

Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants

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Abstract

In light of recent events causing people's movement into Europe, continued misuse of the term "migrant" in policy making and public discourse, and at the occasion of events celebrating the international regime of refugee protection, the human rights protection of irregular migrants is explored in relation to irregular migrants' entry/admission and expulsion/deportation. The term "migrant" has, in contrast to the term "refugee", no bearing on whether or not an international migrant has a need for international protection. While many irregular migrants have no such need, other migrants may be refugees or be in need of international protection "outside" the framework of the 1951 Convention relating to the Status of Refugees. The paper analyses the international human rights law framework applying to individuals with and without need for international protection, when their claims have a socio-economic dimension. The principle of non-refoulement remains the most important source of protection for irregular migrants; it is not concerned with the irregular status of a migrant and also has a bearing on procedural rights in status determination. Socio-economic motivations for flight are not a bar to being a refugee within the meaning of the 1951 Convention, if their underlying cause is persecution, or if motives are mixed. Refugee law can accommodate such claims and overcome a strict dichotomy but is currently only rarely and restrictively applied in this regard. In expulsion cases, virtually only the prohibition of torture, inhuman or degrading treatment is relevant. For individuals that have no need for international protection there are mitigating individual circumstances which a state has to take into account. All pertinent norms of international human rights law apply without distinction and irregular migrants may have, just as refugees may have, humanitarian needs that states should meet.

A. Introduction

While the 1951 Convention on the Status of Refugees (the 1951 Convention) has reached its 60th anniversary, events in the Arab world continue to cause significant flows of individuals attempting to reach Europe. Though all European countries have ratified the 1951 Convention, which contains a distinct definition of the term “refugee”, public perception appears characterised by an ongoing confusion between use of terms “migrants” and “refugees”, with the former term frequently being employed to capture anybody not in need of international protection. In light of the events and their often distorted coverage and perception, it seems to be a good opportunity to elucidate the human rights protection of irregular international migrants in border control situations.¹

This paper will specifically address human rights issues related to entry/admission and expulsion/deportation.² The paper will, from a primarily geographic European perspective, analyse the human rights legal aspects pertaining to admission and expulsion and make conclusions on *lacunae* in international law, rather than on state practice and the international cooperative framework. The paper will conceptualise irregular migration according to the protection needs of people undertaking it, localise those protection needs legally, and identify gaps in the relevant protection. Thereby, it will particularly look at people who leave for socio-economic reasons. The paper will, finally, draw conclusions *de lege lata* and *de lege ferenda*, mainly on the adequacy of the existing international legal framework.

¹ Irregular migration may generate a number of very different human rights concerns in all phases of the migration process, see Jorge Bustamante, Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/7/12, 25 February 2008, para. 15.

² Note that in this paper, these terms will be, together with “return”, used interchangeably.

B. Irregular Migrants Are no Distinct Group in International Law

I. “Migrants” as a Negative Definition to “Refugees”

First and foremost, the term “migrant” is overarching for those undertaking migration and not a legal term. There are refugees as a sub-category of migrants, the protection and status of whom is regulated by international law. Refugees are, cursorily, those outside their country of origin, fleeing a well-founded fear of persecution on the grounds of race, religion, nationality, membership in a particular social group (PSG) or political opinion. Persecution is not rigidly defined, but is predominantly understood to comprise violations of civil and political rights,³ including the failure to protect from harm inflicted by non-state actors. Obligations are set out primarily in the 1951 Convention and its 1967 Protocol relating to the Status of Refugees (the Protocol), and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).

The creation of a protection regime under international refugee law has led to a negative definition of “migrants”,⁴ which maintains that migrants are, *inter alia*, those who are *not* refugees. The United Nations High Commissioner for Refugees (UNHCR) defines a migrant as “a person who, for reasons other than those contained in the definition [of the 1951 Convention and the Protocol], voluntarily leaves his country in order to take up residence elsewhere. [...] If he is moved exclusively by economic considerations, he is an economic migrant [...]”⁵. It is evident that a person who would neatly fit into this category has no international protection needs. The use of the word “migrant” may thus be misleading from a perspective of international law.

Issues of definition are further complicated because individuals may have mixed motives to leave their country of origin, and because they may

³ For a broader understanding of the term “persecution”, see below, section B. I.

⁴ R. Karatani, ‘How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins’, 17 *International Journal of Refugee Law* (2005) 3, 517.

⁵ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, UN Doc HCR/IP/4/Eng/REV.1, January 1992, para. 62.

move in groups which are not homogenous.⁶ Indeed, refugees and individuals without protection need use not only the same routes, but also the same means of transport, including increasingly diverse methods of smuggling.⁷ An example for such mixed movement is smuggling by boat in the Mediterranean and Gulf region. According to UNHCR, three quarters of all persons crossing the Mediterranean as “boat people” in 2009 filed an application for asylum, half of which were recognised.⁸ Libyans who flee the 2011 armed conflict and clearly have a need for international protection, do so alongside other people who,⁹ depending on their nationality and individual situation, may or may not have international protection needs.

Furthermore, push and pull-factors can be social, economic or political in nature, and may be related to deficient security, rule of law and human rights protection.¹⁰ Refugees’ push and pull-factors may include, in addition to fear of persecution, economic elements, too. In this regard, mention must be made of secondary movements of refugees, which UNHCR estimates “likely to remain a feature of both refugee flows and mixed movements more generally”, if economic disparities between host states were not reduced.¹¹

⁶ UNHCR, Global Consultations on International Protection/Third Track: Refugee Protection and Migration Control: Perspectives from UNCHR and IOM, 31 May 2001, UN Doc EC/GC/01/11, para. 5.

⁷ For the definition, see Article 3 lit. a of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Smuggling Protocol).

⁸ Tagesschau.de, ‘Für Flüchtlinge kein Grund zum Feiern’ (13 June 2010) available at <http://www.tagesschau24.com/ausland/schengen110-tellafriend.html> (last visited 12 July 2010).

⁹ UNHCR, ‘Hundreds Risk Return to Libya in Bid to Reach Europe by Boat’ (17 May 2011) available at <http://www.unhcr.org/4dd27eea9.html> (last visited 25 August 2011).

¹⁰ UNDP, ‘Human Development Report 2009. Overcoming Barriers: Human Mobility and Development’ (2009) available at http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf (last visited 25 August 2011), 11-14.

¹¹ UNHCR, High Commissioner’s Dialogue on Protection Challenges. Discussion Paper. Refugee Protection and Durable Solutions in the Context of International Migration, UN Doc UNHCR/DPC/2007/Doc. 02, para. 40.

II. Who Is Irregular?

Irregularity, essentially, refers to the lack of the necessary permit to enter and stay within a territory of a state at a given time, and is thereby contingent upon domestic jurisdictions. However, most jurisdictions define irregularity by default, in contrast to regularity.¹²

The only aspect of irregular migration defined under international law is irregular entry. The Smuggling Protocol defines it as “crossing borders without complying with the necessary requirements for legal entry into the receiving State”¹³. Obligations on irregularity are imposed notably by the 1951 Convention and the Protocol with regard to refugees. According to UNHCR, the 1951 Convention for the host country incorporates the distinction between presence, lawful presence, lawful stay and durable residence.¹⁴ This builds on a differentiation as to the regularity of presence made in the *travaux préparatoires* of the 1951 Convention.¹⁵ Those individuals admitted to asylum procedures are lawfully present.¹⁶ This is to be contrasted with the status of lawful stay, which a person has after refugee status has been formally recognised.¹⁷ Drawing once more on the *travaux préparatoires* of the 1951 Convention, only those whose application for a residence permit has been rejected or those who did not lodge an application at all are in an irregular status.¹⁸ As regards the legality of entry, accordingly, a refugee travelling to a border and temporarily admitted pending application for asylum would neither have entered irregularly nor

¹² E. Guild, ‘Who Is An Irregular Migrant?’, in Bogusz *et al.* (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004), 3, 4; this is also the approach taken by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 5.

¹³ Article 3 lit. b of the Smuggling Protocol.

¹⁴ UNHCR, ‘*Saadi v. United Kingdom*. Written Submissions on Behalf of the United Nations High Commissioner for Refugees’ (30 March 2007) available at <http://www.unhcr.org/refworld/docid/47c52072.html> (last visited 25 August 2011), para 12.

¹⁵ See statement made by the French representative Rain, in UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifteenth Meeting Held at Lake Success, New York, on Friday, 27 January 1950, at 10.30 a.m., UN Doc E/AC.32/SR.15, 6 February 1950, para. 81.

¹⁶ UNHCR, *supra* note 14, para. 12.

¹⁷ *Id.*

¹⁸ *Id.*, para. 13 lit. b.

would he be irregularly present.¹⁹ If non-refugees use applications for asylum for deceptive entry,²⁰ and are granted temporary admission pending application, they would similarly be lawfully *present*.²¹ In such cases, however, UNHCR has argued that *entry* was unlawful.²² Yet, UNHCR's interpretation is not universally agreed. In the case of *Saadi v. United Kingdom*, the European Court for Human Rights (ECtHR) held that that "until a State has 'authorised' entry to the country, any entry is 'unauthorised'"²³ and that a temporary admission²⁴ was no such authorisation. Under such a dictum, all international migrants, who enter without the required documentation, whether refugees or non-refugees, could be referred to as *irregular* migrants. As regards rejected asylum seekers, their irregularity mostly depends on the issuance of a decision that classifies them as "removable".

III. Summary and Conclusions

Alongside the legal definition of refugees there is an ambiguous understanding of the term "migrant". On the one hand, it is an umbrella term covering all people undertaking migration. On the other hand, it stands in contrast to the term "refugees" and is often equated with economic migrant. The distinction is, on a practical level, blurred by mixed movements and motives, the fact that refugees increasingly use the same clandestine means of transport as irregular migrants, and by unfounded refugee claims.

