EXPULSION TO TORTURE – THE PRINCIPLE OF NON-REFOULEMENT AND INTERNATIONAL HUMAN RIGHTS LAW
Expulsion to torture – the principle of non-refoulement and international human rights law


Palauttamiskielto-periaate merkitsee pääpiirteissään sitä, että henkilöä ei saada siirtää pois maasta, jos häntä siirron kohteena olevalla alueella kohtaisi perusteltu riski vainosta, kidutuksesta tai epäinhimillisen tai halventavan kohtelun tai rangaistuksen vastainen yleissopimus. YK:n yleissopimus suojaa henkilöä vainolta ja koskee henkilöitä, jotka ovat kotimaansa ulkopuolella eli sillä on se luviaan pakolaisten. EIS suojaa kaikkia henkilöitä kotimaassa olemisesta riippumatta, ja sen tarjoama suojaa niin kidutuksen kuin epäinhimillisen tai halventavan kohtelun tai rangaistuksen. KVY suojaa samaten kaikkia henkilöitä kotimaassa olemisesta riippumatta, mutta sen tarjoama suojaa vain kidutuksen.

Työssä on eroteltu periaatteen sisällöstä eri osa-alueita, jotka ovat suojan alueellinen ja henkilöllinen kattavuus, kielletyn kohtelun sisältö, riskiä koskeva harkinta ja periaatteen absoluuttinen luonne. Näitä osa-alueita käsitellään sekä kussakin sopimuksessa erikseen, että sopimuksia vertailuvastina. Tätä tarkoituksena on selvitää periaatteen sisältöä kussakin sopimuksessa huomioiden mahdollisia eroja ja yhtäläisyyskiiä sekä aukkoja suojelussa, jota periaatteet etenkin pakolaisille tarjoaa.
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1. Introduction

As the globalization trend has drastically expanded during the last decades so has the amount of migration and refugees all over the world. Wars, conflicts and natural disasters inevitably lead to masses of people trying to find shelter in another State than their country of origin. This in turn has led to a growing need for comprehensive and adequate international law regarding refugee rights and the obligations of States towards them. The content of this international refugee law can dramatically influence a refugee's life, health or security, which means that the obligations that are directed towards States should not be taken lightly. While there has been substantial development regarding this field of law in the United Nations and other international organizations since at least the early 1930s, questions of refugee law are often highly political and bring forth heated debate that has continued to this day. If there is not sufficient consensus among States regarding the legal rules of refugee law and their application, the whole field of law may appear too unclear and ambiguous. Thus it can be argued that a legal analysis of these rules is of utmost importance, especially when taking into account the aforementioned possible dramatic effects on individuals resulting from refugee policies.

One of the most important rules regarding refugee law is the prohibition on refoulement. The principle of non-refoulement has many varying definitions but one could say that it basically prohibits a State from ejecting a refugee from its territory and returning that refugee to a place where he or she might be exposed to torture or experience persecution. Non-refoulement can also protect a refugee from inhuman or degrading treatment or punishment. However international law at the same time provides that States in normal circumstances have the right to decide whether they allow entry to aliens or whether they

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1 See for instance the 1933 Convention relating to the International Status of Refugees, (1935) 159 LNTS 3663, Article 3.
2 The name of the principle comes from the French term “refouler”, which can be roughly translated as “return” or “reject”.
3 Duffy 2008, p. 373.
deport an alien. The principle of non-refoulement can be seen as restricting the aforementioned right of States, and it is connected to the absolute prohibition of torture and to fundamental human rights. States however have an interest to defend their right to deport or reject refugees especially on the basis that not expelling a refugee is a threat to their security. States have also tried to prevent situations where they would be bound by rules of refugee law by implementing practices of non-entrée⁴. This presents questions on how far can States go in their policies before they are deemed as acting against the object and purpose of the principle that binds them. Thus we can see an important characteristic of refugee law: it prohibits States from acting in a way that would violate the rights of refugees and obliges them to guarantee those rights. Connected to this is the question whether the rules are absolute or, in other words, whether they can be derogated from?

The prohibition on refoulement is codified in many international human rights treaties. I will introduce here the four most important treaties that contain this principle either explicitly or implicitly. Firstly, there is the United Nations Convention Relating to the Status of Refugees (later referred to as the Refugee Convention). Secondly there is the European Convention for the Protection of Human Rights and Fundamental Freedoms (later referred to as ECHR). Thirdly there is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (later referred to as CAT). And fourthly there is the International Covenant on Civil and Political Rights (later referred to as ICCPR). These conventions differ from one another in how they supervise and enforce the principle of non-refoulement as well as in how they define the exact content and scope of that principle. Naturally the applicability of these conventions depends on whether a State has signed and ratified one. However, all of these treaties have been ratified in a rather widespread manner by numerous States either regionally or globally, depending on the type of the

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⁴ Hathaway and Gammeltoft-Hansen 2014, p. 244.
convention. What is common to them all is that they are human rights treaties and have been established in the latter half of the 20th century.

This thesis focuses on the assessment of the principle of non-refoulement in light of the most important human rights treaties that govern it. I have chosen to include the Refugee Convention, ECHR and CAT in the assessment. ICCPR will not be analyzed because it would extend the length of this thesis too much without providing sufficient unique content regarding the principle of non-refoulement. In my opinion its content resembles too strongly that of ECHR and CAT, while its supervisory mechanism does not contain as rich or consistent case law as those two. It is important to gain an understanding about how the prohibition on refoulement is codified, interpreted and enforced in each of the systems and mechanisms of these conventions. Crucial to achieving this is going through the case law that has developed under the European Court of Human Rights (later referred to as ECtHR, a judicial body under ECHR) and the Committee against Torture (later referred to as ComAT, a judicial body under CAT). Under the Refugee Convention significant interpretative material has been created by the United Nations High Commissioner for Refugees (later referred to as UNHCR) and the bodies connected to it or contained in it such as the Executive Committee of the High Commissioner's Programme (later referred to as EXCOM). The analysis of this material is also essential for understanding the principle of non-refoulement. Naturally of importance to the interpretation of the treaties can also be the preparatory work regarding them as well as scholarly writings on them.

A research question which this thesis aims to answer is what content does the principle of non-refoulement have in international law under the aforementioned three treaty regimes? Connected to this is the question what

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5 Jari Pirjola chose to exclude ICCPR in his article as well, arguing that it has been precisely ECHR and CAT that have proven out to provide protection for those asylum-seekers that are not protected by the Refugee Convention. See Pirjola 2002, p. 743.
differences and similarities do the regimes have when compared against each other in this context? And finally, what kind of gaps are there in refugee protection regarding a treaty regime and are those gaps filled with the protection granted by another treaty regime?

I will begin with the assessment of the content of the prohibition on refoulement in three human rights treaties separately. The Refugee Convention will be discussed first, which will be followed by ECHR. After that I will analyze the content of the principle of non-refoulement in the context of CAT. This will be followed by a comparative study of the three convention regimes, where major differences and similarities between them will be discussed. Finally, I will present concluding remarks regarding the aforementioned research questions.
2. The principle of non-refoulement in three human rights treaty regimes

2.1 Brief remarks regarding the interpretation of human rights treaties

As this chapter focuses on three human rights treaties it is useful to discuss first shortly the general rules regarding the interpretation of treaties. The general rule of treaty interpretation can be found in article 31 of the Vienna Convention on the Law of Treaties (later referred to as VCLT). VCLT article 31(1) States that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Also meaningful are any agreements or instruments connected to concluding the treaty, subsequent agreements or practices by the parties and relevant rules of international law. An example of a subsequent agreement that influences the interpretation of a treaty is the United Nations General Assembly’s resolution in which it declared that terrorism is contrary to the purposes and principles of the United Nations.6 As will be discussed later in chapter 2.2, according to article 1(F) (c) of the Refugee Convention a person will not be entitled to refugee status if he is “guilty of acts contrary to the purposes and principles of United Nations”. Thus the aforementioned subsequent agreement is relevant for the interpretation of the Refugee Convention.7 According to VCLT article 32 preparatory work of the treaty and the circumstances of concluding it can affect treaty interpretation only when it is necessary “to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable”.

As “law-making treaties” human rights treaties protect human beings, and, unlike many other treaties, States parties do not have their own subjective

interests in mind when concluding such treaties\(^8\). The special character of human rights treaties means that their object and purpose, in other words humanitarian goals, have particular relevance to the interpretation\(^9\). Arguably the object and purpose can in some cases be more valuable than the text of the treaty itself, although in the law of treaties precedence seems to be given to the textual interpretation\(^10\). Human rights treaties need to be interpreted in a dynamic and evolutive way (this will be especially discussed in chapter 2.3), and all rights contained in them should be interpreted liberally and restrictions on those rights narrowly\(^11\). The evolutive interpretation can be seen as highlighting the relative insignificance of the preparatory work of treaties: human rights treaties must not fall behind in addressing modern issues even if those issues were not thought of at the time of their creation. These are the most important rules of interpretation that we should keep in mind when discussing human rights treaties. Nonetheless general rules of treaty interpretation can also prove useful for the interpretation of these treaties of a special nature.

### 2.2 United Nations Convention Relating to the Status of Refugees

#### 2.2.1 General introduction to the United Nations Convention Relating to the Status of Refugees

After the Second World War the codification process of refugee law developed relatively fast. As early as 1950 a decision by United Nations General Assembly was made that a conference of plenipotentiaries would convene to complete and sign the Convention relating to the Status of Refugees\(^12\). This conference turned out to be successful as the Refugee Convention entered into force on 22\(^{nd}\) of April 1954. Later on in 1967 a protocol relating to the Status of Refugees followed (later referred to as the 1967 Protocol). The main aim of this protocol

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9  Lauterpacht and Bethlehem 2003, p. 104.
12 UN GA res. 429(V), 1950.
was to remove the temporal and optional geographical limitations contained in the Refugee Convention. It is neither necessary nor possible to evaluate the 1967 Protocol separately in this thesis, especially when as of April 2015 there are 142 States that are parties to both the Refugee Convention and to the 1967 Protocol\(^\text{13}\). Thus when discussing the Refugee Convention in this thesis I include the 1967 Protocol in its content. It can be argued that the Refugee Convention is the most influential treaty in refugee law, especially when such a large amount of States has ratified it.

Already from the preamble of the Refugee Convention it becomes clear that it is a human rights treaty which aims to protect fundamental rights without discrimination. The preamble refers explicitly to the Universal Declaration of Human Rights (1948, later referred to as UNDHR) as affirmation. It also emphasizes the humanitarian and social nature of the problem of refugees. More precisely it represents a remedial branch of human rights law because its purpose is to ensure adequate protection in asylum States of the rights of those who are not protected in their countries of origins (refugees)\(^\text{14}\). This kind of international refugee protection establishes rights to the refugees such as the right to be protected from refoulement. It also defines “a refugee” and sets standards for their treatment.\(^\text{15}\)

The Refugee Convention consists of 7 chapters and 46 articles. These chapters are titled “General Provisions”, “Juridical Status”, “Gainful Employment”, “Welfare”, “Administrative Measures”, “Executory and Transitory Provisions” and finally “Final Clauses”. The definition of a refugee is found in Article 1, and the rights of refugees are listed in articles 3 to 34. It is important to note that even though the principle of non-refoulement is codified in article 33 of the


\(^{14}\) Hathaway 2005, p. 5.

\(^{15}\) Goodwin-Gill and McAdam 2007, p. 53.
Refugee Convention, Article 1 is still necessary for understanding it\textsuperscript{16}. Although article 42 (1) allows States to make reservations to some of the articles of the Refugee Convention, it explicitly prohibits this in regard to article 33. Thus all States parties to the Refugee Convention are bound by the prohibition of refoulement.

Although the textual content of a treaty is naturally the starting point for understanding it, it is necessary to mention here the most important sources that can significantly influence the interpretation of the Refugee Convention. Article 38 of the Refugee Convention States that “\textit{Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute}”. Unfortunately to date that article has not been invoked and thus no binding international interpretations exist regarding the Refugee Convention. This means that it is interpreted regularly by domestic decision-makers instead of an inter-State supervisory body, which has been viewed as exceptional in the field of international human rights law\textsuperscript{17}. This thesis concentrates on the \textit{international} interpretation of the prohibition on refoulement and hence it is not necessary to evaluate the domestic interpretations in depth. Luckily there exists material that is, if not binding, still valuable in interpreting the Refugee Convention. I refer mainly to the UNHCR and EXCOM, which have been viewed as authoritative, global in their scope and accepted as important sources by States parties\textsuperscript{18}. UNHCR is mentioned in article 35(1) of the Refugee Convention which states that “\textit{The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{16} Wouters 2009, p. 36.
\item \textsuperscript{17} Hathaway, North and Pobjoy 2013, p. 323. Pirjola 2002, p. 756.
\item \textsuperscript{18} Wouters 2009, p. 38.
\end{itemize}
\end{footnotesize}
this Convention”. The purpose of article 35 can be seen as achieving an optimal and harmonized interpretation of all the provisions of the Refugee Convention\(^{19}\). EXCOM was established in 1958 by the United Nations Economic and Social Council (later referred to as ECOSOC) and has the competence to advise the UNHCR on solving issues of refugee law\(^{20}\). Today EXCOM consists of 98 member States\(^{21}\). Most relevant legal instruments are the “Guidelines” issued by UNCHR and the “Conclusions on International Protection” by EXCOM.

2.2.2 The principle of non-refoulement in the United Nations Convention Relating to the Status of Refugees

2.2.2.1 An overview of article 33 and article 1

The principle of non-refoulement is articulated in article 33 of the Refugee Convention, which States in its first paragraph that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. However, this rule is not absolute as becomes clear from the second paragraph: “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. It is interesting to note that in the beginning the principle was drafted so that it did not contain the exceptions clause, because the Ad Hoc Committee on Refugees and Stateless Persons felt that the principle was so fundamental in nature\(^{22}\). It appears that the “climate of

\(^{19}\) Kälin 2001, p. 3.
\(^{20}\) UN ECOSOC res. 672 (XXV), 1958. UN GA res. 1166 (XII), 1957.
\(^{21}\) EXCOM membership by admission of members, 2015.
\(^{22}\) UN doc. E/1850 1950, paragraph 30.
opinion” had altered in 1951 in such a way that the exceptions clause was ultimately deemed necessary\textsuperscript{23}. It is important to note that even though the prohibition on refoulement is not absolute it can still be considered fundamental to the humanitarian aim of the Refugee Convention and thus any exception on it should be interpreted narrowly.

Since the prohibition on refoulement concerns only refugees, the definition of a refugee is also relevant for the interpretation of article 33. According to article 1(A) (2) of the Refugee Convention a refugee is “any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”. It is important to note here that protection from refoulement is not dependent on the formal recognition of a refugee, but instead asylum-seekers are treated on the assumption that they may be refugees and thus must be effectively protected\textsuperscript{24}. The wording of article 1(A) (2) is similar to the wording on article 33(1), the main difference being that the latter speaks of a “threat to life or freedom” and the former of a “well-founded fear of persecution”. At first glance and from a purely textual perspective it might seem that article 33(1) would require a higher threshold than article 1(A) (2). It appears however that a vast majority of academics have argued for an interpretation where a “well-founded fear of persecution” must be considered as fulfilling a “threat to life or freedom”, because another interpretation would be against the object and purpose of the

\textsuperscript{23} UN doc. A/CONF.2/SR.16 1951, third Statement by the representative of the United Kingdom (Mr. Hoare).

\textsuperscript{24} For instance, UN doc. A/AC.96/815 1993, paragraph 11. Thus the personal scope of the prohibition on refoulement is not limited to persons who have been formally recognized as refugees.
Refugee Convention as well as internally incoherent. Support for this liberal interpretation can also be found on the preparatory work of the Refugee Convention, where a “threat to freedom” was seen as a “relative term” which did not necessarily require a severe risk to the refugee. The difference between the wordings of the articles have been explained as emphasizing that the application of the principle of non-refoulement is not limited to the country of origin but instead extends anywhere where there is a reason to fear persecution. Thus I have seen it justified to use the phrase “well-founded fear of persecution” when discussing article 33(1) of the Refugee Convention in this thesis. Indeed, when discussing the prohibition on refoulement in the context of the Refugee Convention, article 33 must be read in conjunction with article 1 (A) (2).

