESCR does not require the harm to be linked to a particular group such as those under Article 1(A)(2) of the Refugee Convention.[424]

Moreover, the obligation of non-discrimination plays an important role in the evaluation of the legality of State acts that deprive people of certain rights, either entirely or to a certain level. Although a State may justify reducing the level of enjoyment of economic, social, and cultural rights by reference to its available resources, such as in the case of an economic crisis,[425] this withdrawal may be seen as discriminatory if it disproportionately affects specific individuals or groups. In these cases, in which the discussion revolves around the negative obligation to refrain from withdrawing protection to human rights, it may be easier to identify a breach of the ICESCR and not attribute the situation to lack of resources.

Some Canadian judicial and administrative bodies have had the opportunity to decide on whether discrimination in relation to access to a socioeconomic right—namely, the right to health—could bar removal. These cases were decided under Canada's Immigration and Refugee

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[422] See notably: *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, [2000] HCA 19 at para. 31; *Tchoukhrova v Gonzales*, 404 F.3d 1181 (9th Cir. 2005) at 4580-4582 [*Tchoukhrova v Gonzales*]; *Cheung c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 2 RCF 314; *RN (Returnees) Zimbabwe v Secretary of State for the Home Department* [2008] UKAIT 00083 at para. 249 [*RN (Returnees) Zimbabwe*].

[423] Although each jurisdiction has its own test for assessing the likelihood of persecution, the standards commonly referred to ("reasonable chance", "real chance", "serious possibility", among others) usually represent a possibility of around 50% or less of the risk materialising. James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014) at 110-118; *Goodwin-Gill & McAdam*, *supra* note 179, at 59-60.

[424] *Refugee Convention*, *supra* note 7, at art. 1(A)(2).

[425] Still, the CESCR considers that "any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources." *General Comment No 3*, *supra* note 16, at para. 9.

Protection Act,[426] which prohibits *refoulement* to States where there is a risk of cruel and unusual treatment or punishment. These provisions have been interpreted to encompass health cases. Although the ICESCR was not taken into account, these cases are interesting examples of how the principle of *non-refoulement* can be applied to situations of discrimination in relation to economic, social, and cultural rights.

In one case, the Canadian Immigration and Refugee Board ("IRB") assessed the risk that an applicant would not have access to antiretroviral medication in Zimbabwe, despite his advantageous financial conditions.[427] The IRB attributed the socioeconomic situation in Zimbabwe to widespread corruption and to the State's unwillingness to provide adequate health services rather than to a lack of resources.[428] In that scenario, health services were denied even to those who could afford it, as was the applicant's case.[429] The IRB considered there was a real risk of harm prohibiting the applicant's removal, which arose from "the unwillingness of the Zimbabwe government to take reasonable steps to make adequate health care available to its citizens."[430] Thus, the existence of discrimination was determinant for the IRB to find that removal was prohibited. Similarly, in *Gorzsas v. Canada*, the Canadian Federal Court annulled a decision from the IRB because the Board had failed to consider that the applicant might be prevented from accessing antiretroviral medication in Hungary due to the discrimination he would face as a gay HIV-positive man of Roma ethnicity.[431]

Conversely, in the case *Covarrubias*,[432] concerning access to medical treatment in Mexico, the Federal Court held that the applicant had not proven he would be subject to discrimination upon removal.[433] According to the Federal Court, it was necessary to establish a distinction between the unwillingness of the State to make the treatment freely accessible to all, without discrimination—in the event of which protection against *refoulement* could be granted[434]—and the State's inability to provide such a treatment—which could not possibly be verified and hence could not constitute a ground for *non-refoulement*.[435] In this sense, the

[426] *Immigration and Refugee Protection Act*, SC 2001, c 27 at s. 97(1).
[427] *X Re*, Immigration and Refugee Board, RPD File No VA6-03149/VA6-03150, 25 January 2008, at para. 35, 37-39 [*X Re*].
[428] *Ibid*, at para. 44-45, 48.
[429] *Ibid*, at para. 47.
[430] *Ibid*, at para. 48.
[431] *Gorzsas v. Canada (Citizenship and Immigration)*, [2009] FC 458 at para. 26, 38-41. See also: *Ampong v. Canada (Citizenship and Immigration)*, [2010] FC 35 at para. 48-49; *Yusuf v. Canada (Citizenship and Immigration)*, 2013 FC 591 at para. 35.
[432] *Covarrubias v Canada (Minister of Citizenship and Immigration)*, [2006] FCA 365.
[433] *Ibid*, at para. 46.
[434] *Ibid*, at para. 39, 42.
[435] *Ibid*, at para. 32.

Federal Court observed that the absence of free health insurance in the case could be a mere policy choice of the Mexican Government, which could not be subjected to the Court's scrutiny.[436] Consequently, the applicant's removal was found to be lawful.[437]

This "unwilling/unable" formula in assessing the lawfulness of removal to unfavourable socioeconomic conditions has also been adopted by Australian administrative and judicial bodies. The case-law of these bodies has consolidated the understanding that removal may amount to "significant harm," consequently triggering the duty of *non-refoulement*, only in cases of discrimination in accessing health care rather than where health care is simply unavailable.[438] This stems from the understanding that, under Australian domestic law, the existence of inhuman and degrading treatment capable of preventing removal depends on a deliberate action or omission of the person perpetrating the harm.[439] Omissions through lack of State funding are not considered enough in this regard.[440]

It should be stressed that, even though these cases represent good examples of how non-discrimination can be seen as an immediate obligation capable of preventing *refoulement* in relation to socioeconomic rights, they do not necessarily reflect the same results that could have been achieved had the ICESCR been directly applied. Within the framework of the ICESCR, the distinction between inability and unwillingness of the receiving State in providing medical treatment loses some of its significance, since States have duties to guarantee minimum levels of enjoyment of socioeconomic rights irrespective of available resources.[441] Accordingly, in cases where discrimination was absent, the Canadian and Australian bodies could have inquired whether the alleged harm related to the minimum core of the right to health and, in the

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[436] *Ibid*, at para. 35, 38.

[437] *Ibid*, at para. 46. The same reasoning is found in: *Singh v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 FC 323, 2004 FC 288; *Nicolas v. Canada (Citizenship and Immigration)*, [2010] FC 452 at para. 33; *X (Re)*, 2007 CanLII 61466 (CA IRB) at para. 24-25; *X (Re)*, 2012 CanLII 100677 (CA IRB) at para. 13.

[438] *AJI16*, *supra* note 291, at para. 32-33; *ENU18 v Minister for Home Affairs* [2019] FCA 1391 (7 August 2019) at para. 41. Likewise, discrimination was deemed a necessary element for applying the principle of *non-refoulement* to a situation where the applicant claimed he would be homeless upon return to Fiji: *1621961 (Refugee)* [2017] AATA 1143 (21 June 2017) at para. 84-85, 87. Nonetheless, not every claim of discrimination succeeds; in another case, the Australian authorities found that, although the conditions of Palestinian refugees in Lebanon were "appalling" and they faced discrimination in practically every aspect of life, including access to health care, these circumstances did not amount to serious harm. *1506832 (Refugee)* [2017] AATA 500 (2 March 2017) at para. 58-59.

[439] *1910307 (Refugee)* [2019] AATA 4673 (8 July 2019) at para. 141 [*1910307 (Refugee)*]; *1406290* [2014] RRTA 815 (11 November 2014) at para. 68 [*1406290*]; *1318956* [2014] RRTA 562 (23 July 2014) at para. 50; *1220110* [2013] RRTA 281 (9 April 2013) at para. 50-51. A similar reasoning is applied in relation to risk of arbitrary deprivation of life: *1510994 (Refugee)* [2018] AATA 3026 (20 June 2018) at para. 55, 61, 71-72.

[440] *1516248 (Refugee)* [2019] AATA 4304 (9 August 2019) at para. 138-157; *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326 (13 March 2019).

[441] *General Comment No 3*, *supra* note 16, at para. 10. For further discussion on this subject, see Section 3.3.2 below.

affirmative, whether that gave rise to irreparable harm, which would then trigger the obligation of *non-refoulement*.

3.3.2 Minimum core

The other obligation of immediate effect relevant for applying the principle of *non-refoulement* under the ICESCR is the protection of the minimum core of each of the Covenant's rights.

The text of the ICESCR does not expressly establish such a duty. Rather, the idea of minimum core obligations was first enunciated in the CESCR's General Comment No 3, based on a teleological interpretation of the Covenant.[442] According to the CESCR, if States did not have to guarantee a minimum level of economic, social, and cultural rights, the ICESCR "would be largely deprived of its raison d'être."[443] Furthermore, the notion of a minimum core can be derived from the obligation to take steps to progressively realise economic, social, and cultural rights. If the taking of such steps must be immediate,[444] then there is at least some level of rights that must be guaranteed by States from the beginning. Although some criticise the idea of a minimum core,[445] this concept has been reiterated by the CESCR in numerous occasions[446] and adopted by States and other human rights bodies.[447]

General Comment No 3 indicated that States-parties to the ICESCR have a "minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights."[448] A State that fails to meet these essential levels is, "prima facie, failing to discharge its obligations under the Covenant."[449] Despite this strong formulation, a few sentences down, the CESCR seemed to deny the absolute character of this minimum core by affirming that a State may invoke the lack of available resources so as to discharge itself from

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[442] *Ibid*.
[443] *Ibid*.
[444] *Ibid*, at para. 2.
[445] Gillian MacNaughton, "Beyond a Minimum Threshold: The Right to Social Equality" in Lanse Minkler, ed, *The State of Economic and Social Human Rights: a global overview* (New York: Cambridge University Press, 2013) 271 at 281-282.
[446] For example: *General Comment No 14*, *supra* note 252, at para. 47; *General Comment No 15*, *supra* note 316, at para. 40; *General Comment No 19*, *supra* note 316, at para. 60; *Marcia Cecilia Trujillo Calero v. Ecuador*, CESCR, 63rd Sess, UN Doc E/C.12/63/D/10/2015 (2018) 1 at para. 14.2 [*Marcia Cecilia Trujillo Calero v. Ecuador*].
[447] *Kondowe*, *supra* note 358, at 7-10; *Paschim Banga Khet Majoor Samity v State of West Bengal*, Case No 169, Supreme Court of India (1996) at para. 9, 15, 17; AG REG no RE com AG 727.864/PR, Second Chamber, STF (2014).
[448] *General Comment No 3*, *supra* note 16, at para. 10.
[449] *Ibid*.

this obligation if it employed all its efforts in order to satisfy, as a matter of priority, its minimum obligations.[450]

However, in subsequent General Comments, when detailing the content of the rights to health[451] and water,[452] the CESCR highlighted that a State-party could not justify non-compliance with minimum core obligations, since they are non-derogable. To make matters even more confusing, in General Comment No 19, concerning the right to social security, the Committee reverted to its previous formulation, indicating that a State could be excused from a failure to satisfy the minimum essential levels of this right by demonstrating that, despite all of its efforts, it lacked the resources to do so.[453] This rationale, denoting the non-absolute character of minimum core obligations, was reiterated in *Calero v. Ecuador*.[454] In this case, while acknowledging that States have a core obligation to provide certain non-contributory old-age assistance, the CESCR noted that States may be excused from a violation if they demonstrate that all efforts and resources were engaged in fulfilling the core obligation as matter of priority, even if these efforts were not enough.[455]

The apparent shifts in the CESCR's position as to the absoluteness of minimum core obligations under the ICESCR have led to conflicting positions among scholars, with some defending that States may be excused from non-compliance with these duties under exceptional circumstances of lack of resources[456] and others suggesting that States are always responsible if they fail to meet the standards of this minimum core.[457] In an attempt to conciliate these views, Gregor Chatton submitted that the CESCR in fact had sought to establish two kinds of obligations: the minimum core (*noyau dur*) and the minimum threshold (*seuil minimum*).[458]

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[450] *Ibid*.
[451] *General Comment No 14*, *supra* note 252, at para. 47.
[452] *General Comment No 15*, *supra* note 316, at para. 40.
[453] *General Comment No 19*, *supra* note 316, at para. 60.
[454] *Marcia Cecilia Trujillo Calero v. Ecuador*, *supra* note 446.
[455] *Ibid*, at para. 14.2-14.3. For an in-depth analysis of this decision, see Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol" (2020) 42:1 Hum Rts Q 48 [*Liebenberg*].
[456] David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence" (2003) 19 SAJHR 1 at 17; *Langford, Coomans & Isa*, *supra* note 378, at 85; *Liebenberg*, *supra* note 455, at 82.
[457] "The Limburg Principles on the Implementation of the International Covenant on Economic, social and Cultural Rights", (1986) 37 ICJ Rev 43 at para. 25; "The Maastricht Guidelines on Violations of Economic, social and Cultural Rights" (1998) 20:3 Hum Rts Q 691 at 695.
The IACommHR and the ACommHPR also seem to support an absolutist position regarding minimum core obligations, at least in relation to their respective human rights mechanisms. See: "Annual report of the Inter-American Commission on Human Rights", *Inter-American Commission on Human Rights*, 1993, available at: <https://www.cidh.oas.org/annualrep/93eng/chap.5.htm>, last accessed 15 December 2020; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, No 155/96, Afr Comm HR (27 October 2001) at para. 65-66.
[458] *Chatton*, *supra* note 33, at 242-244.

According to Chatton, the minimum core refers to States' obligation of satisfying at least the essential elements of each right regardless of their available resources.[459] The definition of what constitutes this core is based mainly on the CESCR's General Comments, such as those issued in relation to the rights to adequate food,[460] education,[461] health,[462] water,[463] work,[464] social security,[465] and to take part in cultural life.[466] The core is the same in relation to all States, which must immediately ensure it.