¹⁹ The Human Rights Committee (HRC) in *Celepli v. Sweden* considered those who lodged an application for asylum as lawfully within the territory of a state within the meaning of Article 12 ICCPR, see HRC, *Celepli v. Sweden*. Communication No. 456/1991, UN Doc CCPR/C/51/D/456/1991, 2 August 1994, Annex, para. 9.2.

²⁰ Europol, 'Facilitated Illegal Immigration Into the European Union' (March 2008) available at http://57.67.199.6/publications/Serious_Crime_Overviews/Facilitated_illegal_immigration_2008.pdf (last visited 25 August 2011), 3.

²¹ For EU law, see Article 7 of Council Directive 2005/85/EC of 1 December 2005, OJ 2005 L 326/13; see also Preamble Recital 9 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, OJ 2008 L 348/98.

²² UNHCR, *supra* note 14, para 14.

²³ *Saadi v. United Kingdom*, ECHR, Application No. 13229/03, Judgment of 29 January 2008, para. 65.

²⁴ Temporary admission is a "non-status" under British law whereby aliens are lawfully physically present on the territory, and yet considered not to have entered the country legally. Other jurisdictions, such as Germany, allow for similar status ("Duldung", para. 54 Ausländergesetz).

Categorising international migrants in legal terms, according to their need for international protection, they may be,

- i. migrants who are refugees (international protection “within” the 1951 Convention/Protocol framework), with claims based on civil and political rights violations and/or claims that have a socio-economic dimension to it,
- ii. migrants in need of complementary protection (international protection “outside” the 1951 Convention/Protocol framework) who flee for reasons of generalised violence and/or for broader human rights reasons, including instances of socio-economic claims,
- iii. migrants not in need of international protection (in non-legal terms, some may be *economic migrants*)

Because of the understanding of migrants that associates their migration with socio-economic motivations, the cases where socio-economic reasons for flight play a role will be particularly discussed in the subsequent analysis.

C. International Law Pertaining to Human Rights Protection of International Irregular Migrants in Border Control

As a matter of principle, it is the sovereign right of a state to decide who it will admit to its territory. The UN General Assembly has reaffirmed on numerous occasions that states had the “sovereign right to enact and implement migratory and border security measures”²⁵. Although according to Article 12 of the International Covenant on Civil and Political Rights (ICCPR), everyone is “free to leave any country, including his own”, international human rights law (IHRL) does not recognise a corollary right to enter or reside in another state’s territory. In respect of border control, however, individuals have a right not to be *brought/returned* into some territories, which may, in effect, oblige a state to admit an individual to its

²⁵ GA Res. 61/165, 19 December 2006, para. 7; see also UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 97 (LIV) – 2003; *Amuur v. France*, ECHR, Application No. 19776/92, Judgment of 20 May 1996, para. 41.

territory. The underlying principle of *non-refoulement* governs the questions *if* and *to where* a state may expel persons.

Irrespective of the answers to these questions, IHRL further imposes obligations in respect of all other treatments towards migrants and thus in respect of measures of border control. Although it may be lawful under IHRL to treat irregular migrants differently in some respects than those lawfully residing or entering the territory,²⁶ the overwhelming majority of human rights law applies to irregular migrants irrespective of migration status when a person is in the jurisdiction of a state party to a respective instrument.²⁷

I. Admission and Non-Removal of Irregular Migrants for Reasons Relating to *Non-Refoulement*

1. Access to Asylum Procedures: The “Right to Seek Asylum”

In relation to the principle of *non-refoulement*, two issues are particularly pertinent. First, there is the need to identify refugees in mixed flows, as well as those with mixed motives or claims related to socio-economic deprivations. Second, there is the need to ensure that measures aimed at curbing irregular migration do not prevent refugees from submitting claims for the recognition of refugee status.²⁸

²⁶ See for instance Articles 12 and 13 of the ICCPR. See also the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in which rights granted to irregular migrants are less extensive than those granted to regular migrants.

²⁷ See *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03. Inter-American Court of Human Rights (2003) Series A, No. 18; and HRC, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

²⁸ UNHCR, ‘Discussion Paper. Refugee Protection and Durable Solutions in the Context of International Migration’ (19 November 2007) available at <http://www.unhcr.org/4742a6b72.html> (last visited 25 August 2011), para. 25.

a) Substance of the Right in International Law – UDHR, 1951 Convention, HRC

The precise meaning of the right to seek asylum is not entirely clear. According to Article 14 para. 1 of the Universal Declaration of Human Rights (UDHR), “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”. This is reconfirmed by the Vienna Declaration and Programme of Action of 1993.²⁹ As it stands, these documents are not legally binding and the wording may be understood to merely restate states’ right to grant asylum, without a correlative duty.³⁰ However, the notion of a *right to seek* asylum has been argued to reflect customary international law as a procedural right,³¹ because it is implicit in the 1951 Convention, and because one of its aspects, the prohibition of *refoulement*, has acquired that status.

The Executive Committee (ExCom) of UNHCR, which authoritatively reflects the *opinio iuris* of the participating states, has consistently affirmed the right to seek asylum.³² According to Conclusion No. 82 (XLVIII), beside *non-refoulement* other aspects of the right are, *inter alia*, “access, [...] of asylum-seekers to fair and effective procedures for determining status and protection needs [and] the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs”³³. In another Conclusion regarding manifestly unfounded or abusive applications, the Committee stated that, “the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by

²⁹ Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, UN Doc A/CONF.157/23, 12 July 1993, para. 23.

³⁰ G. S. Goodwin-Gil & J. McAdam, *The Refugee in International Law*, 3rd ed. (2007), 360-361. For the negotiations leading to such wording see T. Gammeltoft-Hansen & H. Gammeltoft-Hansen, ‘The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU’, 10 *European Journal of Migration and Law* (2008) 4, 439.

³¹ G. Goodwin-Gill, ‘Asylum: The Law and Politics of Change’, 7 *International Journal of Refugee Law* (1995) 1, 1, 4.

³² See UNHCR, ‘A Thematic Compilation of Executive Committee Conclusions’ (August 2009) available at <http://www.unhcr.org/3d4ab3ff2.html> (last visited 25 August 2011), 29-31.

³³ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 82 (XLVIII), lit. d subparts ii, iii.

an official of the authority competent to determine refugee status”³⁴. The notion of fair procedures further includes the provision of relevant information and guidance and the possibility to appeal within an adequate time.³⁵

The 1951 Convention does not contain provisions on asylum procedures. However, it implies procedural safeguards through the effectiveness of the Convention as a whole and, in particular, through its definition of a refugee. As the fear of persecution must be well founded, the definition includes an objective element, and thus warrants an individual assessment in which the claimant needs to be given the opportunity to present his case in an interview or hearing, in a language he understands.³⁶ Based on this treaty law and the ExCom conclusions, UNHCR has recommended that determination of refugee status or complementary protection needs to be carried out in a single procedure, by staff with the relevant legal knowledge, the use of interpreters and “appropriate cross-cultural interviewing”. Further recommendations included that no time limits exist for filing a claim after entry, that claimants have a right to legal assistance as well as representation and that there be access to appeal procedures.³⁷

On the question whether Article 14 ICCPR (fair trial rights) is applicable in asylum cases, the Human Rights Committee (HRC) is divided. Hence, it has not applied the provision in its case law but has not entirely excluded this possibility.³⁸ It has been stated that the Committee’s practice suggests procedural guarantees in asylum cases would “hardly fall short of

³⁴ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 30 (XXXIV), lit. e sublit. i.

³⁵ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 8 (XXVIII), lit. e.

³⁶ See G. P. Heckman, ‘Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?’, 15 *International Journal of Refugee Law* (2003) 2, 212, 223.

³⁷ UNHCR, ‘Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards’ (2 September 2005) available at www.unhcr.org/refworld/docid/432ae9204.html (last visited 25 August 2011), 2-4.

³⁸ C. Phuong, ‘Minimum Standards for Return Procedures and International Human Rights Law’, 9 *European Journal of Migration and Law* (2007) 1, 105, 115, citing HRC, *V.R.M.B. v. Canada*, Communication No. 236/1987, UN Doc CCPR/C/33/D/236/1987, 18 July 1988, Annex, para. 6.3.

the guarantees provided in Article 14(1)”³⁹. In state observations, the Committee has considered asylum procedures as a remedy against *refoulement* and voiced concerns about the availability of effective remedy in fast-track procedures. It has explicitly demanded that asylum seekers have sufficient time to file a claim.⁴⁰ In any case, the principle of non-discrimination remains applicable, which has also been confirmed by an individual case before the Committee on the Elimination of Racial Discrimination.⁴¹

b) Procedural Guarantees in Europe

In the European context, the ECtHR has denied applicability of the ECHR’s Article 6 to asylum cases on the basis that “decisions regarding entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him”, as warranted by the chapeau of the article.⁴² However, the ECtHR in its jurisprudence has required procedural guarantees at least for cases which concern an alleged breach of Article 3 ECHR (right to life), by recourse to Article 13. In such cases, it has held that procedures should grant claimants realistic opportunity to substantiate a claim⁴³ and thus found a time limit of five days for lodging a claim as contrary to the *non-refoulement* obligations in Article 3.⁴⁴ The Court also developed a standard of examination when it held, in *Vilvarajah*, that the examination should be “rigorous” due to the absoluteness of Article 3. Upon reviewing the meaning of this in the Court’s jurisprudence, Spijkerboer concluded that the scrutiny “must dispel any

³⁹ S. Persaud, ‘Protecting Refugees and Asylum Seekers under the International Covenant on Civil and Political Rights’ (November 2006) available at <http://www.unhcr.org/4552f0d82.html> (last visited 25 August 2011), 15.

⁴⁰ *Id.*, 17.

⁴¹ *Inter alia*, Committee on Elimination of Racial Discrimination, Report of the Committee on Elimination of Racial Discrimination to the General Assembly, 57th Session, UN Doc A/57/18, 2002, para. 79.

⁴² *Maaouia v. France*, ECHR, Application No. 39652/98, Judgment of 5 October 2000, para. 40. See also S. Saroléa, *Droits de l’homme et migrations: de la protection du migrant aux droits de la personne migrante* (2006), 279.