Article 33 can be seen as consisting of many elements and in the following sub-chapters I will therefore go through one element of the article at a time. The issue of what amounts to expelling or returning (“refouler”) and the territorial scope of article 33 will be first discussed shortly. After that the harm from which a person is protected and the element of risk will be analyzed. Lastly I will go through the exceptions enumerated in article 33 (2). Article 1 includes exclusion clauses regarding the status of a refugee, and even though there exists the aforementioned intimate connection between article 1 and article 33 of the Refugee Convention, those exclusion clauses will not be examined when discussing the exceptions to the protection from refoulement. In my opinion that would needlessly broaden the scope of this thesis and since the application of those exclusion clauses in article 1 result in a different outcome than the application of the exception clauses in article 33 (2), it is clearer to stay focused purely on the latter.

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27 UN doc. EC/SCP/2 1977, paragraph 4.
2.2.2.2 Prohibited measures and the (extra-) territorial scope

States are prohibited from expelling or returning a refugee according to article 33 (1) of the Refugee Convention. A literal meaning of the word “expel” is “force someone to leave a place”\(^\text{28}\). In the context of article 33 (1) of the Refugee Convention the term “expel” has been defined as the only measure available for removing lawfully staying aliens from the territory of a State that has issued a formal expulsion order\(^\text{29}\). Thus for a State to be able to expel a refugee, that refugee must be in the territory of the expelling State. While the term “expel” might seem unambiguous enough, the word “return” does not suffice in its own. A literal meaning for “return” is “send something back to a place”\(^\text{30}\). The emphasis of the term “return” seems to be in the destination of the refugee, and the drafters of the Refugee Convention remarked that the aim must be to not let refugees “be pushed back into the arms of their persecutors”\(^\text{31}\). In the context of the Refugee Convention the French word “refouler” was explicitly inserted into the authentic English text so that the term “return” is always followed by “refouler”, clarifying its meaning\(^\text{32}\). “Refoulement” has been seen as encompassing both situations inside the territory of a State and situations that are outside it such as non-admittance\(^\text{33}\). Therefore, the prohibition on refoulement applies not only in the territories of the “refouling” State but also extra-territorially.

Although the prohibition on refoulement applies extra-territorially, its scope is not unlimited. Firstly, its application is limited to areas outside the refugee’s country of nationality. Territorial jurisdiction of the country of nationality prevents international protection without exception.\(^\text{34}\) Thus foreign embassies


\(^{32}\) UN doc. A/CONF.2.SR.35 1951, article 33 (second Statement by the President).


\(^{34}\) UNCHR Handbook 2011, paragraph 88. This territorial limitation is mentioned explicitly in the article 1 (A) (2) of the Refugee Convention.
or diplomatic missions cannot grant protection from refoulement\textsuperscript{35}. Secondly it would seem reasonable that what is required is some kind of a consequential relationship between the State conduct and the risk of persecution on the refugee. The conduct must be attributed to a State either because the State has actual control or authority over the refugee regardless of the location or because it exercises effective control over a foreign territory in which the conduct occurs.\textsuperscript{36}

Here we can see the first gap in refugee protection regarding this treaty regime: if a refugee is inside his country of nationality the Refugee Convention cannot offer that refugee protection from refoulement. Therefore, those unfortunate individuals who are not successful in leaving their country or who are unwilling to even attempt it can be seen as stuck without protection before they fulfill this criterion. Although it is in general logical to apply refugee law only in situations where a person is outside his country of nationality, this gap of protection can lead to difficult situations in some cases.

### 2.2.2.3 The harm from which a person is protected

As we established earlier (in chapter 2.2.2.1), in the context of the Refugee Convention the relevant term for the harm from which a person is protected is “persecution”. For a person to receive refugee protection, he must have a well-founded fear of persecution, and that persecution must be connected to a discriminatory reason enumerated in article 33(1): race, religion, nationality, membership of a particular social group or political opinion. I will firstly analyze the meaning and definition of the term “persecution”, focusing on what kind of actions or violations it entails without explicitly discussing the discriminatory reasons. After that the five different discriminatory reasons will be scrutinized, and finally some concluding remarks will be drawn regarding

\textsuperscript{35} Wouters 2009, p. 49.
\textsuperscript{36} Ibid. p. 53.
the harm from which a person is protected by the prohibition on non-refoulement in the Refugee Convention.

Persecution is not defined in the Refugee Convention and it can be seen as a flexible concept. What kind of measures can then amount to persecution? A threat to life or freedom as well as other serious human right violations are always persecution.\(^{37}\) It seems that a sufficient level of severity is required, and important factors to consider are the type, nature and scale of a human rights violation.\(^{38}\) Measures that would not alone amount to persecution can together produce it on cumulative grounds.\(^{39}\) It has also been argued that persecution signifies a sustained or systematic failure by a State in regard to protecting recognized international human rights and this failure results in serious harm to a person.\(^{40}\) In my opinion this definition is useful because of its broadness, for instance a State failure can be caused either by its activity or inactivity, the focus being on the results. Thus it is clear that for one to evaluate whether something amounts to persecution or not, one should take a human rights approach. In my opinion it would seem artificial to attempt to limit persecution to only certain kinds of human rights violations, for instance by excluding socio-economic rights.\(^{41}\) What should matter is that as a result of a human rights violation the victim suffers serious discriminatory harm regardless of how, why and by who the violation was instigated.

The persecution must occur for a specific, discriminatory reason. It appears that

\(^{37}\) UNHCR Handbook 2011, paragraph 51.
\(^{38}\) Wouters 2009, p. 58.
\(^{39}\) UNHCR Handbook 2011, paragraph 53.
\(^{40}\) Hathaway and Foster 2014, p. 185. Hathaway and Foster come to this conclusion by analyzing a variety of case law that contains evaluation of persecution, for instance the case Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.), United Kingdom: House of Lords (Judicial Committee), 1999.
\(^{41}\) Quite to the contrary it has been argued that since major human rights documents such as the UNDHR contain socio-economic rights, violations of those rights may amount to persecution. See Foster 2007, p. 28. In my opinion it is also noteworthy that the Refugee Convention refers explicitly to the UNDHR.
a discriminatory reason does not need to be the sole reason for the persecution. Instead it must be a relevant factor that contributes to the well-founded fear of persecution. Race, religion, nationality, membership of a particular social group and political opinion can be seen as such precious characteristics to groups or individuals as to warrant special protection. Race, religion and nationality have to be interpreted broadly and thus they include all kinds of ethnic and linguistic groups (instead of mere citizenship) as well as the right to freedom of thought and conscience. Membership of a particular social group can grant protection in two cases: if a group shares an immutable characteristic or a characteristic that is fundamental to human dignity; or if a group shares a characteristic that is cognizable to those outside of it or sets the group apart from society in large. The former case includes characteristics such as homosexuality or gender, while the latter can recognize for instance occupation or social class. It is important to note that the shared characteristic cannot solely exist on the basis of the persecution aimed at certain individuals. Political opinion have to be also interpreted broadly including any opinions that are related to a State, its government or its policies. It is important to stress the requirement that a sufficient connection must exist between the political opinions expressed and the fear of persecution – opposing a government will not suffice on its own. However, protection can be afforded in exceptional cases even to those who have not yet expressed their political opinion when their conviction is so strong that a future conflict with the government can be assumed.

To summarize, the principle of non-refoulement in the context of the Refugee

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42 Foster 2007, p. 247. Foster bases his argument largely on the case law of some common law countries such as Canada. See also the wording of the article 1 (A) (2) of the Refugee Convention and UNCHR Handbook 2011, paragraph 81.
43 Wouters 2009, p. 76.
44 Goodwin-Gill and McAdam 2007, p. 92.
45 UNHCR Handbook 2011, paragraphs 68 – 76.
47 Goodwin-Gill and McAdam 2007, p. 87.
48 UNCHR Handbook 2011, paragraph 80 – 82.
Convention protects a person when that person has a well-founded fear of being persecuted. Persecution can be seen as a human rights violation which is attributed to the State’s activity or inactivity and results in serious harm to the protected individual. Additionally, persecution must be connected to a discriminatory reason: race, religion, nationality, membership of a particular social group or political opinion. A discriminatory reason doesn’t need to be the sole reason for persecution but should be a relevant contributing factor amongst others. The discriminatory reasons are interpreted broadly. Finally, it should be noted that it has been proposed that torture, cruel, inhuman or degrading treatment or punishment should be included in the definition of persecution regardless of whether these acts fulfill the discrimination requirement. I do not, however, agree with this proposition mostly because the requirement of discrimination remains valid regarding the refugee determination which is considered very closely linked with the content of the principle of non-refoulement.

It has become clear that the second gap in refugee protection regarding this treaty regime is a situation where the persecution is not linked to any discriminatory reason. In this situation, the refugee may have a well-founded fear of harm that would otherwise be classified as persecution but the lack of discriminatory features cancels that classification. For instance, being subjected to the death row phenomenon in USA has been classified as inhuman treatment by the European Court of Human Rights but on its own lacks discriminatory features and thus would not constitute persecution in the context of the Refugee Convention. This presents serious issues for the refugees and can lead one to question the necessity of the discrimination requirement.

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50 For instance, UNHCR Handbook 2011, paragraph 66 states clearly that for a person to be considered a refugee he must be persecuted for a discriminatory reason.
2.2.2.4 The element of risk

It is important to note that the protection against refoulement in article 33 (1) of the Refugee Convention does not require a full certainty of persecution but instead a sufficient level of threat. In other words, it includes an element of risk, which can be seen as a crucial element for determining whether a person has a right to be protected from refoulement. As I pointed out earlier in chapter 2.2.2.1, the prohibition on refoulement in the context of the Refugee Convention must be interpreted by reading article 33 in conjunction with article 1 (A) (2). The former speaks of a threat to life or freedom and the latter both clarifies the reason for protection to a well-founded fear of persecution as well as limits protection to situations where it is unavailable in the country of nationality. This leads to the conclusion that the element of risk requires that a person must have a well-founded fear of persecution and he or she must be unable or unwilling to obtain protection from his country of origin.

How this risk and the availability of national protection is evaluated will next be examined more closely.

A person is not protected solely on the basis that he has a subjective fear of persecution because that fear needs to be supported by an objective situation. What is needed is a fear that is well-founded, and it has been stated that both a subjective and an objective element must be considered. However, there seems to exist some controversy regarding the importance of the subjective element. While the UNHCR explicitly speaks of “the evaluation of the subjective element” academics have instead argued that the personal mind-set “hardly matters at all” or that “it is a notion that should simply be

51 Wouters states that it is unfortunate to not have any clear international legal interpretation of the risk criterion, because it is “essential” in non-refoulement cases. See Wouters 2009, p. 84.
52 Wouters 2009, p. 83.
53 UNHCR Handbook 2011, paragraph 38. However, it is acknowledged that in some cases such as when the refugee is a mentally disturbed person, the burden of proof is lightened. See ibid. paragraph 210.
54 Ibid. paragraph 40.
abandoned\textsuperscript{56} and that to interpret the term “well-founded fear” as including a subjective element “cannot be the correct interpretation of the refugee definition\textsuperscript{57}”. It has been stated that the term “fear” in article 1 (A) (2) of the Refugee Convention should be read as “the likelihood of something unwelcome happening” instead of an emotional state of mind, which is indicated also by the use of the term “threat” in article 33\textsuperscript{58}. It has also been argued that neither the text of the Refugee Convention nor its object and purpose point towards the relevance of a subjective fear\textsuperscript{59}. Indeed, the views of the scholars seem more persuasive in this matter than that of the UNHCR’s Handbook. It might be that mentions of the evaluation of subjective element were not intended to emphasize the mind-set of a person but nonetheless that kind of interpretation would sit awkwardly with the general aim of the Refugee Convention, which is to grant refugees as broad protection as possible. It would also seriously limit the scope of humanitarian protection if not all those whose life or freedom is threatened were protected but instead only those that exhibit subjective emotions of fear. Thus this thesis adopts a stance that focuses on the objective evaluation of the element of risk. Naturally it must still be demanded that the applicant make at least one statement regarding the risk for his safety for a State to be able to reflect that statement to the objective situation\textsuperscript{60}.

How probable must the risk of persecution be for the prohibition on refoulement to apply? This is a tricky question since it seems to be impossible to say in measurable terms or in the form of “a probability calculus”\textsuperscript{61}. What can be requested is that the applicant establishes his fear of persecution to a

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\textsuperscript{56} Hathaway and Foster 2014, p. 105. This conclusion follows after an analysis of various practical difficulties and risks that have been identified in case law regarding the evaluation of subjective fear of persecution.
\textsuperscript{57} Wouters 2009, p. 84 (footnote 292).
\textsuperscript{58} Ibid. p. 84. The definition of fear is based on an official Oxford dictionary, see <http://www.oxforddictionaries.com/definition/english/fear>. Accessed on 11.4.2016.
\textsuperscript{59} Hathaway and Foster 2014, p. 105.
\textsuperscript{60} This condition stems from the view that knowledge of conditions of the applicant’s country of origin isn’t a “primary objective”. See UNHCR Handbook 2011, paragraph 42.
\textsuperscript{61} Wouters 2009, p. 85.
Reasonable degree, or in other words “a real chance”, means that it is not required to show that the persecution would be more probable to occur than not. It only requires that persecution is a reasonable possibility, and thus protection from refoulement can be granted even when the persecution is more likely not to occur than to occur. Thus the threshold for risk can be seen as relatively low but rightly so since the grave consequences of an erroneous evaluation should be prevented by giving the benefit of doubt to the applicant.

Many factors influence the evaluation whether a fear of persecution is established to a reasonable degree. Past episodes in the country of origin concerning the applicant himself or his friends, relatives and social or racial group as well as the laws and their application in that country are significant factors. Also relevant are the applicant’s personal characteristics such as background, influence and outspokenness. It is important to note that it is not required that some harm has already occurred to the applicant but if it has, it greatly enhances his claims. Indeed, the risk can be assumed to be established sufficiently if the applicant has suffered persecution in the past, even if it is a refutable assumption. It seems that it does not matter when or how the risk develops, and thus a person can be granted protection from refoulement even in cases where the risk has manifested itself after the applicant has left his country of origin (refugees sur place).

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62 UNHCR Handbook 2011, paragraph 42. This view is supported also by the preparatory work of the Refugee Convention, see UN doc. E/AC.32/L.2 1950, paragraph 2 (b). Influential case law from common law countries such as the United States, Canada and the United Kingdom has also confirmed this kind of interpretation for the element of risk, see Hathaway and Foster 2014, p. 111 – 113.


64 UNHCR Handbook 2011, paragraph 43. At exceptional situations there can occur “group determination” of a risk to persecution which puts less focus on the individual traits of an applicant, see UNHCR Handbook 2011, paragraph 44.

65 Wouters 2009, p. 85.


As already mentioned, the assessment of the risk requires that the applicant makes statements regarding his situation. Thus the primary focus of the assessment is on the evaluation of these statements. This assessment of the applicant’s statements has been divided into three parts: internal credibility, plausibility and supporting evidence. Furthermore, internal credibility has also been divided into three parts: statements’ consistency, coherence and relevant details. It has been observed that at least these factors may reduce the credibility: withholding information or personal history data, submitting new information in a second interview, unwillingness to supply information, inappropriate behavior, deliberate destruction of a passport or other documentation and inability to name the transit countries through which the applicant has travelled. UNHCR has recommended that States should focus only on such contradictions or discrepancies that are fundamental or critical to the applicant’s claims. Of important is also to take note that such errors may have a rational explanation such as in situations where the applicant is a victim of torture or trauma, and if that is the case there must be more reliance on the objective facts available. Other explanations can be issues such as confusion, fear, nervousness, tiredness, embarrassment, depression or memory loss. Although the applicant has the primary burden of proof and he has to support his claims with every evidence available, it has to be taken into account that refugees often possess very little or no evidence in the country of refuge because of the conditions of their flight from their country of origin. Thus the country of refuge often has to share the responsibility of evaluating relevant facts and producing necessary evidence.

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69 Wouters 2009, p. 91.
70 UNHCR 1995, p. 88. See also Hathaway and Foster 2014, p. 147, where it is argued that Courts generally have not allowed the credibility be challenged by “peripheral” issues such as a travel route to the asylum State.
72 UNHCR Handbook 2011, paragraph 196.
Even if it is established that a person has well-founded fear of persecution, there remains the issue of the availability of national protection, in other words, the internal protection alternative. Article 1 (A) (2) of the Refugee Convention requires that a person must be “unable or, owing to such fear, unwilling to avail himself of the protection of that country”. This has been described as the protection clause which asks the question: is there affirmative protection available in the country of origin despite the established fear of persecution? If a person is unable to avail himself of the protection of his country of origin that State is either unwilling or unable to provide that protection. A State can be regarded as unwilling to provide protection for many reasons. The reasons include situations where the State is itself clearly responsible for the persecution, it encourages or condones the persecution performed by lower governing bodies of a State or it tolerates or silently approves the persecution performed by non-State agents. When a State is unable to provide protection it usually implies that the persecution is done by non-State actors that are outside the control of a State. It would seem that nowadays it is largely accepted that protection from refoulement covers also these kind of situations and thus is not necessary for the persecution to emanate from only State actors for the principle of non-refoulement to activate.

