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The Practice of Shared Responsibility in relation to Refoulement

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The Practice of Shared Responsibility in relation to Refoulement

Maarten den Heijer[*]

1. Introduction

It is a truism that refugee problems are the concern of the international community at large, yet the regime of international refugee law apportions the duty to protect refugees to the state on whose territory a refugee is present.[1] Refugee protection is premised on the notion that protection in the country of origin has failed, and that it falls to the country of refuge to provide surrogate protection. 'International protection' is the commonly employed term to describe the full panoply of duties that the country of refuge owes vis-à-vis the refugee. These duties derive traditionally from the 1951 Convention relating to the Status of Refugees (Refugee Convention or Convention),[2] but complementary forms of protection stem from general human rights law.

Even though territorial refugee protection is traditionally conceived as an essentially unilateral exercise, it cannot meaningfully be disconnected from the failure of protection in the home state. Refugee protection is activated precisely in response to that failure; and the scope of protection is contingent on conduct of the other state. The link between the host state's duties and the home's state conduct is captured in the definitional provisions of refugee law. The refugee definition sets forth that a person must have a 'well-founded fear' for future persecution in the other state, in order to be able to enjoy the Convention's benefits.[3]

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[1] J.C. Hathaway and R.A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection' (1997) 10 HHRJ 115, 119; M. Zieck, 'Snakes in Ireland: Questioning the Assumption of "Collective Responsibility" to Protect Refugees', Amsterdam Law School Legal Studies Research Paper No. 2011-12, at 3, available at http://papers.ssrn.com/.

[2] Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 137 (Refugee Convention or Convention).

[3] Article 1A(2), ibid.

Subsidiary forms of protection under human rights law are in a similar fashion premised on an individual being in danger, or at risk, of ill-treatment in the home state.[4]

The international obligations of the removing and home state for a failure to protect coincide when the refugee is expelled to the home country. The removing state will then renege on its commitment to protect, resulting in harm which may consecutively engage the responsibility of the home state. Because the conduct against which the refugee must be protected is measured against the yardstick of human rights, the presumption must be that, if the country of return subjects the refugee to such harm, it incurs international responsibility independent of the host state. Acts amounting to *refoulement* therefore meet the general definition of shared responsibility as used in this volume (responsibility is shared, when multiple actors are responsible for their contribution to a single harmful outcome).[5] *Refoulement* entails, firstly, a situation in which two or more states contribute to a single harmful outcome.. Secondly, there is a responsibility of multiple actors. And third, the responsibility of two or more actors for their contribution to a particular outcome is distributed to them separately, rather than resting on them collectively.[6]

A key feature of the legal construction of the prohibition of *refoulement* is its insistence on the independent protective duty of non-exposure to harm. This duty is based on a speculative assessment of risk at the moment of expulsion. This construction renders an analysis of the causal link between the act of expulsion and eventual harm redundant, and does not depend on the conduct of the other state. By localising the violation in the preliminary act of expulsion, international refugee law establishes a forward looking injunctive remedy as a primary norm of international law. This greatly amplifies the effectiveness of human rights protection, as it allows for allocating responsibility fully on the basis of principles of independent responsibility. This manner of legal conceptualisation however also raises questions as to the setting of the standard of risk (see section 5.1), the evidentiary burden (see section 5.2), and the definition and allocation of reparation obligations (see section 5.3).

[4] E.g. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, in force 26 June 1987, 1465 UNTS 85 (CAT), Article 3(1): '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.' See further section 3.

[5] See the Introduction to this volume, Chapter 1 in this volume, P.A. Nollkaemper and I. Plakokefalos, 'The Practice of Shared Responsibility: A Framework for Analysis', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), 1, at ___.

[6] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 366-369.

This chapter discusses how international law on the protection of refugees deals with this situation of shared responsibility. It focuses on the legal concept of *non-refoulement*, or the prohibition of removing an individual to a country or territory where he or she runs a risk of being subjected to serious human rights violations.[7] It maps out, firstly, state practice in the various scenarios in which *refoulement* can occur and where the international responsibility of multiple parties may be engaged. Secondly, the contribution aims to reflect on the manner in which the duty of *non-refoulement* is operationalised from the perspective of general international law. To that purpose, it identifies how international refugee law has coped with issues that arise from the contribution of multiple parties to a single wrongful outcome. It is to be noted at the outset that the very conception of refugee law as a system of surrogate protection has engendered ample legal practice that addresses the relationship between the state of refuge, the home state and other possible involved parties, such as intermediary states or non-state actors.

The chapter employs the legal concept of *non-refoulement* in a wide manner that encompasses its various treaty bases, and does not make a distinction between different modes of removal such as expulsion, deportation, or rejection at the border. It does not however discuss practice on extradition.[8] Even though the human rights principles applicable to the extradition of criminal suspects and the removal of persons seeking asylum are similar, the two types of cases originate from divergent circumstances. They entail different procedural and substantive questions and are therefore subject to specific subsets of rules and doctrines.

2. The involvement of multiple actors in *refoulement*: factual scenarios

The abundant legal practice on *refoulement* in the context of refugee law and its widespread coverage in literature renders it neither feasible nor necessary to map it out in the form of actual cases. It is more useful to point out the typical scenarios, involving the conduct of multiple actors in a variety of ways, in which *refoulement* may occur. Each scenario is illustrated with relevant case law. All scenarios have two elements in common. First, they

[7] K. Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerp: Intersentia, 2009), 25; E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion', in E. Feller, V. Türk, and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), 87, 89.
[8] See Chapter 6 in this volume, A. Constantinides, 'Extradition', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

involve the physical transfer of an individual from one state to another. Second, the responsibility for violating international law of one of the involved states depends on the conduct of the other state.