Minimum threshold obligations, on the other hand, correspond to the basic level of realisation of socio-economic rights that a State must guarantee to individuals under its jurisdiction according to its available resources.[467] If the State has more resources at its disposal, the minimum threshold will be higher; if it has less resources, the minimum threshold will be lower and may even be the same as the minimum core. Thus, this obligation is one of immediate effect but whose content will vary in accordance with the capacities of each State. While minimum core obligations are absolute, minimum threshold obligations relate to providing for the needs that are deemed central to leading a life with dignity within a particular society.[468]

Chatton's interpretation deserves some considerations. Firstly, despite how appealing the idea of an absolute obligation to ensure the minimum core may sound, it seems that the CESCR has avoided endorsing this view in its most recent pronouncements, instead leaving the door open for States to avoid breaches of the ICESCR by claiming lack of resources.[469] However, it should be noted that the CESCR's test is a strict one: to avoid a violation, the State has the burden of proving that it exhausted all of its resources in an attempt to fulfil the minimum core as a matter of priority.[470] This includes the resources that may be available through international cooperation and assistance.[471] Accordingly, if a State that is not complying with its minimum core obligations has not at least asked for cooperation and

[459] *Ibid*, at 242-243.
[460] *General Comment No 12*, *supra* note 316, at para. 8.
[461] *General Comment No 13*, *supra* note 316, at para. 57.
[462] *General Comment No 14*, *supra* note 252 at para. 46.
[463] *General Comment No 15*, *supra* note 316, at para. 37.
[464] *General Comment No 18*, *supra* note 383, at para. 31.
[465] *General Comment No 19*, *supra* note 316, at para. 59.
[466] *General Comment No 21*, *supra* note 335, at para. 55.
[467] *Chatton*, *supra* note 33, at 243-244.
[468] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (New York: Oxford University Press, 2007) at 192 [*Bilchitz*].
[469] *General Comment No 19*, *supra* note 316, at para. 60; *Marcia Cecilia Trujillo Calero v. Ecuador*, *supra* note 446, at para. 14.2.
[470] *General Comment No 3*, *supra* note 16, at para. 10.
[471] *Ibid*, at para. 13.

assistance from other States, there is a practically irrefutable presumption that this State violated the ICESCR.

The stringency of the CESCR's approach is precisely what enables minimum core obligations to be seen as independent from available resources and, consequently, as admitting the application of the principle of *non-refoulement*. When confronted with proof that there is a real risk that the minimum core of a person's rights under the ICESCR will be harmed in the receiving State, the removing State cannot attribute this harm to unavailability of resources unless there exists clear and robust evidence in this sense. The risk to the minimum core then has the effect of reversing the burden of proof in favour of the individual, rendering the assessment of a potential violation as straightforward as one concerning civil and political rights. Although the removing State may go through some effort in defining the precise content of minimum core obligations, this can be done by reference to the CESCR's General Comments and emerging case-law as well as to domestic practice of the removing State itself and that of other States. The task is not much different from determining what constitutes a "flagrant violation" of civil and political rights or "irreparable harm." As such, determining whether there exists a risk of irreparable harm concerning socioeconomic rights' minimum core obligations is not an impossible or overly burdensome task to the point of hampering the application of the principle of *non-refoulement*.

Despite the apparent lack of support for Chatton's first proposal, the second one, that is, the notion of minimum threshold obligations, deserves recognition. This idea had already been advanced by Audrey Chapman[472] as well as by Craig Scott and Philip Alston,[473] albeit under a different terminology. Even though the CESCR has never commented on the existence of such an obligation as of yet, its rationale seems to flow from the very duty of progressive realisation under Article 2(1) of the ICESCR. When a State has obtained a certain level of resources and is progressively promoting the realisation of socioeconomic rights, it seems that, even if certain

[472] *Chapman*, *supra* note 403, at 154: "The minimum core content can be defined as the nature or essence of a right; that is, the essential element or elements without which it loses its substantive significance as a human right. In contrast, minimum state obligations refer to the essential requirements of a state party to be considered to be in compliance with its international obligation. It has been described as a "floor" below which conditions should not be permitted to fall."

[473] Craig Scott & Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise" (2000) 16 S Afr J on Hum Rts 206 at 250: "Each state must go about making sure that it fulfils, as its first priority in resource allocation, at least what the Committee calls 'minimum core obligations' as a function of that state's available resources. And every state must meet at least a core universal minimum represented by the most basic provision of state assistance to those in need reflected by the basic-survival examples listed in the last sentence of the above quotation. There is thus a distinction between relative (state-specific) core minimums and absolute core minimums. For instance, Canada's core minimum will go considerably beyond the absolute core minimum while Mali's may go no further than this absolute core."

retrogressive measures may be called for to address particular budgetary difficulties, there is a line below which it is not reasonable for that State to fall. Say, for instance, that a given developed State provides free primary and secondary education to all persons in its territory. According to the CESCR's General Comment No 13, the provision of free secondary education is not part of the minimum core of right to education.[474] If that State faces a period of reduced economic growth, it cannot put an end to all free public secondary education, since it would be doing much less than what its available resources permit. Only if the State's resources declined so much that it was no longer able to guarantee the right to education at this level could the State be discharged of such an obligation. The promotion of the right to education at the level of free secondary education is, for that State, an obligation of immediate effect in light of its available resources, a minimum threshold. The question then is whether these minimum threshold obligations should be considered in the application of the principle of *non-refoulement*.

There are some obstacles that hinder a removing State from assessing a risk of violation of minimum threshold obligations in another. Firstly, defining the content of a State's minimum threshold duties requires extensive information about its available resources, data which is hardly made available to removing States.[475] Even if it is possible to have a general idea of another State's amount of resources, looking at its Gross Domestic Product, for example,[476] there is no consensus on the appropriate methodology for measuring what level of realisation of socioeconomic rights should be achieved for complying with the ICESCR.[477] To date, the CESCR's guidance on the matter has been restricted. The Committee has never indicated what would be an adequate level of investment in a given right considering a State's pool of available resources.[478] Its Concluding Observations on States-parties' periodic reports are necessarily limited, since they are based on the information the States themselves provide and do not always contain clear indications as to what is expected of each State in progressively realising rights

[474] *General Comment No 13*, *supra* note 316, at para. 57. The General Comment speaks only of adopting and implementing "a national educational strategy which includes provision for secondary, higher and fundamental education" as a minimum core obligation.
[475] In this sense, it is worth noting that the concept of available resources does not include only financial resources but also information, technical, organizational, human, natural, and administrative resources. *O'Connell et al.*, *supra* note 339, at 79.
[476] Some have suggested that comparing the GDP percentage dedicated to economic, social, and cultural rights among countries with a similar level of development or comparing it to the percentage of investment recommended by international organisations might be useful in assessing compliance with ICESCR obligations of progressive realisation. *O'Connell et al.*, *supra* note 339, at 58. Nevertheless, financial investments do not necessarily translate into greater enjoyment of rights, since many other factors, such as availability of infrastructure and existence of societal discrimination, also play a role in this regard. GDP analyses thus should be treated with caution.
[477] *Cuéllar*, *supra* note 403, at 112; *Felner*, *supra* note 403, at 407-408; *Chapman*, *supra* note 403.
[478] *Chapman*, *supra* note 403, at 148.

or whether this obligation is being satisfied.[479] Moreover, due to the amount of data it has to analyse, the CESCR usually takes many years to review a State's progress.[480]

In light of these difficulties, requiring a third State to determine the content of another's minimum threshold obligations and whether the latter are being met may result in decisions based on prejudices and misconceptions, establishing too low a threshold for some States and too high a threshold for others. Nonetheless, the possibility of applying the principle of *non-refoulement* to cases of violations of minimum threshold obligations should not be entirely discarded. Some methodologies may allow for the *a priori* identification of a risk of violation upon return: (1) adopting a reasonableness test, as done in the Optional Protocol to the ICESCR;[481] and (2) examining the level of corruption within the receiving State.

The reasonableness test is a method for assessing compliance with obligations of progressive realisation—and hence applicable to minimum threshold obligations, which possess a progressive component. While admitting that there are several means for realising and ensuring economic, social, and cultural rights,[482] the reasonableness test stresses that States do not have an unlimited margin of appreciation in this regard.[483] The CESCR enumerated several factors for determining the reasonableness of a State's measures, such as: whether these measures were deliberate, concrete, and targeted towards the fulfilment of economic, social, and cultural rights; whether they represented the option that least restricted the rights enshrined in the ICESCR; and the time frame in which these measures were taken.[484]

Despite these general guidelines, the notion of reasonableness remains particularly vague and does not allow a clear definition of States' obligations.[485] Authorities of the removing State will hardly dispose of the necessary information for a proper analysis of the reasonableness of the receiving State's measures for realising economic, social, and cultural rights. However, there may be extreme situations in which the unreasonableness of certain measures may be established by third States. For instance, if it is proven that a State's public health services are in pitiful conditions while the State has been allocating an expressive amount

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[479] *Ibid*, at 149, 151; Siddiqur Rahman Osmani, "Human Rights to Food, Health, and Education" (2000) 1:2 Journal of Human Development 273 at 290 [*Osmani*].
[480] *Osmani*, *supra* note 479, at 290.
[481] *ICESCR-OP*, *supra* note 34, at art. 8(4).
[482] Bruce Porter, "The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins" (2009) 27:1 Nordic Journal of Human Rights 39 at 50.
[483] Catarina de Albuquerque, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, social and Cultural Rights - The Missing Piece of the International Bill of Human Rights" (2010) 32 Hum Rts Q 144 at 174-175.
[484] *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, CESCR, 38th Sess, UN Doc E/C.12/2007/1 (2007) 1 at para. 8.
[485] *Bilchitz*, *supra* note 468, at 176.

of its budget to the army, and there is not an ongoing armed conflict in which the State is implicated, one may conclude that the use of these resources is not reasonable.[486] Ultimately, this will depend on what the removing State's authorities consider sufficient evidence to establish a potential breach of the ICESCR. If a potential violation is found, what is left for the removing State is only to ascertain whether this situation constitutes irreparable harm and whether there exists a real risk that the individual will be subjected to it upon removal.

As for the assessment of corruption levels within a State, this method also appears to be able to establish prima facie violations of minimum threshold obligations in certain cases. Although the determination of what practices are understood as corruption vary among jurisdictions, corruption may be generally defined as the abuse of entrusted power for private gain.[487] Not every act of corruption necessarily implies a violation of socioeconomic rights.[488] Nonetheless, if the realisation of these rights is hampered *due to* the mismanagement of resources resulting from corruption, there is a violation of the ICESCR.[489] The CRC Committee has been particularly vocal on the negative effects of corruption to children's enjoyment of economic, social, and cultural rights.[490]

Accordingly, a situation of widespread corruption cumulated with poor socioeconomic conditions are strong indicators of failure to satisfy minimum threshold obligations. Establishing the level of corruption in another State may be done through reports of international and non-governmental organisations as well as media and academic articles. Again, it is for the removing State's authorities to determine what they consider as reliable and sufficient evidence. Although it is acknowledged that, in the majority of cases, findings

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[486] *O'Connell et al.*, *supra* note 339, at 57. See also the CESCR's comments on the increase of military expenditure in South Korea taken together with a decrease in expenditure related to economic, social, and cultural rights: *Concluding Observations on the Second Periodic Report of Korea*, CESCR, UN Doc E/C.12/1/Add.59 (2001) 1 at para. 9. Similarly, the CESCR expressed concern that Senegal had spent more on developing its military and on servicing its debt than on basic social services and that the amounts allotted to the latter were insufficient: *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, CESCR, UN Doc E/2002/22 (2002) 1 at para. 349.

[487] "Corruptionary A-Z", *Transparency International*, available at: <https://www.transparency.org/glossary/term/corruption>, last accessed 15 December 2020.

[488] For an analysis on the relationship between corruption and specific human rights violations, see: Julio Bacio-Terracino, "Corruption as a Violation of Human Rights", International Council on Human Rights Policy, Working Paper, 2008, at 8.

[489] *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Mr. Paul Hunt)*, CESCR, 62nd Sess, UN Doc E/CN.4/2006/48 (2006) 1 at para. 44; *United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights*, UNHCHR, UN Doc HR/POL/GG/SEM/2006/2 (2006) 1 at para. 6; Gustavo Gallón Giraldo, "Latin-America: Challenges in Economic, social and Cultural Rights" (1995) 55 ICJ Rev 59 at 62.

[490] *Concluding Observations of the Committee on the Rights of the Child: Tajikistan*, CRC, 25th Sess, UN Doc CRC/C/15/Add.136 (2000) 1 at para. 5; *Concluding Observations of the Committee on the Rights of the Child: Kenya*, CRC. 28th Sess, UN Doc CRC/C/15/Add.160 (2001) 1 at para. 9; *Concluding Observations of the Committee on the Rights of the Child: Georgia*, 24th Sess, UN Doc CRC/C/15/Add.124 (2000) 1 at para. 18-19.

regarding corruption in another State may not be robust enough to denote a violation of its obligations under the ICESCR, it is not impossible for the removing State to be confronted with a situation in which corruption has a clear detrimental effect on socioeconomic rights. Such was the aforementioned case in which the Canadian IRB found that the levels of corruption in Zimbabwe led to discrimination in accessing antiretroviral treatment.[491]

In sum, it appears that, despite the inherent difficulties in assessing potential violation of minimum threshold obligations in receiving States, there are some situations in which this may be done. This exercise will depend on the level of proof presented and on the information available to the removing State but not on a purportedly inherent limitation to the principle of *non-refoulement*.

It is important to highlight that, even if minimum core or minimum threshold obligations are found to be at risk of violation in the receiving State, the application of the principle of *non-refoulement* will not be triggered unless this situation amounts to irreparable harm. There are some rights in the ICESCR that, even if completely denied, can hardly be said to give rise to such level of harm, such as the right to form trade unions and the right to strike.[492] This scenario is no different from what happens to some civil and political rights, such as freedom of conscience and religion. As noted by the ECtHR, although a real risk of flagrant violation of this right could in principle trigger a *non-refoulement* obligation, "it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of [the prohibition of cruel and degrading treatment]."[493] Similarly, even if the harm ensuing from the prohibition of forming trade unions *per se* may not be sufficiently serious for triggering *non-refoulement*, if this prohibition results in discrimination concerning the right to work[494] or even a denial of the latter—which in turn could have implications on the right to an adequate standard of living[495]—the severity of the harm could reach the necessary threshold.

Therefore, it seems possible to apply the principle of *non-refoulement* also in relation to obligations to ensure the minimum core and the minimum threshold of rights provided under

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[491] *X Re*, *supra* note 427, at para. 44-45, 48.
[492] *ICESCR*, *supra* note 15, at art. 8.
[493] *Z and T v. the United Kingdom*, *supra* note 143, at 7. A similar decision was reached in *Razaghi v. Sweden*, No 64599/01, ECtHR (11 March 2003) at 9. This goes to show that the level of harm required for *non-refoulement* in a general human rights framework is higher than the level of harm understood as persecution in refugee law, where prohibition to practice a given religion may give rise to refugee status even if not accompanied by some sort of torture or ill-treatment. See, notably: *Bucur* (USCA, 7th Cir., 1997), at 405; *SBZF v. Minister for Immigration and Citizenship*, [2008] FCA 1486 at para. 54-56; *S v. Chief Executive of the Department of Labour*, [2007] NZCA 182 at para. 32-34.
[494] *ICESCR*, *supra* note 15, at art. 6.
[495] *Ibid*, at art. 11.

the ICESCR, similarly to how this principle is applied to civil and political rights. When these obligations are involved, there are relevant means for determining a potential violation of the ICESCR without digging too deep into the receiving State's available resources. It seems that the greatest obstacle for deducing a duty of *non-refoulement* from the ICESCR is actually States' unwillingness to recognise stricter obligations for the implementation of economic, social, and cultural rights.