73 Hathaway and Foster 2014, p. 341 – 342. See also UNHCR 2001, p. 17 (endnote 28) and UNHCR 2007, p. 58. Although domestic legislations and interpretations have argued that the internal protection alternative could be included in the assessment of the fear of persecution, Hathaway and Foster are, however, convincing in proving otherwise. First of all, it would be logically false and against common sense to assume that a fear of persecution couldn’t exist if protection can be found in some region of the country of origin. Secondly, it would often lead to a situation where an applicant would have to establish a real chance of country wide persecution, which would be an unreasonable burden. Thirdly, it could mean that there would exist an implicit duty for the applicant to, if possible, continuously hide and relocate himself in the country of origin, which would be against the object and purpose of the Refugee Convention. Lastly, it would encourage domestic decision-makers to move directly to the question of internal protection, bypassing the primary assessment of the nature of the applicant’s claim. See Hathaway and Foster 2014, p. 336 – 339.

74 Hathaway and Foster 2014, p. 297 – 303 and p. 305. Wide acceptance of this interpretation stems from treaty interpretation rules and influential case law. See also UNHCR Handbook 2011, paragraph 65. The broad definition of “persecution” discussed earlier in section 2.2.2.3 affirms this view as well.
At least four factors can be identified when evaluating whether an internal protection alternative exists for a person who has a well-founded fear of persecution. Firstly, the protection area must be practically (no physical barriers etc.), safely (the route must not include the area of persecution) and legally (travel, enter and remain in the area is legal) accessible. Secondly, there must be clear evidence that the persecutors have no reach to the protection area, no new threats of persecution will arise and that exceptional circumstances explain the failure of the country of origin in disposing of the localized persecution. Thirdly, it must be possible for the person to live in the protection area without unreasonable hardships, and thus for instance the safety and security, economic survival and the human rights situation in the protection area must be taken into account. The last, and most controversial, factor is diplomatic assurances, where a State from whose area the well-founded fear of persecution emanates guarantees the safety of a person with the aim of enabling that person to live in that country despite the fear of persecution. It seems that the use of diplomatic assurances in the context of the Refugee Convention should be limited only to cases where they are provided by the country of origin of its own initiative and when a refugee claim is still undetermined. It is, however, questionable whether they should be acknowledged at all even at that point, since the declaratory nature of the refugee definition obliges States to protect unrecognized refugees from refoulement as if they were refugees, and thus no distinction should be made between unrecognized and recognized refugees. These assurances would appear to have relevance only in the situation where an exception clause to the prohibition of refoulement applies and the refugee is being deported on the basis of that exception clause. Thus it would seem that diplomatic assurances should have limited relevance in the context of the Refugee Convention.

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75 UNHCR July 2003, paragraphs 10 – 30.
76 UNHCR 2006, paragraphs 30 and 39.
77 Wouters 2009, p. 111 – 112. Confirming the prohibition on this kind of distinction, see UNHCR 2006, paragraph 35. See also section 2.2.2.1.
The prohibition on refoulement is not absolute in the context of the Refugee Convention. According to the article 33 (2) of the Refugee Convention the protection from refoulement “may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. Evident from the text is that full proof of the danger that a refugee poses is not required, instead there only needs to exist reasonable grounds for such a conclusion. The drafters explicitly mentioned that the formulation of “reasonable grounds” is necessary for States to be able to determine whether a refugee poses a sufficient danger or not. The burden of proof of establishing reasonable grounds is on the State. This exception clause must be interpreted restrictively and proportionately. Proportionality requires that a rational connection between the refoulement and the elimination of the danger exists, refoulement is the last possible resort to eliminate the danger and that the danger to the country of refuge outweighs the risk that refoulement causes to

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78 It is necessary to remind here that the Refugee Convention includes additional exceptions to the principle of non-refoulement indirectly in its Article 1 (C), (D) and (F) by not allowing the application of the Convention to refugees that are already protected in some other way or have committed war crimes, crimes against peace or humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations. This thesis will not go into detail regarding these refugee status exclusion clauses, since their effect is not limited to exclusion from the protection of non-refoulement but instead causes the exclusion of all refugee rights in the Refugee Convention. Their inclusion would also needlessly broaden the scope of the thesis, which focuses purely on the content of the principle of non-refoulement.

79 It should be noted that it has been proposed that a trend, which has strengthened since 1951, against exceptions regarding the principle of non-refoulement makes the application of exceptions nearly impossible, or possible only in “circumstances of overriding importance”. However, even this kind of interpretation does not “warrant reading the 1951 Convention without them”. See Lauterpacht and Bethlehem 2003, p. 132 – 133.

80 UN doc. A/CONF.2/SR.16 1951, third Statement by the representative of the United Kingdom (Mr. Hoare).

81 Wouters 2009, p. 113.

82 Lauterpacht and Bethlehem 2003, p. 134; Bruin and Wouters 2003, p. 17; UNHCR 2006, p. 1. See also section 2.1 of this thesis regarding the interpretation of human rights treaties.
the refugee\textsuperscript{83}. This exception can be divided into two parts: the first comprising of the phrase “danger to the security of the country in which he is” and the second of “having been convicted by a final judgment of a particularly serious crime, constituting a danger to the community of that country”. It is necessary to examine these parts next in detail and separately to clarify the exception clause.

In case law the ”danger to the security of the country” - clause has be seen as including acts that promote or encourage violent activity which is targeted at the refugee State, its system of government, or its people (regardless of location) directly or indirectly (such as overthrowing a foreign government if that results in actions that threaten the security of the refugee State or its nationals)\textsuperscript{84}. This could be called a narrow interpretation. On another influential case it was argued that ”a danger to the security of the country” should not be limited only to the safety of the refugee State but instead be extended to the protection of that State's international relations and obligations\textsuperscript{85}. This kind of broad interpretation can be seen as a reaction to the modern security threats raised by international terrorism. However, UNHCR and authoritative scholars have argued that the exception to the principle of non-refoulement provided by the Article 33 (2) (first part) of the Refugee Convention applies only when the security of the refugee State is seriously endangered, and thus it excludes situations where other countries or the international community is threatened\textsuperscript{86}. This narrow view is also supported by the precise phrasing of the Article 33 (2).

Since the principle of non-refoulement and the Refugee Convention in general aims at protecting the fundamental human rights of refugees, the possible exceptions to this principle should be interpreted narrowly rather than broadly. Thus the “danger to security of the country” - clause should only concern

\textsuperscript{83} UNHCR 2006, p. 7.
\textsuperscript{84} \textit{Rehman v. Home Secretary}, INLR 517, 528, Special Immigration Appeal Commission, 1999.
\textsuperscript{85} \textit{Suresh v. Canada} (Minister of Citizenship and Immigration) SCC 1, File No.: 27790, 2002.
situations where it can be clearly proven that there exists a serious threat to the refuge State's security. Not only should the danger be serious but rather very serious, since an interpretation consistent with the refugee status exclusion article 1 (F) demands setting the threshold for danger in this article high\textsuperscript{87}.

The second part of the Article 33(2) exception concerns situations when a refugee has been convicted by a judgment of a crime and is viewed as a threat to the refuge State's community. It has been proposed that this rule applies only to crimes committed after the refugee has been admitted to the country of refuge as a refugee since the refugee status exclusion article 1 (F) (b) already concerns crimes committed before the admittance\textsuperscript{88}. I agree with this proposition since it would not appear logical to include identical situations in these two different articles. It is important to note that the judgment must be final – meaning that appeal rights should have expired or been exhausted\textsuperscript{89}. It has been recommended that refugee States should investigate the fairness of the procedures that resulted in convictions in another States to ensure that the status of a final judgment has been achieved properly\textsuperscript{90}. While this recommendation sounds reasonable and fair, there could be some practical issues in how to ensure this. For instance, UNHCR has viewed murder, rape and armed robbery as “serious” crimes\textsuperscript{91}. Since it is required that the crime is “particularly serious”, it has been argued that even when a serious crime has been committed all mitigating and other circumstances must be taken into account before concluding that this exception can be applied\textsuperscript{92}. Finally, in addition to the conviction, the refugee must also pose a threat to the community of the refuge State, in other words, there must exist “a causal link between the crime and the

\textsuperscript{87} Lauterpacht and Bethlehem 2003, p. 136.
\textsuperscript{88} Lauterpacht and Bethlehem 2003, p. 130.
\textsuperscript{89} UN doc. A/CONF.2/SR.16 1951, fourth Statement by the representative of the United Kingdom (Mr. Hoare).
\textsuperscript{90} Hathaway and Harvey 2001, p. 292.
\textsuperscript{91} UNHCR September 2003, p. 5.
\textsuperscript{92} Hathaway 2005, p. 350. In other terms, it has been argued that the danger should mean “very serious danger”. See Lauterpacht and Bethlehem 2003, p. 140.
danger”93. Thus in my opinion separate evidence of the threat that a convicted refugee poses should be required from the refugee State. The refugee State should in its consideration take into account different factors such as the length of time that has passed since the refugee's conviction and the actions of the refugee after his conviction94.

The exceptions are perhaps the clearest indications of gaps in refugee protection concerning the Refugee Convention regime. A refugee is not granted protection from refoulement in two situations: either there are reasonable grounds for regarding that person as a danger to the security of the country or that person, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. This gap is justified by the right for a State to defend itself from persons who are likely to cause danger to that State in one way or another. It has become clear that the formulation of these exceptions leave open the possibility for States to interpret them widely although in refugee law exceptions should always be interpreted narrowly to ensure that protection is afforded to those in need of it. As such, these exceptions can lead to serious gaps in refugee protection and it is especially problematic if they are applied in situations where the connection between the refugee and the danger is vague or indirect.

2.3 European Convention for the Protection of Human Rights and Fundamental Freedoms

2.3.1 General introduction to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (later referred to as ECHR) was adopted by the Council

93 Wouters 2009, p. 117.
94 Grahl-Madsen 1997, p. 142 – 143. I agree especially with the following statement: “a link may hardly be said to exist if a considerable time has passed between the commission of the crime and the time of decision”.

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of Europe on 1950 and came into force on 1953. Unlike the Refugee Convention, ECHR is a regional treaty that secures human rights not only to refugees but to everyone within the jurisdiction of the States parties to it. ECHR has been ratified by 47 States\textsuperscript{95}. ECHR can be described as the most important human rights instrument in Europe because it has been so broadly ratified, and it contains a a long history with impressive case law of a binding nature\textsuperscript{96}. It contains obligations that are of an objective nature and thus the focus of its protection is not on the interests of the contracting States but on the fundamental rights of individuals\textsuperscript{97}. It consists of three sections and 59 articles, of which 17 articles fall under the section “Rights and Freedoms”. Although initially quite sparse in its content, ECHR has been complimented to date by 16 protocols, which have either modified the Convention system or expanded the rights that can be protected.

Crucial to the success of ECHR is the European Court of Human Rights (later referred to as ECtHR) which, according to article 19 of ECHR, is a permanent judicial body that observes that the contracting States follow the obligations enumerated in ECHR. According to article 32 ECtHR has the jurisdiction on all matters concerning the interpretation and application of ECHR and the Protocols. According to article 46 the judgments of ECtHR are binding. Alleged breaches of the provisions of ECHR may be submitted either in inter-State cases (article 33) or individual applications (article 34), the latter being far more popular than the former. Other organs related to the Council of Europe or ECHR such as the Committee of Ministers and Secretary General have very little or no relevance to the interpretation of the principle of non-refoulement in the context of ECHR. Thus in my analysis I will focus purely on the case law of ECtHR, including the former European Commission on Human Rights in one case.

\textsuperscript{95} Council of Europe: Chart of signatures and ratifications of Treaty 005, 2016.
\textsuperscript{96} Wouters 2009, p. 191.
\textsuperscript{97} Orakhelashvili 2003, p. 531.
When interpreting the prohibition on refoulement in the context of ECHR, there are a few general principles that one should take into account. Firstly, the principle of effectiveness implies that ECHR should be applied and interpreted in a way to guarantee its safeguards’ practicality and effectivity. In other words, it should be realistic for individuals to enjoy human rights.98 Secondly, rights guaranteed by ECHR should be interpreted liberally or progressively, and thus the restrictions on those rights should be interpreted narrowly99. Thirdly, there is no margin of appreciation when interpreting rights that are absolute, like the prohibition of torture (article 3). This important principle stems from article 15 of ECHR that prohibits derogation of some rights even in a time of emergency. Fourthly, article 53 of ECHR States that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”. The adherence to this principle of respecting international law on the same subject matter has been highlighted by ECtHR on many occasions, for instance when it refers to the Refugee Convention or CAT in its judgment100. And last, but certainly not the least, is the principle of evolutive interpretation. It means that ECHR should be considered a living instrument in the sense that its content changes over time through evolutive interpretation that takes into account important social and technical changes in society101. This principle is often outlined by ECtHR in its numerous judgments102. To understand the protection

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98 Jacobs and White and Ovey 2010, p. 74. See also for instance Klass and Others v. Germany 5029/71, European Court of Human Rights, 1978, at paragraph 34.
99 See for instance Wemhoff v. Germany 2122/64, European Court of Human Rights, 1968, under the section “AS TO THE LAW”, paragraph 8. The Court Stated that “Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”.
100 See for instance Soering v. United Kingdom 14038/88, European Court of Human Rights, 1989, where reference is made to CAT at paragraph 88. This case is later referred to as “Soering v. United Kingdom”.
101 Dzehtsiarou 2011, p. 1731.
102 See for instance Tyrer v. United Kingdom 5856/72, European Court of Human Rights, 1978, where evolutive interpretation is stressed at paragraph 31. This case is later referred to as
that ECHR affords, one should always in addition to reading the text of the ECHR take into account the case law developed by ECtHR. In some cases, ECHR does not explicitly protect a specific right in its text, but instead that right has been interpreted to be implicitly included in another right that is codified in the text. For instance, this is the case for the right of non-refoulement which I will next evaluate in the context of ECHR.

2.3.2 The principle of non-refoulement in the European Convention for the Protection of Human Rights and Fundamental Freedoms

2.3.2.1 An overview of the principle of non-refoulement

The Council of Europe acknowledged that there exists a prohibition on refoulement under ECHR for the first time in 1965, when it recommended that Article 3 “beneath Contracting Parties not to return refugees to a country where their life or freedom would be threatened.”¹⁰³ This kind of recommendation for the application of article 3 can be seen as very important since the text of that article leaves room for interpretation, sparsely stating: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 3 (nor any other article in ECHR) does not contain an explicit right to be protected from refoulement and thus the protection afforded by ECHR can be viewed as “indirect”¹⁰⁴. This kind of indirect responsibility has been supported by the idea that when a State removes an individual without his will to an area where that individual risks being subjected to torture or inhuman or degrading treatment or punishment that State is a “crucial link in the chain of events”¹⁰⁵. I strongly concur with this view.

¹⁰³ Council of Europe 1965, paragraph 3.
¹⁰⁴ McAdam 2007, p. 137.
In 1989, 24 years after the recommendation, ECtHR addressed the prohibition on refoulement for the first time in the case *Soering v. the United Kingdom*. In this case the United States of America (later referred to as USA) requested that a person be extradited from United Kingdom (later referred to as UK) to USA. The court found that the extradition would be a violation of article 3 because of the extreme conditions that the extradited individual would have to suffer in death row in USA\(^{106}\). Subsequently, ECtHR has addressed non-refoulement in the context of asylum\(^{107}\) and in expulsion cases\(^{108}\) as well. Thus it has become clear that article 3 obliges States and protects individuals also in an indirect way, in other words, in the form of prohibition on refoulement. In addition to article 3, ECtHR has acknowledged that a prohibition on refoulement can exist at least under article 2 (right to life)\(^{109}\) and article 6 (right to fair trial)\(^{110}\) as well. However, it is uncertain whether these other rights should be evaluated separately or always only analogously under article 3\(^{111}\).

When discussing the principle of non-refoulement in the context of ECHR, I will limit the scope on article 3 since it is by far the most significant and influential right in ECHR that protects individuals from refoulement. Similar to chapter 2.2, the prohibition on refoulement can be seen as consisting of

\(^{106}\) *Soering v. the United Kingdom*, paragraph 111.

\(^{107}\) *Cruz Varas and Others v. Sweden* 15576/89, European Court of Human Rights, 1991. The Court found no violation of article 3 on this case. This case is later referred to as “*Cruz Varas and Others v. Sweden*”.