2.1 Direct refoulement: state A removes a person to state B, resulting in harm inflicted to the individual by state B

Direct *refoulement* represents the normal scenario of prohibited removal as expressly codified in Article 33(1) of the Refugee Convention and Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[9] Further, applying the *Soering* principle, the European Court of Human Rights (ECtHR or Court) held in *Cruz Varas* that Article 3 of the 1950 European Convention on Human Rights (ECHR)[10] is not only relevant in a purely domestic or extradition context, but in that of expulsions as well.[11] The ECtHR explained that the responsibility of the expelling state is then engaged for exposing an individual to ill-treatment, without – thus stressing the principle of independent responsibility – adjudicating on, or establishing the responsibility of, the receiving country.[12] In a similar fashion, the United Nations Human Rights Committee (HRC) applied the prohibition of *refoulement* as a component part of the right to life and the prohibition of torture, cruel, inhuman or degrading treatment or punishment, laid down in Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[13]

Of particular interest are cases that have involved all potentially responsible parties. One such case is *M.S.S.* v. *Belgium and Greece,* concerning the expulsion of an Afghan asylum seeker to Greece by Belgium in application of the European Union (EU) Dublin Regulation.[14] The

[9] See n. 4.
[10] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights or ECHR).
[11] *Soering* v. *the United Kingdom*, App. No. 14038/88 (ECtHR, 7 July 1989); *Cruz Varas a.o.* v. *Sweden*, App. No. 15576/89 (ECtHR, 20 March 1991), paras. 69-70.
[12] *Soering*, ibid., para. 91; *Cruz Varas*, ibid., para. 69.
[13] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR). UN Human Rights Committee (HRC), CCPR General Comment No. 20: 'Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)', 10 March 1992, para. 9.
[14] *M.S.S.* v. *Belgium and Greece*, App. No. 30696/09 (ECtHR, 21 January 2011). Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (2003) OJ L 50/1. See also *Shamayev a.o.* v. *Georgia and Russia*, App. No. 36378/02 (ECtHR, 12 April 2005) (concerning extradition).

case concerned not only the scenario of possible indirect *refoulement* to Afghanistan (see section 2.2 below), but also the cumulative responsibilities of Belgium and Greece for the inhuman treatment the asylum seeker received in Greece. After having established that Greece had violated Article 3 ECHR for subjecting the asylum seeker to extreme poverty and inhuman detention conditions, the ECtHR went on to conclude that Belgium, by transferring the applicant and therewith exposing him to such treatment, also acted contrary to that provision.[15] These violations accrued independently to Belgium and Greece and entailed separate examinations in the sphere of remedies.[16] Similar applications have subsequently been brought before the ECtHR concerning the transfer of asylum seekers to Italy, but in these cases no violations were found.[17]

2.2 Indirect refoulement: state A removes a person to state B, which in turn removes him to state C, resulting in harm inflicted to the individual by state C

Indirect or chain *refoulement* involves removal via an intermediary country and may therefore involve the responsibility of three (or more) states. Complaints involving indirect *refoulement* have been brought before the ECtHR (*T.I.* v. *the United Kingdom*; *K.R.S.* v. *the United Kingdom*; *M.S.S.* v. *Belgium and Greece*; *Hirsi* v. *Italy*; *Hussein* v. *the Netherlands and Italy*); the HRC (*Bakhtiyari* v. *Australia*); and the United Nations Committee Against Torture (CAT Committee or Committee Against Torture) (*Korban* v. *Sweden*; *Z.T.* v. *Australia*).[18] General guidelines on indirect *refoulement* have been produced by the HRC, and by the United Nations High Commissioner for Refugees (UNHCR).[19] Some of the relevant case law involves only a determination of the responsibility of the expelling state, but it may also

[15] *M.S.S.* v. *Belgium and Greece*, ibid., paras. 362-368.
[16] Ibid., paras. 404-411.
[17] *Mohammed Hussein a.o.* v. *the Netherlands and Italy*, App. No. 27725/10 (ECtHR, 2 April 2013); *Halimi* v. *Austria and Italy*, App. No. 53852/11 (ECtHR, 18 June 2013); and, *Mohammed Hassan* v. *the Netherlands and Italy*, App. No. 40524/10 (ECtHR, 27 August 2013).
[18] *T.I.* v. *the United Kingdom*, App. No. 43844/98 (ECtHR, 7 March 2000); *K.R.S.* v. *the United Kingdom*, App. No. 32733/08 (ECtHR, 2 December 2008); *M.S.S.* v. *Belgium and Greece*, n. 14; *Hirsi Jamaa a.o.* v. *Italy*, App. No. 27765/09 (ECtHR, 23 February 2012) (*Hirsi* v. *Italy*); *Mohammed Hussein* v. *the Netherlands and Italy*, ibid.; *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari* v. *Australia*, HRC, UN Doc. CCPR/C/79/D/1069/2002 (2003); *Avedes Hamayak Korban* v. *Sweden*, UNCAT, UN Doc. CAT/C/21/D/088/1997 (16 November 1998); *Z.T.* v. *Australia*, UNCAT, UN Doc. CAT/C/31/D/142/2000 (19 November 2003).
[19] HRC, General Comment No. 31: 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004); UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at www.refworld.org.

involve the responsibility of both the expelling and intermediary states. There does not appear to be practice that involved a legal determination of the responsibility of all three states.

In *T.I.* v. *the United Kingdom*, the ECtHR held that the return pursuant to the Dublin Convention – the predecessor of the Dublin Regulation – of an asylum seeker from the United Kingdom (UK) to Germany, where a deportation order had been previously issued to remove him to Sri Lanka, did not affect the duty of the United Kingdom to not expose the applicant to prohibited treatment. The Court therefore examined both the alleged risk of ill-treatment in Sri Lanka, and the procedural safeguards that existed in Germany against his removal to Sri Lanka. The Court concluded that there was no real risk that the applicant would be expelled by Germany. The ECtHR did find violations of the ECHR in the cases of *M.S.S.* v. *Belgium and Greece* and *Hirsi* v. *Italy*, concerning respectively the expulsion of an Afghan asylum seeker to Greece by Belgium in application of the EU Dublin Regulation; and the summary return of boat migrants at sea by Italy to Libya from where they feared repatriation to Eritrea and Somalia. As noted above, the judgment of *M.S.S.* is of special interest, as it involved a determination of the obligations of both Belgium and Spain as contracting parties to the ECHR.

The HRC and the CAT Committee have also accepted that chain *refoulement* comes within the ambit of Article 7 ICCPR and Article 3 CAT.[20] In *Korban* v. *Sweden*, the CAT Committee expressed the view that the expulsion of an Iraqi citizen to Jordan, his wife's country of nationality, would violate Article 3 CAT, because of the risk of onward expulsion to Iraq. In *Z.T.* v. *Australia*, concerning an Algerian national who had travelled to Australia via Saudi Arabia and South Africa, and who was removed to South Africa by the Australian authorities, the CAT Committee restricted its analysis to the risk of torture in Algeria. Having concluded that the level of risk was insufficient, the CAT Committee deemed it unnecessary to address the risk of removal from South Africa to Algeria.[21]

The issue of chain *refoulement* plays a key role in safe third country practices in asylum law, such as the Canada-United States (US) Safe Third Country Agreement and the Dublin Regulation.[22] Significant litigation has unfolded in EU member states, and to a lesser extent in