⁴³ *Bahaddar v. Netherlands*, ECHR, Application No. 25894/94, Judgment of 19 February 1998, para. 45.

⁴⁴ *Jabari v. Turkey*, ECHR, Application No. 40035/98, Judgment of 11 July 2009, para. 40.

doubts as to the unsoundness of the claim”⁴⁵. The European Court has further elucidated procedural questions in the case of *M.S.S. v. Belgium and Greece*.⁴⁶ In that case, the applicant, an Afghan national, had been, in the framework of the Dublin regime, deported to Greece from Belgium. Structural deficiencies of the Greek asylum system had however been published in numerous reports, *inter alia* by the UNHCR and the Council of Europe. The Court noted that “the general situation was known to the Belgian authorities and that the applicant should not be expected to bear the entire burden of proof.”⁴⁷ The Court noted the shortcomings in the assessment of Article 13, namely “insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision”⁴⁸. The authorities had not offered the applicant a “real and adequate opportunity to defend his application for asylum”⁴⁹. Regarding the possibility to appeal to the Greek Supreme Administrative Court, the applicant had received no information on legal advice, the number of lawyers drawn up for the legal aid was insufficient and the length of the proceedings excessive.

In European Union law, the right to seek asylum is stipulated in Article 6 of the Asylum Procedures Directive,⁵⁰ according to which “Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.” The Directive also sets out procedural standards, including those relating to language rights, communication with UNHCR or organisations working on its behalf, notice of the decision in reasonable time, access to counsel and personal interview, as well as accelerated procedures for unfounded

⁴⁵ T. Spijkerboer, ‘Subsidiarity and “Arguability”’: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’, 21 *International Journal of Refugee Law* (2009) 1, 48, 69.

⁴⁶ *M.S.S. v. Belgium and Greece*, ECHR, Application No. 30696/09, Judgment of 21 January 2011.

⁴⁷ *Id.*, para. 352.

⁴⁸ *Id.*, para. 301.

⁴⁹ *Id.*, para. 313.

⁵⁰ Council Directive 2005/85/EC of 1 December 2005, OJ 2005 L 326/13.

applications, i.e. within the meaning of the Directive, those of safe countries of origin or safe third country.

Lastly, the Council of Europe has set some procedural standard in its Guidelines on accelerated asylum procedures, including legal advice and interpretation.⁵¹

2. Recognition of Refugee Claims

Socio-economic reasons alone cannot be invoked to claim recognition of refugee status. According to UNHCR, however, “[t]he distinction between an economic migrant and a refugee is sometimes blurred in the same way as the distinction between economic and political measures in an applicant’s country of origin is not always clear”⁵². On the one hand, irregular migrants may be refugees because of mixed motives, whereby the flight has a socio-economic motivation *together* with a well-founded fear of persecution. On the other hand, persecution may underlie a socio-economic rights violation or may find expression in socio-economic categories. At the same time, both possibilities may overlap.

As Foster has pointed out, mixed motives often lead to a dismissal of an asylum claim.⁵³ Additionally, the economic position of an asylum seeker is often used as proof of purely economic motives.⁵⁴ UNHCR has endorsed the opinion by Hathaway⁵⁵ that even where economic motives have turned the balance towards a decision to flee, such a decision should not affect a claim for asylum when there is a well-founded fear of persecution.⁵⁶

⁵¹ CoE: Committee of Ministers, ‘Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures’ (1 July 2009) available at <http://www.unhcr.org/refworld/docid/4a857e692.html> (last visited 25 August 2011).

⁵² UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reedited, UN Doc HCR/IP/4/Eng/REV.1, January 1992, para. 63.

⁵³ M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007), 248-249.

⁵⁴ J. A. Klinck, ‘Recognizing Socio-Economic Refugees in South Africa: A Principled and Rights-Based Approach to Section 3(b) of the Refugees Act’, 21 *International Journal of Refugee Law* (2009) 4, 653, 665; Foster, *id.*, 238.

⁵⁵ J. C. Hathaway, ‘The Causal Nexus in International Refugee Law’, 23 *Michigan Journal of International Law* (2002) 2, 207, 209.

⁵⁶ UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees

With regard to the second category, jurisprudence appears to have recognised that deprivations of socio-economic rights have an impact which may be similar in severity to that of traditional claims revolving around civil and political rights, reflecting a broader notion of persecution and consideration of cumulative effects of violations in that sphere.⁵⁷ However, the prevailing view is that, in such cases, the notion of “persecution” warrants a nexus between violations of economic, social and cultural rights (ESCR) and violations of civil and political rights. Yet, such cases are not well represented in jurisprudence or scholarly literature. This may be *inter alia* due to a widely prevalent but erroneous view that every aspect of ESCR norms are subject to progressive realisation,⁵⁸ and the difficulties associated with establishing that persecution is for a Convention reason.⁵⁹ Thus, claims involving socio-economic rights may be rebutted because persecution is misinterpreted as generalised economic disadvantage.⁶⁰ Economic deprivations that may constitute persecution may be based on any Convention ground. One such example is discrimination against Roma. However, the notion of “membership in a particular social group”⁶¹ is probably best suited to accommodate the various socio-economic deprivations that social groups face. Such groups may also be economic classes like castes, disabled persons, women⁶² or children.⁶³

to the Victims of Trafficking and Persons at Risk of Being Trafficked, UN Doc HCR/GIP/06/07, 7 April 2006, para. 29.

⁵⁷ Foster, *supra* note 53, 92; *id.*

⁵⁸ Note the opinion by the Committee on ESCR whereby every ESCR has a core not subject to progressive realisation, see UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), UN Doc E/1991/23, 14 December 1990, paras 9-10.

⁵⁹ Foster, *supra* note 53, 231.

⁶⁰ *Id.*, 287.

⁶¹ See UNHCR, Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/GIP/02/02, 7 May 2002.

⁶² See, for instance, Immigration and Refugee Board of Canada, ‘Women Refugee Claimants fearing Gender related persecution’ (13 November 1996) available at <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx> (last visited 25 August 2011), which states that the notion of persecution is also to be interpreted by recourse to the ICESCR; for classifying women as a PSG in a more traditional case, see *R v. Immigration Appeal Tribunal and another, ex parte Shah*, [1999] UKHL 20.

⁶³ Foster, *supra* note 53, 331.

The only type of claims relatively well established are those of economic proscription, whereby a person is completely denied the possibility to obtain employment or earn a livelihood.⁶⁴ Meanwhile, according to Foster, determining whether partial forms of denial to employment qualify as proscription and whether less severe measures of discrimination similarly qualify is problematic. Questions also revolve around the harm caused, notably when there is deprivation, but not necessarily a threat to one's subsistence.⁶⁵ Other ESCR claims that have been accepted include cases in which children were denied education on ethnic grounds, denial of medical treatment for reasons of HIV/Aids or discrimination in obtaining housing.⁶⁶ There are also strong linkages conceivable between persecution and socio-economic rights with regard to gender-based persecution. Claims of domestic violence against women may be recognised, for instance, because of the state failure to protect, which may include some aspects of a support system, too. Recognition of claims may, however, fail because of the reluctance to recognise women as a PSG, or because of difficulties in establishing state responsibility when the original harm is inflicted by non-state actors or because of internal flight alternative.⁶⁷

Whether such "less orthodox" claims are recognised depends on the respective jurisdiction and its application of the law. However, refugee law has undergone considerable development alongside the evolution and advancement of IHRL,⁶⁸ and is amenable to interpretation capable of encompassing claims with socio-economic deprivations.⁶⁹

⁶⁴ J. C. Hathaway, *The Law of Refugee Status* (1991), 122-123; *Gash v. Nikshiqi (IAT)* [1997] INLR 96; and, for a list of jurisprudence, Foster, *supra* note 53, 94, fn. 23.

⁶⁵ Foster, *supra* note 53, 101.

⁶⁶ *Id.*, 104.

⁶⁷ Particularly for the problems of state responsibility, see M. Heyman, 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations', 17 *International Journal of Refugee Law* (2005) 4, 729.

⁶⁸ J. McAdam, *Complementary Protection in International Refugee Law* (2007), 198.

⁶⁹ Foster, *supra* note 53, 340.

3. Complementary Protection

a) Common Characteristics

Complementary protection is a form of protection “granted by States on the basis of an international protection need outside the 1951 Convention/Protocol framework”⁷⁰. The international regimes of complementary protection are mostly created by IHRL. Sources of protection are the ICCPR, the Convention against Torture (CAT), the Convention of the Rights of the Child (CRC) and regional Conventions, notably the European ECHR and the Inter-American Convention on Human Rights.

Non-refoulement obligations are applicable where the return of an individual to any territory where he would be at risk of subsection to treatment that falls within the ambit of the principle and where any such treatment is attributable to the state.⁷¹ Because the prohibition of *refoulement* in IHRL derives from the absolute prohibition of torture, inhuman and degrading treatment or punishment, it is itself absolute as well. It is not subject to limitation or derogation, nor is exclusion possible.⁷²

In the ECtHR, the absolute nature of *refoulement* has been reiterated *inter alia* in *Saadi v. Italy*⁷³ and, most recently, in *A. v. Netherlands*⁷⁴ and *N. v. Sweden*.⁷⁵

⁷⁰ McAdam, *supra* note 68, 21.

⁷¹ *Id.*, 129; UNHCR amicus curiae brief in *Sale v. Haitian Centers Council, Inc.*, 509 US 155, 163, 179-87, 113 S. Ct 2549, 125 L.Ed.2d 128 (1993).

⁷² Thus, for instance, the exclusion clause in the EU Qualification Directive (Council Directive 2004/83/EC of 29 April 2004, OJ L 304, 30/09/2004) only has bearing on the *subsidiary status*, which those excluded will not enjoy. It is, therefore, distinguishable from the *non-refoulement* obligation in Article 33 of the 1951 Convention, which explicitly provides for exceptions to *non-refoulement* in cases provided in Article 33 para. 2, for security reasons. This indicates that the criminalisation of irregular entry or stay of an irregular migrant, no matter how qualified in domestic law, or irregular entry coupled with drug or other offences have no legal significance on *non-refoulement*.