\(^{108}\) *Chahal v. United Kingdom* 22414/93, European Court of Human Rights, 1996. The Court found that the expulsion of the applicant would violate article 3. This case is later referred to as “*Chahal v. United Kingdom*”.

\(^{109}\) For instance, *Bader and Others v. Sweden* 13284/04, European Court of Human Rights, 2005. This case is later referred to as “*Bader and Others v. Sweden*”.


\(^{111}\) ECtHR has examined article 2 and article 3 separately in the case *Bader and Others v. Sweden*, see paragraph 42. However, the Court has argued that when the complaints raised under article 2 are indissociable from the substance of the complaint under article 3, it is not necessary to examine the complaint under article 2 separately, see *D. v. United Kingdom* 146/1996/767/964, European Court of Human Rights, 1997, paragraph 59. This case is later referred to as “*D. v. United Kingdom*”.
different elements which will be evaluated next separately. I will begin with the prohibition’s personal and territorial scope, which will be followed by the assessment of what is the harm from which a person is protected. Then the element of risk will be scrutinized and lastly there will be brief conclusions regarding the character of the principle of non-refoulement in the context of ECHR.

2.3.2.2 Personal and (extra-) territorial scope

Article 1 of ECHR declares that the rights and freedoms contained in it are secured to everyone within the jurisdiction of the States party to it. This means that for a person to be protected that person does not need to be a national of any State party to the Convention. The legal status of a person is irrelevant, and thus for instance Stateless persons and illegal aliens are granted protection. Since the text of article 3 does not limit its personal scope, persons are protected from refoulement in the broad sense declared in article 1 of ECHR.

It is clear that the territorial scope includes those who are present within any area of the territory of a State party to ECHR. In addition, according to article 56 of ECHR a State may extend this territorial scope “to all or any of the territories for whose international relations it is responsible”. ECtHR has denied the possibility of a State generally limiting the territorial scope with a reservation although at the same time it has acknowledged the prospect that a State might have reduced responsibility in special circumstances. International or transit zones such as airports do not limit the territorial scope.

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112 See for instance Siliadin v. France 73316/01, European Court of Human Rights, 2005, where the applicant was an illegal alien and the Court confirmed that she is protected by ECHR.
113 See for instance VCLT article 29: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.
114 This has been done for instance by Denmark in respect to Greenland. Wouters 2009, p. 204.
115 Ilascu and Others v. Moldova and Russia 48787/99, European Court of Human Rights, 2004, paragraph 333. This case is later referred to as “Ilascu and Others v. Moldova and Russia”.

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but instead they are a part of a State’s territory\textsuperscript{116}. ECtHR has also stated that it is irrelevant whether a person enters a State’s territory in a technical sense, as long as that person is physically present there\textsuperscript{117}.

In addition to territorial responsibility, States also have extra-territorial responsibility. This kind of responsibility can emerge in two scenarios. First, it can be established when a State exercises effective control over a foreign territory\textsuperscript{118}. Secondly, extra-territorial responsibility is activated when a conduct can be attributed to a State (for instance when State officials perform the conduct) if that conduct includes controlling a person and his rights\textsuperscript{119}. For the principle of non-refoulement this means that even when a person seeking protection is not inside the territory of a State, that State has to protect the person if extra-territorial responsibility is established. For instance, States are bound by article 3 of ECHR when encountering people on the sea areas outside their territorial waters\textsuperscript{120}.

All in all, it can be concluded that the principle of non-refoulement has a very broad personal, territorial and extra-territorial scope in the context of ECHR. A person seeking protection is not required to be outside his country of origin, and technical issues in reaching the jurisdiction of a State is not crucial. The essence lies in the factual authority or responsibility of a State.

It must be noted here that one gap in refugee protection concerning the ECHR

\begin{footnotesize}
\textsuperscript{117} D v. United Kingdom, paragraph 48.
\textsuperscript{118} See for instance Loizidou v. Turkey 40/1993/435/514, European Court of Human Rights, 1995, where the Court considered Turkey responsible for its actions in Northern Cyprus. See also Issa and Others v. Turkey 31821/96, European Court of Human Rights, 2004, where ECtHR found that effective control wasn’t established because the control was lacking in both personnel and covered area width.
\textsuperscript{119} See for instance Öcalan v. Turkey 46221/99, European Court of Human Rights, 2003, where the Court found Turkey responsible for its officials’ conduct outside its territory.
\textsuperscript{120} See Xhavara and Others v. Italy and Albania 39473/98, European Court of Human Rights, 2001.
\end{footnotesize}
stems from the regional nature of the treaty. Unlike Refugee Convention or CAT, only European States can be contracting States of ECHR. Thus a refugee is not protected by ECHR if the responsible State is located outside Europe since in that case that State cannot be a contracting State of this treaty.

2.3.2.3 The harm from which a person is protected

Article 3 of ECHR protects a person from torture, inhuman treatment or punishment or degrading treatment or punishment. These three forms of ill-treatment are not defined in the Convention. ECtHR has distinguished torture from inhuman or degrading treatment based on their difference in the “intensity of the suffering inflicted”. Torture can be seen as the most intense form of ill-treatment because it is especially deliberate, serious and cruel.\(^{121}\) If ill-treatment does not qualify as torture, one must assess whether it qualifies as inhuman treatment or punishment. If it is not qualified as that either, the final assessment will be whether it is degrading treatment or punishment.\(^{122}\) I will next analyze these different forms of ill-treatment separately, firstly torture and then inhuman or degrading treatment or punishment. It should be noted that the focus here is in determining what elements does the ill-treatment need to possess for it to qualify as either torture or inhuman or degrading treatment or punishment, regardless of whether the case law referred to has a refoulement context or not. The context isn’t crucial here because it has been argued that neither the text of article 3 nor the object and purpose of ECHR indicate that a different standard should be applied in refoulement cases\(^{123}\). Indeed, it has been explicitly stated that article 3 is equally absolute in cases involving deportation\(^{124}\). However, in refoulement cases the question of the perpetrator of the ill-treatment, in other words the source of the conduct, proscribed by article 3 is not relevant at all.

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\(^{121}\) Ireland v. United Kingdom 5310/71, European Court of Human Rights, 1978, paragraph 167. Later referred to as Ireland v. United Kingdom.

\(^{122}\) Tyrer v. United Kingdom, paragraphs 29 – 30.


\(^{124}\) D. and Others v. Turkey 24245/03, European Court of Human Rights, 2006, paragraph 45. This document was only available in French and hence the translated meaning is taken from Wouters 2009, p. 242.
since the responsibility of a State is activated when an individual is exposed to a real risk, not when the proscribed ill-treatment itself occurs\textsuperscript{125}.

If a conduct is viewed as torture its effect on a person should be very serious, consisting of cruel pain or suffering either physical or mentally\textsuperscript{126}. According to ECtHR the assessment regarding the level of ill-treatment is relative because it is dependent on the circumstances and the context of the case\textsuperscript{127}. Factors that can be relevant for assessing the severity of ill-treatment include duration of treatment, physical or mental effects, sex, age and state of health of the victim\textsuperscript{128}. There seems to be some ambiguity regarding the issue of intent as a requirement for a conduct to be seen as torture. In many cases ECtHR seems to emphasize whether a treatment was deliberately inflicted, thus focusing on the intent of the perpetrators\textsuperscript{129} while in some cases it has viewed that sufficiently serious and cruel acts qualify as torture without a mention of the element of intent\textsuperscript{130}. Thus, both the intent of the perpetrators and the particularly serious or cruel nature of the suffering of the victim have influenced the assessment whether ill-treatment is qualified as torture. The source of the conduct, in other words whether torture was carried out, instigated or consented by public officials, does not seem to be relevant even in another context than refoulement, since ECtHR has included ill-treatment that is performed by private individuals under the scope of article 3\textsuperscript{131}.

Treatment or punishment can be considered inhuman if it was premeditated, applied for hours and caused physical injury or intense suffering of either

\textsuperscript{125} \textit{Soering v. United Kingdom}, paragraph 91.
\textsuperscript{126} \textit{Selmouni v. France} 25803/94, European Court of Human Rights, 1999, paragraph 105. This case is later referred to as “\textit{Selmouni v. France}”.
\textsuperscript{127} \textit{Tyrer v. United Kingdom}, paragraph 30.
\textsuperscript{128} \textit{Selmouni v. France}, paragraph 100.
\textsuperscript{129} Such as \textit{Aksoy v. Turkey} 100/1995/606/694, European Court of Human Rights, 1996, paragraph 64. This case is later referred to as “\textit{Aksoy v. Turkey}”.
\textsuperscript{130} Such as \textit{Ilascu and Others v. Moldova and Russia}, paragraph 440.
\textsuperscript{131} \textit{Mahmut Kaya v. Turkey} 22535/93, European Court of Human Rights, 2000, paragraph 115. This case is later referred to as “\textit{Mahmut Kaya v. Turkey}”.  

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physical or mental kind. For treatment or punishment to be viewed as degrading it should arouse feelings of fear, anguish and inferiority in the victims, thus being capable of humiliating and debasing them.\textsuperscript{132} It is interesting to note that a sufficiently real and immediate threat of torture may constitute inhuman treatment itself\textsuperscript{133}. Unlike torture, the intent or purpose of the perpetrator is not viewed as a decisive factor when determining whether a treatment or punishment is inhuman or degrading\textsuperscript{134}. It has been argued that the consent of the victim can revoke the prohibited nature of a treatment or punishment that is objectively viewed as inhuman or degrading\textsuperscript{135}. In my opinion taking note of the consent of the victim sounds reasonable albeit it should be relevant only in cases where the ill-treatment was mild in its intensity, and thus it should not be applicable in cases where the prohibited act is considered aggravated. Similar to torture, the assessment of a minimum level of severity in ill-treatment is relative and thus depends, for instance, on the duration of treatment, physical or mental effects, sex, age and state of health of the victim\textsuperscript{136}. Again, like torture, who the perpetrator of inhuman or degrading treatment or punishment is does not have a crucial relevance even in another context than refoulement since ECtHR has included ill-treatment that is performed by private individuals under the scope of article 3\textsuperscript{137}.

\textbf{2.3.2.4 The element of risk}

\textsuperscript{132} Kuula v. Poland 30210/96, European Court of Human Rights, 2000, paragraph 92.
\textsuperscript{133} Campbell and Cosans v. United Kingdom 7511/76; 7743/76, European Court of Human Rights, 1982, paragraph 26.
\textsuperscript{134} Regarding inhuman treatment or punishment see for instance Selcuk and Asker v. Turkey 23184/94; 23185/94, European Court of Human Rights, 1998, paragraph 79. This case is later referred to as “Selcuk and Asker v. Turkey”. Regarding degrading treatment or punishment see for instance Labita v. Italy 26772/95, European Court of Human Rights, 2000, paragraph 120. This case is later referred to as “Labita v. Italy”.
\textsuperscript{135} Vermeulen 2006, p. 419.
\textsuperscript{136} Regarding inhuman treatment or punishment see for instance Selcuk and Asker v. Turkey, paragraph 76. Regarding degrading treatment or punishment see for instance Labita v. Italy, paragraph 120.
\textsuperscript{137} See for instance A v. United Kingdom 25599/94, European Court of Human Rights, 1998, paragraph 22.
In cases concerning refoulement a State’s responsibility under article 3 is essentially determined by “the act of exposing an individual to the risk of ill-treatment”138. On one hand full certainty or even high probability regarding the ill-treatment is not required but on the other hand a mere possibility is not sufficient. What is sufficient is that the ill-treatment is foreseeable, realistic and personal. The risk must be foreseeable at the time of the expulsion or extradition by assessing what facts were known or ought to have been known by the State at that time, even though the Court may consider information which becomes available after that point of time.139 Similar to the Refugee Convention, this assessment of the element of risk can be seen as crucial in the case law of ECtHR concerning article 3 and non-refoulement. The burden of proof can be seen as both on the applicant since it is he or she who has to submit the relevant material and information140 and on the State expulsing or extraditing that refugee when that State is assessing the risk of ill-treatment141. It is necessary next to scrutinize this risk assessment in several parts. I will firstly go through the substantive or material part, where the main question is what kind of elements and reasons have been seen as establishing the foreseeable, realistic and personal risk of ill-treatment. After that the evidentiary standard will be analyzed, including credibility and material evidence. Lastly the question of national protection will be discussed, including internal protection alternative and the use of diplomatic assurances.

As previously mentioned, the risk of ill-treatment needs to be foreseeable, realistic and personal. This has been seen as implying that the risk is

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138 Cruz Varas and Others v. Sweden, paragraph 76.
140 Said v. Netherlands 2345/02, European Court of Human Rights, 2005, paragraph 49. This case is later referred to as “Said v. Netherlands”.
141 Soering v. United Kingdom, paragraph 91. It is important to note that even though the primary responsibility regarding the assessment of the risk is on the State, ECtHR allows itself to independently re-assess relevant facts and circumstances when necessary. See Wouters 2009, p. 285.
prospective: it is both objectively realistic and has a connection to the individual concerned\textsuperscript{142}. It is important to note that a subjective feeling of fear is relevant only if it is based on a substantial, objective basis\textsuperscript{143}. Both belonging to a group and individual reasons can either alone or cumulatively establish that the risk of ill-treatment is foreseeable\textsuperscript{144}. In addition, in “most extreme cases of general violence” the general violent conditions in a country may be sufficient to establish a foreseeable risk of ill-treatment even without any individual or group considerations\textsuperscript{145}. In the case law of ECtHR political activities and past experiences of ill-treatment related to the applicant are often relevant, although their relevance is dependent on their type, duration, frequency and time of occurring as well as events occurring after them\textsuperscript{146}. Naturally information regarding the general conditions of a country is relevant as well, such as its political and institutional situation, level of violence, plight of refugees, army practices, law enforcement agencies and human rights situation\textsuperscript{147}. Finally, the actions of an applicant \textit{sur place}, in other words after his departure from the country of origin, may have relevance for establishing a foreseeable risk of ill-treatment, although it is unclear how ECtHR views the situation where an applicant intentionally creates a risk \textit{sur place}\textsuperscript{148}. However, it has been argued

\textsuperscript{142} Wouters 2009, p. 247.

\textsuperscript{143} Cruz Varas and Others \textit{v.} Sweden, paragraph 84.

\textsuperscript{144} Vilvarajah and Others \textit{v.} Sweden, paragraph 112, where the Court found that no “\textit{special distinguishing features}” existed to contribute to the risk of ill-treatment when a mere membership of a group did not suffice. Saadi \textit{v.} Italy 37201/06, European Court of Human Rights, 2008, paragraph 132, where ECtHR found that a mere membership of a group did suffice for establishing a foreseeable risk of ill-treatment. This case is later referred to as “Saadi \textit{v.} Italy”.

\textsuperscript{145} NA. \textit{v.} United Kingdom 25904/07, European Court of Human Rights, 2008, paragraph 115. This case is later referred to as “NA. \textit{v.} United Kingdom”.

\textsuperscript{146} Wouters 2009, p. 262 – 263. See for instance cases such as Kandomabadi \textit{v.} Netherlands 6276/03; 6122/04 (admissibility decision), European Court of Human Rights, 2004, where the applicant had participated in student demonstrations and Thampibillai \textit{v.} Netherlands 61350/00, European Court of Human Rights, 2004, where the applicant had been previously arrested and detained. The latter case will later be referred to as “Thampibillai \textit{v.} Netherlands”.

\textsuperscript{147} Wouters 2009, p. 264. See for instance Chahal \textit{v.} United Kingdom, paragraphs 100 – 103, where the situation in Punjab region of India was scrutinized regarding its police force, democratic elections, justice system as well as general transparency and accountability.

\textsuperscript{148} In the case \textit{N. v. Finland} 38885/02, European Court of Human Rights, 2005, paragraph 165, the Court considers the possible effects of the applicant’s activities and publicity in Finland to the way he would be treated in the Democratic Republic of Congo. This case is later
that to not provide protection from refoulement when the applicant has intentionally created the conditions where a foreseeable risk of ill-treatment exists would go against the absolute nature of Article 3 of ECHR\(^{149}\). I concur with this view, especially when the intentionality of creating a risk is often problematic to prove in retrospect and even enabling the use of that kind of argument for States would in my opinion indeed go against the absolute protection from refoulement that ECHR provides.