[20] HRC, ibid., para. 12. There do not appear to be cases where the Human Rights Committee has examined a chain *refoulement* claim on the merits. In *Bakhtiyari* v. *Australia*, n. 18, such a claim was brought but declared unsubstantiated and inadmissible.
[21] For a similar approach, see *H.M.H.I.* v. *Australia*, UNCAT, UN Doc. CAT/C/28/D/177/2001 (1 May 2002).
[22] Agreement between the Government of the United States of America and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Washington, 5

Canada, on the question whether the execution of such agreements in individual cases engenders a risk of onward *refoulement*.[23] Chain *refoulement* also plays a role in the context of readmission agreements which allow for readmission of persons who do not have the nationality of either of the parties, but who transited the territory of one of the parties.[24]

2.3 Direct refoulement to a non-state actor: state A removes a person to state B, resulting in harm inflicted to the individual in state B by a non-state actor

The link between expulsion and ill-treatment may be more difficult to identify when the expected ill-treatment cannot be attributed to the receiving state. Although the issue of persecution by non-state actors has long produced divergent opinion of academics and courts, it is now widely accepted that refugeehood may also originate in conduct of non-state actors.[25] In Africa and Latin America, the relevance of persecution by third parties was recognised in the 1969 Organization of African Unity Convention on Refugees; the 1984 Cartagena Declaration; and the 2009 Kampala Convention.[26] In the context of the Refugee Convention, original disagreement, especially in Europe, on these so-called 'third party refugees' focused on whether it was necessary for the receiving state to have instigated, condoned or tolerated persecution, so that the protection failure could be attributed to the

December 2002, in force 29 December 2004, available at https://treaties.un.org; Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) (2013) OJ L 180/31.

[23] *N.S. and M.E. and others*, Joined Cases C-411/10 and C-493/10 (CJEU, 21 December 2011); *M.S.S.* v. *Belgium and Greece*, n. 14; *Mohammed Hussein* v. *the Netherlands and Italy*, n. 17; *Mohammed* v. *Austria*, App. No. 2283/12 (ECtHR, 6 June 2013); *Canadian Council for Refugees* v. *Canada*, Federal Court of Appeal (Canada), 27 June 2008, 2008 FCA 229.

[24] Parliamentary Assembly of the Council of Europe, 'Readmission agreements: a mechanism for returning irregular migrants', Report, Doc. 12168, Strasbourg, 17 March 2010. Cf. *Hirsi* v. *Italy*, n. 18.

[25] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, Doc. HCR/IP/4/Eng/REV.1, para. 65 (UNHCR Handbook); *H.L.R.* v. *France*, App. No. 24573/94 (ECtHR, 29 April 1997); G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press, 2007), 98-99; W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 GILJ 415; D. Wilsher, 'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' (2003) 15 IJRL 68.

[26] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, in force 20 June 1974, 1001 UNTS 45, Article 2 (1969 Organization of African Unity Convention on Refugees); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, 22 November 1984, Article III (1) (1984 Cartagena Declaration); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala, 23 October 2009, in force 6 December 2012, available at https://treaties.un.org, Article 2(e) and 3(1)(h)-(i) (2009 Kampala Convention).

receiving state (the position of France, Germany and Switzerland).[27] The now dominant position is that it is sufficient that the state is unable to protect against persecutory measures of a third party, regardless of whether it incurs 'accountability'.[28] This approach is codified in the EU Qualification Directive.[29]

Under general human rights treaties, it has also been accepted that *non-refoulement* applies to situations where the harm originates in conduct of non-state actors. In the case of *H.L.R.* v. *France* before the ECtHR, the risk stemmed from drug cartels against which the Colombian state was allegedly incapable to protect.[30] The Court held that 'owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials'.[31] The Court added that it must in such a situation not only be shown that the risk is real, but also that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection.[32]

That it is not necessary for either the misconduct or the failure to protect to be attributable to the receiving state was confirmed in the ECtHR's later case law, most notably on the return of asylum seekers to Somalia, where at various points in time simply no effective state authorities were present.[33] Although one may expect analogous considerations in the context of the ICCPR, the issue of non-state actors in a *refoulement*-context has so far not been addressed by the Human Rights Committee.[34] Scenarios involving non-state actors have been brought before the Committee Against Torture, but the application of Article 3 CAT to non-state actors faces the obstacle that the torture definition presupposes the involvement of the state in the act of torture.[35] The CAT Committee's case law on *refoulement* and non-state

[27] Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', n. 25, referring to both positions as the accountability and the protection view. See also the discussions in Wilsher, 'Non-State Actors and the Definition of a Refugee in the United Kingdom', n. 25; and *Adan* v. *Secretary of State for the Home Department*, House of Lords, 2 April 1998, [1999] 1 AC 293.
[28] Goodwin-Gill and McAdam, *The Refugee in International Law*, n. 25, 98-99.
[29] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (2011) OJ L 337/9, Article 6.
[30] *H.L.R.* v. *France*, n. 25.
[31] Ibid., para. 40.
[32] Ibid.
[33] *Salah Sheekh* v. *the Netherlands*, App. No. 1948/04 (ECtHR, 11 January 2007); *Sufi and Elmi* v. *the United Kingdom*, App. Nos. 8319/07 and 11449/07 (ECtHR, 28 June 2011).
[34] Wouters, *International Legal Standards for the Protection from Refoulement*, n. 7, 391.
[35] Article 1 CAT, n. 4: 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

actors therefore often centres on the preliminary task of establishing the requisite standard for linking acts of torture with the receiving state, such as in cases concerning quasi-governmental actors operating in Somalia and Sri Lanka.[36]

In theory, instances of *refoulement* where a non-state actor is the author of actual harm can involve the responsibility of three parties: the expelling state for exposing the individual to ill-treatment; the receiving state for not providing appropriate protection; and the non-state actor for committing the actual harmful act. Refugee law, however, chiefly focuses on the responsibility of the expelling state.

2.4 Indirect refoulement to a non-state actor: state A removes a person to state B, which in turn removes him to state C, resulting in harm inflicted to the individual in state C by a non-state actor

The case of *T.I.* referred to above, concerned precisely this scenario, as it involved a Tamil from the Jaffna area, Sri Lanka, who feared reprisals both from the Liberation Tigers of Tamil Eelam (LTTE) and from government forces on suspicion of previous involvement with the LTTE. It was because Germany at the time required ill-treatment to be attributable to the receiving state – thus leaving possible maltreatment at the hand of the LTTE outside the risk assessment – that a potential risk of onward removal from Germany to Sri Lanka was present. In such a scenario, the ECtHR therefore engages in a threefold assessment: first, the risk of removal from the intermediary to the receiving state; second, the risk of ill-treatment by non-state actors; and third, the protective capabilities of the receiving state.