⁷³ *Saadi v. Italy*, ECHR, Application No.37201/06, Judgment of 28 February 2008, paras 137-141.

⁷⁴ *A. v. Netherlands*, ECHR, Application No. 4900/06, Judgment of 20 July 2010, paras 142-143.

⁷⁵ *N. v. Sweden*, ECHR, Application No. 23505/09, Judgment of 20 July 2010, para. 51; see also *A. v. Netherlands*, para.142 where the Court confirmed its earlier ruling in

With regard to the irregular migrants of particular interest to this paper, obligations of complementary protection are pertinent in several regards. Whether irregular migrants may face treatment contrary to *non-refoulement* obligations in a country they are deported to depends on the scope of these obligations, particularly whether and to what extent they may encompass socio-economic claims or severe humanitarian conditions.

b) Scope of Complementary Protection under the ICCPR

Although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC has not excluded that in theory any right of the Covenant may lead to a *non-refoulement* obligation for any individual within a state's jurisdiction. Thus, in *A.R.J. v. Australia* it stated that "[i]f a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant"⁷⁶.

However, even though this progressive view potentially extends *non-refoulement* obligations to the full range of rights included in the ICCPR, the actual case law by the HRC is limited to cases involving deportations that would expose the claimant to a violation of Articles 6 or 7.⁷⁷ There is, however, little evidence that it may include socio-economic risks. It may include medical cases, although case law only supports this argument with regard to illnesses that state conduct of the deporting state has caused, for instance through prolonged detention. In *C. v. Australia*, the HRC found a

Chahal v. United Kingdom, ECHR, Application No. 22414/93, Judgment of 15 November 1996 and *Saadi v. Italy*, ECHR, Application No. 37201/06, Judgment of 28 February 2008, that evidence for security threats would not augment the standard of proof in Article 3.

⁷⁶ HRC, *A.R.J. v. Australia*, Communication No. 692/1996, UN Doc CCPR/C/60/D/692/1996, 11 August 1997, Annex, para. 6.9; see also HRC, *G.T. v. Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997, para. 8.2; HRC, 'General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)' (10 March 1992) available at <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument> (last visited 25 August 2011), para. 9.

⁷⁷ In *G.T. v. Australia*, although the Committee did not consider the particular claim on the merits, it did not exclude the possibility that the right to family life may be violated by a deportation, see HRC, *G.T. v. Australia*, Communication No. 706/1996, UN Doc CCPR/C/61/D/706/1996, 4 December 1997, para. 7.2 and Appendix A.

violation of Article 7 ICCPR if the applicant was deported, for it was “unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party’s violation of the author’s rights” (unduly prolonged detention in violation of Article 9 para. 1).⁷⁸ Lastly, the notion of cruel, inhuman or degrading treatment or punishment may be invoked in some cases of physical restraint.

c) Scope of Complementary Protection under the ECHR

Although the ECHR does not explicitly contain the prohibition of *refoulement*, the ECtHR established the principle in its jurisprudence.⁷⁹

In theory, the ECtHR has moved the full spectrum of Article 3 obligations into the *non-refoulement* obligations implicit in the ECHR. This includes, besides unnecessary recourse to physical force⁸⁰ measures with a socio-economic dimension. Thus, lack of medical treatment where giving rise to medical emergency or causing severe and prolonged pain⁸¹ may be inhuman treatment. Degrading treatment contrary to Article 3 has been found in many cases of detention, when there was lack of daylight, overcrowding, unsanitary conditions⁸² or lack of medical assistance.⁸³ The shared characteristic of violations under this Article is the “threshold of severity” test.⁸⁴

However, in practice, cases in which deportations were found to be in violation of Article 3 have not included this broad range under Article 3. Yet, in *D. v. United Kingdom*, where the applicant was diagnosed with Aids while in detention in the United Kingdom and proposed for removal, the Court found unanimously that in the exceptional circumstances of the case,

⁷⁸ HRC, *C. v. Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002, para. 8.5.

⁷⁹ *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, paras 85, 91 and later extended to deportation cases in *Cruz Varas and others v. Sweden*, ECHR, Application No. 15576/89, Judgment of 20 March 1991, paras 69-70.

⁸⁰ *Ribitsch v. Austria*, ECHR, Application No. 18896/91, Judgment of 21 November 1995, para. 38.

⁸¹ *McGlinchey and others v. United Kingdom*, ECHR, Application No. 50390/99, Judgment of 29 April 2003, para. 57.

⁸² *Kalashnikov v. Russia*, ECHR, Application No. 47095/99, Judgment of 15 July 2002, paras 97-99, 102.

⁸³ *Kudla v. Poland*, ECHR, Application No. 30210/96, Judgment of 26 October 2000, para. 94.

⁸⁴ N. Mole, *Asylum and the European Convention on Human Rights* (2002), 16.

and given the “compelling humanitarian considerations”, the deportation would amount to a violation of Article 3. This was because the applicant was in the final phase of the illness, lacked family support, and because deportation would have caused acute mental and physical suffering, reducing his life expectancy.⁸⁵ However, the accumulation was decisive, since the Court made clear in a later case that “the fact that the applicant’s [...] life expectancy, would be significantly reduced if he were to be removed [...] is not sufficient in itself to give rise to breach of Article 3”⁸⁶. Also, the Chamber held that “aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison”⁸⁷.

N. v. United Kingdom concerned a Ugandan national who had Aids which was treated during the nine years the applicant’s asylum application was pending. She claimed that the medication in Uganda was unaffordable and inaccessible in rural areas. The Court held that her case did not disclose very exceptional circumstances, for she was not at that time critically ill and for the rapidity of the deterioration of her illness was unclear.⁸⁸ The Court acknowledged the differences between contracting states and states of origin, as well as the varying levels of available treatment, but stated that while it was “necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States”⁸⁹.

Thus, socio-economic differences are only a bar to deportation in the most exceptional cases, and only when coupled with compelling

⁸⁵ *D. v. United Kingdom*, ECHR, Application No. 30240/96, Judgment of 21 April 1997, paras 52-53.

⁸⁶ *N. v. United Kingdom*, ECHR, Application No. 26565/05, Judgment of 27 May 2008, para. 42.

⁸⁷ *D. v. United Kingdom*, ECHR, Application No. 30240/96, Judgment of 21 April 1997, para. 54.

⁸⁸ *N. v. United Kingdom*, ECHR, Application No. 26565/05, Judgment of 27 May 2008, para. 50.

⁸⁹ *Id.*, 44.

humanitarian considerations. For all other aspects of Article 3, several obstacles may preclude an irregular migrant from successfully invoking Article 3, notably the “real risk test”⁹⁰ and internal protection alternatives.⁹¹

Comparable to the ICCPR, *non-refoulement* obligations are not limited to violations of the right to freedom from torture, inhuman, and degrading treatment or punishment. In *Soering v. United Kingdom*, *Tomic v. United Kingdom*, *Z. and T. v. United Kingdom* and *F. v. United Kingdom*,⁹² the Court did at least not exclude the possibility that other provisions implied *non-refoulement* obligations. However, in *Razaghi v. Sweden*, the Court seemed to exclude that Article 9 may be invoked for expulsion cases.⁹³

In scholarly literature reviewing ECtHR jurisprudence, views range from the position that only Article 3 is applicable to the position that the full range of Convention rights is applicable in *refoulement* cases.⁹⁴ In practice, no complaint has yet been successful, for instance, on Article 6, where the Court held on several occasions that only a flagrant denial would preclude return.⁹⁵ In *Al-Moayad v. Germany*, the Court defined such flagrant denial in the Article 6 context as denial of access to an independent and impartial tribunal and denial of *habeas corpus*.⁹⁶ However, in *F. v. United Kingdom*, a case in which the applicant was a homosexual proposed for expulsion to

⁹⁰ *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, para. 91; *Cruz Varas and others v. Sweden*, ECHR, Application No. 15576/89, Judgment of 20 March 1991, para. 69. In some cases, the Court has assessed post-return treatment to determine whether a breach of Article 3 was present, see *Shamayev and others v. Georgia and Russia*, ECHR, Application No. 36378/02, Judgment of 12 April 2005.

⁹¹ *Salah Sheek v. Netherlands*, ECHR, Application No. 1948/04, Judgment of 11 January 2007, para. 137.

⁹² *Tomic v. United Kingdom*, ECHR, Application No. 17837/03, Decision as to the Admissibility of 14 October 2003; *Z. and T. v. United Kingdom*, ECHR, Application No. 27034/05, Decision as to the Admissibility of 28 February 2006; *F. v. United Kingdom*, ECHR, Application No. 17341/03, Decision as to the Admissibility of 22 June 2004.

⁹³ *Razaghi v. Sweden*, ECHR, Application No. 64599/01, Decision as to the Admissibility of 11 March 2003; see M. den Heijer, ‘Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights’, 10 *European Journal of Migration and Law* (2008) 3, 277, 284.

⁹⁴ Den Heijer, *id.*, 295.

⁹⁵ *Id.*, 281.

⁹⁶ *Al-Moayad v. Germany*, ECHR, Application No. 35865/03, Decision as to the Admissibility of 20 February 2007, para. 101.

Iran, claiming a violation of Article 8 because of the Iranian prohibition of homosexuality, the Court held that the *non-refoulement* obligations of Articles 2 and 3 were to be seen in connection with the special importance of those provisions which did “not automatically apply under the other provisions of the Convention”⁹⁷. Rejecting the application, the Court, however, did not state the level of harm necessary for there to be a violation of Article 8.