In its first refoulement case ECtHR set the starting point for the evidentiary standard regarding the foreseeable risk of ill-treatment: the responsibility of a State under article 3 is activated when there have been shown “\textit{substantial grounds for believing}” that the ill-treatment is a real risk\(^{150}\). Naturally both the credibility of the claim of an applicant and the evidence in support of that claim are relevant. Factors such as the detail, comprehensiveness, consistency, plausibility and promptly providing relevant information are especially important in assessing the credibility\(^{151}\). For instance, remaining silent for a prolonged period about previous activities and experiences of ill-treatment as well as changing the story has been seen as diminishing the credibility of a claim\(^{152}\). However, in refoulement cases ECtHR has pointed out that it cannot be expected that persons who are seeking refuge and who very often have experienced ill-treatment of some kind have completely accurate information regarding their claim\(^{153}\). It can be concluded from the case law of ECtHR that only those inconsistencies that relate to the essential part of the claim can remarkably diminish the credibility of it\(^{154}\).

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\(149\) Wouters 2009, p. 266.
\(150\) Soering v. United Kingdom, paragraph 91.
\(151\) Wouters 2009, p. 266.
\(152\) Cruz Varas and Others v. Sweden, paragraph 78.
\(154\) Said v. Netherlands, paragraph 51, where the Court found the applicant’s arguments persuasive regarding the general situation even though there was some ambiguity regarding some elements of his personal story.
factors such as the type, comprehensiveness, information and consistency of the evidence are important, as well as the independence, reliability, objectiveness, authority and reputation of the source. Elements relating to evidence that can seriously question a claim’s credibility include, for instance, complete absence of relevant material evidence, relying solely on the letters of a relative for indication of a risk of ill-treatment and significant delay in submitting or even mentioning a relevant document. In general, ECtHR has highlighted the evidential value of human rights information gathered by States’ diplomatic missions and the agencies of the United Nations.

Even when a risk of ill-treatment proscribed by article 3 of ECHR has been established, it must be assessed whether the authorities of the receiving State are able to eliminate that risk by providing sufficient protection. This issue of national protection can be divided into two situations: internal protection alternative and diplomatic assurances. The idea behind internal protection alternative is that although the applicant would face a risk of ill-treatment in one area of the country of destination, another area of that same country could be deemed as safe. It would seem that ECtHR has adopted a rather restricting view on the use of internal protection alternative, at least when the risk emanates from State actors. The Court has listed preconditions for relying on the internal protection alternative: it must be possible to travel to that protection area, gain admittance there and be able to settle there without a possibility of

156 Cruz Varas and Others v. Sweden, paragraph 78.
157 H.L.R. v. France 11/1996/630/813, European Court of Human Rights, 1997, paragraph 42. This case is later referred to as “H.L.R. v. France”.
159 NA. v. United Kingdom, paragraph 121.
160 H.L.R. v France, paragraph 40.
161 See for instance cases where ECtHR rejected the argument of internal protection alternative: Chahal v. United Kingdom, Hilal v. United Kingdom 45276/99, European Court of Human Rights, 2001 and Salah Sheekh v. Netherlands 1948/04, European Court of Human Rights, 2007 (this case is later referred to as “Salah Sheekh v. Netherlands”).
ending up outside that area where a risk of ill-treatment exists. It has been seen as necessary that the protection afforded by the internal protection area be both practical and effective. Diplomatic assurances aim, as their name suggests, to assure an extraditing or expulsing State that the person sent to the country of destination will not be subjected to ill-treatment proscribed by article 3 of ECHR. ECtHR has seen it necessary to require a quite demanding standard for the effective use of diplomatic assurances: they must at least significantly reduce the risk of ill-treatment and thus lower the level of the risk to a negligible level. General good faith regarding diplomatic assurances is not deemed sufficient. Diplomatic assurances seem to have a very restricted effect on non-extradition cases while on extradition cases they may effectively decrease the risk of ill-treatment when the assurances have been provided by an institution actually capable of effective prevention of the risk.

2.3.2.5 The character of the principle of non-refoulement

The principle of non-refoulement is codified under article 3 of ECHR which has an absolute character. This absolute nature of article 3 is concluded from several observations. Firstly, the text of article 3 does not allow any limitations since it simply states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Secondly, article 15 (2) of ECHR explicitly prohibits any derogations regarding article 3. Thirdly, it has been argued that article 3 is absolute because it is fundamentally aimed at the protection of values of such importance that it should not be derogated from

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162 Salah Sheekh v. Netherlands, paragraph 141.
163 Wouters 2009, p. 293. See section 2.2.2.4 for similar requirements in the context of the Refugee Convention. Naturally I concur with this view since it would go against the absolute nature of the prohibition of refoulement and be illogical to demand less of the internal protection alternative in the context of ECHR.
164 Soering v. United Kingdom, paragraph 93.
165 Chahal v. United Kingdom, paragraph 105.
166 See cases such as Chahal v. United Kingdom and Saadi v. Italy.
167 See cases such as Nivette v. France 44190/98 (admissibility decision), European Court of Human Rights, 2001 and Einhorn v. France 71555/01 (admissibility decision), European Court of Human Rights, 2001.
regardless of the conditions\textsuperscript{168}. Finally, the extensive case law of ECtHR has confirmed the absolute nature of article 3 several times during recent decades\textsuperscript{169}. However, it must be noted that article 3 has an element of relativity in the sense that a minimum level of severity has to be attained, as explained in chapter 2.3.2.3. In other words, an assessment must be made of the ill-treatment itself by distinguishing merely “harsh” treatment from treatment proscribed by article 3. This is different from a proportionality test or the margin of appreciation, where the purpose of the action that inflicts harm would be weighed against the level of harm suffered, which is not allowed regarding article 3.\textsuperscript{170}

Even though it seems clear that the prohibition on refoulement in the context of ECHR is absolute, States have tried to challenge this view several times. In one case, Governments of Lithuania, Portugal, Slovakia and UK questioned the absolute nature of article 3 in expulsion cases since the harm was not inflicted directly by the State that expelled a person. These States argued in favor of a proportionality test and proposed setting a higher standard of proof in cases where there was a threat to national security\textsuperscript{171}. It should be noted that a proportionality test where the threat to a State would be weighed against the harm to a person was famously presented by a State and rejected by the Court in a previous case, \textit{Chahal v. United Kingdom}\textsuperscript{172}. In another case, UK repeated

\textsuperscript{168}Wouters 2009, p. 314. See also \textit{Saadi v. Italy}, Concurring Opinion of Judge Myjer, joined by Judge Zagrebelsky, where it is argued that “Upholding human rights in the fight against terrorism is, first and foremost, a matter of upholding our values, even with regard to those who may seek to destroy them”.

\textsuperscript{169}See for instance following cases dating from 1989 to 2005, \textit{Soering v. United Kingdom}, paragraph 88; \textit{Aksoy v. Turkey}, paragraph 62; \textit{N v. Finland}, paragraph 166.

\textsuperscript{170}Wouters 2009, p. 309 – 310.

\textsuperscript{171}\textit{Ramzy v. Netherlands} 25424/05 (admissibility decision), European Court of Human Rights, 2005, paragraphs 128 and 130. A higher standard of proof, where “the individual concerned had to prove that it was “more likely than not” that he would be subjected to treatment prohibited by Article 3”, was justified by the interpretation of CAT article 3 which was itself based on the case law of ECtHR. Unfortunately, in its decision on merits the Court decided to strike the case out of its list because the applicant had disappeared, see \textit{Ramzy v. Netherlands} 25424/04 (judgment/striking out), European Court of Human Rights, 2010.

\textsuperscript{172}However, see in the case \textit{Chahal v. United Kingdom} the Joint Partly Dissenting Opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotchev and Levits,
the same points as in the previous case, with the addition that it emphasized the usefulness of diplomatic assurances in alleviating the risk of ill-treatment\textsuperscript{173}. ECtHR acknowledged the difficulties States face when combatting international terrorism, but nonetheless rejected all of United Kingdom’s arguments, confirming once again the strict requirements of diplomatic assurances and the absolute nature of article 3\textsuperscript{174}. Thus, it can be concluded that the prohibition on refoulement in the context of ECHR is indeed of absolute nature.

\textbf{2.4 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}

\textbf{2.4.1 General introduction to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (later referred to as CAT) was adopted by the United Nations on 1984 and came into force on 1987. Currently there are 159 States Parties to CAT.\textsuperscript{175} According to the preamble of CAT its aim is to strengthen the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world. The term “strengthen” clearly indicates that torture is already outlawed and fought against in international law but not sufficiently\textsuperscript{176}. CAT consists of three parts and 33 articles, of which articles 1 – 16 contain a definition of torture and obligations for States parties. The second part (articles 17 – 24) concerns rules regarding implementation of the Convention and its supervisory mechanism while the final part (articles 25 – 33) consists of final treaty clauses. Like the Refugee Convention and ECHR,

\textsuperscript{173} \textit{Saadi v. Italy}, paragraphs 120 and 122 – 123.

\textsuperscript{174} \textit{Saadi v. Italy}, paragraphs 137 – 147.


\textsuperscript{176} See for instance UNDHR article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”.
CAT is a human rights treaty that formulates obligations for States parties to it, and those obligations can be seen as the rights of an individual\textsuperscript{177}. CAT is a universal treaty that is not regionally limited.

Article 17 of CAT establishes a supervisory body named Committee against Torture (later referred to as ComAT). It consists of ten members who are each elected by the States parties. ComAT should not be seen as an appellate, a quasi-judicial or an administrative body but as a monitoring body with declaratory powers only\textsuperscript{178}. It has various monitoring mechanisms, of which one is mandatory to States parties and the others optional. The only mandatory mechanism is the country reports, which means that States are obliged to submit to ComAT country reports every four years. Optional mechanisms include an inquiry mechanism, a State-complaint mechanism and an individual complaint mechanism. The individual complaint mechanism has significant value when interpreting CAT since it has been used very actively resulting in many Communications by ComAT\textsuperscript{179}. In addition, ComAT has issued a rather large number of other documents such as Concluding Observations on country reports, Annual Reports and General Comments, which are of interpretative relevance. These other documents alongside the case law of ComAT forms the basis of the interpretation of CAT.

When interpreting CAT one should keep in mind the general principles of interpreting human rights treaties, as discussed previously in this thesis. Like ECHR, CAT should be interpreted in an evolutive way, and the rights guaranteed by it should be interpreted liberally whereas restrictions narrowly. Of importance are also other human rights treaties covering the same subject area as that of CAT. However, it has been argued that ComAT itself has not

\textsuperscript{177} Wouters 2009, p. 427.

\textsuperscript{178} Committee Against Torture 1997, paragraph 9.

\textsuperscript{179} As of 15.8.2015 there have been 539 concluded cases by ComAT of which 272 cases were declared admissible. See UN Human Rights Office of the High Commissioner: Statistical Survey on individual complaints 2015.
been very active in referring to the general rules of treaty interpretation or other human rights treaties covering the same subject area\(^{180}\). A clearer picture of the content and elements of CAT will be presented next through the analysis of the principle of non-refoulement in this specific context.

### 2.4.2 The principle of non-refoulement in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

#### 2.4.2.1 An overview of the principle of non-refoulement

The prohibition on refoulement is formulated explicitly in article 3 of CAT, which in its first paragraph States “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”. The second paragraph of article 3 guides the evidentiary assessment of the danger proscribed by the first paragraph and it emphasizes the importance of the human rights situation of a destination State. Article 3 (2) of CAT states “For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”. Article 16 of CAT prohibits “…other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1…” but, unlike article 3, it does not explicitly mention a prohibition of refoulement. It would seem then that only article 3 is relevant for the principle of non-refoulement in the context of CAT. Indeed, this has been confirmed by the ComAT: “…the scope of the non-refoulement obligation described in article 3 does not extend to situations of ill-treatment envisaged by article 16.”\(^{181}\). Thus, when analyzing the prohibition on

\(^{180}\) Wouters 2009, p. 434.

refoulement in the context of CAT in this thesis the focus is purely on article 3.

The principle of non-refoulement in the context of CAT has some interesting connections to the previously addressed Convention regimes, the Refugee Convention and ECHR, which are worthy to mention here. Firstly, the explicit formulation of the prohibition on refoulement in CAT was largely influenced by case law that was emerging under the European Commission on Human Rights. This concerned both cases of expulsion and of extradition. Secondly, the exact wording of article 3 of CAT bears great resemblance to article 33 of the Refugee Convention, especially the terms “return” and “refouler”. Indeed, the addition of these words seems to play a similar role as in article 33 of the Refugee Convention, broadening the protection on the basis of humanitarian reasons.\footnote{Burgers and Danelius 1988, p. 35 and 50.} Despite the clear connection of CAT to both the Refugee Convention and ECHR it is next necessary to focus purely on the interpretation of the principle of non-refoulement in the context of CAT since it is a separate regime with its own distinct characteristics.

Once again, it is useful to separate the content of the prohibition on refoulement into different elements. I will firstly go through the personal and territorial scope of the principle. After that it will be investigated what kind of harm is it that CAT article 3 protects people from. Then the element of risk will be analyzed, and finally some concluding remarks will be drawn regarding the character of the principle of non-refoulement in the context of CAT.

**2.4.2.2 Personal and (extra-) territorial scope**

The protection from refoulement afforded by article 3 of CAT is very broad in its personal scope. This interpretation is based on the wording of that article since it prohibits the refoulement of “a person”. There are no mentions of
restricting factors such as a person’s nationality, legal status and location. Neither are Stateless persons or aliens who are illegally in the area of a country excluded from protection. Thus, it can be concluded that the personal scope of the protection from refoulement that article 3 affords is limitless as long as the object of that protection is a person, i.e. a human being.

The territorial scope of article 3 of CAT is not explicitly formulated anywhere in the text of the Convention. Only article 2 refers to the general responsibility of State Parties by stating that they must “prevent acts of torture in any territory under its jurisdiction”. This formulation can at first be seen as limiting the responsibility of State Parties territorially, but this interpretation would seem misguided since ComAT itself has commented that article 2 of CAT does not limit a State Party’s responsibility in the context of refoulement\textsuperscript{183}. Since, as previously established, the text of article 3 of CAT is heavily influenced by the Refugee Convention, it has been argued that an analogical interpretation of the territorial scope clarifies the issue. As previously mentioned in chapter 2.2.2.2, the principle of non-refoulement applies both territorially and extra-territorially in the context of the Refugee Convention. Thus, by analogy the same applies to the interpretation of article 3 of CAT. In addition, according to general international human rights law a State has a responsibility regarding a person’s human rights if: a) that person is present within the territory of a State; b) a State has actual control or authority over that person; or c) a State exercises effective control over foreign territory where that person is.\textsuperscript{184} The comment made by ComAT, the analogous interpretation and the guidelines that general human rights law provide, which all seem persuasive and convincing, argue for the extra-territorial responsibility of States regarding the prohibition of refoulement in the context of CAT. Thus, it can be concluded that the territorial

\textsuperscript{183} Committee Against Torture 2008, paragraph 19. It has been argued that this is because the prohibition on refoulement does not concern situations where acts of torture are committed by or occur in the territory of a State party but instead situations where a State party has expelled or returned an individual to another State, regardless of what is the territorial status of the destination State. See Wouters 2009, p. 438.

\textsuperscript{184} Wouters 2009, p. 435 – 438.
scope of article 3 is both territorial and extra-territorial.

2.4.2.3 The harm from which a person is protected

It becomes clear from the wording of article 3 that CAT provides protection only from torture. Thus, to answer the question what is the harm that the principle of non-refoulement protects one from in the context of CAT it is necessary to seek out what kind of conduct qualifies as torture. Fortunately, CAT has a rather comprehensive definition of torture in its article 1, which is directly linked to the interpretation of article 3 that prohibits refoulement. Article 1 of CAT States “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”. Since the definition of torture in article 1 is so long it can be divided into different elements such as result and purpose of the conduct, intention and identity of the perpetrator and the exclusion of lawful sanctions. It is necessary to next address these different elements separately.

Torture is defined as an “act” but it would seem justified that it encompasses also omissions in special circumstances. The result of an act or omission has

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185 This has been stated many times by ComAT in its case law, see for instance G.R.B. v. Sweden CAT/C/20/D/083/1997, UN Committee Against Torture, 1998, paragraph 6.5 and S.S. v. The Netherlands CAT/C/30/D/191/2001, UN Committee Against Torture, 2003, paragraph 6.4. The latter case is later referred to as “S.S. v. The Netherlands”.

186 The inclusion of omissions would, in accordance with article 31 of VCLT, follow the object and purpose of the Convention, which is to strengthen the struggle against torture. It has
to be severe physical or mental pain or suffering, but it is very difficult to assess what is the minimum level of severity required. It can be, however, be deduced that a risk of “double jeopardy” where a person would be arrested and retried in the country of destination does not qualify as torture, and neither does the absence of adequate psychiatric treatment in the country of destination. Whereas, for instance, according to ComAT following practices constitute torture: threat of being drowned, mock executions, electric shocks, pouring water that contains irritants into the mouth while pressure is applied to the victim’s stomach and repeated blows to various parts of body. Thus, it can be concluded that torture includes acts that are done repeatedly or in connection with other acts, even if those acts alone or done once would not suffice, as well as an act that has occurred only once so long as it is severe enough.