2.5 Intra-state refoulement: state A transfers a person in state B to state B resulting in harm inflicted to the individual in state B

Refoulement is normally construed as the removal of an individual from the territory of state A to the territory of state B. Although far more scant, there is nascent practice on the intra-state transfer of individuals. Such transfers presume the extraterritorial conduct of the agents

[36] *Sadiq Shek Elmi* v. *Australia*, Communication No. 120/1998, UNCAT, UN Doc. CAT/C/22/D/120/1998 (1999); *H.M.H.I.* v. *Australia*, n. 21; *S.S.* v. *the Netherlands*, UNCAT, UN Doc. CAT/C/30/D/191/2001 (19 May 2003).

of one state, who either act as transferring or receiving party. Such transfers may subsequently be followed up by the onward removal of the individual to the receiving state or to yet another, third state. Intra-state removals where the territorial state acts as transferring party do not appear to give rise to essentially different standards of adjudication. This scenario was addressed in the context of extraordinary rendition in the case of *El-Masri* before the ECtHR, which applied the traditional *Soering* standard to the transfer of Mr. El-Masri, an Al-Qaeda suspect, from the Macedonian to US agents at Skopje airport, who subsequently flew him to CIA detention facilities in Afghanistan.[37] Noteworthy about the Court's reasoning in *El-Masri* is however that it not only found that Macedonia exposed El-Masri to a real risk of a flagrant violation of his rights under Article 5 ECHR, but also held Macedonia responsible for violating the applicant's rights during the entire period of his captivity in Afghanistan – presumably attributing the conduct of the US in Afghanistan to Macedonia.[38]

Complications may rise when the transferring party acts extraterritorially, such as in the context of prisoner transfers during military operations, or in the event of asylum sought at embassies (diplomatic asylum). Should the territorial state demand the surrender of the individual, the petitioned extraterritorial state may face a potential conflict between human rights obligations vis-à-vis the individual and the duty to respect the territorial sovereignty of the host state. This conflict was at issue before UK courts and the ECtHR in a few cases concerning the transfer of prisoners from British military forces in Iraq to the Iraqi authorities.[39] It also arose in a UK case concerning a request for asylum at the British consulate in Melbourne.[40] But apart from the potential obstacle of territorial sovereignty and the preliminary matter whether such extraterritorial conduct is to be brought within the ambit of the transferring state's human rights obligations, the material standards applicable to this type of intra-state transfers appear similar. In *Munaf* v. *Romania*, on the expulsion of an Iraqi-American national from the Romanian embassy in Baghdad, the Human Rights Committee found its previous case law on territorial *refoulement* to be applicable, but concluded that the

[37] *El-Masri* v. *the Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (ECtHR, 13 December 2012).
[38] Ibid., paras. 239-241.
[39] *Al-Saadoon and Mufdhi* v. *the United Kingdom*, App. No. 61498/08 (ECtHR, 2 March 2010), paras. 141-143; *R (on the application of (1) Faisal Attiyah Nassar Al-Saadoon (2) Khalaf Hussain Mufdhi)* v. *Secretary of State for Defence*, High Court (England and Wales), 19 December 2008, [2008] EWHC 3098 (Admin).
[40] *R* (*B*) v. *Secretary of State for Foreign and Commonwealth Affairs*, Court of Appeal (England and Wales), 18 October 2014, EWCA Civ 1344, [2005] QB 643.

Romanian authorities could not have known that the author ran a risk of his rights under Covenant being violated.[41]

2.6 Reverse refoulement: state A acts wrongfully in respect of a person who is transferred to state B that continues or completes the wrongful conduct

Further, there is some nascent international case law on a scenario which could be described in terms of reverse *refoulement*: the removal of a person from one state to another one, where the latter state's responsibility may be engaged on account of previous wrongful conduct in the transferring state. This may happen in the course of prisoner transfers (*Willcox and Hurford* v. *the United Kingdom*; *Drozd and Janousek* v. *France and Spain*) or in the course of a transfer of criminal proceedings from one state to another one (*Sari* v. *Denmark and Turkey*).[42] In *Willcox and Hurford* v. *the United Kingdom*, concerning a prisoner transfer from Thailand to the United Kingdom, where the detention resulted from an allegedly unfair trial and would continue for an allegedly disproportionate duration, the Court emphasised that

> different considerations arise in cases in which a Contracting State is asked to refuse extradition to a jurisdiction where a grossly disproportionate sentence might be imposed; and in cases where that same State is confronted with a request by a prisoner for transfer to serve a sentence imposed by a foreign court that might have been considered grossly disproportionate had it been assessed in the context of a prior extradition request.[43]

The Court framed the case as a choice between two evils. It reasoned that the generally beneficial effects of a transfer for the prisoner should be included in the Article 3 assessment and found no violation.

3. Primary rules applicable to *refoulement*

The rules applicable to the protection of refugees traditionally derive from the 1951 Refugee Convention. Within the framework of the Refugee Convention, the prohibition of *refoulement*

[41] *Mohammed Munaf* v. *Romania*, HRC, UN Doc. CCPR/C/96/D/1539/2006 (21 August 2009), paras. 14.2., 14.5.
[42] *Willcox and Hurford* v. *the United Kingdom*, App. Nos. 43759/10 and 43771/12 (ECtHR, 8 January 2013); *Drozd and Janousek* v. *France and Spain*, App. No. 12747/87 (ECtHR, 26 June 1992); *Sari* v. *Denmark and Turkey*, App. No. 21889/93 (ECtHR, 8 November 2011).
[43] *Willcox and Hurford*, ibid., para. 75.

(Article 33(1)) forms part of the more general scheme to protect refugees. That scheme basically sets forth a range of rights that a refugee, as defined in Article 1 of the Convention, can invoke in the country in which he or she sought refuge. This includes *non-refoulement* but also standards of treatment in the sphere of juridical status, welfare, employment, and administrative assistance.