This unwillingness is well illustrated in the case of *Rahman v. Minister of Immigration*, decided by the New Zealand High Court ("NZHC").[496] The case concerned a man who claimed that, if removed to Bangladesh, he would be subjected to conditions of extreme poverty that amounted to a violation of his right to an adequate standard of living, ensured under Article 11 of the ICESCR.[497] When assessing the risk of harm to this right, the NZHC at first seemed to make reference to minimum core obligations in affirming that the conditions in Bangladesh would be "judged against basic standards necessary for existence, or indeed the rather better New Zealand standards."[498] Nevertheless, the NZHC then proceeded to balance the opposing interests between the poverty conditions claimed by the applicant and New Zealand's immigration policy. It stated the following:

> Where the person resisting removal has entered New Zealand by calculated fraud, or has become a burden on New Zealand society, it might well be just, and not unduly harsh (or indeed harsh at all) to require that person to return to relative or even absolute poverty. It is not New Zealand's duty to allow the rest of the world to be safer or more comfortable. If R.'s submission is correct, once a person from an impoverished country gained entry to New Zealand it would always be unjust or unduly harsh to compel his or her return home. That is an absurdity which could not have been intended, and is not the law.[499]

The NZHC then asserted that the rights under the ICESCR are subject to progressive realisation[500] and may be restricted on behalf of the general well-being, especially in what concerns the New Zealand society.[501] In view of these considerations, the Court rejected the existence of a *non-refoulement* obligation under the ICESCR and affirmed that New Zealand was under no obligation not to return individuals only because they would be subjected to less than adequate living conditions in the receiving State.[502]

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[496] *Rahman v Minister of Immigration*, (HC Wellington, AP 56/99 & CP49/99, 26 September 2000) [*Rahman*].
[497] *Ibid*, at para. 36.
[498] *Ibid*, at para. 43.
[499] *Ibid*, at para. 44.
[500] *Ibid*, at para. 59.
[501] *Ibid*, at para. 60, 62.
[502] *Ibid*, at para. 60.

The NZHC's decision is permeated by strong policy considerations on immigration and on States' prerogative to remove undocumented migrants. These considerations led to an inadequate interpretation of the obligations States have under ICESCR. Firstly, as seen throughout this thesis, the ICESCR does not contain only obligations of progressive realisation but also some of immediate effect, including non-discrimination and respect for the minimum core and minimum threshold of rights. Furthermore, any limitation of the rights enshrined in the ICESCR must be adopted to protect the rights of individuals and "only in so far as this may be compatible with the nature of these rights."[503] Allowing a potentially serious violation of the right to an adequate standard of living under the justification of immigration control, without showing that an equally serious prejudice could otherwise befall New Zealand, does not seem compatible with the ICESCR.

Similar reluctance in admitting an obligation of *non-refoulement* directly under the ICESCR is seen in the Administrative Appeals Tribunal of Australia ("AATA"). In a 2019 decision concerning whether an applicant who feared not having access to adequate medical treatment in his country of origin could qualify for complementary protection, the AATA applied the Australian Refugee Law Guidelines, which state the following: "[w]hile the right to health is protected under article 12 of the ICESCR (International Covenant on Economic, Social Cultural Rights), it is not considered to be a basis for non-refoulement obligation in its own right."[504] However, neither the AATA nor the Refugee Law Guidelines offered further explanation as to why this conclusion was warranted.

In view of the above, it seems that objections to recognising a principle of *non-refoulement* directly applicable to the ICESCR stem mainly from policy considerations rather than legal ones. Accordingly, the next Section will deal with the main arguments in this regard.

3.4 Addressing non-legal objections to applying the principle of *non-refoulement* under the ICESCR

As seen in the preceding Sections, a legal analysis seems to support the existence of a principle of *non-refoulement* within the ICESCR, arising from the Covenant's positive obligations to prevent violations of human rights. The particular characteristics of economic, social, and cultural rights do not prevent the principle of *non-refoulement* from being applied at least to obligations of immediate effect. What determines whether the duty not to remove arises in a given case is the existence of a real risk of irreparable harm in the receiving State,

[503] *ICESCR*, *supra* note 15, art. 4. See also *General Comment No 13*, *supra* note 316, at para. 42.
[504] *1510755 (Refugee)* [2019] AATA 3420 (26 August 2019) at para. 18, Annexure C [*1510755 (Refugee)*].

and not the nature of the rights invoked. As long as sufficient evidence is given, any human right could give rise to an obligation of *non-refoulement*.

Despite this legal reasoning, some objections arise as to the practical feasibility of recognising a specific duty of *non-refoulement* in the ICESCR and to the utility in doing so, from a standpoint of improving human rights protection.

The first objection is intrinsically linked to a floodgates argument. Deducing a principle of *non-refoulement* from the ICESCR would lead to people all over the globe who live in unfavourable socioeconomic conditions fleeing their countries and requesting protection in more developed States. This, in turn, would strain host States' financial resources to accommodate migrants, imposing a significant burden on the former and rendering them unable to comply with other international obligations, including human rights ones. The dangers of increasing the influx of people seeking protection abroad were seen in the so-called "refugee crisis" in Europe. In 2017, the Organisation for Economic Cooperation and Development calculated that the cost of processing and accommodating these people in their first year in European countries amounted to about €10,000 per person.[505] As put by Marc Bossuyt, one of the most vocal opponents of the application of the principle of *non-refoulement* to socioeconomic claims, this practice would seem "to be 'only a small step' away from a future prohibition of the removal of any asylum seeker, or by extension any foreign national, to his country of origin if he is not sure to find in that country decent living conditions."[506]

One should consider, however, that this argument is ultimately speculative. People living in poor socioeconomic conditions today already resort to migration in vast numbers, even when they do not fit in the traditional refugee definition. A prime example is the case of environmental migrants, who comprise millions of displaced individuals each year.[507] Many of these persons do not migrate because they have a clear intention of applying for international protection in another State; they simply seek an opportunity to improve their living conditions,

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[505] Organisation for Economic Cooperation and Development, "Who bears the cost of integrating refugees?", Migration Policy Debates, 2017, at 2.

[506] Marc Bossuyt, "The Court of Strasbourg Acting as an Asylum Court" (2012) 8:2 European Constitutional Law Review 203 at 234.

[507] Although exact numbers of environmentally displaced persons are difficult to estimate, the International Organization for Migration's 2020 report on world migration indicated several situations of environmental disasters or degradation that resulted in the displacement of millions, both internally and across borders. See International Organization for Migration, *World Migration Report 2020* (Geneva: IOM, 2019).
For an analysis of the impossibility and undesirability of applying refugee protection to environmental migrants, see Mariana Ferolla Vallandro do Valle, "Six of One, Half a Dozen of the Other: The Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons" in Giovanni Carlo Bruno; Fulvio Maria Palombino & Valentina Rossi, eds, *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward* (Rome: CNR, 2017) 1.

which sometimes barely surpass the minimum for survival in the State of origin. Regardless of whether *non-refoulement* is recognised under the ICESCR, these people will continue to leave their countries, even if they risk having only a precarious status as undocumented migrants in the host States.

Applying *non-refoulement* directly to the ICESCR will not create an obligation for States to host all of these people but only those at a real risk of being subjected to irreparable harm in their countries of origin. As the preceding analysis has shown, not every violation of human rights will reach this level of severity. A number of people fleeing irreparable harm are already encompassed by the principle of *non-refoulement* as currently applied, since socioeconomic deprivation may amount to inhuman and degrading treatment, as the case-law of the ECtHR and the HRC highlights.[508] The purpose of the obligation of *non-refoulement* is not to ensure better living conditions to a greater number of people but rather to prevent individuals who escaped some of the most serious forms of harm from being returned to such a plight. The focus then should be on the severity of the harm, and not on the legal classification of the right concerned.

Nonetheless, it is true that, even if an obligation of *non-refoulement* under the ICESCR would not be applicable to all people fleeing adverse socioeconomic conditions, this would not necessarily discourage more people from crossing borders and putting forward their claims. Even if in the end the State will not have the obligation to host all persons seeking protection—only those risking being subjected to irreparable harm—it will have to admit them into its territory and provide for them at least until their individual case is evaluated, in accordance with the procedural obligations stemming from the principle of *non-refoulement*. As such, it is not possible to guarantee either that the application of the principle of *non-refoulement* under the ICESCR would not encourage heavier migration flows.

Concerns as to the intensity of the migratory influx are directly related to the costs host States might incur in accommodating new migrants. It is true that an increase in the influx of migrants does not necessarily entail a negative economic impact to the host State. As recent studies on the European "migration crisis" have shown, in the medium and long term, the economic impact depends on how quickly these migrants are integrated into the labour market.[509] Such an integration has a direct relationship with the rights to education and to work

[508] See Chapter 2 above.

[509] Gratiela Georgiana Noja et al., "Migrants' Role in Enhancing the Economic Development of Host Countries: Empirical Evidence from Europe" (2018) 10 Sustainability 1 at 14; Shekhar Aiyar et al., "The Refugee Surge in Europe: Economic Challenges", *International Monetary Fund*, 2016, available at:

under the ICESCR,[510] so that States have not only an obligation but also a financial incentive to promote further realisation of access to rights such as education and work within their jurisdiction. However, one must also acknowledge that not all States have the appropriate infrastructure and financial resources to coordinate this integration.[511] Moreover, having a massive influx of people seeking protection in a short timeframe can destabilise the organisation of States who previously had not had much problem in accommodating migrants.

Accordingly, it does not seem possible to presume that recognising an autonomous obligation of *non-refoulement* within the ICESCR would lead to a sudden and significant increase in migration influxes and overburden host States or that it would not. Both arguments are speculative in the end. This uncertainty is not particular to the proposition developed herein but to any and all developments in the application of the principle of *non-refoulement*. Notably, when the ECtHR first applied the principle of *non-refoulement* to halt the removal of severely ill people in 1997[512] or when the Court recognised that extreme forms of socioeconomic deprivation could give rise to inhuman and degrading treatment in removal contexts in 2011,[513] such decisions may have encouraged people in similar situations to migrate and claim protection on the basis of these new developments. Nevertheless, there is no clear causal link between them and the number of migrants and asylum-seekers trying to get to Europe in subsequent years. Likewise, when the ECtHR set a very high threshold of harm for applying *non-refoulement* to health cases in *N. v. the United Kingdom*,[514] it is not possible to say that this decision caused the number of people seeking protection on that basis to decrease.

The point is that migration flows and their intensity are determined by a multitude of factors and legal developments are only one of them. Mass influxes have already happened in recent years, such as the situation of people displaced by the armed conflict in Syria and by the political and economic turmoil in Venezuela. Similar occurrences may well happen in the future

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<https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/The-Refugee-Surge-in-Europe-Economic-Challenges-43609>, last accessed 15 December 2020. Preliminary conclusions as to the positive impact of migrants, including asylum-seekers, in Europe were presented by: Jamal Bouoiyour, Amal Miftah, Refk Selmi, "The economic impact of migrants and refugees on Europe" (2019) 24 Femise Med Brief 1. Other studies focusing on migration in general, and not necessarily on categories of people seeking protection, also indicated that, overall, migration led positive economic impacts in host countries. See, notably: Amandine Aubry; Michał Burzynski & Frédéric Docquier, "The welfare impact of global migration in OECD countries" (2016) 101 J Int'l Econ 1.

[510] *ICESCR*, *supra* note 15, at art. 6.

[511] According to the UNHCR's statistics of 2019, the countries that host the largest number of asylum-seekers were Turkey (3.6 million), Colombia (1.8 million), and Pakistan (1.4 million), developing countries that in general face greater challenges in providing adequate socioeconomic conditions for their populations. Global Trends: Forced Displacement in 2019, UNHCR, 2020 at 3, 22.

[512] *D. v. the United Kingdom*, *supra* note 26.

[513] *M.S.S. v. Belgium and Greece*, *supra* note 9.

[514] *N. v. the United Kingdom*, *supra* note 127.

as well due to countless reasons, even if the protection of the principle of *non-refoulement* is not extended to other groups. The appropriate solution seems to promote the creation of burden-sharing mechanisms and agreements among States[515] rather than seeking to halt coherent developments in the application of the obligation of *non-refoulement*, such as applying it under the ICESCR.[516] Hence, it seems that the floodgates argument is too vague and uncertain to justify not applying the principle of *non-refoulement* to the ICESCR in similar parameters as it is done to treaties dealing with civil and political rights.

A second objection that may be advanced relates to the practical utility of deducing the principle of *non-refoulement* from the ICESCR. One may argue that, if this principle can only be applied to obligations of immediate realisation and to situations that amount to irreparable harm, it would encompass only situations that already qualify as inhuman and degrading treatment under international instruments dealing with civil and political rights. In this case, there would be no benefits from having an autonomous obligation of *non-refoulement* under the ICESCR. It would then be more beneficial to focus on promoting a better comprehension of socioeconomic harm as ill-treatment.

Indeed, there are many cases in which a risk of irreparable harm arising under the ICESCR will simultaneously constitute inhuman and degrading treatment. This seems to be so especially when thinking of the minimum core obligations concerning rights that have a closer relationship to the right to life, such as the right to health, to food, to water, to housing, and to an adequate standard of living. However, as the case-law of the ECtHR well illustrates,[517] not every situation of irreparable harm—or "flagrant violation," to use the ECtHR's terminology—entails inhuman or degrading treatment. Regarding the ICESCR, this seems to be the case especially concerning the right to education.[518] Denying access even to primary education, violating the minimum core obligations relating to this right, constitutes irreparable harm, since it hinders the individual's full development and significantly reduces their opportunities in life. This denial does not seem to constitute inhuman or degrading treatment *per se*, unless accompanied by some sort of physical or psychological violence. A similar argument could be

[515] The relevance of burden-sharing in a sustainable global strategy for addressing migration flows was highlighted in the: *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, UNGAOR, 73rd Sess, UN Doc A/RES/73/195 (2019) 1 at para. 11; *Office of the United Nations High Commissioner for Refugees*, GA Res73/151, UNGAOR, 73rd Sess, UN Doc A/RES/73/151 (2019) 1 at para. 8, 17-25, 53, 60; *New York Declaration for Refugees and Migrants*, GA Res 71/1, UNGAOR, 71st Sess, UN Doc A/RES/71/1 (2016) 1 at para. 11, 68. For an analysis of the normative gap on the issue burden-sharing in the context of asylum-seekers, see Meltem Ineli-Ciger, "The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?" (2019) 38:2 RSQ 115.