The House of Lords in the case of *Ullah* assessed ECtHR jurisprudence on *non-refoulement* and other Convention rights than Article 3, coming to the conclusion that, in principle, other Convention rights may bear *non-refoulement* obligations, too.⁹⁸ Thus, in *D. v. United Kingdom* and *Soering v. United Kingdom* the ECtHR did not exclude that it may be the case for Article 2, 4,⁹⁹ 5 and 6.¹⁰⁰ However, it was pointed out that successful reliance on any of those articles demanded the presentation of a very strong case, i.e. a test as strict as the one applied by the Court for *non-refoulement* obligations with regard to Article 3.¹⁰¹

Jurisprudence thus indicates that the Court applies a higher threshold for expulsion cases. For some provisions, this can be explained with limitation clauses. Such an approach was taken in *Bensaid v. United Kingdom*, with regard to Article 8.¹⁰² The Court stated that while ill-treatment below the threshold of Article 3 may still be in breach of Article 8, interference was justified under Article 8 para. 2, for it was in accordance with law and necessary in a democratic society in the interests of the

⁹⁷ *F. v. United Kingdom*, ECHR, Application No. 17341/03, Decision as to the Admissibility of 22 June 2004, para. 3.

⁹⁸ *R (on the application of Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department* [2004] UKHL 26, para. 21.

⁹⁹ *Ould Barar v. Sweden*, ECHR, Application No. 42367/98, Decision as to the Admissibility of 19 January 1999.

¹⁰⁰ *Soering v. United Kingdom*, ECHR, Application No. 14038/88, Judgment of 7 July 1989, para. 85; and *Banković Stojadinović, Stoimenovski, Joksimović and Suković v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and United Kingdom*, ECHR, Application No. 52207/99, Decision as to the Admissibility of 12 December 2001.

¹⁰¹ *R (on the application of Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department* [2004] UKHL 26, para. 24.

¹⁰² *Bensaid v. United Kingdom*, ECHR, Application No. 44599/98, Judgment of 6 February 2001, para. 48.

economic wellbeing of the country and the prevention of disorder or crime.¹⁰³

d) Convention of the Rights of the Child

Non-refoulement obligations may also arise from the Convention of the Rights of the Child (CRC). In General Comment 6 on unaccompanied children, the Committee of the Rights of the Child declares that “states shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child”¹⁰⁴. The Committee specifically names Articles 6 (right to life) and 36 (freedom from torture, inhuman or degrading treatment or punishment, freedom from arbitrary detention, no separation from parents against child’s wish). However, the Committee also states that *non-refoulement* obligations were by no means limited to these provisions and maintains that the “assessment of a serious risk should be conducted in an age and gender-sensitive manner and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services”. This suggests that in light of the vulnerabilities to which children are susceptible, humanitarian cases of irregular migrant children may have a lower threshold to establish a real risk than adults. Although the Committee’s comments relate to unaccompanied children, it is at least conceivable that these principles may in some cases be applied to accompanied children too.

In addition to the *non-refoulement* obligations explicitly framed by the Committee, the obligation of non-return may also flow from Article 3 CRC, which stipulates that all action concerning children shall be taken in their “best interest”. Again in relation to unaccompanied children, the Committee states that in principle, the return to a country of origin shall only be effected when in the best interest of the child.¹⁰⁵ In the determination of the best interest the states shall take into account the safety, security and other conditions, including socio-economic conditions, awaiting the child upon

¹⁰³ For other cases where the Court affirmed the public interest of migration control, see McAdam, *supra* note 68, 144.

¹⁰⁴ Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc CRC/GC/2005/6, 1 September 2005, para. 27.

¹⁰⁵ *Id.*, para. 84.

return.¹⁰⁶ This suggests that the “best interest” provision may create an obligation independent of a substantive right such as Article 36, which for its humanitarian dimension, may be of particular relevance for some irregular migrant children. Although the CRC is nearly universally ratified and incorporated in many domestic legal systems, the principle’s content remains unclear, not least in admission and expulsion cases.¹⁰⁷ However, such a far-fetched interpretation of Article 3 CRC is not applied, even in countries which have established practice of applying the article in admission and deportation cases.¹⁰⁸

The recognition of a child’s protection needs, whether under more “classic” *non-refoulement* or the best interest of the child, may in turn have implications for admission or removal of their parents, too, because the CRC takes a clear stand on the separation of parents and children. In turn, if expulsion/deportation is proposed for the parents, best interest considerations are relevant and indeed effected in some domestic law systems.¹⁰⁹

II. Admission and Non-Removal of Irregular Migrants for Reasons Unrelated to *Non-Refoulement*

While *non-refoulement* is concerned with the risk of a human rights violation in the state to which a person is deported, there are bars to the removal that are imposed by the violation of a right in and by the state that is deporting. This is the case with the right to family life. Thus, although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC notes in relation to expulsion in General Comment 15 that “in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”¹¹⁰. The HRC has dealt with the issue of family

¹⁰⁶ *Id.*

¹⁰⁷ McAdam, *supra* note 68, 179.

¹⁰⁸ *Id.*, 184.

¹⁰⁹ *Id.*, 189.

¹¹⁰ HRC, ‘General Comment No. 15: The Position of Aliens under the Covenant’ (11 April 1986) available at <http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument> (last visited 25 August 2011), para. 5.

life in three individual complaint cases.¹¹¹ In the case of *Steward v. Canada* it recognised that “due consideration” of the family ties had to be made and, in the assessment of the lawfulness of the expulsion, stated that “ample opportunity” had been given to the applicant to present his family ties in the domestic system.¹¹² However, the right to family life includes, both in the ICCPR and in the ECHR, a limitation clause. Case law of the ECtHR has, in accordance with jurisprudence on all limitation clauses, established that a legitimate aim is to be pursued, which immigration control was found to be *per se*.¹¹³ Further, it needs to be necessary in a democratic society and be proportional. So far, the cases before the ECtHR have only concerned individuals who were in a regular situation before the removal proceedings, mostly individuals who forfeited their entitlement through the commitment of a crime.¹¹⁴ It would thus appear that, if ever there was a consideration of Article 8 for a person with irregular migration status, the threshold for a measure to be disproportionate would be extremely high. This would have to be different if a child was concerned, as the CRC and the Committee on the Rights of the Child have set up an express strong legal framework for the protection of the right to family life.¹¹⁵ Indeed, because the Convention on the Rights of the Child is universally ratified, there is a point to be made about the CRC content regarding family unity and family unification to represent the core content in international law. The CRC’s article on family unity does not contain a limitation clause; neither does the Convention foresee the possibility of derogation. This indicates that it can never be necessary, irrespective of the reasons put forward by a Contracting Party, to restrict the right to family unity as stated in the CRC.

¹¹¹ HRC, *Charles Edward Stewart v. Canada*, Communication No. 538/1993, UN Doc CCPR/C/58/D/538/1993, 1 November 1996; HRC, *Hendrick Winata and So Lan Li v. Australia*, Communication No. 30/2000, UN Doc CCPR/C/72/D/930/2000 (2001), 26 July 2001; HRC, *Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003), 29 October 2003.

¹¹² *Steward v. Canada*, *id.*, para. 12.10.

¹¹³ *Nyanzi v. United Kingdom*, ECHR, Application No. 21878/06, Judgment of 8 April 2008, para. 76.

¹¹⁴ *Boultif v. Switzerland*, ECHR, Application No. 54273/00, Judgment of 2 August 2001.

¹¹⁵ See Article 10 CRC; and Committee on the Rights of the Child, *supra* note 104, para. 12.

III. Human Rights Protection of Individuals Classified as Removable – Expulsion/Deportation

Among irregular migrants, many may indeed leave their country of origin for generalised economic conditions without those conditions being exacerbated by discrimination, or without circumstances precluding their removal outside the 1951 Convention and the Protocol or under wider *non-refoulement* obligations. Included among those irregular migrants may be rejected asylum seekers, who either lodged their application *bona fide* or who used an application for deceptive entry. Under international law, these individuals have no right to remain in a territory and may thus be removed. However, this is predicated on the existence of a system of refugee determination¹¹⁶ which is in accordance with the applicable standards discussed above. Although international law does not question the legitimacy of removal if *non-refoulement* obligations are abided by, IHRL governs the methods of removal.¹¹⁷ Lastly, there is IHRL applicable to admission of returned individuals by their states of origin.

1. Procedural Guarantees

Distinction must be made between those irregular migrants that have applied for asylum and those that have not. With respect to the former, in addition to the procedural guarantees discussed above, it is important to note that those asylum seekers who have been rejected in the initial decision should have a right to appeal, and that this appeal should have a formal postponing effect *vis-à-vis* the deportation. Such is the practice of the ECtHR, which has held that in asylum cases where Article 3 was at stake, the irreversible nature of the harm that might occur if the risk materialised and the absoluteness of that Article required a postponing effect.¹¹⁸ Similarly the Committee Against Torture and the HRC have recommended

¹¹⁶ J. Gibson, 'The Removal of Failed Asylum Seekers: International Norms and Procedures' (1 December 2007) available at <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=476651262&query=EXCOM%20Conclusions%20and%20Decision> (last visited 25 August 2011), 1.

¹¹⁷ Phuong, *supra* note 38, 106.

¹¹⁸ *Jabari v. Turkey*, ECHR, Application No. 40035/98, Judgment of 11 July 2009, para. 50.

such a postponing effect.¹¹⁹ Indeed, it has been argued that a postponing effect was part of the right to a remedy contained in every human rights treaty.¹²⁰ As for the ICCPR, Article 13 is confined to aliens lawfully in a state's territory and, according to the HRC, excludes illegal entrants.¹²¹ However, the HRC has noted that if the legality of an alien's entry or stay was in dispute, "any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13"¹²². Notable guarantees arising from Article 13 are that expulsions are effected only in pursuance of a decision reached in accordance with law and the right to have a case reviewed by the competent authority,¹²³ except in compelling cases of national security.