The recognition of *non-refoulement* as an independently functioning human right led to expanded protection concepts in European countries as well as internationally, under which persons who are not technically 'refugees', but whose expulsion may put them at risk of human rights violations are allowed to remain in the state.[44] Article 3 CAT; Article 22(8) of the 1969 American Convention on Human Rights;[45] Article 2(3) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa;[46] and Article 19(2) of the EU Charter on Fundamental Rights[47] proscribe in explicit terms *refoulement*. Under the ECHR and ICCPR, *non-refoulement* developed initially as a component part of the prohibition of torture and inhuman or degrading treatment. But it is also applied in the context of the right to life (Articles 6 ICCPR and 2 ECHR) and, under the ECHR, the right to liberty (Article 5) and the right to a fair trial (Article 6).[48] In Europe, the US and Canada, such protection initially gave rise to informal residence statuses such as 'leave to remain', 'tolerated stay', or 'the withholding of removal'. But increasingly these complementary or subsidiary forms of protection entertain formal residence statuses, including in Canada, Australia and the EU. The differences in material and personal scope of the various 'explicit' and 'implicit' prohibitions of *refoulement* have received ample commentary.[49]

Two defining features of the prohibition of *refoulement* that set it apart from most primary norms in international law are, firstly, that the removing state may incur responsibility for

[44] J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007).
[45] American Convention on Human Rights 'Pact of San José, Costa Rica', 22 November 1969, in force 18 July 1978, 1144 UNTS 123.
[46] See n. 26.
[47] Charter of Fundamental Rights of the European Union, (2012) OJ C 326/391 (EU Charter on Fundamental Rights).
[48] The ECtHR found violations in a *refoulement*-context of provisions other than Article 3 ECHR in *Bader a.o.* v. *Sweden*, App. No. 13284/04 (ECtHR, 8 November 2005), (Article 2); *El-Masri* v. *the Former Yugoslav Republic of Macedonia*, n. 37 (Article 5); *Othman (Abu Qatada)* v. *the United Kingdom*, App. No. 8139/09 (ECtHR, 17 January 2012) (Article 6).
[49] Wouters, *International Legal Standards for the Protection from Refoulement*, n. 7; Lauterpacht and Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*', n. 7; McAdam, *Complementary Protection in International Refugee Law*, n. 44; A. Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 IJRL 373; D. Weissbrodt and I. Hörtreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 BHRLR 1.

eventual harmful conduct that, if it would occur, must be attributed to another state. Secondly, the prohibition sees to prospective conduct and does not depend on the occurrence of an actual harmful outcome (see, on the complications this may entail, section 5.1).

The nature of the obligation not to *refoule* is on that basis best conceived as a duty to protect. It articulates the duty to shield a person from misconduct by another actor.[50] In this sense, the very norm of *non-refoulement* embodies the phenomenon of shared responsibility. It establishes the potential responsibility of the expelling state *ex ante*.

Even though *refoulement* cases concern conduct by and in another state, the applicable standards do not essentially differ from cases where the duty to protect against acts of private persons within the state's territory is at stake. In both type of cases, the elements of knowledge, protective capabilities, and 'real risk' inform the duty to introduce protective measures.[51] The fact that the harm would materialise in another country does not necessitate a different approach. The state's protective duty rests in its presumed capacity to guarantee human rights to anyone within its jurisdiction and therefore extends to all persons in its territory, including against harmful conduct in another state.

4. Secondary rules applicable to *refoulement*

It follows from the above that the primary rules on protection from *refoulement* incorporate questions that in the International Law Commission (ILC) Articles on Responsibility Responsibility of States for Internationally Wrongful Acts (ARSIWA)[52] are framed as secondary rules, and in particular those on the responsibility of a state in connection with the act of another state ('derivative' or 'attributed' responsibility). Acts of expulsion that amount to exposure to ill-treatment could be conceptualised as conduct whereby one state assists, or facilitates, another state in committing a wrong (Article 16 ARSIWA). Under the Refugee Convention and general human rights treaties, however, such conduct is placed within the

[50] On the conceptualisation of the duty protect: UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Covenant), 11 August 2000, UN Doc. E/C.12/2000/4, para. 33; S.P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention' (2009) 1 GR2P 422, 450 et seq.
[51] *L.C.B.* v. *the United Kingdom*, App. No. 23413/94 (ECtHR, 9 June 1998), para. 38; *Akkoc* v. *Turkey*, App. Nos. 22947/93 and 22948/93 (ECtHR, 10 October 2000), para. 81; *Mahmat Kaya* v. *Turkey*, App. No. 2535/93 (ECtHR, 28 March 2000), para. 89; *Osman* v. *the United Kingdom*, App. No. 23452/94 (ECtHR, 28 October 1998), para. 116.
[52] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

ambit of a state's positive obligations. A key difference between the rule as formulated in Article 16 ARSIWA and the primary norm of *non-refoulement* is that the latter does not require the other state to have actually committed the wrongful act. The wrongfulness of the expelling state's conduct does therefore not 'depend' on the independent action of another state.[53] Neither does *non-refoulement* presuppose that expulsion takes place 'with a view to facilitating the commission of the wrongful act' as stipulated in the ILC Commentary.[54] In other words, *in lieu* of establishing *ex post facto* whether actual harm inflicted should be attributed to the expelling state or attract its responsibility under Article 16 ARSIWA, the prohibition of *refoulement* localises the prohibited conduct – and the responsibility for not respecting it – in the act of expulsion. International refugee law creates international responsibility without a manifestation of actual harm. It assumes – instead of determining on it – the responsibility of the other state. This conceptualisation reduces a situation that may be conceived as one of shared responsibility to one of independent responsibility. By thus expanding independent responsibility, international refugee law ensures not only an effective injunctive remedy as self-standing primary norm, but it also facilitates the adjudication of claims, as it does not require probing into the responsibility of the other state. That other state may of course be separately held responsible for any harm committed on the basis of a failure to observe its own international obligations.

Arguably, the construction of *non-refoulement* as an obligation that gives rise to the state's independent rather than derivative responsibility, precludes potential problems in the sphere of the admissibility of claims in international judicial proceedings under the *Monetary Gold*[55] principle. In its Commentary to Article 16, the ILC identified *Monetary Gold* as especially relevant to cases under Article 16, because '[t]he wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter', which would require an international court to rule, as a prerequisite, on the lawfulness of the conduct of another state, in the latter's absence and without its consent.[56] The ECtHR has repeatedly stressed in expulsion cases that although the establishment of the responsibility of the expelling state inevitably involves an assessment of conditions in the requesting country against the standards of the Convention, there is no question of adjudicating on, or

[53] Cf. Commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA Commentary), Commentary to Chapter IV, 64, para. 4.
[54] Ibid., Commentary to Article 16 ARSIWA, 66, para. 5.
[55] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, ICJ Reports 1954, 19.
[56] ARSIWA Commentary, n. 53, Commentary to Article 16, 67, para. 11.

establishing, the responsibility of the receiving country, whether under general international law, under the Convention, or otherwise.[57] In a similar fashion, the UNHCR underlines that 'the competent authorities that are called upon to determine refugee status are not required to pass judgement on conditions in the applicant's country of origin'.[58]