[516] To offer a solution on how these initiatives can be conducted is beyond the scope of this thesis, however.

[517] See Section 2.1.

[518] *ICESCR*, *supra* note 15, at art. 13.

attempted in relation to the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications.[519]

Moreover, situations in which the risk of harm relates to the obligation of non-discrimination or of guaranteeing the minimum threshold of rights may give rise to irreparable harm while not necessarily amounting to inhuman and degrading treatment. This could happen, for instance, in the case of a person who faces discrimination in accessing housing programs but is able to receive a somewhat precarious form of shelter, or where this housing program is part of the State's minimum threshold obligations. Another example would be a situation in which a person has access to basic health care but is discriminated in accessing another more complex form of treatment that is nevertheless necessary for them to live a dignified life. Attempting to fit all possible scenarios of irreparable harm under the ICESCR into the notion of inhuman and degrading treatment could thus lead to an erroneous assessment of *non-refoulement* claims and exclude serious situations that may not fall within a State's interpretation of ill-treatment. This risk is particularly prominent in States that consider that ill-treatment requires the adoption of concrete and deliberate measures causing harm to an individual, a position Australia, for instance, endorses.[520]

Applying the principle of *non-refoulement* directly to economic, social, and cultural rights is also useful to deepen States-parties' comprehension of what the ICESCR's obligations actually require. Specifically, such an application could reinforce the fact that some of the Covenant's obligations must be satisfied immediately and that failure to meet these obligations can result in harm as serious as the one arising from violations of civil and political rights. Claims concerning minimum core and minimum threshold obligations could also contribute to clarifying the content of each of these duties. This is of particular relevance in jurisdictions such as Canada and Australia, which adopt the unable/unwilling test to determine whether socioeconomic claims are able to prevent removal. An assessment of these claims under the ICESCR, instead of under domestic law, would open the possibility for considering a risk of irreparable harm in cases where there is no discriminatory treatment in relation to the applicant but instead potential breaches of minimum core and minimum threshold obligations.

Aside from cases brought before domestic jurisdictions and the CESCR itself, recognising a duty of *non-refoulement* under the ICESCR may also impact how this principle is applied by other human rights bodies that are competent to deal with violations of economic, social, and cultural rights, such as the IACommHR, the IACtHR, the ACommHPR, the CRC

[519] *Ibid*, at art. 15.
[520] *1910307 (Refugee)*, *supra* note 439, at para. 141; *1406290*, *supra* note 439, at para. 68.

Committee, and the CEDAW Committee. Given that the CESCR's complaint procedure is still incipient, mainly due to the restricted number of States-parties,[521] having other human rights bodies apply the principle of *non-refoulement* to economic, social, and cultural rights is essential for the effective protection of persons covered by this interpretation of the principle. The Inter-American human rights system holds a special potential in this regard, since, in the past decades, its bodies have dealt with a growing number of cases dealing with migration issues and with economic, social, and cultural rights.[522]

The development of analyses concerning socioeconomic rights in the context of *non-refoulement* may also have positive impacts in other legal frameworks. More opportunities to adjudicate on the risk of harm to economic, social, and cultural rights in another State could increase domestic authorities' familiarisation with these rights and lead to a more reasoned and coherent consideration of them in claims of persecution under the Refugee Convention.[523] The same tendency would follow in assessing socioeconomic conditions related to *non-refoulement* claims of inhuman and degrading treatment under the ICCPR and other international instruments.

Therefore, it seems that the application of the principle of *non-refoulement* to the rights enshrined in the ICESCR can bring important contributions to the protection of economic, social, and cultural rights in migration contexts while not necessarily leading to an impractical situation of overburdening host States.

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[521] As of December 2020, the Optional Protocol to the ICESCR had been ratified by 25 States. "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *United Nations Treaty Collection*, available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4>, last accessed 15 December 2020.

[522] Only in the last decade, the IACtHR has delivered decisions on its first two contentious cases dealing with the principle of *non-refoulement* and issued two advisory opinions on questions of migration and human rights. See: *Familia Pacheco Tineo v. Bolivia*, *supra* note 159; *Wong Ho Wing v. Peru*, *supra* note 96; *Rights and Guarantees of Children*, *supra* note 96; *The Institution of Asylum*, *supra* note 44. During the same period, the IACtHR has asserted its jurisdiction over a variety of claims relating to economic, social, and cultural rights under Article 26 of the American Convention. See: *Lagos del Campo v. Peru*, *supra* note 207; *San Miguel Sosa y otras v. Venezuela*, *supra* note 357; *Poblete Vilches y otros v. Chile*, *supra* note 357; *Cuscul Piraval v. Guatemala*, *supra* note 207; *Empregados da Fábrica de Fogos v. Brazil*, *supra* note 357.

[523] The relevance of improving the analysis of socioeconomic claims in refugee status determination procedures is highlighted in Imogen Little's analysis of decisions of New Zealand domestic bodies, in which a hierarchical approach to human rights, with civil and political rights being considered more important than economic, social, and cultural ones, can still be seen. *Little*, *supra* note 8. It should be noted, however, that some authors criticise reliance on human rights norms and standards to define what constitutes persecution under refugee law. See mainly: David James Cantor, "Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm" in Bruce Burson & David James Cantors, eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Leiden: Brill Nijhoff, 2016) 349; Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (Oxon: Routledge, 2021) at 39-85.

CONCLUSION

Almost 60 years after the publication of *Arrow of God*, in 1964, Chinua Achebe's words in the priest Ezeulu's prayer ring truer than ever: "[…] life alone is not enough. May we have the things with which to live it well. For there is a kind of slow and weary life which is worse than death."[524] If there ever was a view that the harm resulting from violations of civil and political rights is more serious than that emanating from violations of economic, social, and cultural rights, this position seems today unsustainable in the face of the thousands of people that seek to flee from deplorable living conditions each year. To them, not being arbitrarily arrested or subjected to physical violence by State authorities may bring little comfort when considering the dangers of socioeconomic destitution and the prospects of mere survival.

Despite the severity of the harm that may arise from States' failure to comply with economic, social, and cultural rights, the protection of migrants' rights is still mainly focused on their civil and political rights. Whether socioeconomic conditions are taken into consideration in claims for complementary protection depends on the possibility of translating them to the framework of civil and political rights. More often than not, allegations of violations of economic, social, and cultural rights are discarded on a presumption of lack of resources in the country of origin without the host State even bothering to verify whether that is truly the case. Accordingly, these rights still hold little significance in the application of the principle of *non-refoulement* by international human rights bodies and domestic authorities.

Nevertheless, deeper analysis concerning the structure of the principle of *non-refoulement* and of obligations arising from socioeconomic rights shows that a coherent application of this principle does not allow for distinction between civil and political rights and economic, social, and cultural ones.

Despite the lack of clarity and even incoherencies in human rights bodies' approach to establishing the legal basis for the principle of *non-refoulement*, this norm can only be fully comprehended by reference to the framework of positive human rights obligations. This is because the duty of *non-refoulement* is, in sum, an obligation to prevent human rights violations from being committed by third parties where the State knew or should have known there existed a real risk of such violations. This formula, encompassing the elements of risk and foreseeability, has been repeatedly adopted in relation to positive human rights obligations in

[524] Chinua Achebe, *Arrow of God* (Portsmouth: Heinemann Ltd., 1989) at 95.

decisions of human rights bodies.[525] Negative obligations, on the other hand, depend on the materialisation of the harm and are not deemed to be breached solely on the basis that the State took the risk that such harm might occur.

Accepting that the principle of *non-refoulement* is a positive obligation implies that any human right can give rise to this duty. Although the case-law of human rights bodies has focused on applying *non-refoulement* to the prohibition of ill-treatment, it seems that these bodies have attempted to formulate the duty to prevent removal in broader terms. The clearest approach in this regard is that of the ECtHR, which has expressly recognised and applied the principle of *non-refoulement* to other non-derogable provisions of the European Convention, such as the right to liberty and security,[526] the right to a fair trial,[527] and the right to family life.[528] What matters for the ECtHR is not the provision invoked but whether there is a real risk of a flagrant violation of the right, capable of giving rise to serious harm to the applicant. Similarly, the HRC and the CRC Committee, even though they have not yet applied the principle of *non-refoulement* to rights other than the prohibition of ill-treatment in their complaints procedures, have indicated that an obligation to prevent return arises where there exists a real risk of irreparable harm in the receiving State.[529] The IACtHR, in turn, has applied the obligation of *non-refoulement* to the rights of the family and of the child[530] and seems not to have foreclosed the possibility of doing the same to other rights enshrined in the American Convention.[531] Accordingly, the relevant element for the application of the principle of *non-refoulement* seems to be not the specific right invoked but the severity of the harm risked—a flagrant violation, according to the ECtHR, or "irreparable harm," as put by the HRC and the CRC Committee.

Poor socioeconomic in the receiving State can reach the level of harm required for the application of the principle of *non-refoulement*. This has been recognised mainly by the ECtHR and the HRC, which have indicated that extremely dire material conditions in the receiving country, including lack of access to shelter, medical care, and adequate food, may amount to

[525] *Osman v. the United Kingdom*, *supra* note 113, at para. 116; *Velásquez Paiz y Otros v. Guatemala*, *supra* note 101, at para. 109; *EWLA v. Ethiopia*, *supra* note 102, at para. 124-125; *Norma Portillo Cáceres et al v. Paraguay*, *supra* note 103, at para. 7.3, 7.5.
[526] *Al Nashiri v. Romania*, *supra* note 23, at para. 596, 689-692.
[527] *Othman (Abu Qatada) v. the United Kingdom*, *supra* note 23, at para. 250-251, 287.
[528] *Nars et Ghali c. Italie*, *supra* note 140, at para. 308-310, 324-326.
[529] *General Comment No 31*, *supra* note 24, at para. 12; *General Comment No 6*, *supra* note 24, at para. 27.
[530] *Familia Pacheco Tineo v. Bolivia*, *supra* note 159, at para. 226-229.
[531] *The Institution of Asylum*, *supra* note 44, at para. 181; *Rights and Guarantees of Children*, *supra* note 96, at para. 231.

inhuman and degrading treatment, thus triggering the probation of removal.[532] The ECtHR and the HRC have set a high standard for the harm to amount to ill-treatment in these cases, emphasising the vulnerability of the individuals concerned,[533] which may be explained by the fact that the prohibition of inhuman and degrading treatment was not originally conceived with the aim to address socioeconomic hardship. Nonetheless, this case-law is relevant in demonstrating that violations of economic, social, and cultural rights can give rise to harm as severe as that arising from breaches of civil and political rights.

When taking these developments into account, it seems that there is no obstacle to deducing a principle of *non-refoulement* directly from the ICESCR, as a positive obligation to prevent risk of irreparable harm to a person's economic, social, and cultural rights. This understanding is further confirmed by the fact that the normative differences between socioeconomic rights and civil and political rights are not of such magnitude as to hamper the application of the principle of *non-refoulement* to the former. Indeed, both categories of rights impose positive obligations on States, which may lead to greater or lesser financial implications depending on the case at hand,[534] and both are capable of being adjudicated by judicial and administrative bodies.[535] Moreover, the obligation to provide international cooperation and assistance under Article 2(1) of the ICESCR[536] reinforces the attention States-parties should pay to the situation of human rights beyond their territories and jurisdiction, so as not to contribute to violations abroad.

The most significant hurdle to the application of the principle of *non-refoulement* to the ICESCR seems to be the fact that full realisation of the Covenant's rights is to be achieved progressively, in light of States' available resources.[537] Requiring removing States to have a comprehensive understanding of which resources the receiving State has and how it should use them to comply with its progressive obligations under the ICESCR is simply not feasible. Even if this kind of data were available to the removing State, which is rarely if ever the case, this State would have to dedicate a vast amount of its own resources—including time, facilities, personnel, and money—to establish the extent of the receiving State's obligations under the

[532] *M.S.S. v. Belgium and Greece*, *supra* note 9, at para. 367-368; *Tarakhel v. Switzerland*, *supra* note 268, at para. 120-122; *Warda Osman Jasin v. Denmark*, *supra* note 9, at para. 8.9-8.10; *Bayush Alemseged Araya v. Denmark*, *supra* note 305, at para. 9.9-9.12
[533] *M.S.S. v. Belgium and Greece*, *supra* note 9, at para. 251, 259; *Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark*, *supra* note 26, at para. 7.7-7.9.
[534] See Section 3.1.1.
[535] See Section 3.1.3.
[536] *ICESCR*, *supra* note 15, at art. 2(1).
[537] *Ibid*.

ICESCR. The rationale of positive obligations prohibits such a disproportionate burden from being imposed on the State.[538]

However, these difficulties can be circumvented by focusing the application of the principle of *non-refoulement* to the ICESCR's obligations of immediate effect—that is, the obligation of non-discrimination and of protecting the minimum core and minimum threshold of economic, social, and cultural rights.[539] Since compliance with these obligations can be verified without reference to a State's available resources, the removing State should be able to ascertain whether there exists a real risk of harm in relation to them without assuming a disproportionate burden. Indeed, it is common for domestic authorities to analyse the existence of discrimination in the country of origin when examining socioeconomic claims of asylum-seekers and of those seeking complementary protection.[540]

Although the content of minimum threshold obligations must be based on the receiving State's available resources, it is not impossible for removing States to define this minimum threshold in some situations in which it is manifestly disregarded. This may done by applying the reasonableness test adopted in the ICESCR's Optional Protocol[541] or by reference to the level of corruption in the receiving State.[542] If the evidence before the removing State's authorities indicates that the receiving State has resources to provide a certain level of economic, social, and cultural rights and is deliberately not doing so without a legitimate reason—fulfilling other rights or other public interests—there may exist a risk that the minimum threshold will be breached upon removal.

In addition to these legal grounds allowing for the deduction of a principle of *non-refoulement* from the ICESCR, it does not seem that other non-legal considerations are sufficient to prevent the application of this principle to economic, social, and cultural rights.