Severe pain or suffering must be intentionally inflicted for a specific purpose for a conduct to qualify as torture. Since the perpetrator of torture needs to intend the harm caused merely negligent conduct does not suffice. The intention required includes both a general intent regarding an act’s result of severe pain or suffering to the victim and a specific intent concerning the purpose of such an act. This means that it is not required that the objective of the perpetrator is the infliction of severe pain or suffering so long as the perpetrator intended to act for a prohibited purpose. According to article 1 of CAT prohibited purposes include obtaining information from the victim or from a third person, punishing, intimidating or coercing the victim or the third person, or any discriminatory reason. Although the term “such as” used in the text of article 1 implies that the list of prohibited purposes is only illustrative and not exhaustive it has been argued that other relevant purposes must have something

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been argued that omissions such as the deprivation of food and other vital items can constitute torture, see UN Voluntary Fund for Victims of Torture 2011, p. 3.


189 Committee Against Torture 2003, paragraphs 143 – 144.

in common with the listed purposes\textsuperscript{191}. The primary objective of CAT is to eliminate torture that public officials are responsible for when the purpose of their acts is connected to their public functions. Because of this it would seem reasonable to require from prohibited purposes not listed in article 1 at least a remote connection to the interests or policies of the State and its organs\textsuperscript{192}. It is important to note that the element of intent and purpose should not be established based on evidence of subjective motives of the perpetrators but instead on the basis of objective assessment of the situation\textsuperscript{193}.

According to article 1 of CAT torture has to be inflicted, instigated, consented or acquiesced by a public official or another person acting in an official capacity. It has been argued that this requirement of some kind of State involvement in the harm inflicted stems from the assumption that violence done by private actors would normally be addressed by a State’s domestic legal system regardless of international prohibitions on torture, unlike violence that public officials are responsible for\textsuperscript{194}. The clearest situation is when a public official is the one who has inflicted torture, in other words, directly acted as a perpetrator\textsuperscript{195}. Instigation means bringing something about, initiating something or inciting someone to do something\textsuperscript{196}. Instigating is considered as including both a direct and an indirect involvement of a public official, such as when a State uses private groups such as paramilitary forces that participate in acts constituting torture\textsuperscript{197}. Arguably consent is only indirect involvement where a public official clearly, actively and knowingly accepts acts of torture. The most difficult level of involvement to assess is acquiescence. The ordinary meaning of the word “acquiescence” is accepting something reluctantly without

\textsuperscript{191} Miller 2005, p. 16.
\textsuperscript{192} Burgers and Danelius 1988, p. 118 – 119.
\textsuperscript{193} Committee Against Torture 2008, paragraph 9.
\textsuperscript{194} Burgers and Danelius 1988, p. 119 – 120.
\textsuperscript{195} Wouters 2009, p. 446.
\textsuperscript{197} Wouters 2009, p. 446.
protesting. The ordinary meaning of the word seems not to suffice in this context since it has been argued that a State is acquiescing when it knows, could have known or ought to have known an act of torture was about to be committed or has been committed by private perpetrators and that State does not act to the fullest extent of its capabilities in taking effective legislative, administrative, judicial or other measures in response. For instance, the failure of public officials in intervening in customs such as sexual mutilations can be considered as acquiescence. ComAT has considered acquiescence in a case that, although concerning the application of article 16 instead of article 3, is relevant in this context too. In it ComAT found that a State acquiesced in prohibited ill-treatment when police, informed of the immediate risk of ill-treatment and present when it occurred, failed to take appropriate steps in protecting the victims and in addition, failed to conduct a proper investigation after the incident. It has been considered that a State is responsible also when it is not unwilling but unable to provide effective protection against torture by private actors. This responsibility should, however, only activate when the private actors who are the perpetrators of torture occupy and exercise quasi-governmental authority over the area where that kind of ill-treatment occurs.

According to article 1 of CAT torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. It is not completely clear whether these sanctions have to be lawful in the context of national law only or also in international humanitarian law. It would seem however that establishing lawful sanctions in such a way that they would defeat

199 Wouters 2009, p. 446 – 447. Article 2 of CAT obliges States parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture.
202 UN Human Rights Office of the High Commissioner 2002, p. 34.
203 S.S. v. Netherlands, paragraph 6.4.
204 Burgers and Danelius 1988, p. 47.
the object and purpose of CAT cannot be allowed. ComAT has itself emphasized that any effort by a State to justify torture as a means to protect safety or avert emergencies is absolutely rejected in all situations. In case law concerning article 3 (prohibition of refoulement) it seems that whether an act amounting to torture is a lawful sanction or not has not been relevant for the outcome. Indeed, it has been argued that it is quite impossible to find a meaningful way to apply the lawful sanctions exclusion clause and thus it should be ignored. I agree with this proposal since it does not seem justified to apply this exception when at the same time CAT clearly and absolutely prohibits torture. Moreover, according to the preamble of CAT it aims at strengthening the protection against torture and allowing States to legalize acts amounting to torture would lead in exactly the opposite result and would thus be against the object and purpose of the whole Convention.

It is evident that a major gap in refugee protection regarding this treaty regime is the scope of the harm from which a person is protected. Not only does the ill-treatment need to be very severe it must also be intentionally inflicted for a specific purpose for it to qualify as torture. In addition, the prohibited purpose not listed in article 1 must have at least a remote connection to the interests or policies of the State and its organs and the conduct itself must be inflicted, instigated, consented or acquiesced by a public official or another person acting in an official capacity. Thus, a refugee is not protected in many situations where he would clearly have a substantial risk of ill-treatment. This could happen for


206 Committee Against Torture 2008, paragraph 5.

207 For instance, A.S. v. Sweden CAT/C/25/D/149/1999, UN Committee Against Torture, 2001, paragraphs 8.4 – 9. This case is later referred to as “A.S. v. Sweden”. Stoning to death was a lawful sanction under Iranian national law.

208 Nowak and McArthur 2008, p. 84.
instance, if the level of severity of the ill-treatment is not high enough, if very severe treatment is inflicted but not for a specific purpose or if the responsibility of the prohibited conduct itself cannot be connected even by acquiescence to a public official or to another person acting in an official capacity.

### 2.4.2.4 The element of risk

Article 3 (1) of CAT prohibits refoulement “where there are substantial grounds for believing that he would be in danger of being subjected to torture”. The word “danger” implies that a mere possibility is not sufficient but on the other hand full certainty is not required either, and thus there clearly is an element of risk. The assessment of the risk must be done *ex nunc*, in other words, in the moment of the consideration of the complaint unless removal has already taken place, in which case the assessment must be done based on the moment of removal209. On the evidentiary side “substantial grounds” is required and article 3 (2) of CAT emphasizes the importance of “a consistent pattern of gross, flagrant or mass violations of human rights” in the destination State in “determining whether there are such grounds”. The element of risk has been described as the “backbone of the prohibition on refoulement” in article 3 of CAT210. It is necessary next to scrutinize this risk assessment in several parts. First I will analyze the substantive side of the element of risk, which concerns the level of probability required for establishing whether there is a danger of being subjected torture. Secondly the evidentiary side will be discussed, including the standard of evidence, credibility and burden of proof relevant for determining whether substantial grounds have been shown. Lastly I will go through the issue of national protection, including internal protection alternative

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and diplomatic assurances.

The element of risk has been seen as a purely objective element\textsuperscript{211}, and indeed in my opinion it would seem counterintuitive even terminologically to assume that “danger” would require a subjective feeling of fear. The risk or “danger” needs, however, to be personal, foreseeable, real and present\textsuperscript{212}. High probability is not required but the risk must go beyond mere theory or suspicion for it to be foreseeable\textsuperscript{213}. For a risk to be personal it must be established that an individual is personally at risk\textsuperscript{214} even though it can also be possible, albeit rare, for a risk to be established solely on the membership of a specific group that runs a substantial risk of torture\textsuperscript{215}. For the danger to be “real” a sufficient combination of personal facts and circumstances must be presented, possibly with the addition of evidence regarding the general human rights violations in the country of destination, which does not, however, suffice on its own\textsuperscript{216}. It has been emphasized that the general human rights violations are relevant only when the violations have been performed, instigated, consented, acquiesced by a public official or other person acting in an official capacity\textsuperscript{217}. Relevant evidence for establishing the general human rights situation include practices of torture and other inhuman treatment as well as practices that can facilitate acts

\textsuperscript{211} Wouters 2009, p. 459.
\textsuperscript{212} Seid Mortesa \textit{Aemei v. Switzerland} CAT/C/18/D/34/1995, UN Committee Against Torture, 1997, paragraph 9.5. This case is later referred to as “\textit{Aemei v. Switzerland}”. Chedli Ben Ahmed \textit{Karoui v. Sweden} CAT/C/28/D/185/2001, UN Committee Against Torture, 2002, paragraph 8. This case is later referred to as “\textit{Karoui v. Sweden}”. For instance, these cases mentioned the terms “personal”, “foreseeable” and “real”. See also Gamal El Rgeig \textit{v. Switzerland} CAT/C/37/D/280/2005, UN Committee Against Torture, 2007, paragraph 7.3, where the term “present” is mentioned. This case is later referred to as “\textit{El Rgeig v. Switzerland}”.

\textsuperscript{214} Balabou Mutombo \textit{v. Switzerland} CAT/C/12/D/013/1993, UN Committee Against Torture, 1994, paragraph 9.3. This case is later referred to as “\textit{Mutombo v. Switzerland}”.
\textsuperscript{215} S.S. and S.A. \textit{v. Netherlands} CAT/C/26/D/142/1999, UN Committee Against Torture, 2001, paragraph 6.6. Even though the Committee concluded that in this case a mere belonging to a group did not suffice, it can be seen as leaving the possibility of that open. See also Wouters 2009, p. 461.
\textsuperscript{216} Mutombo \textit{v. Switzerland}, paragraph 9.3.
\textsuperscript{217} Committee Against Torture 1997, paragraph 3. Naturally this stems from the definition of torture in article 1 of CAT, see chapter 2.4.2.3.
of torture or increase the risk of them\textsuperscript{218}. To establish that the individual is vulnerable to torture upon his return the individual’s past experiences of human rights violations and political activities have been seen as particularly important evidence\textsuperscript{219}. Also relevant is the length of time that has passed since the individual’s aforementioned experiences since for instance six years ago has not been considered to be recent enough while four years has\textsuperscript{220}. Finally, it would seem that it is not relevant whether the risk stems from the experiences of the individual before or after his departure from his country of origin and thus, similar to the Refugee Convention and ECHR, risk \textit{sur place} is protected by CAT\textsuperscript{221}.

The claim for protection afforded by article 3 of CAT must be sufficiently detailed, comprehensive, consistent and plausible considering the general human rights situation in the country of origin\textsuperscript{222}. Regarding inconsistencies, it must, however, be noted that complete accuracy should not be required from victims of torture and if the inconsistencies are not material and do not raise doubts about the general veracity of the author's claims they are not crucial for the claim\textsuperscript{223}. It has been also argued that it is relevant what moment in time the facts and evidence are presented as well as the truthfulness of the facts\textsuperscript{224}. It is sufficient that the facts presented by the individual are found well attested and

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{218}] Mutombo v. Switzerland, paragraph 9.5.
\item[\textsuperscript{219}] Ibid., paragraph 8.
\item[\textsuperscript{220}] See cases where six years was not recent enough: S.S.S. v. Canada CAT/C/35/D/245/2004, UN Committee Against Torture, 2005, paragraph 8.4 and N. Z. S. v. Sweden CAT/C/37/D/277/2005, UN Committee Against Torture, 2006, paragraph 8.5. The latter case is later referred to as “N.Z.S. v. Sweden”. A case where four years was recent enough: Tahir Hussain Khan v. Canada CAT/C/13/D/15/1994, UN Committee Against Torture, 18 November 1994, paragraph 12.6. This case is later referred to as “Khan v. Canada”.
\item[\textsuperscript{221}] Aemei v. Switzerland, paragraph 9.5.
\item[\textsuperscript{222}] See A.S. v. Sweden, paragraph 8.6, where sufficient details and plausibility were mentioned. See also Karoui v. Sweden, paragraph 10, where consistency and comprehensiveness were discussed.
\item[\textsuperscript{223}] For instance, Mrs. Pauline Muzonzo Paku Kisoki v. Sweden CAT/C/16/D/41/1996, UN Committee Against Torture, 1996, paragraph 9.3. This case is later referred to as “Kisoki v. Sweden”.
\item[\textsuperscript{224}] Wouters 2009, p. 477.
\end{enumerate}
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credible, and thus not all the facts must be proved\textsuperscript{225}. Important evidence relating to the individual’s experiences includes letters of support from non-governmental organizations and, perhaps most importantly, medical reports\textsuperscript{226}. Evidence that relates instead to the general human rights situation in the country of origin includes information resulting from the mechanisms of the ComAT itself\textsuperscript{227}, information resulting from UNHCR\textsuperscript{228} and findings made by national authorities\textsuperscript{229}, such as diplomatic missions in the country of origin of the individual claiming for protection.

The burden of proof is primarily on the individual claiming for protection since the complainant has to submit sufficient details and evidence in support of his claim\textsuperscript{230}. However, the State party is obliged to assess whether substantial grounds exist for the claimant’s claim, and when sufficient details and evidence have been presented by the individual the burden of proof can be shifted to the State party\textsuperscript{231}. It has been argued that the responsibility of the State party is emphasized by the phrasing of the first paragraph of article 3 since substantial grounds need to exist, not to be shown. It has also been proposed that the second paragraph of article 3 as well as the case law of the ComAT highlight the active role of a State party since they oblige the competent authorities to take into account all relevant considerations and to ensure the security of the


\textsuperscript{226} For instance, Karoui v. Sweden, paragraph 10.

\textsuperscript{227} For instance, see cases U.S. v. Finland CAT/C/30/D/197/2002, UN Committee Against Torture, 15 May 2003, paragraph 7.7, where the inquiry mechanism according to article 20 of CAT was utilized; Cecilia Rosana Nuñez Chipana v. Venezuela CAT/C/21/D/110/1998, UN Committee Against Torture, 1998, paragraph 6.4, where the reporting mechanism according to article 19 of CAT was utilized.

\textsuperscript{228} Kisoki v. Sweden, paragraph 9.5.

\textsuperscript{229} Committee Against Torture 1997, paragraph 9 (a) States that “Considerable weight will be given...to findings of fact that are made by organs of the State party concerned.”. See also, for instance, N.Z.S. v. Sweden, paragraph 8.6.

\textsuperscript{230} Committee Against Torture 1997, paragraph 5. See also, for instance, S.P.A. v. Canada CAT/C/37/D/282/2005, UN Committee Against Torture, 2006, paragraph 7.5.

\textsuperscript{231} Committee Against Torture 1997, paragraph 6. See, for instance, A.S. v. Sweden, paragraph 8.6, where indeed “…the author has submitted sufficient details... to shift the burden of proof.”.
Indeed, it would seem justified to conclude that in a way the individual and the State party share the burden of proof, although naturally at first the individual must be more active in presenting sufficient facts and evidence to make his claim comprehensive, consistent and plausible.

Finally, the element of risk can be influenced by the issue of national protection, including internal protection alternative and diplomatic assurances. Internal protection alternative can eliminate or considerably alleviate the risk of torture usually in a situation where the public authorities of a State control only a part of the territory of that State. It has been argued that it is difficult to deduce from the case law of ComAT the requirements for an internal protection alternative, other than, rather obviously, that it needs to be safe. Indeed, regarding internal protection alternative it would seem that I can only conclude that in some cases the argument for internal protection alternative has been accepted and in some cases rejected. Diplomatic assurances aim to guarantee the individual’s safety by guarantees made by the State authorities of the country of destination. ComAT has been satisfied with diplomatic assurances when they provide a sufficient mechanism for their enforcement and when the State issuing the assurances is a State party to CAT. However, it has been argued that in general the Committee is rather reluctant to accept diplomatic assurances. Indeed, it has been recommended that States parties should rely on diplomatic assurances only when the assuring State is not

233 Wouters 2009, p. 495.
234 For instance, B.S.S. v. Canada CAT/C/32/D/183/2001, UN Committee Against Torture, 2004, paragraph 11.5, where the Committee Stated that “…the complainant has failed to substantiate that he would be unable to lead a life free of torture in another part of India.”.
235 For instance, Halil Hayden v. Sweden CAT/C/21/D/101/1997, UN Committee Against Torture, 1998, paragraph 6.4, where the Committee Stated that “…no place of refuge is available within the country…”.
236 Attia v. Sweden, paragraph 12.3 and Agiza v. Sweden, paragraph 13.4. It is important to note that different conclusions were drawn regarding the aforementioned two cases despite the destination State being Egypt in both cases, the former satisfying the requirements of the Committee and the latter not.
systematically violating CAT’s provisions and only when there exist clear procedures for obtaining such assurances as well as arrangements for effective post-return monitoring²³⁸. I concur with this recommendation, especially when CAT protects individuals only from torture that is connected in some way to State authorities. In my opinion this means that particular caution must be exercised when considering the reliability of assurances made by State authorities.