For irregular migrants without protection needs, no procedural guarantees arise from the ICCPR. However, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) contains procedural guarantees for expulsion that applies to all migrant works, irrespective of migration status and protection needs. These guarantees are also far more extensive than Article 13 ICCPR. Whereas Article 22 paras 2-3 ICRMW restate Article 13 ICCPR, most notably the right to review the decision, it also contains other elements of the fair trial rights in IHRL, including that the decision shall be communicated in a language the migrant understands and, upon request, in writing. Furthermore, migrants subject to expulsion have the right to compensation in case of annulment after the expulsion has been executed, shall have reasonable opportunity to settle claims for wages and shall not be required to pay the costs of expulsion. According to Article 23, a migrant shall also be informed without delay of his right to seek consular or

¹¹⁹ Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, France, UN Doc CAT/C/FRA/CO/3, 3 April 2006, para. 7; HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Uzbekistan, UN Doc CCPR/CO/83/UZB, 26 April 2005, para. 12.

¹²⁰ J. McBride, *Access to Justice for Migrants and Asylum Seekers* (2009), 109; *Gebremedhin v. France*, ECHR, Application No. 25389/05, Judgment of 26 April 2007, para. 58.

¹²¹ HRC, *supra* note 110, para. 9.

¹²² *Id.*

¹²³ Note the difference to Article 32 para. 2 of the 1951 Convention, which guarantees a right to appeal.

diplomatic protection. However, the ICRMW has a poor record of ratifications; states parties are all sending rather than receiving states of migrants.

In the European context, Article 1 of the ECHR Seventh Protocol contains procedural guarantees for expulsion cases that are applicable only to migrants in a regular situation. However, it is applicable to those persons “whose lawful permission to be present is being set aside”¹²⁴. There are also several soft law documents that provide authoritative guidance and are in part applicable to irregular migrants without protection needs. They include the Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons Twenty Guidelines on Forced Return,¹²⁵ the Council of Europe’s (CoE) Committee of Ministers Recommendation No. (99) 12 on the return of rejected asylum seekers,¹²⁶ and the CoE Recommendation of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a CoE member state and the enforcement of expulsion orders.¹²⁷ According to the Twenty Guidelines on Forced Return, they partly reflect existing obligations. Among such obligations is the requirement to grant an accessible effective remedy to everybody against removal orders. Additionally, the guidelines in some parts explicitly exceed the existing obligations, notably the recommendation that notification shall be given in writing, in a language that the migrant understands and in time to enable the person to retrieve personal belongings.

2. Methods of Removal

When an irregular migrant is under the jurisdiction of a state, the full spectrum of human rights obligations are applicable. However, from a practical point of view, IHRL contains several norms that are particularly

¹²⁴ McBride, *supra* note 120, 100.

¹²⁵ CoE: Committee of Ministers, Ad hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons – Twenty Guidelines on Forced Return, CM(2005)40 final, 9 May 2005.

¹²⁶ CoE: Committee of Ministers, Recommendation R (1999) 12 of the Committee of Ministers to Member States on the Return of Rejected Asylum-Seekers (and Explanatory Memorandum), (1999) 12, 18 May 1999.

¹²⁷ CoE: The Commissioner for Human Rights, Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders, CommDH/Rec (2001) 1, 19 September 2001.

relevant regarding methods of removal, and particularly forced removal. The most critical is the right to life and the prohibition of torture, inhuman or degrading treatment or punishment.¹²⁸ Thus, in the context of the ECHR, Article 4 of the Fourth Protocol prohibits the collective expulsion¹²⁹ of aliens, which is not limited to those in a regular situation. In the ICCPR, according to the HRC, the protection against collective expulsion is limited to regular migrants.¹³⁰ However, *non-refoulement* obligations may have ramifications on irregular migrants even if they do not have protection needs. A collective expulsion of groups in which there are people whose protection needs have not been determined is thus unlawful.

Furthermore, both norms clearly restrict the use of force that may be used to coerce an irregular migrant during removal. The HRC has noted that placing a cushion on the face of an individual to stop his resistance entailed a risk to life and advised Belgium to “re-examine the whole procedure of forcible deportations” and recommended that all security forces executing forced return received special training.¹³¹ It has asserted elsewhere that the presence of independent observers or doctors should be allowed during forcible return.¹³² Lastly, the CAT has welcomed the ban of any form of gagging, compression of the thorax, bending of the trunk and binding together of the limbs and recommended that states systematically allow medical examination to be conducted before removals and after failed

¹²⁸ In relation to the deportation of aliens, the Human Rights Committee has expressed concern over ill-treatment, see HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Switzerland, UN Doc CCPR/CO/73/CH, 12 November 2001, para 13.

¹²⁹ For a definition of forced expulsions see *Andric v. Sweden*, ECHR, Application No. 45917/99, Decision as to the Admissibility of 23 February 1999, para. 1: “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”.

¹³⁰ HRC, *supra* note 110, paras 9-10.

¹³¹ HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Belgium, UN Doc CCPR/C/79/Add.99, 19 November 1998, para. 15.

¹³² Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Covenant, Conclusions and Recommendations of the Committee against Torture, France, UN Doc CAT/C/FRA/CO/3, 3 April 2006, para. 11.

removal attempts.¹³³ The Committee against Torture has further proposed that states adopt rules on forcible return at the federal level to ensure compliance with the CAT.¹³⁴

The European Committee for the Prevention of Torture (CPT) has deemed the following practices unlawful: physical assault to coerce a migrant to board a means of transport or to punish his refusal of doing so; withholding medication on the basis of a medical decision and in accordance with medical ethics; employing means that may obstruct a migrant's airways, such as using tape, cushions or padded gloves, or by pushing the face against a seat.¹³⁵

According to the Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons Guidelines on Forced Return, existing obligations prohibit "restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia". Furthermore, the Guidelines recommend the issuance of regulations and guidelines, that members of escorts shall be identifiable, adequately trained, and that medical examinations be carried out before each removal. The CoE Commissioner of Human Rights has recommended that the "use during aircraft take-off and landing of handcuffs on persons resistant to expulsion should be prohibited".¹³⁶

The UNHCR ExCom has adopted several conclusions dealing with the return of people not in need of international protection. It has deplored practices of return that endanger physical safety and reiterated that "irrespective of the status of the persons concerned, returns should be undertaken in a humane manner and in full respect for their human rights

¹³³ *Id.*

¹³⁴ Committee against Torture, Consideration of Reports Submitted by States Parties under Article 19 of the Covenant, Conclusions and Recommendations of the Committee against Torture, Germany, UN Doc CAT/C/CR/32/7, 11 June 2004, para. 5, lit. c.

¹³⁵ CoE: CPT, 7th General Report on the CPT's Activities Covering the Period 1 January to 31 December 1996, CPT/Inf(97) 10, 22 August 1997, para. 36; CoE: CPT, 13th General Report on the CPT's Activities Covering the Period 1 January 2002 to 31 July 2003, CPT/Inf (2003) 35, 10 September 2003, paras 36 and 38.

¹³⁶ CoE: The Commissioner for Human Rights, Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders, CommDH/Rec (2001) 1, 19 September 2001, para. 18.

and dignity and without resort to excessive force”¹³⁷. In cases where force is used, it should be “necessary, [...] proportional and undertaken in a manner consistent with human rights law”¹³⁸. The Committee has also recommended that strategies for carrying out forced returns in safety and dignity be examined within a framework of international cooperation.¹³⁹

IV. Humanitarian Obligations Applicable to Irregular Migrants Irrespective of a Need for International Protection and Outside Removal Proceedings¹⁴⁰

1. Rescue at Sea and the Right to Life

The principle to assist or rescue those in distress at sea¹⁴¹ has been referred to as a “constitutional element of the law of the sea”¹⁴² and is codified in a range of international treaties, including the UN Convention on the Law of the Sea, International Convention for the Safety of Life at Sea (SOLAS Convention), and the International Convention on Maritime Search and Rescue (SAR Convention). The principle’s content is expressed in SOLAS.

It is evident from the SOLAS Convention that the focus of the principle is the life and health of individuals, and that the principle applies in cases of individuals needing medical attention, not merely in cases where an entire *vessel* is in distress. The SAR Convention clarified the substance of the duty to engage in rescue at sea as encompassing the provision of

¹³⁷ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 85 (XLIX), lit. bb.

¹³⁸ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 96 (LIV) – 2003, lit. c.

¹³⁹ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 79 (XLVII) – 1996, lit. u.

¹⁴⁰ Recent cases of boats carrying migrants in the Mediterranean are numerous. In one particularly problematic case, NATO was accused to have ignored the boat, see J. Shenker, ‘Aircraft Carrier Left Us to Die, Say Migrants’, *The Guardian*, 8 May 2011, available at <http://www.guardian.co.uk/world/2011/may/08/nato-ship-libyan-migrants> (last visited 25 August 2011).

¹⁴¹ For the definition of distress under international law of the seas, see International Convention on Maritime Search and Rescue, Annex, Chapter 1, para. 1.3.11.

¹⁴² K. Wouters & M. den Heijer, ‘The *Marine I* Case: A Comment’, 22 *International Journal of Refugee Law* (2010) 1, 1, 4.

medical aid and basic needs. These obligations have been interpreted to extend beyond territorial waters.¹⁴³ The 2004 amendments of the SAR Convention refined the duty to assist those in distress, creating an obligation for the state to ensure that “in every case a place of safety is provided within a reasonable time” to recovered survivors.¹⁴⁴ Some states have, however, objected to these amendments, contending that they may be interpreted as creating an obligation to let all survivors rescued in its SAR region disembark on the territory.¹⁴⁵ Consequently, instances in which entry into ports is prohibited still persist.¹⁴⁶ Meanwhile, it is clear that some frequent problems relating to irregular migrants’ distress, like disputes concerning the responsibility to respond to distress calls¹⁴⁷ or delays in rescue at sea operations¹⁴⁸ relate to the core of the principle, not its controversial aspects.

The obligations that maritime law imposes are not framed as human rights. The duty to deliver to a place of safety is to be understood as relating only to immediate well-being and is thus not governed by IHRL.¹⁴⁹ However, The UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea has stated that “[h]uman rights and refugee law principles are an important point of reference in handling rescue at sea situations”¹⁵⁰. The right to life is under certain circumstances

¹⁴³ R. Weinzierl & U. Lisson, ‘Border Management and Human Rights – A Study of EU Law and the Law of the Sea’ (December 2007) available at <http://www.unhcr.org/refworld/category,REFERENCE,GIHR,,47b1b0212,0.html> (last visited 25 August 2011), 35-36.