Actual wrongful conduct of the other state can however be relevant in establishing the wrongfulness of the expelling state's conduct. Firstly, instances of past persecution or harm constitute a serious indication of well-founded fear or a real risk.[59] Secondly, even though the existence of a risk must be assessed on the basis of facts which were known or ought to have been known at the moment of expulsion, events subsequent to expulsion may confirm or refute the correctness of an expulsion decision.[60] Thirdly, many refugee claims relate to general human rights problems in the country of origin and require an in depth inquiry into the human rights record of a given state. It is therefore not uncommon for international monitoring bodies to pronounce on the lawfulness of conduct of receiving states in the process of determining the responsibility of the expelling state, albeit in often generalised terms.[61]

5. Processes

Refugee law adjudication is normally organised around the expelling state's conduct and therefore involves the determination of singular instead of multiple responsibility. Even though international supervision against human rights abuse could in theory address both the conduct of countries of origin and countries of refuge, the relevant mechanisms operate in such a way so as to distinguish between the two types of obligations. At the United Nations (UN) level, the primary functions of charter-based and treaty-based human rights bodies are to discuss, monitor and deter human rights abuse in countries of origin. The UNHCR, on the

[57] *Soering* v. *the United Kingdom*, n. 11, para. 86; *Cruz Varas a.o.* v. *Sweden*, n. 11, para. 60; *Mamatkulov and Askarov* v. *Turkey*, App. Nos. 46827/99 and 46951/99 (ECtHR, 4 February 2005), para. 67; *Saadi* v. *Italy*, App. No. 37201/06 (ECtHR, 28 February 2008), para. 126.
[58] UNHCR Handbook, n. 25, para. 42.
[59] Ibid., para. 45; Article 4(4) Directive 2011/95/EU, n. 29.
[60] *Vilvarajah a.o.* v. *the United Kingdom*, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 (ECtHR, 30 October 1991), para. 107; *Salkic a.o.* v. *Sweden*, App. No. 7702/04 (ECtHR, 29 June 2006); *Cruz Varas a.o.* v. *Sweden*, n. 11, para. 79.
[61] E.g. *NA.* v. *the United Kingdom*, App. No. 25904/07 (ECtHR, 17 July 2008), para. 124, noting that there is 'clear evidence of a culture of torture with impunity' in Sri Lanka; and *Bader a.o.* v. *Sweden*, n. 48, para. 47, noting that a particular set of criminal proceedings in Syria 'must be regarded as a flagrant denial of a fair trial'.

other hand, is mandated to protect persons who have fled from that abuse.[62] Even though treaty monitoring bodies such as the HRC and CAT Committee, and at a regional level the ECtHR, may be mandated to address the conduct of all states involved, pronouncements on multiple responsibilities are scarce. *M.S.S.* v. *Belgium and Greece* is one of the few cases where a determination was made of concurrent conduct of multiple states that led to a single harmful outcome.

Despite the absence of an integral approach that addresses both the conduct of the country of origin and that of country of refuge, refugee law adjudication – nationally and internationally – benefits greatly from accountability processes in the more general realm of human rights. Reports and evaluations on the human rights situation in countries of origin of UN or regional supervisory organs facilitate the establishment of facts and circumstances necessary for deciding a claim. As a rule, national decision-makers and courts must take account of all relevant facts (as presented to them) as they relate to the country of origin at the time of taking a decision on the application.[63] This includes information on general human rights circumstances, as well as on laws and regulations of the country of origin and the manner in which they are applied.

Reports by non-governmental organisations or intergovernmental agencies often play a decisive role before the ECtHR and Committee Against Torture. *In NA.* v. *the United Kingdom*, the ECtHR considered that states, 'through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it' and that the same consideration applies to agencies of the UN, given their 'direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which states and non-governmental organisations may not be able to do'.[64] The CAT Committee attaches particular attention in individual complaints to its own monitoring activities in the context of the reporting mechanism, and also refers to other UN human rights protection mechanisms.[65] Rules 62 and 112 of the CAT Committee's Rules of Procedure

[62] J.C. Hathaway, 'New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection' (1995) 8 JRS 288, at 290-291.
[63] Article 4(3)(a) Directive 2011/95/EU, n. 29.
[64] *NA.* v. *the United Kingdom*, n. 61, para. 402.
[65] E.g. *Josu Arkauz Arana* v. *France*, UNCAT, UN Doc. CAT/C/23/D/63/1997 (5 June 2000); *Chedli Ben Ahmed Karoui* v. *Sweden*, UNCAT, UN Doc. CAT/C/28/D/185/2001 (25 May 2002); *G.K.* v. *Switzerland*, UNCAT, UN Doc. CAT/C/30/D/219/2002 (12 May 2003). See extensively Wouters, *International Legal Standards for the Protection from Refoulement*, n. 7, 482.

expressly foresee in the procurement by the Committee of documentation from other United Nations bodies.

The relationship between the removing state's duties and the receiving state's conduct raises a number of distinct obstacles for the adjudication of asylum claims. These concern especially the issues of risk (section 5.1), evidence (section 5.2), and remedies (section 5.3).

5.1 Issues of risk

The prospective character of the prohibition of *refoulement* inherently presupposes a degree of uncertainty. This questions the probability standard used for activating the duty of non-expulsion. Under the Refugee Convention, that standard hinges on the terms 'well-founded fear' and 'threat' used in Articles 1A(2) and 33(1) of the Refugee Convention. Article 3 CAT speaks of 'substantial grounds for believing' that a person 'would be in danger' of being subjected to torture. The ECtHR and HRC have in fairly similar terms construed the prohibition of *refoulement* under Articles 3 ECHR and 7 ICCPR as engaging the expelling state's responsibility 'where substantial grounds have been shown for believing that there is a real risk of ill-treatment'.[66]

Despite the differences in wording, the probability standard actually employed in domestic and international practice shows convergence in respect of the respective treaty provisions. Although the well-founded fear standard of the Refugee Convention has been interpreted as referring to both subjective and objective factors, it is widely agreed that the criterion's application should rest primarily – rather than on the frame of mind of the person concerned – on objective evidence.[67] The element of uncertainty is under all treaty provisions therefore most commonly translated into a forward-looking expectation of risk, to be measured in accordance with objective criteria. Some domestic courts have employed a strict probability calculus, by requiring for example that there is at least a 50 per cent chance ('more likely than

[66] *Soering* v. *the United Kingdom*, n. 11, para. 91; *Saadi* v. *Italy*, n. 57, para. 125; HRC, General Comment No. 31, n. 19, para. 12. In construing this formula, the ECtHR took inspiration in *Soering* from the text of Article 3 CAT, n. 4.