### 2.4.2.5 The character of the principle of non-refoulement

The prohibition on refoulement is formulated in absolute terms in article 3 of CAT. The absolute character is further strengthened in at least three ways. Firstly, case law of ComAT has consistently found that no exceptions regarding article 3 are permitted, not even when an individual poses a threat to the national security of a State or has otherwise engaged in illegal activities, such as being convicted of assault²³⁹. Secondly, article 2 (2) and 2 (3) of CAT explicitly prohibit torture even because of exceptional circumstances such as a state of war or because of an order from a superior officer or a public authority. Thirdly, ComAT has explicitly discussed this issue in its General Comment Number 2, where it expressed its serious concern at States’ efforts to justify torture or to grant any kind of amnesty to the perpetrators of it and emphasized the absolute nature of the prohibition on refoulement in the context of CAT²⁴⁰. Although it would at first glance seem that the exclusion of lawful sanctions in the definition of torture in article 1 of CAT would make prohibition on refoulement

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²³⁸ Nowak and McArthur 2008, p. 150.
²³⁹ See, for instance, following cases: Gorki Ernesto Tapia Paez v. Sweden CAT/C/18/D/39/1996, UN Committee Against Torture, 1997, paragraph 14.5, and Adel Tébourski v. France CAT/C/38/D/300/2006, UN Committee Against Torture, 2007, paragraphs 8.2 – 8.3, where the Court emphasized that protection must be afforded to a person “regardless of the character of the person”. See also cases Khan v. Canada, paragraph 8.7, where the State party argued “...that article 3 of the Convention should not be interpreted to offer protection to persons who voluntarily place themselves at risk.” without success, and Mostafa Dadar v. Canada CAT/C/35/D/258/2004, UN Committee Against Torture, 2005, paragraph 4.4, where the State party explained that “the risk that the complainant represented to Canadian society outweighed any risk that he might face upon his return to Iran” again without success.
²⁴⁰ Committee Against Torture 2008, paragraph 5.
derogable in that context, it seems justified to simply ignore that exclusion since it hasn’t proven out to be practically viable, as discussed previously in chapter 2.4.2.3. No doubt the State parties will continue to try and challenge the definition of torture as well as the absolute character of the principle of non-refoulement, especially based on threats from international terrorism. However, ComAT consistently maintains that the character of the prohibition of torture and thus of the principle of non-refoulement in the context of CAT remains absolute no matter how severe threats of terrorisms the State party encounters. Thus, it can be concluded that the prohibition on refoulement is indeed absolute in the context of CAT.

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241 See, for instance, ComAT 2014, paragraph 9, where ComAT expressed concern because USA maintains its restrictive definition of torture.

242 For instance, ComAT 2016, paragraph 12.
3. Comparison of three human rights treaty regimes regarding the principle of non-refoulement

I will next compare the content of the principle of non-refoulement in the three human rights treaty regimes discussed in chapter 2, those being the Refugee Convention, ECHR and CAT. When introducing the prohibition of refoulement in each one of the treaty regimes I have analyzed separately the scope and the character of the principle, the harm from which it protects a person from and the element of risk that it includes. I maintain this division in this comparative chapter as well, with the addition of first discussing the supervisory mechanisms of the three regimes, after which the scope of the principle of non-refoulement will be compared. Following the scope, the harm from which a person is protected will be analyzed. After that I will discuss how the element of risk compares between the treaty regimes. Finally, the character of the principle of non-refoulement will be comparatively scrutinized.

3.1 The supervisory mechanisms regarding the prohibition on refoulement

It has become clear from the previous chapters that ECHR and CAT regimes both have important and effective supervisory mechanisms, those being ECtHR and ComAT. They have proven out to clarify the content of the prohibition on refoulement in their own contexts by providing substantial case law. Refugee Convention regime differs greatly from the other two in this regard since it does not contain any proper supervisory mechanism that has been used up to this day. Even though article 38 of the Refugee Convention enables States to make complaints to the International Court of Justice (ICJ) in order to decide bindingly on the interpretation of that convention that possibility has unfortunately never been utilized. On the other hand, UNHCR has a duty, according to article 35 (1) of the Refugee Convention, to supervise the application of the Refugee Convention, but it is left largely without any effective means to perform that supervision. UNCHR and EXCOM have, however, issued several interpretative guidelines that clarify the content of the
prohibition on refoulement and that have been accepted by States on an international level. Whereas, according to articles 19, 34 and 46 of ECHR, ECtHR is a permanent judicial body that makes binding decisions. In the context of CAT, according to article 17 and 22, ComAT is established as the supervisory body and it too can review individual complaints but does not, however, have the competence to deliver binding decisions. Thus, although both ECHR and CAT, unlike Refugee Convention, share a supervisory body that is capable of making decisions on individual complaints and that is used frequently, they differ on the nature of the decisions made. ECtHR makes binding judgments while the decisions of ComAT are of a declaratory nature. The judgments of ECtHR have also proven out to be, in most cases, more extensively argued than those of ComAT. ECtHR can also be considered to resemble more a de facto appellate judicial body, meaning that it conducts a more rigorous re-assessment of the facts.

ECHR has the strongest mechanism since it can make binding judgments on individual complaints, it has a great amount of case law that is often well-argued, it is directly relevant for individual human rights protection and it often acts as a de facto appellate judicial body. CAT is similar to ECHR since it also processes individual complaints and is also directly relevant for individual human rights protection. It is, however, considerably weaker than ECHR since its case law is not binding and not as developed in its amount or its argumentation and it often plays a more passive role in the re-assessment of facts. CAT contains also, unlike ECHR, a State reporting mechanism and a possibility for ComAT to adopt general views on the interpretation of CAT, and although these mechanisms are not binding either they can be considered as bringing a little extra strength into the supervisory mechanism of CAT. The weakest of the three convention regimes is without a doubt the Refugee Convention since it does not process individual complaints, its State complaint

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243 Rather the decisions are of a declaratory nature, see Committee Against Torture 1997, paragraph 9.
system has never been used and the supervisory mechanisms under UNHCR can be considered very weak. Despite the clear weakness of the Refugee Convention it should be noted that the guidelines that UNHCR and EXCOM provide have been accepted globally by States, and thus have proven out to be of interpretative relevance. Still, real authority in interpreting the Refugee Convention seems to lie at the national level.  

### 3.2 Scope

The personal scope of ECHR and CAT is clearly without restrictions since they apply to everyone regardless of their nationality or legal status within the jurisdiction of the States party to it. The Refugee Convention clearly differs from the two aforementioned conventions since its protection is limited only to refugees or refugee claimants as defined by article 1 of the Refugee Convention. The Refugee Convention limits the personal scope of the prohibition on refoulement in five ways: a person must be outside his country of origin, that person must base his fear of persecution on discriminatory reasons and be unable or unwilling to avail himself of the protection of his country of origin. In addition, the cessation and exclusion clauses in articles 1C, 1D, 1E and 1F provide conditions that exclude a person from the protection from refoulement (and from the protection of the Refugee Convention in its entirety). Thus, it can be concluded that the personal scope is most limited in the Refugee Convention and identical in ECHR and CAT.

All three treaties apply within the territory of their States parties. The term “territory” must be understood broadly as the treaties apply also to persons in the transit zones of States’ airports or to stowaways in States’ seaports. Regarding the extra-territorial scope ECHR has the clearest rules as its article 1 states that States “…shall secure to everyone within their jurisdiction the rights and freedoms…” This means that ECHR is applied to a State party even

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outside its own territory when it exercises effective control over a foreign territory or when a conduct can otherwise be attributed to that State party. Although CAT and the Refugee Convention do not explicitly mention their extra-territorial application, there have been strong interpretative arguments that point towards their extra-territorial scope, most notably the interpretation of the word “refouler” and the use of that term in both treaties. Thus, I would argue that all three treaties have extra-territorial scope. A notable exception is that the Refugee Convention does not apply in the country of origin of the person seeking for protection, as article 1 and 33 together clearly state that protection is afforded only to refugees, who by definition must be outside their countries of nationalities. Therefore, ECHR and CAT have broader territorial scope than the Refugee Convention.

3.3 The harm from which a person is protected

It has been argued that generally the principle of non-refoulement protects a person from human rights violations that are of a serious nature\(^{245}\). This can be seen most clearly in ECHR and CAT since the former protects a person from torture or inhuman or degrading treatment or punishment (article 3 of ECHR) and the latter protects a person only from torture (article 3 of CAT). It can be immediately noticed that ECHR offers a wider protection than CAT because it includes other kind of harm than torture. The Refugee Convention is much more ambiguous in this respect since it protects a person from discriminatory persecution. Although persecution is not defined in the Refugee Convention it has been argued, as previously discussed in chapter 2.2.2.3, that it too signifies a human rights violation that causes serious harm. Thus, all three treaties can be seen as protecting a person from a distinct yet a similar kind of harm. It is necessary next to examine the differences and the similarities of the harm from which these three treaties protect a person from in more depth. I will firstly discuss torture since both ECHR and CAT protect a person from it. After that

\(^{245}\) Wouters 2009, p. 533.
persecution will be compared to both torture and inhuman or degrading treatment or punishment. Lastly the question of whether the source of the harm is relevant or irrelevant in each treaty will be analyzed.

CAT and ECHR both protect a person from being subjected to torture but only CAT has a definition of it in its text. Torture in the context of ECHR can be, however, defined through its extensive case law. In both treaties torture has to have a certain level of severity in its effects on the victim as article 1 of CAT speaks of severe physical or mental pain or suffering while case law of ECtHR almost identically mentions particularly serious, cruel and severe physical or mental pain or suffering. Also similar to both treaties, torture has to be intentionally inflicted and for a certain purpose. This becomes clear from the wording of article 1 of CAT, but the case law of ECtHR seems to leave open the possibility that intent is not decisive when the ill-treatment is severe enough. It has been argued that the purpose element should be interpreted broadly, although CAT requires additionally at least some kind of a connection with the interests of a State. This is logical since CAT defines torture as including some form of official State involvement. Torture in the context of ECHR instead is not restricted to only situations where State is involved. Although the scope of torture differs between these two treaty regimes, they can be also described as having a close and linked relationship. Most notably ECtHR has referred to CAT (or to its predecessor) several times in its extensive case law to clarify the issue of what amounts to torture. However, ECtHR and ComAT have differed

246 Selmouni v. France, paragraph 105.
247 For instance, Ilascu and Others v. Moldova and Russia, paragraph 440, where the element of intent was of no consideration. Exceptionally harsh treatment had been experienced by the applicant: “…death sentence imposed on the applicant coupled with the conditions he was living in and the treatment he suffered during his detention after ratification, account being taken of the State he was in after spending several years in those conditions before ratification….”.
249 First time in Ireland v United Kingdom, paragraph 167, where reference was made to Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975. Afterwards CAT has been explicitly referred to in such cases as Selmouni v France, paragraph 97 and Mahmut Kaya v. Turkey, paragraph 117.
on the issue of whether methods of handcuffing, hoooding, shaking and sleep deprivation, either alone or in combination, amount to torture or not. ECtHR viewed that it amounted only to inhuman treatment\textsuperscript{250} while ComAT considered those methods to be in violation of article 1 of CAT\textsuperscript{251}. This can be seen as somewhat surprising as one would assume that ECHR provides an individual wider protection from torture than CAT since the latter limits the scope in its definition of torture. I would argue that this single divergence of opinion should not be seen as reflecting the relationship between ECHR and CAT on the issue of torture as a whole, especially since the case where ECtHR expressed its view is relatively old. The main conclusion still remains: for a conduct to be viewed as torture in light of CAT the elements of intent, purpose and State involvement must be more rigorously satisfied than in the context of ECHR.

Unlike CAT and ECHR, the Refugee Convention protects an individual from persecution when that individual has a well-founded fear of it. As discussed previously in chapter 2.2.2.3, persecution can be seen as a human rights violation which is attributed to the State’s activity or inactivity and results in serious harm to the protected individual. It must be connected to a discriminatory reason enlisted in the Refugee Convention, although the reasons are interpreted broadly and they do not need to be the sole cause for persecution. It becomes evident from this definition of persecution that it differs significantly from both torture and other inhuman or degrading treatment or punishment. Persecution includes torture and other inhuman or degrading treatment or punishment but other human rights violations can amount to it as well, for instance violations of freedom of thought, conscience and religion or violations of socio-economic rights.\textsuperscript{252} It is important to note that when assessing persecution severity is determined “\textit{in light of all the

\begin{footnotes}
\item[250] Ireland v United Kingdom, paragraph 167.
\item[251] ComAT 1998, paragraph 239 – 242.
\end{footnotes}
instead of the seriousness of individual measures which can be seen as characteristic of ill-treatment proscribed by ECHR and CAT. It has been argued that this difference of emphasis on the situation as a whole leads to the conclusion that for instance when an individual is arbitrarily deprived of his nationality for a discriminatory reason and is left stateless that result amounts to persecution proscribed by the Refugee Convention but not to ill-treatment proscribed by CAT or ECHR. Lastly, persecution differs from both torture and inhuman or degrading treatment or punishment in the sense that it always requires a discriminatory element for a violation to amount to it. For instance, being subjected to the death row phenomenon in USA has amounted to a breach of ECHR and being subjected to preventive detention in Syria was a violation of CAT but neither of them would not, on their own, amount to persecution proscribed by the Refugee Convention. Thus, persecution would seem to protect a more diverse set of human rights, require a different minimum level of severity and require an additional element of discrimination in comparison to the ill-treatment proscribed by ECHR and CAT.

How is the source of the harm assessed differently between ECHR, CAT and the Refugee Convention? In the context of CAT, the source is clearly most relevant since torture, by definition, requires at least some kind of involvement from public officials. The lowest level of involvement is acquiescence which can be described as a situation where a State knew or should have known about the risk of torture yet still failed to act accordingly. This differs most

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253 UNHCR Handbook 2011, paragraph 55.
254 Wouters 2009, p. 539 – 540. It is, however, at the same time mentioned that theoretically the aforementioned result could amount to degrading treatment proscribed by article 3 of ECHR.
255 As mentioned in chapter 2.2.2.3, it has been proposed that torture, cruel, inhuman or degrading treatment or punishment should be included in the definition of persecution regardless of whether these acts fulfill the discrimination requirement. See Lauterpacht and Bethlehem 2003, p. 123 – 127. This kind of interpretation would naturally limit the differences of the harm between the Refugee Convention and ECHR or CAT.
256 Soering v. United Kingdom, paragraph 111.
significantly from the Refugee Convention which is silent regarding the source of the persecution. As earlier concluded in chapter 2.2.2.3, this silence leads to the conclusion that a human rights violation in which the victim suffers serious discriminatory harm amounts to persecution regardless of how, why and who instigated the violation. It is more difficult to assess how significant the difference is between ECHR and CAT since in the case law of ECtHR it has been stated that “…the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there or from non-State bodies when the authorities are unable to afford the applicant appropriate protection.”\textsuperscript{258}. However, it would seem that the aforementioned statement, while a strong principal rule, does not limit the scope of protection if there exist sufficient exceptional conditions. For instance, if a terminally ill person who needed medical and social care could not receive it in his country of origin, then sending that person there would amount to ill-treatment proscribed by ECHR, even when “…the risk of being subjected to inhuman and degrading treatment stemmed from factors for which the authorities in that country could not be held responsible…”\textsuperscript{259}. In conclusion, regarding the source of the harm CAT is the most restrictive, the Refugee Convention the least restrictive and ECHR somewhere in between those two.

### 3.4 Element of risk

The element of risk can be considered the most important assessment regarding the prohibition on refoulement in all three of the human right treaties discussed here. The Refugee Convention requires a well-founded fear of persecution that can be established to a reasonable degree while in the context of ECHR the risk of proscribed ill-treatment must be real, personal and foreseeable. In the context of CAT there must be substantial grounds for believing in a danger of torture and, like ECHR, the danger must be real, personal and foreseeable. It is clear

\textsuperscript{258} N. v. United Kingdom 26565/05, European Court of Human Rights, 2008, paragraph 31.