¹⁴⁴ International Maritime Organization, Resolution MSC. 155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, MSC 78/26/Add.1 Annex 5, 20 May 2004, 1.

¹⁴⁵ Amnesty International, ‘Italy/Malta: Obligation to Safeguard Lives and Safety of Migrants and Asylum Seekers’ (7 May 2009) available at <http://www.amnesty.org/en/library/asset/EUR30/007/2009/en/75e53b86-79eb-4d39-a5d4-e0df8cf13a0c/eur300072009en.pdf> (last visited 25 August 2011), 3.

¹⁴⁶ *Id.*, 1-4.

¹⁴⁷ *Id.*

¹⁴⁸ UNHCR, ‘UNHCR Questions Delays in Rescue-at-Sea Operation off Malta’ (8 June 2010) available at <http://www.unhcr.org/4c0e33b66.html> (last visited 25 August 2011).

¹⁴⁹ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 23 (XXXII); see also Wouters & Den Heijer, *supra* note 142, 7.

¹⁵⁰ UNHCR, The Treatment of Persons Rescued at Sea: Conclusions and Recommendations from Recent Meetings and Expert Round Tables Convened by the Office of the United Nations High Commissioner for Refugees, Report of the Office of the UNHCR, UN Doc A/AC.259/17, 11 April 2008, para. 8.

extraterritorially applicable on a vessel, when it is a vessel of the Coast Guard or when conduct is otherwise attributable.¹⁵¹ The ECtHR admissibility decision in *Xhavara and others v. Italy*,¹⁵² which was rejected *ratione temporae* and for failure to exhaust domestic remedies, showed the relevance of basic and fundamental human rights norms in such context. In that case, the applicants were irregular migrants whose boat was allegedly sunk by an Italian coast guard vessel outside coastal waters attempting to stop the boat as it traversed the Mediterranean to Italy, killing 58 passengers. The applicants claimed a violation of the right to life on behalf of their families, by virtue of failure to investigate. The Court recalled the principle voiced in *Osman v. United Kingdom* on the positive obligations implicit in Article 2 to protect the lives of individuals within the jurisdiction, as well as the obligation to adequately investigate any death caused that might have been caused by state agents.

2. Other Humanitarian Needs

Smuggled irregular migrants are often abandoned by their smugglers in hazardous areas like deserts,¹⁵³ or are in immediate humanitarian need after a perilous journey.¹⁵⁴ Legally speaking, it is a relatively straightforward claim that states have to meet these needs when they have apprehended irregular migrants and hold them in detention, for denying medical treatment or other basic necessities like food and water has been

¹⁵¹ In the ECtHR context, see *Medvedyev and others v. France*, ECHR, Application No.3394/03, Judgment of 29 March 2010, para. 65; see also the decision by the Committee against Torture in *J.H.A. v. Spain* (Committee against Torture, *J.H.A. v. Spain*, Communication No. 323/2007, UN Doc CAT/C/41/D/323/2007, 21 November 2008), which concerned the rescue of the migrant passengers of the vessel *Marine I* off the Canary Islands by a Spanish rescue tug. The Committee observed that Spain “maintained control over the persons on board the *Marine I* from the time the vessel was rescued and throughout the identification and repatriation process that took place at Nouadhibou” (para. 8.2).

¹⁵² *Xhavara and fifteen others v. Italy and Albania*, ECHR, Application No. 39473/98, Decision as to the Admissibility of 11 January 2001.

¹⁵³ See the documentary monograph by F. Gatti, *Bilal. Viaggiare, lavorare, morire da clandestini* (2007).

¹⁵⁴ Migrants suffer of sicknesses, starvation, dehydration, hypothermia or skin burns, see K. Derderian & L. Schockaert, ‘Responding to “Mixed” Migration Flows: A Humanitarian Perspective’, 10 *SUR International Journal on Human Rights*, (2009) 1,105, 107.

found to be ill-treatment.¹⁵⁵ For instance, the HRC found that the deprivation of food and water for five successive days amounted to a violation of Article 7 ICCPR.¹⁵⁶ By analogy, denial of medical aid and basic necessities may amount to a violation of pertinent provisions guaranteeing humane treatment of persons deprived of liberty. Hence the HRC, in general Comment 21,¹⁵⁷ makes reference to the Standard Minimum Rules for the Treatment of Prisoners (1957),¹⁵⁸ one of which stipulates that such needs shall be met. For medical cases, however, case law suggests that there has to be a deterioration of the physical condition which can be attributed partly to the authorities' conduct, or to the conditions of detention.¹⁵⁹

A different question is whether IHRL also imposes humanitarian obligations in cases where migrants are not detained. Such obligation may be derived from the right to adequate food, contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee on ESCR stated in General Comment 12 that the right, through the respect, protect, fulfil scheme, encompassed the obligation to *provide* when individuals are unable, for reasons beyond their control, to enjoy the right.¹⁶⁰ It is unclear whether that obligation is part of the core obligations not subject to progressive realisation. In any case, the problem is closely

¹⁵⁵ N. S. Rodley & M. Pollard, *The Treatment of Prisoners Under International Law*, 3rd ed. (2009), 407.

¹⁵⁶ HRC, *Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, UN Doc CCPR/C/51/D/414/1990, 10 August 1994, Annex, para. 6.4.

¹⁵⁷ HRC, 'General Comment No. 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Art. 10)' (10 April 1992) available at <http://www.unhchr.ch/tbs/doc.nsf/0/3327552b9511fb98c12563ed004cbe59?Opendocument> (last visited 25 August 2011), para. 5.

¹⁵⁸ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at http://www2.ohchr.org/english/law/pdf/treatment_prisoners.pdf (last visited 25 August 2011).

¹⁵⁹ See *Bitiyeva and X v. Russia*, ECHR, Application Nos 57953/00 and 37392/03, Judgment of 21 June 2007, paras 99-101.

¹⁶⁰ CESCR, General Comment 12: Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/1999/5, 12 May 1999, para. 15.

related to obligations of a “negative” character, for instance not obstructing aid organisations to assist persons.¹⁶¹

V. Summary and Conclusions

No specialised international law is applicable to irregular migrants’ human rights protection in general, or in particular areas like border control. However, whenever someone declares to seek protection, the pertinent IHRL applies fully, with some exceptions in fair trial rights in expulsion cases.

No migrant has a right to enter or reside in a state other than his own. The only right which may *in effect* result in states granting entry is the protection against *refoulement*, in the event that an irregular migrant is in need of international protection. However, granting entry remains framed as a right of the state rather than the individual.

The principle of *non-refoulement* has as its source treaty and customary international refugee law and IHRL. It applies to refugees, even if they have mixed motives for flight or if persecution takes the form of socio-economic deprivations. In the latter respect, international jurisprudence is meagre, with the modest exception of economic proscription. Extended *non-refoulement* obligations under IHRL and outside the 1951 Convention may, in theory, arise from various norms in IHRL and thus broaden the basis on which irregular migrants may claim a need for international protection. Thus, the right to a family life has been invoked in litigation, but is itself subject to limitation. In practice, *non-refoulement* obligations have been applied only on the grounds of the prohibition of torture, inhuman or degrading treatment or punishment. Hereunder, some socio-economic claims may be subsumed, notably cases with compelling humanitarian considerations. It is nevertheless evident that socio-economic reasons cannot normally be invoked as the basis for a claim for complementary protection.

In order to abide by the absolute principle of *non-refoulement*, states need to ensure adequate, that is fair and effective, determination of the protection needs of irregular migrants within their jurisdiction. Because of

¹⁶¹ See, in this regard K. Luopajarvi, ‘Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?’, 15 *International Journal of Refugee Law* (2003) 4, 678, 696.

the implications of *non-refoulement* and its strong status in international law, it remains a cornerstone for the protection of all irregular migrants.

Only irregular migrants that have been determined not to be in need of international protection can be expelled. There is little evidence that procedural guarantees under international law against such expulsion go beyond those required for an adequate status determination, with the exception of the poorly ratified ICRMW. IHRL, however, restricts the use of methods for expulsion and grants those returned a right to re-enter their state of origin. Regardless of the need for international protection, there are also humanitarian obligations that partly derive from IHRL, and partly from other bodies of international law, such as the law of the sea.

D. Challenges in Protection

A review of pertinent reports indicates miscellaneous deficiencies in human rights protection of international irregular migrants. In line with the preceding analysis, protection challenges all appear to be related to the principle of *non-refoulement*.¹⁶² First, there is the challenge of ensuring access to procedures. Second, there is a challenge as to the substantive content of those procedures. Third, a challenge exists as to the scope of the actual principle of *non-refoulement*. Challenges concern both the existing law and its development.

I. Access to Procedures

In order to curb irregular migration, states often resort to fast track procedures, whereby applicants for asylum are held in border areas and subject to an initial screening or expedited determination.¹⁶³ In the global consultations on international protection under UNHCR's auspices, several concerns were voiced over fast track procedures. They included refugee status determination (RSD) by border guards with limited experience in asylum matters and procedures (e.g., interview techniques and relevant protection principles), lack of safeguards and support to asylum seekers, and

¹⁶² It is evident that the subsequent paragraphs reflect merely a selection. Other challenges that may be named, but that have been less subject of the present paper, are the criminalisation of irregular migration and the externalisation of migration control.

¹⁶³ UNHCR, Global Consultations on International Protection: Asylum Processes (Fair and Efficient Asylum Procedures), UN Doc EC/GC/01/12, 31 May 2001, para. 21.

denial of access to UNCHR and NGOs working on behalf of it. Other aspects that may infringe upon the right to seek asylum at borders include the absence of translation into a language the asylum seeker understands.