[67] Extensively: A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), 339-342; Goodwin-Gill and McAdam, *The Refugee in International Law*, n. 25, 63-64.

not') of the occurrence taking place.[68] But most states, including the US in respect of the well-founded fear criterion,[69] have come to reject a criterion that is expressed in a percentage. In line with UNHCR guidelines and case law of the ECtHR, the Human Rights Committee and the Committee Against Torture, the test most commonly applied focuses on 'a real risk' or 'reasonable degree'. This does not have to meet the threshold of being highly probable or more likely than not, but the risk does need to go beyond a mere possibility of persecution or ill-treatment to occur.[70]

Moreover, it will normally be simply impossible to couch the risk criterion into a strict probability calculus. The assessment is always case-specific, and, as such, an 'interrelated matter of credibility, plausibility and evidence'.[71] The risk assessment depends on the individual's story, facts and circumstances prevailing in the country of return, as well as the application of specific doctrines in refugee law, such as the relevance of past experience of ill-treatment, the availability of an internal protection alternative, the existence of diplomatic assurances, etcetera.

5.2 Issues of evidence

The risk assessment requires an inquiry into the circumstances prevailing in the other country. This may raise practical as well as procedural issues. The authorities of the expelling state, including courts, may encounter difficulties in collecting evidence and will normally not be empowered to secure evidence in the receiving country. Moreover, to force domestic courts to probe into the domestic affairs of another state may raise issues under the rule of non-inquiry, as developed in US extradition law, which bars courts from supervising the judicial systems or general human rights conditions in another sovereign country.[72] Further, as noted above, the application of the prohibition of *refoulement* by an international court may theoretically raise issues under the ICJ's *Monetary Gold* rule, because it may involve an assessment of the

[68] *Immigration and Naturalization Service* v. *Stevic*, 467 US 407 (S. Ct., 5 June 1984) (in respect of Article 33(1) Refugee Convention, n. 2).
[69] *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 US 421 (S. Ct., 9 March 1987).
[70] UNHCR Handbook, n. 25, paras. 42-44; *Vilvarajah a.o.* v. *the United Kingdom*, n. 60, para. 111; *E.A.* v. *Switzerland*, UNCAT, UN Doc. CAT/C/19/D/028/1995 (10 November 1997), para. 11.3.
[71] Wouters, *International Legal Standards for the Protection from Refoulement*, n. 7, 542-543.
[72] J.T. Parry, 'International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty' (2010) 90 BULR 1973; J. Quigley, 'The Rule of Non-Inquiry and Human Rights Treaties' (1996) 45 CULR 1213. The rule of non-inquiry plays a role in Canadian practice as well: D.K. Piragoff and M.V.J. Kran, 'The impact of human rights principles on extradition from Canada and the United States: The role of national courts' (1992) 3 CLF 225.

possible wrongful conduct of a state that is not party to the proceedings, running counter to the principle that an international court can only exercise jurisdiction over a state with its consent.

By and large, refugee law manages to cope with these obstacles. Although the availability and appreciation of evidence plays a cardinal and often contested role in status determinations, specific doctrines in refugee law serve to compensate for the potential absence of documentary evidence, and especially the difficulty an applicant may have to substantiate a claim. In the first place, reliance is often placed on generally available country of origin information that is produced by either governmental, intergovernmental or non-governmental actors. Secondly, state authorities may verify on an individual basis statements of the applicant, for example through their diplomatic or consular officers. Thirdly, full proof of an asylum claim is not normally required. According to the UNHCR and the ECtHR, asylum seekers whose general credibility is not at issue, must enjoy the 'benefit of the doubt' in view of the difficulty they may have in proving every part of their story.[73] Fourthly, although the initial burden of proof may rest on the shoulder of the claimant, states are required to play an active role in collecting and presenting evidence, and verifying information put forward by the claimant.[74] The UNHCR states that 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner'.[75] A similar standard is used by the ECtHR and the Committee Against Torture.[76] The duty on the part of the state to actively contribute to collecting evidence must be explained from its wider protective duty to not expose someone to ill-treatment once it becomes aware of potential risks.[77]

5.3 Issues of remedies and reparation

The expulsion of aliens as a rule entertains procedural safeguards. According to Article 13 ICCPR and Article 1 Protocol 7 ECHR, expulsions must be based on a decision reached in accordance with law and must be subject to review. 'Arguable complaints' that expulsion

[73] UNHCR Handbook, n. 25, paras. 203-204; *S.H.H.* v. *the United Kingdom*, App. No. 60367/10 (ECtHR, 29 January 2013), para. 71; *N.* v. *Sweden*, App. No. 23505/09 (ECtHR, 20 July 2010), para. 53.
[74] Article 4(1) Directive 2011/95/EU, n. 29.
[75] UNHCR Handbook, n. 25, para. 196.
[76] *A.S.* v. *Sweden*, UNCAT, UN Doc. CAT/C/25/D/149/1999 (15 February 2001), para. 8.6.
[77] Cf. *Balabou Mutombo* v. *Switzerland*, UNCAT, UN Doc. CAT/C/12/D/013/1993 (27 April 1994), para. 9.2.

results in *refoulement* must be subjected to a thorough review and require effective remedies at the domestic level with suspensive effect.[78] Because the moment of expulsion logically precedes the occurrence of harm, there is ample procedural opportunity to prevent an actual harmful result. Ideally, the preventive character of *non-refoulement* would ensure that no issues of reparation arise. In the European context, this preventive function is amplified by the ECtHR's practice of issuing interim measures with the effect of suspending removal decisions until it has thoroughly scrutinised the merits of a complaint. Such orders are binding.[79] In case the ECtHR concludes that expulsion comes in conflict with Article 3 ECHR, it does not, indeed, establish a violation, but employs the standard formula that deportation 'would give rise' to a violation.[80]

Problems in the sphere of reparation do arise in the event the proscribed expulsion occurs. Re-establishment of the situation prior to the expulsion (restitution, Article 35 ARSIWA) would be achieved by retrieving the individual, but depends on the cooperation of the receiving state that will not normally be a party to the proceedings. Moreover, as the ECtHR noted in one case, to request a contracting party to ensure an applicant's release from prison in an absent state, 'would require the respondent Government to interfere with the internal affairs of a sovereign State'.[81]