The floodgates concern that a principle of *non-refoulement* under the ICESCR would lead to an unmanageable increase in migratory influxes does not appear compelling. An obligation of *non-refoulement* under the ICESCR would only apply to those who risk being subjected to irreparable harm in the receiving State, a number of people far smaller than the total of those who seek to improve their socioeconomic living conditions. Moreover, causes of migration flows are varied and complex. Even though one cannot state with certainty that

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[538] *Mukhitdinov v. Russia*, *supra* note 113, at para. 69; *Xákmok Kásek Indigenous Community v. Paraguay*, supra note 114, at para. 188.
[539] *General Comment No 3*, *supra* note 16, at para. 7, 10; *Chatton*, *supra* note 33, at 243-244.
[540] *Tchoukhrova v Gonzales*, *supra* note 422, at 4580-4582; *RN (Returnees) Zimbabwe*, *supra* note 422, at para. 249; *X Re*, *supra* note 427, at para. 35, 37-39; *AJI16*, *supra* note 291, at para. 32-33.
[541] *ICESCR-OP*, *supra* note 34, at art. 8(4).
[542] Similarly to what was done by the Canadian IRB in *X Re*, *supra* note 427.

recognising a principle of *non-refoulement* under the ICESCR would not increase migratory influxes, the opposite cannot be said either. In this scenario of uncertainty and speculation, efforts to prevent the overburdening of host States seem more beneficial if directed at the establishment of burden-sharing mechanisms rather than at halting new developments concerning the principle of *non-refoulement*.

As for the argument that recognising a *non-refoulement* obligation in the ICESCR would have no practical effect in terms of enhancing complementary protection, it is important to stress that not every risk of irreparable harm to economic, social, and cultural rights amounts to a violation of civil and political rights such as the prohibition of inhuman and degrading treatment. Forcing socioeconomic rights to be translated into civil and political rights for applying *non-refoulement* leads to stricter standards of harm, such as the ECtHR's and the HRC's reference to vulnerability, and diminishes the relevance of receiving States' omissions in complying with obligations of immediate effect under the ICESCR. It is thus important that each right be assessed in its own legal framework. Furthermore, encouraging the application of *non-refoulement* to the ICESCR can lead to positive effects in the analysis of other socioeconomic claims in the context of migration and refugee law, since domestic authorities will have further opportunities to familiarise themselves with the framework of the Covenant. This practice could also open the door for other human rights bodies that have jurisdiction over economic, social, and cultural rights to apply the principle of *non-refoulement* to these guarantees.

Therefore, it seems there are relevant grounds, both from a legal and a non-legal perspective, to recognise the principle of *non-refoulement* as a rule implicit in the ICESCR, as it has been done in other international instruments dealing with civil and political rights. Indeed, due to legal basis from which the principle of *non-refoulement* stems—a positive obligation—coherent application of this rule requires it to be read into any human right and triggered whenever there is a real risk of irreparable harm in the receiving State. The fact that the practice of States currently does not support such an interpretation,[543] mainly due to political considerations and misconceptions as to the kind of obligations imposed by the ICESCR, reinforces the role of human rights bodies in ensuring that the duty of *non-refoulement* is applied in a well-reasoned manner to all categories of rights. This task is not limited to the CESCR but can also be performed by human rights bodies such as the CRC, the ACommHPR, the IACommHR, and the IACtHR, especially since the last two are more used to dealing with

[543] *Rahman*, *supra* note 496, at para. 60; *1510755 (Refugee)*, *supra* note 504, at para. 18.

removal cases. The support of these bodies seems essential for *non-refoulement* to achieve independence from civil and political rights and be seen as a general obligation in human rights treaties.

INDEX OF AUTHORITIES

Treaties

African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3.

Convention relating to the International Status of Refugees, 28 October 1933, 159 LNTS 3663.

Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 150.

International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, UN Doc A/RES/63/117 (2009) 1.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

UN Documents

Committee on Economic, Social, and Cultural Rights

An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, CESCR, 38th Sess, UN Doc E/C.12/2007/1 (2007) 1.

Concluding observations on sixth periodic report of Denmark, CESCR, 66th Sess, UN Doc E/C.12/DNK/CO/6 (2019) 1.

Concluding observations on the fifth periodic report of Australia, CESCR, 61st Sess, UN Doc E/C.12/AUS/CO/5 (2017) 1.

Concluding observations on the fourth periodic report of New Zealand, CESCR, 63rd Sess, UN Doc E/C.12/NZL/CO/4 (2018) 1.

Concluding observations on the initial report of Pakistan, CESCR, 61st Sess, UN Doc E/C.12/PAK/CO/1 (2017) 1.

Concluding observations on the sixth periodic report of Norway, CESCR, 67th Sess, UN Doc E/C.12/NOR/CO/6 (2020) 1.

Concluding observations on the sixth periodic report of Poland, CESCR, 59th Sess, UN Doc E/C.12/POL/CO/6 (2016) 1.

Concluding observations on the sixth periodic report of the Netherlands, CESCR, 61st Sess, UN Doc E/C.12/NLD/CO/6 (2017) 1.

Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, CESCR, 60th Sess, UN Doc E/C.12/2017/1 (2017) 1.

General Comment No 3, CESCR, 5th Sess, UN Doc HRI/GEN/1/Rev.6 (2003) 14.

General Comment No 9, CESCR, 19th Sess, UN Doc E/C.12/1998/24 (1998) 1.

General Comment No 13, CESCR, 21st Sess, UN Doc E/C.12/1999/10 (1999) 1.

General Comment No 14, CESCR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) 1.

General Comment No 15, CESCR, 29th Sess, UN Doc E/C.12/2002/11 (2003) 1.

General Comment No 18, CESCR, 35th Sess, UN Doc E/C.12/GC/18 (2006) 1.

General Comment No 19, CESCR, 39th Sess, UN Doc E/C.12/GC/19 (2008) 1.

General Comment No 20, CESCR, 42th Sess, UN Doc E/C.12/GC/20 (2009) 1.

General Comment No 21, CESCR, 43rd Sess, UN Doc E/C.12/GC/21 (2009) 1.

General Comment No 24, CESCR, 61st Sess, UN Doc E/C.12/GC/24 (2017) 1.

Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Mr. Paul Hunt), CESCR, 62nd Sess, UN Doc E/CN.4/2006/48 (2006) 1.

Report on the First Session, CESCR, 1st Sess, UN Doc E/C.12/1987/5 (1987) 1.

Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, CESCR, UN Doc E/2002/22 (2002) 1.

Committee on the Elimination of All Forms of Discrimination against Women

General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW, UN Doc CEDAW/C/GC/32 (2014) 1.

Joint general comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW, CRC, UN Doc CMW/C/GC/3-CRC/C/GC/22 (2017) 1.

Committee on the Rights on the Child

Concluding Observations of the Committee on the Rights of the Child: Tajikistan, CRC, 25th Sess, UN Doc CRC/C/15/Add.136 (2000) 1.

Concluding Observations of the Committee on the Rights of the Child: Kenya, CRC. 28th Sess, UN Doc CRC/C/15/Add.160 (2001) 1.

Concluding Observations of the Committee on the Rights of the Child: Georgia, 24th Sess, UN Doc CRC/C/15/Add.124 (2000) 1.

General Comment No 6, CRC, 39th Sess, UN Doc CRC/GC/2005/6 (2005) 1.

Human Rights Committee

Draft General Comment No 35, HRC, 107th Sess, UN Doc CCPR/C/107/Rev.3 (2013) 1.

General Comment No 20, HRC, 44th Sess, UN Doc HRI/GEN/1/Rev.6 (2003) 159.

General Comment No 31, HRC, 80th Sess, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) 1.

General Comment No 35, HRC, 112th Sess, UN Doc CCPR/C/GC/35 (2014) 1.

General Comment No 36, HRC, 124th Sess, UN Doc CCPR/C/GC/36 (2018) 1.

Commission on Human Rights and Human Rights Council

Draft international covenants on human rights and measures of implementation, Commission on Human Rights, 9th Sess, UN Doc E/CN.4/SR.390 (1953) 9.

Final draft of the guiding principles on extreme poverty and human rights, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, Human Rights Council, 21st Sess, UN Doc A/HRC/21/39 (2012) 1.

The New International Economic Order and the Promotion of Human Rights: Report on the right to adequate food as a human right submitted by Mr. Asbjørn Eide, Special Rapporteur, Commission on Human Rights, 39th Sess, UN Doc E/CN.4/Sub.2/1987/23 (1987) 1.

Question of a Convention on the Rights of the Child: Report of the Working Group on a draft convention on the rights of the child, Commission on Human Rights, 42nd Sess, UN Doc E/CN.4/1986/39 (1986) 1.

Question of a Convention on the Rights of the Child: Report of the Working Group on a draft convention on the rights of the child, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/25 (1987) 1.

Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Res 1987/20, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/60 (1987) 68.

Realization of economic, social and cultural rights, Res 1987/19, Commission on Human Rights, 43rd Sess, UN Doc E/CN.4/1987/60 (1987) 65.

Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session, Human Rights Council, 6th Sess, UN Doc A/HRC/6/8 (2007) 1.

Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, Commission on Human Rights, 60th Sess, UN Doc E/CN.4/2004/44 (2004) 1.

Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session, Commission on Human Rights, 61st Sess, UN Doc E/CN.4/2005/52 (2005) 1.

Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, Commission on Human Rights, 62nd Sess, UN Doc E/CN.4/2006/47 (2006) 1.

The right to food: Report of the Special Rapporteur on the right to food, Jean Ziegler, Commission on Human Rights, 61st Sess, UN Doc E/CN.4/2005/47 (2005) 1.

Summary Record of the Hundred and Fifty-Fourth Meeting, Commission on Human Rights, 6th Sess, UN Doc E/CN.4/SR.154 (1950) 1.

Summary Record of the Hundred and Fifty-Third Meeting, Commission on Human Rights, 6th Sess, UN Doc E/CN.4/SR.153 (1950) 1.

Summary Record of the Hundred and Sixth Meeting, Commission on Human Rights, 5th Sess, UN Doc E/CN.4/SR.106 (1949) 1.

Other UN bodies

Draft International Covenants on Human Rights, Report of the Third Committee, UNGAOR, 9th Sess, UN Doc A/2808 (1954) 1.

Draft International Covenants on Human Rights, UNGAOR, 9th Sess, 573rd meeting, UN Doc A/C.3/SR.573 (1954) 1.

Draft International Covenants on Human Rights, UNGAOR, 11th Sess, 740th meeting, UN Doc A/C.3/SR.740 (1957) 1.

Draft International Covenant on Human Rights, UNGAOR, 11th Sess, 742nd meeting, UN Doc A/C.3/L.586 (1957) 1.

Draft International Covenants on Human Rights, UNGAOR, 11th Sess, 742nd meeting, UN Doc A/C.3/SR.742 (1957) 1.

Draft International Covenants on Human Rights, UNGAOR, 12th Sess, 795th meeting, UN Doc A/C.3/SR.795 (1957) 1.

Draft International Covenants on Human Rights, UNGAOR, 12th Sess, 796th meeting, UN Doc A/C.3/SR.796 (1957) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1202nd meeting, UN Doc A/C.3/SR.1202 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1203rd meeting, UN Doc A/C.3/SR.1203 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1204th meeting, UN Doc A/C.3/SR.1204 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1205th meeting, UN Doc A/C.3/SR.1205 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1206th meeting, UN Doc A/C.3/SR.1206 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 17th Sess, 1207th meeting, UN Doc A/C.3/SR.1207 (1962) 1.

Draft International Covenants on Human Rights, UNGAOR, 18th Sess, 1273th meeting, UN Doc A/C.3/SR.1273 (1963) 1.

Draft International Covenants on Human Rights, UNGAOR, 21st Sess, 1398th meeting, UN Doc A/C.3/SR.1398 (1966) 1.

Draft International Covenants on Human Rights, UNGAOR, 21st Sess, 1455th meeting, UN Doc A/C.3/SR.1455 (1966) 1.

Draft International Covenants on Human Rights, UNGAOR, 21st Sess, 1495th meeting, UN Doc A/PV.1495 (1966) 1.

Draft International Covenants on Human Rights: Annotation prepared by the Secretary-General, UNGAOR, 10th Sess, UN Doc A/2929 (1955) 1.

Global Compact for Safe, Orderly and Regular Migration, GA Res 73/195, UNGAOR, 73rd Sess, UN Doc A/RES/73/195 (2019) 1.

Indivisibility and interdependence of economic, social, cultural, civil and political rights, GA Res 43/113, UNGAOR, 75th Sess, UN Doc A/RES/44/130 (1989) 1.

New York Declaration for Refugees and Migrants, GA Res 71/1, UNGAOR, 71st Sess, UN Doc A/RES/71/1 (2016) 1.

Office of the United Nations High Commissioner for Refugees, GA Res73/151, UNGAOR, 73rd Sess, UN Doc A/RES/73/151 (2019) 1.

OHCHR, Expert Meeting on Protecting the human rights of migrants in the context of return, Informal Summary, 6 March 2018.

Preparation of two Draft International Covenants on Human Rights, UNGAOR, 6th Sess, Supp. No 20, UN Doc A/RES/543(VI) (1952) 36.

Proclamation of Teheran, Final Act of the International Conference on Human Rights, UN Doc A/CONF. 32/41 (1968) 3.

Report of the Third Committee, UNGAOR, 17th Sess, UN Doc A/5365 (1962) 1.

United Nations Conference on Anti-Corruption Measures, Good Governance and Human Rights, UNHCHR, UN Doc HR/POL/GG/SEM/2006/2 (2006) 1.

Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights, 25 June 1993.

Decisions of international human rights bodies

African Commission of Human and Peoples' Rights

Charter in Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea, No 249/02, ACommHPR (7 December 2004).

Equality Now and Ethiopian Women Lawyers Association (EWLA) v. Ethiopia, No 341/07, ACommHPR (16 November 2015).

John K. Modise v. Botswana, No 97/93_14AR, ACommHPR (6 November 2000).

Kenneth Good v. Republic of Botswana, No 313/05, Afr Comm HR (26 May 2010)

Organisation mondiale contre la torture, Association Internationale des juristes démocrates, Commission internationale des juristes, Union interafricaine des droits de l'Homme v. Rwanda, No 27/89-46/91-49/91-99/93, ACommHPR (31 October 1996).

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria, No 155/96, Afr Comm HR (27 October 2001).

Zimbabwe Human Rights NGO Forum v Zimbabwe, No 245/02, ACommHPR (15 May 2006).

Committee on Economic, Social, and Cultural Rights

Marcia Cecilia Trujillo Calero v. Ecuador, CESCR, 63rd Sess, UN Doc E/C.12/63/D/10/2015 (2018) 1.

Committee on the Elimination of All Forms of Discrimination against Women

A.S. v. Denmark, CEDAW, 69th Sess, UN Doc CEDAW/C/69/D/80/2015 (2018) 1.

R.S.A.A. et al v. Denmark, CEDAW, 73rd Sess, UN Doc CEDAW/C/73/D/86/2015 (2019) 1.