\textsuperscript{259} D v. United Kingdom, paragraphs 45, 53.
that, regardless of the treaty, the risk does not have to be certain or very probable and its assessment does not include any kind of exact probability calculus. It has been argued that there does not exist a difference in the material risk criterion between the Refugee Convention, ECHR and CAT\(^2\)\textsuperscript{60}, and case law of ECtHR has been indicated as highlighting this lack of difference since that Court has referred in its risk assessment to the Refugee Convention criteria\(^2\)\textsuperscript{61}. Since the formulation of risk seems to be terminologically identical between ECHR and CAT one could argue that if the risk assessment regarding ECHR and the Refugee Convention is identical then it can be presumed that the risk assessment regarding the Refugee Convention and CAT is identical as well. Although it has been stated that the risk assessment in the context of ECHR “…appears more elaborate…” than that of the two other treaty regimes, its material difference is still unclear\(^2\)\textsuperscript{62}. It is necessary next to compare the risk assessment in parts by first concentrating on what factors define, expand or limit it (past experiences, objectivity, individualization and group membership), then on the standard and burden of proof and finally on national protection alternatives including diplomatic assurances.

It would seem that the relevance of past experiences of serious harm to the risk assessment differs between the treaties. ECHR seems to place the least emphasis on the past experiences of an applicant since in its case law ECtHR has rejected a refoulement claim despite the applicant suffering from a serious post-traumatic stress disorder related to his experiences in his country of origin\(^2\)\textsuperscript{63}. The Refugee Convention would appear to give a little more relevance

\textsuperscript{260} Wouters 2009, p. 542.
\textsuperscript{261} Ahmed v. Austria 71/1995/577/663, European Court of Human Rights, 1996, paragraphs 42-44 and 47. It is evident that the Court concluded that there was a serious risk of proscribed ill-treatment because there still existed a well-founded fear of persecution for the applicant who had been previously granted a refugee status “within the meaning of the Geneva Convention”.
\textsuperscript{262} See also Jabari v. Turkey 40035/98, European Court of Human Rights, 2000, paragraph 34 and 41-42. Again, the previous positive decision of a refugee status made by UNHCR was the primary motivation behind the Court’s decision that there existed a real risk of proscribed ill-treatment. This case will later be referred to as “Jabari v. Turkey”.
\textsuperscript{263} Lauterpacht and Bethlehem 2003, p. 161.
\textsuperscript{263} Cruz Varas and Others v. Sweden, paragraphs 84-86.
to past experiences, since the risk can be assumed to be established sufficiently if the applicant has suffered persecution in the past, even if it is a refutable assumption. Clearly the most emphasis on past experiences is placed by CAT since in its case law ComAT has accepted a refoulement claim based largely on the post-traumatic disorder suffered by the applicant. In all three treaties, the risk must be assessed on the basis of objective facts and circumstances, not on a subjective emotion of an applicant. Both individual related and general human rights situation related issues are relevant in the risk assessment.

The question of individualization and group membership is answered differently in ECHR, the Refugee Convention and CAT. In the context of ECHR both belonging to a group and individual reasons can either alone or cumulatively establish the risk of ill-treatment. Even the general violent conditions in a country alone may be sufficient to establish this risk. The Refugee Convention may also grant protection against refoulement on the basis of both group and individual factors but it cannot, however, establish a sufficient risk on the basis of general violent conditions in the country alone, unless there exist discriminatory reasons for those conditions. CAT is similar to the Refugee Convention as it too cannot grant protection against refoulement solely on the basis of general violent conditions, as the definition of torture requires intent and purpose from the perpetrator. Although it can establish a sufficient risk based on both group and individual factors, the threshold for a group risk assessment would appear to be higher than in ECHR and the Refugee Convention. Thus, ECHR is the least strict treaty regarding individualization, while the Refugee Convention and CAT are more limited in their protection in this regard. It would seem that this difference stems from the fact that persecution requires discriminatory reasons behind the ill-treatment and there needs to exist purpose and intent from the perpetrator for an act to qualify as torture. Thus, they cannot include situations of general violence.

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265 El Rgeig v. Switzerland, paragraphs 7.4 and 8.
alone. Establishing a risk solely based on a group membership seems to have the same threshold between ECHR and the Refugee Convention, but comparing case law between ECtHR and ComAT indicates a higher threshold for this in the context of CAT.266

Questions regarding proof of the risk of refoulement include issues of credibility, evidence and the burden of proof. It has been argued that credibility of a claim depends on three factors: internal credibility, plausibility and supporting evidence.267 It seems that the three treaty regimes are quite identical in their requirements regarding credibility. For instance, the Refugee Convention, ECHR and CAT can all grant protection from refoulement despite minor discrepancies on internal credibility of the claim and lack of evidence. This would seem logical and justified in refoulement cases since often the circumstances of the applicants’ departures of their countries of origin have been very chaotic and stressful. Perhaps most lenient is CAT since torture victims have experienced even worse circumstances than those that are victims of proscribed ill-treatment or persecution generally have. On the evidentiary side, it would seem that the Refugee Convention is the most silent on its guidelines regarding this. CAT too does not have clear guidelines, but since it focuses largely on the past experiences of torture and their aftermath medical reports are viewed with particular interest in ComAT.268 ECtHR, instead, has stated that the reliability of evidence is dependent on how objective and independent the source is and what kind of authority and reputation it has.269 In

266 For instance, ComAT seems to emphasize the importance of individual factors despite the situation of the whole group in the case Sadiq Shek Elmi v. Australia CAT/C/22/D/120/1998, UN Committee Against Torture, 1999, paragraphs 6.7–6.9. On a similar case ECtHR, instead, decided that there was a risk of ill-treatment on the basis of group membership alone, since “…it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist….”, Salah Sheekh v. Netherlands, paragraph 148.

267 Wouters 2009, p. 549.

268 For instance, El Rgeig v. Switzerland, paragraphs 7.4 and 8. It would seem that the medical certificate regarding post-traumatic stress disorder was decisive for the conclusion that the applicant was granted protection from refoulement.

269 For instance, Saadi v. Italy, paragraph 143.
general, ECtHR has also highlighted the evidential value of human rights information gathered by States’ diplomatic missions and the agencies of the United Nations.\textsuperscript{270}

In all three treaties, the burden of the proof lies primarily on the individual making a claim for protection. However, the determination of the risk of refoulement can be seen as a co-operative effort since the State too has to both assess and gather information itself and provide the individual with adequate possibilities to do this. Perhaps this co-operative responsibility is declared most clearly by ECtHR since it has demanded “\textit{rigorous scrutiny}” of an individual’s claim\textsuperscript{271} and reliance on multiple sources to obtain a complete and accurate picture of the conditions.\textsuperscript{272} Moreover, it has been argued that the basic assumption should be that the individual needs protection since the refugee definition has a declaratory character which implies this assumption.\textsuperscript{273} Indeed, I agree that this should be the initial view that one takes in refoulement cases regardless of whether the claim for protection is based on the Refugee Convention, ECHR or CAT.

The Refugee Convention has the clearest formulation of the national protection alternative as its article I (A) (2) requires that a person must be “unable or, owing to such fear, unwilling to avail himself of the protection of that country”. Although article 3 of ECHR does not include this kind of a “protection clause”, ECtHR has assessed in its case law whether the country of origin is “…\textit{able to obviate the risk by providing appropriate protection}.”\textsuperscript{274} There would appear to be at least some kind of a difference between the Refugee Convention and ECHR on this matter since ECtHR has only focused on the State’s ability and

\textsuperscript{270} For instance, \textit{NA. v. United Kingdom}, paragraph 121.
\textsuperscript{271} For instance, \textit{Jabari v. Turkey}, paragraph 39.
\textsuperscript{272} For instance, \textit{Said v. Netherlands}, paragraph 54.
\textsuperscript{273} Wouters 2009, p. 551.
\textsuperscript{274} \textit{H.L.R. v France}, paragraph 40. See also, for instance, \textit{Chahal v. United Kingdom}, paragraph 105.
willingness to provide protection whereas the Refugee Convention takes also into account the objective unwillingness of the individual. Thus it has been argued that, for instance, when a person has been traumatized by his experiences in his country of origin and is unwilling to avail himself of the protection of that country the outcome is different between these two treaties. In the context of the Refugee Convention the national protection alternative is considered not available while in the context of ECHR it may be considered available. In the context of CAT, it is more difficult to find clear guidelines what is required from the national protection alternative. However, ComAT has concluded that even military forces of a foreign State occupying an area of another country can provide protection to the individual which alleviates the risk of refoulement sufficiently. Since CAT protects a person from ill-treatment that must be connected in some way to State officials, it is reasonable that it rarely accepts internal protection as alleviating the risk of refoulement. The Refugee Convention too has a restrictive view on internal protection alternative but for different reasons than CAT since it has been argued that it accepts only States or formal State substitutes as providers of protection. ECHR differs in this respect since ECtHR has in its case law accepted the possibility of protection provided by non-State actors too, even including international organizations.

Finally, all three of the human rights treaty regimes discussed here accept rather reluctantly the use of diplomatic assurances in alleviating the risk of refoulement. The most reluctant would appear to be the Refugee Convention, since in its context the individual has a fear of persecution and he is unwilling to avail himself of the protection of his country of origin. Thus the possibility of the country of origin to afford protection is already stroked out in the definition

276 ComAT 2006, paragraph 20.
278 Thampibillai v. Netherlands, paragraph 67; Salah Sheekh v. Netherlands, paragraph 144; Muratovic v. Denmark (admissibility decision) 14513/03, European Court of Human Rights, 2004.
of the prohibition of refoulement. As explained earlier in chapter 2.2.2.4, in the context of the Refugee Convention diplomatic assurances should be relevant only in the situation where the exception clause (article 33 (2)) is applied. CAT is not quite as reluctant as the Refugee Convention since the use of diplomatic assurances have been accepted in the case law of ComAT. However, this should be only when the assuring State is not systematically violating CAT’s provisions and only when there exist clear procedures for obtaining such assurances as well as arrangements for effective post-return monitoring. It would appear that ECHR may be the least reluctant to accept diplomatic assurances, if only because it has not formulated clear criteria regarding it. It has been argued that it is most troubling that ECtHR has not mentioned anything about post-return monitoring and judicial review mechanisms\textsuperscript{279}. In all of the treaty regimes it would seem that diplomatic assurances are more viable in extradition cases while in non-extradition cases they are, at best, of limited use.

3.5 The character of the principle of non-refoulement

The character of the principle of non-refoulement refers here to whether the prohibition on refoulement is formulated in absolute terms or not. It has become clear that in the context of ECHR and CAT, there is no room for any exceptions regarding the prohibition on refoulement. It is explicitly stated in the text of these two treaties that no derogations can be made regarding the principle of refoulement even in exceptional conditions, such as wars or public emergencies. Even serious criminal conduct cannot deprive an individual from the protection of refoulement. Although the absolute nature of the prohibition on refoulement has been and most likely continues be challenged over and over by States, both ECtHR and ComAT have persistently and consistently defended it. The Refugee Convention differs greatly from the two other treaties in this respect since exceptions to the prohibition on refoulement are codified into its

\textsuperscript{279} Wouters 2009, p. 560.
text explicitly. Thus it is not an absolute principle in the context of the Refugee Convention. It must be reminded here that neither the risk of ill-treatment nor other rights guaranteed to a refugee do not cease to exist despite the activation of the exception clause in the Refugee Convention. This situation can in many States lead to the conclusion that although the refugee could be deported back to his country of origin on the basis of the Refugee Convention, in reality it cannot be accomplished because other human rights treaties such as ECHR and CAT do not allow it. Indeed, it would seem that the difference in the character of the principle in many cases does not ultimately lead to a different outcome. However, it can still be seen as the clearest difference between these three human rights treaties and is important to keep in mind when comparing them.
4. Conclusion

It would seem that one can deduce a general meaning of the principle of non-refoulement in international law by looking at what its varying forms in different human right treaties have in common. Regardless of whether we are discussing the Refugee Convention, ECHR or CAT, the prohibition on refoulement has essentially the same objective: to protect an individual from a risk to ill-treatment caused by rejection or deportation to a State by another State. Furthermore, that ill-treatment needs to achieve a certain level of severity as it is required to amount to some kind of a serious violation on the human rights of the individual protected. While the ill-treatment needs to achieve a certain level of severity, the risk does not have to be certain or very probable and its assessment does not include any kind of exact probability calculus, regardless of the treaty. The principle of non-refoulement can be seen as an indirect way for protection since it aims to eliminate the decision that would occur before the individual faces a risk of ill-treatment: the decision of a State to deport a refugee back to an area where there clearly exists a risk of ill-treatment.

A research question which this thesis aims to answer is what content does the principle of non-refoulement have in international law under three human rights treaty regimes: the Refugee Convention, ECHR and CAT and what differences and similarities do the regimes have when compared against each other in this context? To summarize, it has become clear that the main difference lies between the Refugee Convention and the latter two treaties. This results from several factors, the first being that the Refugee Convention, as its name implies, is aimed at protecting only refugees, whereas ECHR and CAT do not limit the scope of the protected individual. Secondly the Refugee Convention requires a discriminatory reason for the ill-treatment while ECHR and CAT, although different on the precise content and source of the harm, do not. Thirdly, the nature of the principle is not absolute in the context of the Refugee Convention since it includes exceptions while in the context of the latter two treaties no
derogations to the principle can be made in any conditions. Lastly, the Refugee Convention has not, at least up until now, proven to be capable of efficiently monitoring and enforcing the principle of non-refoulement through supervisory mechanisms. On the contrary, ECtHR and ComAT have both accumulated a vast amount of case law which both clarifies the content of the principle as well as emphasizes its importance on States aiming to circumvent it. Especially ECHR and its supervisory mechanism, ECtHR, can be seen as the most efficient and widely used regime in the prohibition of refoulement. However, it cannot be concluded that the protection afforded by ECHR is always superior compared to the other two treaty regimes. Rather it should be concluded that depending on the particular details of the case these three treaty regimes often differ on the outcome of whether protection should be granted or not. Still, most often the difference lies between the Refugee Convention on the one hand and ECHR and CAT on the other.

The second research question concerned gaps of refugee protection regarding a treaty regime and the possibility of filling those gaps with the protection granted by another treaty regime. I have discussed gaps in protection separately in chapters concerning different treaty regimes but now it is necessary to evaluate the relationship between these gaps and the three treaty regimes analyzed in this thesis. First, the Refugee Convention had three significant protection gaps: territorial restriction to outside of country of origin, discriminatory requirement to the harm from which a person is protected from and exceptions to the prohibition on refoulement based on the danger that the refugee poses to the refugee State. Both the ECHR and CAT are capable of filling all three of these gaps, with the reservation that ECHR limits its Contracting States regionally and CAT requires the non-discriminate harm to amount to torture as defined by its own articles. Secondly, ECHR is, as

280 Although case law of ECtHR points out that the protection granted by ECHR is ”wider” than that of the Refugee Convention, see Chahal v. United Kingdom, paragraph 80.
281 For instance, Pirjola argues that ECHR and CAT seem to offer stronger protection against refoulement than the Refugee Convention, see Pirjola 2002, p. 756.
mentioned before, a regional treaty and thus its scope is limited mainly to Europe. This kind of protection gap is filled by both the Refugee Convention and CAT since they are universal human rights treaties established under the United Nations. Lastly, a protection gap regarding CAT is that it requires the harm from which a person is protected from to amount to torture as defined by its own articles. Since ECHR protects not only from torture but also from inhuman or degrading treatment or punishment it naturally can fill the protection gap regarding CAT. The gap can be filled by the Refugee Convention as well, since it protects from persecution which can be described as a human rights violation that is attributed to the State’s activity or inactivity and results in serious harm to the protected individual. Because the Refugee Convention can fill this particular protection gap only when there is a discriminatory reason connected to the harm, it can be concluded that ECHR would seem to offer the most efficient protection in this sense.

Finally, it is important to remember that the essential content of this principle of non-refoulement, which is the same regardless of the treaty, should not be taken for granted as States have time after time presented opposition and resistance to adhering to it completely. Although the treaty regimes have proven out to be rather resilient in defending the principle, there seems to be no indications that States would now cease to try and circumvent or oppose it. Quite to the contrary, the growing refugee issue for instance as highlighted by the mass of people moving from Syria to all over Europe presents serious threats to upholding the essential notion of protecting individuals from serious violations to their human rights. Thus, fighting for the survival of the prohibition on refoulement is crucial in today’s field of refugee law, and more broadly, in international human rights law as well.