When identification of asylum seekers takes place on board a ship after interception or the blocking of a vessel in the territorial sea, laws of the flag state are applicable. However, in such situations, questions arise as to access of administrative procedures and counsel, translation and privacy during interviews. UNHCR has therefore criticised both screenings and RSD on board ships in past situations and recommended that it be carried out on board ships only in “some limited instances depending on the number and conditions of the persons involved, the facilities on the vessel and its physical location”¹⁶⁴. Access to fair and efficient asylum procedures within the meaning of the ExCom conclusions may best be assured after disembarkation. The ExCom of UNHCR observed that states in whose territory or territorial waters interception takes place have responsibility for addressing the protection needs of those intercepted. It also recommended *inter alia* that states respect the principle of *non-refoulement* and the right to seek and enjoy asylum in other countries; that they design adequate procedures to identify those in need of international protection among the intercepted persons; train officials on the applicable standards; and take into account the special needs of refugee women and children.¹⁶⁵

II. Procedural Safeguards

The principle of *non-refoulement* implies that asylum seekers should not be returned to a third country for a determination of their claim when the procedural safeguards of the “right to seek” are not met and when there is thus the risk of indirect *refoulement*. The ECtHR’s Grand Chamber has recently made this clear in the case of *M.S.S. v. Greece and Belgium*.¹⁶⁶ The

¹⁶⁴ UNHCR, ‘Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea (Final version, including Annexes)’ (18 March 2002) available at <http://www.unhcr.org/refworld/docid/3cd14bc24.html> (last visited 25 August 2011), 6-7.

¹⁶⁵ UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 97 (LIV) – 2003; see also: UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CRP.17, 9 June 2000.

¹⁶⁶ *M.S.S. v. Belgium and Greece*, ECHR, Application No. 30696/09, Judgment of 21 January 2011.

ECtHR rejected the argument of the Belgian authorities that it was sufficient to seek assurances from Greece as to the treatment of the applicant in Greece: “In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention”¹⁶⁷.

The Court argued that it was, in the light of the information about Greece, up to the Belgian authorities “not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3”¹⁶⁸.

While the existing obligations appear relatively clear in this respect, the challenge lies rather on the implementation. Although this may to a large extent depend on the political will within a state it must be mentioned that states may also lack the administrative capacity for registering and documenting. Where this is the case, international cooperation aimed at fostering expertise and capacity is to be welcomed. Existing obligations need constant reaffirmation in law and practice. The notion of “fair and effective” procedures, reaffirmed numerous times by the ExCom, is applicable to all irregular migrants who apply for asylum, and irregular status cannot exclude access to such procedures.

De lege ferenda, procedural safeguards itself are most likely to develop further with regard to individuals that claim a need for international protection. This also includes the postponing effect of asylum procedures *vis-à-vis* deportation, which, for instance, does not seem to be fully guaranteed in EU law. Thus, in the EU “Returns Directive”¹⁶⁹ there appear to be various circumstances in which irregular migrants may be classified

¹⁶⁷ *Id.*, para. 353.

¹⁶⁸ *Id.*, para. 359.

¹⁶⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, OJ 2008 L 348/98.

removable within the Directive's framework when asylum applications are pending.¹⁷⁰

In contrast, the ICRMW stands alone in imposing a set of obligations for migrants without need for international protection and further in overcoming the dichotomy of regular and irregular migrants in expulsion cases. Its progressive stand thus appears unlikely to crystallise in international law in the short term.¹⁷¹

III. Development of the Scope of *Non-Refoulement*

It has been demonstrated that in removal not the full range of treaty-based human rights is applicable. Both the HRC and the ECtHR have in practice restricted *non-refoulement* obligations to some provisions. There are several possible explanations for such restriction.

First, it may be explained by a hierarchy of norms, in particular between basic civil and political rights on the one hand, and social, economic and cultural rights on the other. In RSD, when the existence of persecution is determined, it is common practice to associate the term persecution to a basic core of civil and political rights.¹⁷² However, there is, arguably, no evident hierarchy in international human rights law apart from a hierarchy that may be deduced from the possibility of derogation of a provision. Yet, the expulsion cases that were before the HRC do not allow for the conclusion that the higher threshold applied in such cases is based on such rationale. In General Comment 29, the Committee stated that every provision of the Covenant had a non-derogable core. The Committee's reasoning was that the requirement of proportionality in the derogation clause would preclude disregarding a Covenant provision completely.¹⁷³

¹⁷⁰ A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive', 11 *European Journal of Migration and Law* (2009) 1, 1.

¹⁷¹ The EU Returns Directive 2008/115/EC, for instance, in Article 2 lit. a, excludes from its scope irregular migrants that "are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State" or are subject to return as a criminal law sanction.

¹⁷² See Hathaway, *supra* note 64.

¹⁷³ HRC, ICCPR, General Comment No. 29: States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 6.

Moreover, the HRC regards non-derogable cores as necessary for the protection of the actual non-derogable rights explicitly mentioned in the Covenant.¹⁷⁴ An approach whereby all rights in the Covenant may be a source of *non-refoulement* obligations if their core is violated is problematic to the extent that it is unclear in most cases what constitutes the core. Developing such clarity is to be aspired to. To attach *non-refoulement* obligations to the “derogability” of a provision seems a plausible avenue for the development of *non-refoulement* obligations.

Second, a different regime for removal cases may be justified by the fact that removal cases rely upon a risk for a migrant, rather than on a violation that has occurred. If *non-refoulement* obligations had wider application, more risks might arise for more individuals and thus unravel the substance of the principle. As for the European Court, it has been argued that the higher standard for expulsion cases resonated “with the idea that the Convention operates in an essentially regional context and primarily governs the European public order”, signifying that standards of the ECHR reflected a consensus in Europe that “cannot be automatically transposed to treatment received in countries not party to the Convention”¹⁷⁵. Obviously, such reasoning can hardly convince when it comes to risks of treatment that violate both the ECHR and the ICCPR. It would equally be flawed in removal cases based on the ICCPR alone. However, it may be argued that there is a difference in quality between a violation that is committed directly within the domestic jurisdiction, and a *risk* of a violation that is committed in another jurisdiction, and that it is this difference alone that explains the restriction of the *non-refoulement* principle.

Leaving aside the reasons for the less complete applicability of IHRL in expulsion cases, the analysis has shown that IHRL could accommodate

¹⁷⁴ *Id.*, para. 16; see also HRC, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Israel, UN Doc CCPR/CO/78/ISR., 21 August 2003, para. 12; see also HRC, ‘General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7)’ (10 March 1992) available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/6924291970754969c12563ed004c8ae5?Opendocument> (last visited 25 August 2011), para. 11; note also Article 10 ICCPR (together with General Comment No. 29, para. 13 lit. a); in HRC, *Arzuaga Giboa v. Uruguay*, Communication No. 147/1983, UN Doc CCPR/C/OP/2, 1 November 1985, para. 14, the Committee has found incommunicado detention to have contributed to a violation of Article 10.

¹⁷⁵ Den Heijer, *supra* note 93, 308-309.

needs of migrants whose claims have a socio-economic dimension. Hence emphasis ought to be on consolidation of existing obligations, taking into account the shortcomings of the migrant-refugee dichotomy.

E. Conclusion

This paper conceptualised international irregular migration in border control from the perspective of IHRL. It expounded but endorsed the meaning of “migrants” as an umbrella term, while acknowledging the common understanding that migrants are those who leave their countries of origin or nationality for socio-economic related reasons. The dichotomy between refugees and economic migrants is simplistic and does not always reflect reality.

Through the principle of *non-refoulement*, international law in border control is almost wholly concerned with individuals that have a need for international protection, whether it has refugee law or complementary protection at its source. If such a need is present, *non-refoulement* is not concerned with the irregular status of a migrant. Socio-economic motivations for flight are not a bar to being a refugee within the meaning of the 1951 Convention, if their underlying cause is persecution, or if motives are mixed. Refugee law can accommodate such claims and overcome a strict dichotomy but is currently only rarely and restrictively applied in this regard. *Non-refoulement* obligations outside the 1951 Convention and the Protocol may fill this gap to some extent, but do at the moment not significantly exceed the substantial scope of the *non-refoulement* obligations in refugee law when it comes to socio-economic rights. In expulsion cases, virtually only the prohibition of torture, inhuman or degrading treatment is relevant. Furthermore, the scope of the prohibition in its extraterritorial application is limited. A more transparent application of this extraterritorial dimension is to be aspired to. A subtle development towards greater scope in the application of Article 3, as well as of other articles, is not only conceivable, but arguably also more consistent with the developing notions of extraterritorial obligations.

Non-refoulement obligations equally govern procedural rights in status determination. In this regard, it remains crucial for states to design and implement measures to legitimately restrict irregular migration of those not in need of international protection in a way that meets procedural guarantees, particularly in interception, fast track or “hot return” policies.

Individuals may be removed under international law if they have no need for international protection under the 1951 Convention or expanded

IHRL *non-refoulement* obligations, and if there is no other individual right violated, particularly the right to family life. It is essential to reiterate that such irregular migrants are also right holders under IHRL. Irregular migrants may also have, just as refugees may have, humanitarian needs that a state should meet. Here, no distinction should be made between regular and irregular migrants, or between varying needs for international protection. International law imposes such obligations, particularly, through the right to life.

Meanwhile, this paper has omitted some fundamental human rights concerns pertaining to irregular migrants, notably questions of legality of detention, status accorded pending application for refugee status¹⁷⁶ and, finally, access to ESCR and access to durable solutions. Human rights protection in admission and expulsion is not to be seen in isolation, but rather as piece of a jigsaw of norms in international law which are germane to the human rights protection of irregular migrants.

Although the majority of obligations are clear, recent developments in Europe show that politics can be prone to question them. Yet, what in situations of large influxes is more needed than anything else is a strong affirmation of the obligations as one of the pillars of a democratic society respecting the dignity of everybody.

¹⁷⁶ See J. C. Hathaway, 'What's in a Label?', 5 *European Journal of Migration and Law* (2003) 1, 1.