S.J.A. v. Denmark, CEDAW, 68th Sess, UN Doc CEDAW/C/68/D/79/2014 (2017) 1.

S.O. v. Canada, CEDAW, 59th Sess, UN Doc CEDAW/C/59/D/49/2013 (2014) 1.

Y.C. v. Denmark, CEDAW, 59th Sess, UN Doc CEDAW/C/59/D/59/2013 (2014) 1.

Y.W. v. Denmark, CEDAW, 60th Sess, UN Doc CEDAW/C/60/D/51/2013 (2015) 1.

Committee on the Rights of the Child

D.D. v. Spain, CRC, 80th Sess, UN Doc CRC/C/80/D/4/2016 (2019) 1.

I.A.M. v. Denmark, CRC, 77th Sess, UN Doc CRC/C/77/D/3/2016 (2018) 1.

Z.H. and A.H. v. Denmark, CRC, 82nd Sess, UN Doc CRC/C/82/D/32/2017 (2019) 1.

European Commission of Human Rights

B.B. c. France, No 30930/96, ECommHR (9 March 1998).

Jens Soering v. the United Kingdom, No 14038/88, ECommHR (19 January 1989).

Kemal Altun c. République fédérale d'Allemagne, No 10308/83, ECommHR (3 May 1983).

Kirkwood v. the United Kingdom, No 10479/83, ECommHR (12 March 1984).

M.C. France, No 10078/82, ECommHR (13 December 1984).

X c. l'Autriche et la Yougoslavie, No 2143/64, ECommHR (30 June 1964).

X v. the Federal Republic of Germany, No 3110/67, ECommHR (19 July 1968).

X v. the Federal Republic of Germany, No 4162/69, ECommHR (17 December 1969).

X v. the Federal Republic of Germany, No 4314/69, ECommHR (02 February 1970).

X v. the Germany, No 3040/67, ECommHR (07 April 1967).

X v. the Netherlands, No 1983/63, ECommHR (13 December 1965).

X. c. Belgique, No 984/61, ECommHR (29 May 1961).

European Court of Human Rights

Airey v. Ireland, No 6289/72, ECtHR (9 October 1979).

Al Nashiri v. Poland, No 28761/11, ECtHR (24 July 2014).

Al Nashiri v. Romania, No 33234/12, ECtHR (31 May 2018).

Al-Moayad v. Germany, No 35865/03, ECtHR (20 February 2007).

A.M.E. v. the Netherlands, No 51428/10, ECtHR (13 January 2015).

Amegnigan v. the Netherlands, No 25629/04, ECtHR (25 November 2004).

A.S. v. Switzerland, No 39350/13, ECtHR (30 June 2015).

Arcila Henao v. the Netherlands, No 13669/03, ECtHR (24 June 2003).

Babar Ahmad and others v. the United Kingdom, No 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ECtHR (10 April 2012).

Bader v Sweden, No 13284/04, ECtHR (8 November 2005).

Bah v. the United Kingdom, No 56328/07, ECtHR (27 September 2011).

Balogun v. the United Kingdom, No 60286/09, ECtHR (10 April 2012).

Bensaid v. the United Kingdom, No 44599/98, ECtHR (6 February 2001).

Budayeva and others v. Russia, No 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, ECtHR (20 March 2008).

Buturugă c. Roumanie, No 56867/15, ECtHR (11 February 2020).

Ceesay v. Austria, No 72126/14, ECtHR (16 November 2017).

Chahal v. the United Kingdom, No 70/1995/576/662, ECtHR (11 November 1996).

Cruz Varas and others v. Sweden, No 15576/89, ECtHR (20 March 1991).

D. v. the United Kingdom, No 30240/96, ECtHR (2 May 1997).

Drozd and Janousek v. France and Spain, No 12747/87, ECtHR (26 June 1992).

Einhorn v. France, No 71555/01, ECtHR (16 October 2001).

El-Masri v. the Former Yugoslav Republic of Macedonia, No 39630/09, ECtHR (13 December 2012).

F. v. the United Kingdom, No 17341/03, ECtHR (22 June 2004).

Fernandes de Oliveira v. Portugal, No 78103/14, ECtHR (31 January 2019).

Florea c. Roumanie, No 37186/03, ECtHR (14 September 2010).

Gheorghe Predescu v. Romania, No 19696/10, ECtHR (25 February 2014).

Golder v. the United Kingdom, No 4451/70, ECtHR (21 February 1975).

Hiller v. Austria, No 1967/14, ECtHR (22 November 2016).

Husayn (Abu Zubaydah) v. Poland, No 7511/13, ECtHR (24 July 2014).

Ilias and Ahmed v. Hungary, No 47287/15, ECtHR (21 November 2019).

Ireland v. the United Kingdom, No 5310/71, ECtHR (18 January 1978).

Kalashnikov v. Russia, No 47095/99, ECtHR (15 July 2002).

Keenan v. the United Kingdom, No 27229/95, ECtHR (3 April 2001).

Khamtokhu and Aksenchik v. Russia, No 60367/08 and 961/11, ECtHR (24 January 2017).

Khlaifia et autres c. Italie, No 16483/12, ECtHR (15 December 2016).

Makhmudzhan Ergashev v. Russia, No 49747/11, ECHR (16 October 2012).

Malik Babayev v. Azerbaijan, No 30500/11, ECtHR (1 June 2017).

Mamatkulov and Askarov v. Turkey, No 46827/99 and 46951/99, ECtHR (4 February 2005).

M.S.S. v. Belgium and Greece, No 30696/09, ECtHR (21 January 2011).

Mohammed Hussein and others v. the Netherlands and Italy, No 27725/10, ECtHR (2 April 2013).

Mukhitdinov v. Russia, No 20999/14, ECtHR (21 May 2015).

N. v. the United Kingdom, No 26565/05, ECtHR (27 May 2008).

N.A. v. the United Kingdom, No 25904/07, ECtHR (17 July 2008).

Nars et Ghali c. Italie, No 44883/09, ECtHR (23 February 2016).

Ndangoya v. Sweden, No 17868/03, ECtHR (22 June 2004).

N.H. et autres c. France, No 28820/13, 75547/13, and 13114/15, ECtHR (2 July 2020).

Oprea v. Moldova, No 38055/06, ECtHR (21 December 2010).

Opuz v. Turkey, No 33401/02, ECtHR (9 June 2009).

Osman v. the United Kingdom, No 87/1997/871/1083, ECtHR (28 October 1998).

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

Ould Barar v. Sweden, No 42367/98, ECtHR (19 January 1999).

Paposhvili v. Belgium, No 41738/10, ECtHR (13 December 2016).

Paul and Audrey Edwards v. the United Kingdom, No 46477/99, ECtHR (14 March 2002).

Ponomaryovi v. Bulgaria, No 5335/05, ECtHR (28 November 2011).

Rantsev v. Cyprus and Russia, No 25965/04, ECtHR (7 January 2010).

Razaghi v. Sweden, No 64599/01, ECtHR (11 March 2003).

Renolde v. France, No 5608/05, ECtHR (16 October 2008).

R.R. and others v. Hungary, No 19400/11, ECtHR (4 December 2012).

Saadi v. Italy, No 37201/06, ECtHR (28 February 2008).

Savran v. Denmark, No 57467/15, ECtHR (1 October 2019).

S.C.C. v. Sweden, No 46553/99, ECtHR (15 February 2000).

S.H.H. v. the United Kingdom, No 60367/10, ECtHR (29 January 2013).

Sigurdur A. Sigurjónsson v. Iceland, No 16130/90, ECtHR (30 June 1993).

Soering v. the United Kingdom, No 14038/88, ECtHR (07 July 1989).

Stec and others v. the United Kingdom, No 65731/01 and 65900/01, ECtHR (12 April 2006).

Sufi and Elmi v. the United Kingdom, No 8319/07 and 11449/07, ECHR (28 June 2011).

Tarakhel v. Switzerland, No 29217/12, ECHR (4 November 2014).

Tomic v. the United Kingdom, No 17837/03, ECtHR (14 October 2003).

Van Colle v. the United Kingdom, No 7678/09, ECtHR (13 November 2012).

Vilvarajah and others v. the United Kingdom, No 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECtHR (30 October 1991).

Watts v. the United Kingdom, No 53586/09, ECtHR (4 May 2010).

Yoh-Ekale Mwanje c. Belgique, No 10486/10, ECtHR (20 December 2011).

Young, James and Webster v. the United Kingdom, No 7601/76, ECtHR (13 August 1981).

Z and T v. the United Kingdom, No 27034/05, ECtHR (28 February 2006).

Human Rights Committee

Abdilafir Abubakar Ali and Mayul Ali Mohamad v. Denmark, HRC, 116th session, UN Doc CCPR/C/116/D/2409/2014 (2016) 1.

A.H.G. v. Canada, HRC, 113th Sess, UN Doc CCPR/C/113/D/2091/2011 (2015) 1.

Ali Aarrass v. Spain, HRC, 111th Sess, UN Doc CCPR/C/111/D/2008/2010 (2014) 1.

A.R.J. v. Australia, HRC, 60th Sess, UN Doc CCPR/C/60/D/692/1996 (1997) 1.

A.S.M. and R.A.H. v. Denmark, HRC, 117th Sess, UN Doc CCPR/C/117/D/2378/2014 (2017) 1.

Bayush Alemseged Araya v. Denmark, HRC, 123rd session, UN Doc CCPR/C/123/D/2575/2015 (2018) 1.

B.L. (represented by Balmain for Refugees) v. Australia, 112th Sess, UN Doc CCPR/C/112/D/2053/2011 (2014) 1.

B.M.I. and N.A.K. v. Denmark, HRC, 118th session, UN Doc CCPR/C/118/D/2569/2015 (2016) 1.

C.L. and Z.L. v. Denmark, HRC, 122nd Session, UN Doc CCPR/C/122/D/2753/2016 (2018) 1.

Fahmo Mohamud Hussein v. Denmark, HRC, 124th session, UN Doc CCPR/C/124/D/2734/2016 (2018) 1.

Fan Biao Lin v. Australia, HRC, 107th Sess, UN Doc CCPR/C/107/D/1957/2010 (2013) 1.

F.H. Zwaan-de Vries v. the Netherlands, HRC, 29th Sess, UN Doc CCPR/C/29/D/182/1984 (1987) 1.

Hibaq Said Hashi v. Demark, HRC, 120th session, UN Doc CCPR/C/120/D/2470/2014 (2017) 1.

Ioane Teitiota v. New Zealand, HRC, 127th Sess, UN Doc CCPR/C/127/D/2728/2016 (2020) 1.

M.A.S and L.B.H. v. Denmark, HCR, 121st session, UN Doc CCPR/C/121/D/2585/2015 (2017) 1.

Maksudov et al. v. Kirghizstan, HRC, 93th Sess, UN Doc CCPR/C/93/D/1461, 1462, 1476 and 1477/2006 (2008) 1.

Mamatkarim Ernazarov v. Kyrgyzstan, HRC, 113th Sess, UN Doc CCPR/C/113/D/2054/2011 (2015) 1.

Mansour Ahani v. Canada, HRC, 80th Sess, UN Doc CCPR/C/80/D/1051/2002 (2004) 1.

M.C. v. Australia, HRC, 76th Sess, UN Doc CCPR/C/76/D/900/1999 (2002) 1.

Merhdad Mohammad Jamshidian v. Belarus, HRC, 121st Sess, CCPR/C/121/D/2471/2014 (2017) 1.

M.M. v. Denmark, HRC, 125th Sess, UN Doc CCPR/C/125/D/2345/2014 (2019) 1.

Nikolai Valetov v. Kazakhstan, HRC, 110th Sess, UN Doc CCPR/C/110/D/2104/2011 (2014) 1.

Norma Portillo Cáceres et al v. Paraguay, HRC, 126th Sess, UN Doc CCPR/C/126/D/2751/2016 (2019) 1.

O.A. v. Denmark, HRC, 121st session, UN Doc CCPR/C/121/D/2770/2016 (2017) 1.

R.A.A. and Z.M. v. Denmark, HRC, 118th session, UN Doc CCPR/C/118/D/2608/2015 (2016) 1.

R.I.H. and S.M.D. v. Denmark, HRC, 120th session, UN Doc CCPR/C/120/D/2640/2015 (2017) 1.

Roger Judge v. Canada, HRC, 78th Sess, UN Doc CCPR/C/78/D/829/1998 (2003) 1.

S. W. M. Broeks v. the Netherlands, HRC, 29th Sess, UN Doc CCPR/C/29/D/172/1984 (1987) 1.

S.Y.L. v. Australia, HRC, 108th session, UN Doc CCPR/C/108/D/1897/2009 (2013) 1.

S.Z. v. Denmark, HRC, 117th Sess, UN Doc CCPR/C/117/D/2443/2014 (2016) 1.

Warda Osman Jasin v. Denmark, HRC, 114th Sess, UN Doc CCPR/C/114/D/2360/2014 (2015) 1.

Womah Mukong v. Cameroon, HRC, 51st Sess, UN Doc CCPR/C/51/D/458/1991 (1994) 1.

Yubraj Giri v. Nepal, HRC, 101st Sess, UN Doc CCPR/C/101/D/1761/2008 (2011) 1.

Z. v. Australia, HRC, 111th session, UN Doc CCPR/C/111/D/2049/2011 (2014) 1.

Inter-American Commission of Human Rights

Andrea Mortlock v. the United States (2008), Inter-Am Comm HR, No 63/08.

Carl E. Vincent v. the United States (2013) Inter-Am Comm HR, PM 347/14, Resolution 8/2014.

Edwin A. Márquez González v. the United States (2011), Inter-Am Comm HR, PM 171-11.

Gary Resil et al v. the United States (2011), Inter-Am Comm HR, PM 5/11.

Gary Resil et al v. the United States (2016), Inter-Am Comm HR, Resolution 6/2016.

The Haitian Centre for Human Rights v. the United States, (1997), Inter-Am Comm HR, No 10675.

M.B.B.P. v. Panama (2018) Inter-Am Comm HR, PM 490/18, Resolution 81/2018.

Inter-American Court of Human Rights

Concurring Opinion of Judge Sergio García Ramírez in relation to the Judgment of the Inter-American Court of Human Rights in the Case of Anzualdo Castro v. Peru (2009), Inter-Am Ct HR (Ser C) No 202.

Cuscul Piraval (Guatemala) (2018), Inter-Am Ct HR (Ser C) No 359.

Empregados da Fábrica de Fogos de Santo Antônio de Jesus e seus Familiares (Brazil) (2020), Inter-Am Ct HR (Ser C) No 407.

Familia Pacheco Tineo (Bolivia) (2013), Inter-Am Ct HR (Ser C) No 272.

The Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (interpretation and scope of articles 5, 22.7 and 22.8 in relation to article 1(1) of the American Convention on Human Rights) (2018), Advisory Opinion OC-25/18, Inter-Am Ct HR (Ser A) No 25.

I.V. (Bolivia) (2016) Inter-Am Ct HR (Ser C) No 329.

Lagos del Campo (Peru) (2017) Inter-Am Ct HR (Ser C) No 340.

Merchants (Colombia) (2004) Inter-Am Ct HR (Ser C) No 109.

Poblete Vilches y otros (Chile) (2018), Inter-Am Ct HR (Ser C) No 349.

Pueblo Bello Massacre (Colombia) (2006) Inter-Am Ct HR (Ser C) No 140.

Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Argentina, Brazil, Paraguay, Uruguay) (2014), Advisory Opinion OC-21/14, Inter-Am Ct HR (Ser A) No 21.

San Miguel Sosa y otras (Venezuela) (2018), Inter-Am Ct HR (Ser C) No 348.

Sawhoyamaxa Indigenous Community (Paraguay) (2006), Inter-Am Ct HR (Ser C) No 146.

Valle Jaramillo et al. (Colombia) (2008) Inter-Am Ct HR (Ser C) No 192.

Velásquez Paiz y Otros (Guatemala) (2015) Inter-Am Ct HR (Ser C) No 307.

Vélez Loor (Panamá) (2010), Inter-Am Ct HR (Ser C) No 218.

Vera Vera (Ecuador) (2011), Inter-Am Ct HR (Ser C) No 226.

Wong Ho Wing (Peru) (2015), Inter-Am Ct HR (Ser C) No 313.

Xákmok Kásek Indigenous Community (Paraguay) (2010) Inter-Am Ct HR (Ser C) No 214.

Decisions of domestic courts and domestic administrative bodies

Argentina

Asociación Francesa Filantrópica y de Beneficencia s/ quiebra s/ incidente de verificación de crédito por L.A.R. y otros, CON 8283/2006/34/CS1, Fallo, Corte Suprema de Justicia de la Nación Argentina (6 November 2018).

Borelina, Rosana Claudia s/ extradición, B. 3456. XXXVIII, Fallo, Corte Suprema de Justicia de la Nación Argentina (30 August 2005).

Institutos Médicos Antártida s/ quiebra s/ inc. de verificación (R.A.F. y L.R.H. de F), CSJ 344/2011 (47-I)/CS1, Fallo, Corte Suprema de Justicia de la Nación Argentina (26 March 2018).

Koremblit, Hugo Alberto s/ extradición, C.S. K. 43. XLIV, Dictámen, Procuración General de la Nación (16 July 2008).

Koremblit, Hugo Alberto s/ extradición, K. 43. XLIV, Fallo, Corte Suprema de Justicia de la Nación Argentina (27 May 2009).

Australia

1220110 [2013] RRTA 281 (9 April 2013).

1318956 [2014] RRTA 562 (23 July 2014).

1406290 [2014] RRTA 815 (11 November 2014).

1506832 (Refugee) [2017] AATA 500 (2 March 2017).

1510755 (Refugee) [2019] AATA 3420 (26 August 2019).

1510994 (Refugee) [2018] AATA 3026 (20 June 2018).

1516248 (Refugee) [2019] AATA 4304 (9 August 2019).

1621961 (Refugee) [2017] AATA 1143 (21 June 2017).

1910307 (Refugee) [2019] AATA 4673 (8 July 2019).

AJI16 v Minister for Immigration and Border Protection [2019] FCA 1769 (31 October 2019).

Chen Shi Hai v. Minister for Immigration and Multicultural Affairs, [2000] HCA 19.

ENU18 v Minister for Home Affairs [2019] FCA 1391 (7 August 2019).

Honourable Brendan O'Connor v Adamas [2013] FCAFC 14 (15 February 2013).

M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs, [2003] FCAFC 131.

Minister for Immigration and Citizenship v Anochie and Administrative Appeals Tribunal (joining), Trial judgment, [2012] FCA 1440 (18 December 2012).

SBZF v. Minister for Immigration and Citizenship, [2008] FCA 1486.

SZDCD v Minister for Immigration and Border Protection [2019] FCA 326 (13 March 2019).

Brazil

AG REG no RE com AG 727.864/PR, Second Chamber, STF (2014).

ARE 745745 AgR/MG, Second Chamber, STF (2014).

Canada

Ampong v. Canada (Citizenship and Immigration), [2010] FC 35.

A.M.R.I. v. K.E.R., 2011 ONCA 417 (CanLII).

Cheung c. Canada (Ministre de l'Emploi et de l'Immigration), [1993] 2 RCF 314.

Covarrubias v Canada (Minister of Citizenship and Immigration), [2006] FCA 365.

France v. Diab, 2014 ONCA 374 (CanLII).

Gorzsas v. Canada (Citizenship and Immigration), [2009] FC 458.

India v. Badesha, 2017 SCC 44 (CanLII), [2017] 2 SCR 127.

Lozano Navarro v. Canada (Citizenship and Immigration), 2011 FC 768.

Nicolas v. Canada (Citizenship and Immigration), [2010] FC 452.

Singh v. Canada (Minister of Citizenship and Immigration), [2004] 3 FC 323, 2004 FC 288.

X (Re), 2007 CanLII 61466 (CA IRB).

X (Re), 2012 CanLII 100677 (CA IRB).

X Re, Immigration and Refugee Board, RPD File No VA6-03149/VA6-03150, 25 January 2008.

Yusuf v. Canada (Citizenship and Immigration), 2013 FC 591.

Colombia

Sentencia T-595/02, expediente T-444377, Corte Constitucional (2002).

Sentencia T-833/10, expediente T-2709592, Corte Constitucional (2010).

Germany

"Oberverwaltungsgericht Berlin (Administrative Court of Appeal, Berlin), Decision of 27th September 1960" (1960) 3 Yearbook of the European Convention on Human Rights 638.

India

Paschim Banga Khet Majoor Samity v State of West Bengal, Case No 169, Supreme Court of India (1996).

Luxembourg

Recours formé par Madame ..., contre des décisions du ministre de l'Immigration et de l'Asile en matière de protection internationale (art. 35 (3), L.18.12.2015), N° 43536, Tribunal administratif du Grand-Duché de Luxembourg (6 November 2019).

New Zealand

Attorney-General v Zaoui and Inspector-General of Intelligence and Security and Human Rights Commission (intervening), [2005] NZSC 38.

EX (Sri Lanka) [2018] NZIPT 801296-301.

Kyung Yup Kim v. Minister of Justice of New Zealand and Attorney-General of New Zealand, [2019] NZCA 209.

Rahman v Minister of Immigration, (HC Wellington, AP 56/99 & CP49/99, 26 September 2000).

S v. Chief Executive of the Department of Labour, [2007] NZCA 182.

Peru

EXP. N° 2016-2004-AA/TC, Tribunal Constitucional de Perú (2004).

South Africa

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Case CCT 23/96), 1996 (4) SA 744 (CC).

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00), [2000] ZACC 19.

Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02), [2002] ZACC 15.

Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others (CCT 110/11, CCT 126/11) [2012] ZACC 16 (27 July 2012).

United Kingdom

Adan v Secretary of State for the Home Department and other appeals [1997] 2 All ER 723.

Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1.

EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64.

R v. Special Adjudicator ex parte Ullah [2004] UKHL 26.

RN (Returnees) Zimbabwe v Secretary of State for the Home Department [2008] UKAIT 00083.

United States

Bucur (USCA, 7th Cir., 1997).

Tchoukhrova v Gonzales, 404 F.3d 1181 (9th Cir. 2005).

Decisions of the International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina. v. Serbia and Montenegro), [2007] ICJ Rep 43.

Books, articles, and academic papers

Alastair Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5:1 HRLR 57.

Amandine Aubry; Michał Burzynski & Frédéric Docquier, "The welfare impact of global migration in OECD countries" (2016) 101 J Int'l Econ 1.

Antônio Augusto Cançado Trindade, "A Questão da Implementação dos Direitos Econômicos, Sociais e Culturais: Evolução e Tendências Atuais" (1990) 71 Revista Brasileira de Estudos Políticos 7.

Antonio Cassese, "Are Human Rights Truly Universal?", in Obrad Savić, ed, *The Politics of Human Rights* (London and New York: Verso, 1999) 149.

Ashfaq Khalfan, "Division of Responsibility amongst States" in Malcolm Langford et al., eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) 299.

Audrey R. Chapman, "The Status of Efforts to Monitor Economic, Social, and Cultural Rights" in Shareen Hertel & Lanse Minkler, *Economic Rights: Conceptual, Measurement, and Policy Issues* (New York: Cambridge University Press, 2007) 143.

Başak Çalı, Anne Koch & Nicola Bruch, "The Legitimacy of the European Court of Human Rights: the view from the ground" (2011) University College London.

Bilal Khan, "From D. v. U.K. to Paposhvili v. Belgium: Assessing the Strasbourg Court's Legal and Institutional Approach to the Expulsion of Seriously Ill Migrants under Article 3 of the European Convention on Human Rights" (2019) 25 Colum J Eur L 222.

Bruce Porter, "The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins" (2009) 27:1 Nordic Journal of Human Rights 39.

Bryan S. Turner, *Vulnerability and Human Rights* (University Park: Pennsylvania State University Press, 2006).

Catarina de Albuquerque, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, social and Cultural Rights - The Missing Piece of the International Bill of Human Rights" (2010) 32 Hum Rts Q 144.

Cathryn Costello & Michelle Foster, "Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test" (2016) 46 NYIL 273.

Cathryn Costello, "The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches", in Bruce Burson & David James Cantor, eds,

Human Rights and the Refugee Definition: Comparative Legal Practice and Theory (Leiden: Brill Nijhoff, 2016) 180.

Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2016).

Céline Bauloz, "Foreigners: Wanted Dead or Alive? Medical Cases before European Courts and the Need for an Integrated Approach to Non-Refoulement" (2016) 18:4 EJML 409.

Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique" (1927) 18:3 Recueil des cours de l'Académie de droit international 441.

Chinua Achebe, *Arrow of God* (Portsmouth: Heinemann Ltd., 1989).

Christine Vézina, "Culture juridique des droits de la personne et justiciabilité des droits économiques, sociaux et culturels : tendances à la Cour suprême du Canada" (2020) 61:2 Les Cahiers de droit 495.

Claudio Nash Rojas, "Los derechos económicos, sociales y culturales y la justicia constitucional latinoamericana: tendencias jurisprudenciales" (2011) 9:1 Estudios Constitucionales 65.

Colin Warbrick, "Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering Case" (1990) 11:4 Mich J Int'l L 1073.

Cornelis Wolfram Wouters, *International Legal Standards for the Protection from Refoulement: A legal analysis of 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* (PhD thesis, Leiden University Law School, 2009).

Craig Scott & Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise" (2000) 16 S Afr J on Hum Rts 206.

Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27:3 Osgood Hall LJ 769.

D. J. Harris, *The European Social Charter* (Charlottesville: University Press of Virginia, 1984).

Daniel J. Whelan, "Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights", Economic Rights Working Paper Series, 2008.

Daniel J. Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010).

Daniel Rietiker, “The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law - No Need for the Concept of Treaty Sui Generis” (2010) 79 Nordic J Int’l L 245.

David Bilchitz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 SAJHR 1.

David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (New York: Oxford University Press, 2007).

David James Cantor, “Defining Refugees: Persecution, Surrogacy and the Human Rights Paradigm” in Bruce Burson & David James Cantors, eds., *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Leiden: Brill Nijhoff, 2016) 349.

David Weissbrodt & Isabel Hörtreiter, “The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties” (1999) 5 Buff Hum Rts Rev 1.

E. W. Vierdag, “The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights” (1978) 9 NYIL 69.

Eitan Felner, "Closing the ‘Escape Hatch’: A Toolkit to Monitor the Progressive Realization of Economic, social, and Cultural Rights" (2009) 1:3 Journal of Human Rights Practice 402.

Eman Hamdan, *The Principle of Non-Refoulement under the ECHR and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Leiden: Brill Nijhoff, 2016).

Eric Wyler, “Victime « actuelle » et victime « virtuelle » d’une violation des droits de l’homme dans la jurisprudence relative à l’art. 25 de la Convention européenne des droits de l’homme” (1993) 3 SZIER 3.

Evadné Grant, “Accountability for human rights abuses: Taking the universality, indivisibility, interdependence and interrelatedness of human rights seriously” (2007) 32 S Afr YB Int’l L 158.

Fanny 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* (Leiden: Brill Nijhoff, 2017).

Francesco Cherubini, *Asylum Law in the European Union* (Oxon: Routledge, 2015).

George Jotham Kondowe, “Implementing economic and social rights in ‘domestic’ jurisdictions: understanding the minimum core obligations approach” (2020) Commonwealth Law Bulletin 1.

George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (New York: Oxford University Press, 2007).

Gillian MacNaughton, "Beyond a Minimum Threshold: The Right to Social Equality" in Lanse Minkler, ed, *The State of Economic and Social Human Rights: a global overview* (New York: Cambridge University Press, 2013) 271.

Gratiela Georgiana Noja et al., "Migrants' Role in Enhancing the Economic Development of Host Countries: Empirical Evidence from Europe" (2018) 10 Sustainability 1.

Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Leiden: Martinus Nijhoff, 2000).

Gregor T. Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Geneva: Université de Genève, 2013).

Gustavo Gallón Giraldo, "Latin-America: Challenges in Economic, social and Cultural Rights" (1995) 55 ICJ Rev 59.

Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 3rd ed (Oxford: Oxford University Press, 2007).

Hélène Lambert, "The European Convention on Human Rights and the Protection of Refugees: Limits and opportunities" (2005) 24:2 RSQ 39.

Hemme Battjes, *European Asylum Law and International Law* (Leiden/Boston: Martinus Nijhoff Publihers, 2006).

Hemme Battjes, "In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed" (2009) 22:3 LJIL 583.

Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980).

Ibrahim Kanalan, "Extraterritorial State Obligations Beyond the Concept of Jurisdiction" (2018) 19:1 GLJ 43.

Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009).

Imogen Little, "Out with the Old Approach: A Call to Take Socio-Economic Rights Seriously in Refugee Status Determination" (2018) 16 New Zealand Yearbook of International Law 145.

Institut de droit international, *Règles internationales sur l'admission et l'expulsion des étrangers*, Geneva, 1892.

Ioana Cismas, “The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights” in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 448.

Jamal Bouoiyour, Amal Miftah, Refk Selmi, “The economic impact of migrants and refugees on Europe” (2019) 24 Femise Med Brief 1.