In a majority of cases where expulsion already took place, the ECtHR merely awards non-pecuniary damages. In *Ben Khemais* v. *Italy*; *Trabelsi* v. *Italy*; *Toumi* v. *Italy*; and *Mannai* v. *Italy*, all concerning the expulsion of terrorist suspects from Italy despite an interim measure of the ECtHR, these ranged from 10.000 to 15.000 euros.[82] The sum of 15.000 euro was also paid in the case of *Labsi* v. *Slovakia*, where Slovakia had ignored an interim measure and had expelled a failed asylum seeker to Algeria.[83] In the case of *M.S.* v. *Belgium*, concerning the expulsion of an Al-Qaeda suspect to Iraq where he was put in detention, the Court refrained from awarding the requested amount of 25.000 euro and noted that 'in the circumstances of the case, the finding of violation sufficient to compensate for the damage suffered by the

[78] *Gebremedhin* v. *France*, App. No. 25389/05 (ECtHR, 26 April 2007), para. 66.
[79] *Mamatkulov and Askarov* v. *Turkey*, n. 57.
[80] E.g. *F.N. a.o.* v. *Sweden*, App. No. 28774/09 (ECtHR, 18 December 2012); *S.F. a.o.* v. *Sweden*, App. No. 52077/10 (ECtHR, 15 May 2012).
[81] *Iskandarov* v. *Russia*, App. No. 17185/05 (ECtHR, 23 September 2010), para. 161.
[82] *Ben Khemais* v. *Italy*, App. No. 246/07 (ECtHR, 24 February 2009); *Trabelsi* v. *Italy*, App. No. 50163/08 (ECtHR, 13 April 2010); *Toumi* v. *Italy*, App. No. 25716/09 (ECtHR, 5 April 2011); and *Mannai* v. *Italy*, App. No. 9961/10 (ECtHR 27 March 2012).
[83] *Labsi* v. *Slovakia*, App. No. 33809/08 (ECtHR, 15 May 2012).

applicant'.[84] This forgiving stance questions not only the primacy to be accorded to restitution as form of reparation, but also the deterrent effect of duties of reparation.

It is notable that the former European Commission of Human Rights displayed less reluctance in ordering measures that would enable expelled persons to return pending the procedure. In the cases of *Cruz Varas* v. *Sweden* and *Mansi* v. *Sweden*, the Commission had indicated to Sweden that it was desirable for the proper conduct of the proceedings before the Commission (current Rule 39 Rules of Court)[85] that the applicants who had been deported to Chile and Jordan respectively, would return to Sweden as soon as possible, and that the Swedish government ought to take measures to that effect.[86] The ECtHR, however, has never referred to the return of the applicant as the most appropriate form of reparation.

There are however instances where removing states were ordered to consult with the receiving country with a view to preventing future ill-treatment. In *Tebourski* v. *France*, the Committee Against Torture considered that France should determine, in consultation with Tunisia whereto he was deported, 'the complainant's current whereabouts and the state of his well-being'.[87] In *Judge* v. *Canada*, the Human Rights Committee called upon Canada to make representations to the United States authorities to prevent the carrying out of the death penalty. Similar considerations were employed in the ECtHR cases *Al-Saadoon and Mufdhi* v. *the United Kingdom*, concerning a prisoner transfer in Iraq and in *Hirsi* v. *Italy*.[88] In the latter case, the ECtHR indicated to the Italian government that it 'must take all possible steps to obtain assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated'.[89]

In the case of *M.S.S.*, the ECtHR derived from Greece's responsibility that it should cease the violations of the applicant's rights under Articles 3 and 13 ECHR, and refrain from deporting the applicant. The additional award for compensation of non-pecuniary damage was allocated on an uneven basis to Greece and Belgium, the latter paying a considerably larger sum. 'Having regard to the responsibility for the different violations of the Convention', the Court

[84] *M.S.* v. *Belgium*, App. No. 50012/08 (ECtHR, 31 January 2012), para. 201.
[85] ECtHR Rules of Court, ECtHR, Registry of the Court, 1 July 2014, available at www.echr.coe.int.
[86] *Cruz Varas a.o.* v. *Sweden*, App. No. 15576/89, Report (EComHR, 7 June 1990), para. 66; *Mansi* v. *Sweden*, App. No. 15658/89, Decision (EComHR, 7 December 1989).
[87] *Adel Tebourski* v. *France*, UNCAT, UN Doc. CAT/C/38/D/300/2006 (11 May 2007), para. 10.
[88] *Al-Saadoon and Mufdhi* v. *the United Kingdom*, n. 39, para. 171: 'For the Court, compliance with their obligations under Article 3 of the Convention requires the Government to seek to put an end to the applicants' suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty'; *Hirsi* v. *Italy*, n. 18.
[89] *Hirsi*, ibid., para. 211.

did distribute the cost and expenses incurred in connection with the proceedings before the Court evenly between the two states.[90]

The indulgence of the Court in formulating reparation obligations beyond financial compensation is not too surprising in view of the fact that 'just satisfaction' – in the form of retrieval of the person concerned or a guarantee against ill-treatment in the receiving country – will normally depend on cooperation by the receiving state. It was only in *M.S.S.* v. *Belgium and Greece* that the Court was able to properly ascertain how reparation obligations in the event of expulsion are to be allocated between the two states involved. It gave precedence, in that case, to Greece's obligation to cease the ongoing violations over ordering Belgium to take back the applicant. In cases concerning expulsion to a non-contracting state however, one might reproach the Court for not obliging, in line with the terms of Article 35 ARSIWA, the expelling state to take measures to ensure the retrieval of the expellee, so long as these would not 'involve a burden out of all proportion'.

6. Conclusion

This chapter submitted that the norm of *non-refoulement* embodies the very phenomenon of shared responsibility, as it necessarily proscribes conduct of one state in relation to potential harm done by another state. Violation of the norm, however, leads to the responsibility of the expelling state before any actual harm occurs, and is construed independently of any responsibility of the other state. The chapter has shown that under international refugee law, and human rights law more generally, specific sets of legal doctrines have been developed that have expanded the norm's scope to a wide variety of scenarios of *refoulement*, including indirect *refoulement* via an intermediary party and *refoulement* resulting in harm done by non-state actors. Further, specific procedural rules, such as relating to the evidentiary standard and the probability standard, respond to the difficulty that the other, receiving state, is not involved in the procedure. Seen in this light, the prohibition of *refoulement* may be regarded as a norm of international law that quite successfully overcomes both material and procedural obstacles for distributing responsibility in situations of shared responsibility. The focus on the independent obligations of the expelling state, which are built on a distinct set of material and

[90] *M.S.S.* v. *Belgium and Greece*, n. 14, paras. 402-423.

procedural standards, ensures that at least one state incurs responsibility in the event an expulsion results in ill-treatment in another state.