James Crawford & Amelia Keene, “Interpretation of the human rights treaties by the International Court of Justice” (2020) 24:7 IJHR 935.

James Hathaway & Michelle Foster, *The Law of Refugee Status*, 2nd ed (Cambridge: Cambridge University Press, 2014).

James Simsarian, “Progress in Drafting Two Covenants on Human Rights in the United Nations” (1952) 46 AJIL 710.

James W. Nickel, “Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights” (2008) 30 Hum Rts Q 984.

Jane McAdam, “Complementary protection and beyond: How states deal with human rights protection”, New Issues in Refugee Research, Working Paper No 118, UNHCR, 2005 at 1.

Jean-François Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Strasbourg: Council of Europe, 2007).

José Ricardo Ferreira Cunha & Vinicius Scarpi, “Os direitos econômicos, sociais e culturais: a questão da sua exigibilidade” (2007) 31:2 Direito, Estado e Sociedade 69.

Juan Pedro Machado, “El procedimiento y proceso administrativos en la jurisprudencia de la Corte Interamericana de Derechos Humanos” in Christian Steiner, ed, *Procedimiento y Justicia Administrativa en América Latina* (Mexico City: Konrad Adenauer Stiftung, 2010) 123.

Julio Bacio-Terracino, "Corruption as a Violation of Human Rights", International Council on Human Rights Policy, Working Paper, 2008.

Kanstantsin Dzehtsiarou & Alan Greene, “Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners” (2011) 12:10 GLJ 1707.

Kanstantsin Dzehtsiarou, “European Consensus and the Evolutive Interpretation of the European Convention on Human Rights” (2011) 12:10 GLJ 1730.

Kate Jastram, “Economic harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution” in James C. Simeon, ed, *Critical Issues in International Refugee Law: Strategies toward interpretative harmony* (Cambridge: Cambridge University Press, 2010) 143.

Kathryn Greenman, "A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law" (2015) 27:2 IJRL 264.

Lanse Minkler & Shawna Sweeney, "On the Indivisibility and Interdependence of Basic Rights in Developing Countries" (2011) 33 Hum Rts Q 351.

Laurens Lavrysen, "Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights" (2014) 7 Inter-American and European Human Rights Journal 94.

"The Limburg Principles on the Implementation of the International Covenant on Economic, social and Cultural Rights", (1986) 37 ICJ Rev 43.

Lisa Sonnleitne, "The Democratic Legitimacy of Evolutive Interpretation by the European Court of Human Rights" (2019) 33:2 Temple Int'l & Comp LJ 279.

Maarten den Heijer, "Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights" (2008) 10 European Journal of Migration and Law 277.

"The Maastricht Guidelines on Violations of Economic, social and Cultural Rights" (1998) 20:3 Hum Rts Q 691.

Magdalena Sepúlveda Carmona, "The obligations of 'international assistance and cooperation' under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to Millennium Development Goal 8" (2009) 13:1 IJHRL 86.

Malcolm Langford, Fons Coomans & Felipe Gómez Isa, "Extraterritorial Duties in International Law" in Malcolm Langford et al., eds, *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (New York: Cambridge University Press, 2013) 51.

Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York, Cambridge University Press, 2008).

Manisuli Ssenyonjo, "Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years Since the Adoption of the African Charter" (2011) 29:3 Neth Q HR 359.

Manisuli Ssenyonjo, *Economic, social and Cultural Rights in International Law* (Portland: Hart Publishing, 2009).

Marc Bossuyt, "The Court of Strasbourg Acting as an Asylum Court" (2012) 8:2 European Constitutional Law Review 203.

Mariagiulia Giuffré, *The Readmission of Asylum-Seekers under International Law* (Oxford: Hart Publishing, 2020).

Mariana Ferolla Vallandro do Valle, “Six of One, Half a Dozen of the Other: The Inefficiency of Recognizing Refugee Status to Environmentally Displaced Persons” in Giovanni Carlo Bruno; Fulvio Maria Palombino & Valentina Rossi, eds, *Migration and the Environment: Some Reflections on Current Legal Issues and Possible Ways Forward* (Rome: CNR, 2017) 1.

Marlies Hesselman, “Sharing International Responsibility for Poor Migrants? An Analysis of Extra-Territorial Socio-Economic Human Rights Law” (2013) 15:2 Eur J Soc Sec 187.

Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20:1 YJLF 1.

Mashood A. Baderin & Robert McCorquodale, *Economic, Social and Cultural Rights in Action* (New York: Oxford University Press, 2007).

Mathilde Crépin, *Persecution, International Refugee Law and Refugees: A Feminist Approach* (Oxon: Routledge, 2021).

Meltem Ineli-Ciger, “The Global Compact on Refugees and Burden Sharing: Will the Compact Address the Normative Gap Concerning Burden Sharing?” (2019) 38:2 RSQ 115.

Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (New York: Cambridge University Press, 2007).

Michelle Foster, “Non-Refoulement on the basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law” (2009) 2 New Zealand Law Review 257.

Michelle Foster, “Responsibility Sharing or Shifting? “Safe” Third Countries and International Law” (2008) 25:2 Refuge 64.

Mirja Trilsch, “Les droits sociaux et les instruments de droits de la personne relatifs aux droits civils et politiques : une relecture de la *Convention européenne de sauvegarde des droits de l’homme et des Libertés fondamentales* et du *Pacte international des Nations Unies relatif aux droits civils et politiques*”, in Pierre Bosset & Lucie Lamarche, eds, *Droit de cité pour les droits économiques, sociaux et culturels : La Charte québécoise en chantier* (Cowansville: Éditions Yvon Blais, 2011) 331.

Monica Hakimi, “State Bystander Responsibility” (2010) 21:2 EJIL 341.

Natasa Mavromcola & Francesco Messineo, “Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK” (2013) 76 MLR 589.

Oliver Thurin, *Der Schutz des Fremden vor rechtswidriger Abschiebung: Das Prinzip des Non-Refoulement nach Artikel 3 EMRK* (Vienna: Springer, 2009).

Olivier Delas, *Le principe de non-refoulement dans la jurisprudence internationale des droits de l'homme : de la consécration à la contestation* (Brussels: Bruylant, 2011).

Peggy Ducoulombier, "Interaction between human rights: Are all human rights equal?" in Christophe Geiger, ed, *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar Publishing Limited, 2015) 39.

Philip Alston & Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights" (1987) 9:2 Hum Rts Q 156.

Philip Alston, "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights" (1987) 9 Hum Rts Q 332.

Raffaela Kunz, "Judging International Judgments Anew? The Human Rights Courts before Domestic Courts" (2019) 30:4 EJIL 1129.

Renato Zerbini Ribeiro Leão, "O Regime de Proteção aos Migrantes, Refugiados e Solicitantes de Refúgio do Pacto Internacional de Direitos Econômicos, Sociais e Culturais das Nações Unidas" (2019) 27:57 REMHU 175.

Roberto Adorno, "Is Vulnerability the Foundation of Human Rights?" in Aniceto Masferrer & Emilio García-Sánchez (eds.), *Human Dignity of the Vulnerable in the Age of Rights: Interdisciplinary Perspectives* (Basel: Springer International Publishing AG, 2016) 257.

Roberto Cuéllar, "Actividades sobre Indicadores de Derechos Económicos, Sociales y Culturales (DESC)" (2011) 21 Vox Juris 111.

Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (New York: Routledge, 2014).

Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol" (2020) 42:1 Hum Rts Q 48.

Sandra Ratjen & Manav Satija, "Realizing Economic, Social, and Cultural Rights for All" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 111.

Shekhar Aiyar et al., "The Refugee Surge in Europe: Economic Challenges", *International Monetary Fund*, 2016, available at: <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/The-Refugee-Surge-in-Europe-Economic-Challenges-43609>, last accessed 15 December 2020.

Siddiqur Rahman Osmani, "Human Rights to Food, Health, and Education" (2000) 1:2 Journal of Human Development 273.

Sigrun I. Skogly & Mark Gibney, "Economic Rights and Extraterritorial Obligations" in Shareen Hertel & Lanse Minkler, eds, *Economic Rights: Conceptual, Measurement, and Policy Issues* (New York: Cambridge University Press, 2007) 267.

Sir Hersch Lauterpacht, *The Function of Law in the International Community*, 2nd ed (Oxford: Oxford University Press, 2011).

Stephan Breitenmoser & Gunter E. Wilms, "Human Rights v. Extradition: the *Soering* Case" (1990) 11:4 Mich J Int'l L 845.

Susanne Zühlke & Jens-Christian Pastille, "Extradition and the European Convention – *Soering* Revisited" (1999) 59 ZAÖRV 749.

Sylvie Da Lomba, "Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights" (2014) 21:4 EJHL 339.

Takhmina Karimova, "The Nature and Meaning of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights" in Eibe Riedel, Gilles Giacca & Christophe Golay, eds, *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014) 163.

Terje Einarsen, "The European Convention on Human Rights and the Notion of an Implied Right to *de facto* Asylum" (1990) 2:3 IJRL 361.

Veronika L. B. Flegar, "Can extreme poverty protect against refoulement? "Economic refugees" in the light of recent case law of the European Court of Human Rights" (2015) Conference Paper: Human Rights and Migration.

Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law" in Ruth Rubio-Marín, ed, *Human Rights and Immigration* (New York: Oxford University Press, 2014) 19.

Vincent Chetail, "Le droit des réfugiés à l'épreuve des droits de l'homme : Bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants" (2004) 37:1 RBDI 155.

Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017).

Violeta Moreno-Lax, "The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties", in Guy S. Goodwin-Gill & Philippe Weckel (eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Leiden/Boston: Martinus Nijhoff, 2015) 665.

Vladislava Stoyanova, "Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights" (2011) 3:2 GOJIL 777.

Vladislava Stoyanova, "Fault, knowledge and risk within the framework of positive obligations under the European Convention on Human Rights" (2020) 33 LJIL 601.

Vladislava Stoyanova, "How Exceptional Must 'Very Exceptional' Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*" (2017) 29:4 IJRL 580.

Yutaka Arai-Takahashi, "'Uneven, but in the Direction of Enhanced Effectiveness' – A Critical Analysis of 'Anticipatory Ill-Treatment' under Article 3 ECHR" (2002) 20 Neth Q HR 5.

Miscellaneous

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 1984.

"Preparatory Work on Article 3 of the European Convention of Human Rights", *Council of Europe*, European Commission on Human Rights, DH (56) 5 (1956), available at: <https://www.ECtHR.coe.int/LibraryDocs/Travaux/ECTHRTravaux-ART3-DH(56)5-EN1674940.pdf>, last accessed 15 December 2020.

Crispian Balmer, "Naples mayor offers to welcome in stranded NGO migrant boat", *Reuters*, 3 January 2019, available at: <https://www.reuters.com/article/us-europe-migrants-ngo-italy/naples-mayor-offers-to-welcome-in-stranded-ngo-migrant-boat-idUSKCN1OX14L>, last accessed 15 December 2020.

EC, *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*, [2003] OJ, L 50/1.

General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), ACommHPR, 57th Sess (2015).

Immigration and Refugee Protection Act, SC 2001, c 27 at s. 97(1).

"Annual report of the Inter-American Commission on Human Rights", *Inter-American Commission on Human Rights*, 1993, available at: <https://www.cidh.oas.org/annualrep/93eng/chap.5.htm>, last accessed 15 December 2020.

International Organization for Migration, *World Migration Report 2020* (Geneva: IOM, 2019).

J.T. Quigley, "New Zealand "Climate Change Refugee" Rejected by High Court", *The Diplomat*, 27 November 2013, available at: <https://thediplomat.com/2013/11/new-zealand-climate-change-refugee-rejected-by-high-court/>, last accessed 15 December 2020.

""Nobody Remembers Us": Failure to Protect Women's and Girls' Right to Health and Security in Post-Earthquake Haiti", *Human Rights Watch*, 19 August 2011, available at: <https://www.hrw.org/report/2011/08/19/nobody-remembers-us/failure-protect-womens-and-girls-right-health-and-security>, last accessed 15 December 2020.

OAS, General Assembly, *Conferencia Especializada Interamericana sobre Derechos Humanos*, OR OEA/Ser.K/XVI/1.2 (1969).

"Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *United Nations Treaty Collection*, available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4>, last accessed 15 December 2020.

Organisation for Economic Cooperation and Development, "Who bears the cost of integrating refugees?", Migration Policy Debates, 2017.

"Refúgio em Números traz dados sobre a realidade do refúgio no Brasil", *Ministério da Justiça e Segurança Pública*, 25 July 2019, available at: <https://www.gov.br/mj/pt-br/assuntos/noticias/collective-nitf-content-1564080197.57>, last accessed 15 December 2020.

Robin Emmott, Francesco Guarascio, "EU should repatriate more economic migrants, France, Germany, Italy say", *Reuters*, 4 September 2015, available at: <https://www.reuters.com/article/us-europe-migrants-border/eu-should-repatriate-more-economic-migrants-france-germany-italy-say-idUSKCN0R41PA20150904>, last accessed 15 December 2020.

Sarah Bermeo, "Could foreign aid help stop Central Americans from coming to the U.S.? Here's what you need to know", *The Washington Post*, 18 June 2019, available at: <https://www.washingtonpost.com/politics/2019/06/18/trump-administration-threatened-cut-foreign-aid-if-central-american-countries-dont-stem-migration/>, last accessed 15 December 2020.

"Sudanese seek economic migration to Israel across Lebanon border", *The Arab Weekly*, 24 June 2020, available at: <https://thearabweekly.com/sudanese-seek-economic-migration-israel-across-lebanon-border>, last accessed 15 December 2020.

"Corruptionary A-Z", *Transparency International*, available at: <https://www.transparency.org/glossary/term/corruption>, last accessed 15 December 2020.

"US migrant crisis: Trump seeks to curb Central America asylum claims", *BBC News* 16 July 2019, available at: <https://www.bbc.com/news/world-latin-america-48991301>, last accessed 15 December 2020.

"Venezuela : Le gouvernement s'en prend à ses détracteurs tandis que la crise s'aggrave", *Human Rights Watch*, 24 October 2016, available at: <https://www.hrw.org/fr/news/2016/10/24/venezuela-le-gouvernement-sen-prend-ses-detracteurs-tandis-que-la-crise-saggrave>, last accessed 15 December 2020.

"We Do Not Invite any Economic Migrant to Greece, Gov't Spokesman Petsas Says", *The National Herald*, 19 October 2019, last accessed: <https://www.thenationalherald.com/265058/we-do-not-invite-any-economic-migrant-to-greece-govt-spokesman-petsas-says/>, last accessed 15 December 2020.