

REFUGEE PROTECTION UNDER INTERNATIONAL HUMAN RIGHTS LAW: FROM *NON-REFOULEMENT* TO RESIDENCE AND CITIZENSHIP

María-Teresa Gil-Bazo*

Abstract: This paper examines the contribution of IHRMBs to refugee protection. It first considers the well established position that the principle of *non-refoulement* is enshrined in International Human Rights Law and examines its absolute nature. It then examines some of the recent jurisprudence by IHRMBs where the risk of prohibited treatment arises on account of one of the Refugee Convention grounds for refugee status (namely, race, religion, nationality, membership of a particular social group or political opinion) and identifies the questions that arise from such findings. Last, it examines the jurisprudence of IHRMBs which moves beyond a finding of *non-refoulement* to discuss matters of status and in particular of security of residence. The paper argues that IHRMBs have been instrumental in refugee protection by interpreting International Human Rights Law in an inclusive manner, ultimately contributing to the acceptance by States and UNHCR that protection of the broad categories of refugees covered by International Human Rights Law constitutes a legal obligation (and not merely a discretionary decision) of States under International Law, an understanding that has led to the adoption of specific complementary instruments at regional level and the promotion of complementary forms of protection by UNHCR.

Keywords: International Human Rights Monitoring Bodies, UNHCR, *Non-refoulement*, Residence

1. Introduction

Refugees enjoy a distinct and unique standard of protection under international law within the framework of the international regime for the protection of refugees, which is based on the Convention on the Status of Refugees¹ (hereinafter, the Refugee Convention) and its

* PhD in International Law; Senior Lecturer in Law (Newcastle Law School, Newcastle University) and Member of the Spanish Bar Council.

¹ Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

Protocol.² The Refugee Convention constitutes a continuation of the legal regime for the protection of refugees established in international law in the early 20th Century and it predates the establishment of the international regime for the protection of human rights born in the United Nations (UN) era.

While the forced movement of persons across borders and the granting of asylum to those fleeing persecution are historical constants, refugee protection only became a matter of international law after the First World War. The transformations derived from the dismantling of the Empires and the rapid growth in the control of the movement of persons across international borders led to a response by the League of Nations. And in this way, those movements of persons became of a distinct nature in relation to previous ones, in so far as they left the domain of national jurisdiction to become matters of international concern.³

The League of Nations soon received the mandate to find a solution to the refugee problem. In this way, the understanding developed that refugees were a special group of migrants that required a response from the international community. The adoption of international treaties establishing the standard of treatment in relation to refugees reflected the mutual recognition among states of their obligations in relation to this category of forced migrants.⁴

It is important to notice that these early instruments did not include one of the most fundamental rights of refugees, namely, the right to be granted asylum, an essential premise for the enjoyment of other rights. It is at this time when asylum and refugee status became separate matters, as the definition of the qualifying features of who is a refugee, as well as the status afforded to individuals meeting those criteria, became matters of international law, while the granting of asylum for people fleeing persecution remained (as it had always been) a matter of national sovereignty. This separation between asylum and refugee status was also reflected in the refugee instruments adopted under the auspices of the UN, as neither the Refugee Convention nor its Protocol enshrine the right to asylum for refugees. Indeed, the drafters of the Refugee Convention were well aware that refugees could find themselves without a country of asylum and therefore the Conference that adopted the Convention

² Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 Jan. 1967 (entry into force: 4 Oct. 1967).

³ S. Aga Khan "Legal problems relating to refugees and displaced persons", *Recueil des Cours de l'Académie de Droit International de La Haye*, 149, 1976, 287-352, at 296; E. Reale "Le droit d'asile", *Recueil des Cours de l'Académie de Droit International de La Haye*, 63, 1938, 469-602, at 562.

⁴ For a brief account of international instruments during this period, see G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 3rd ed., Oxford, Oxford University Press, 2007, 16-20.

recommended “that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement” (Recommendation D). The universal regime for the protection of refugees has been complemented overtime by regional instruments on specific aspects of refugee protection, notably the refugee definition and the standard of rights that they are entitled to (refugee status), which do not include the right to asylum or do not do so in an explicit manner.⁵

I have argued elsewhere that the main contribution of International Human Rights Law to the protection of refugees has been precisely to amend the situation just described, in particular by strengthening the protection against *refoulement* and by recognising a right to asylum as a human right.⁶ The 1948 Universal Declaration on Human Rights (UDHR) included asylum among its provisions⁷ and while attempts to translate Article 14 UDHR into a legally binding rule failed in the universal context, the right to asylum is enshrined in international human rights instruments of regional scope.⁸ Indeed, International Human

⁵ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 Sept. 1969 (entry into force: 20 June 1974); Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection on Refugees in Central America, Mexico and Panama, held in Cartagena on 19 – 22 November 1984, available at https://www.oas.org/dil/1984_Cartagena_Declaration_on_Refugees.pdf (last visited 22 Sept. 2014); and in the European Union (EU), 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, 20 Dec. 2011. The Cartagena Declaration expands the refugee definition but does not address issues of status. Article II of the African Convention deals with asylum but it only imposes an obligation on State Parties to “use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees”. In the EU, Directive 2011/95/EU (the so-called Qualifications Directive) does not refer to a right to asylum as such; however the right to be granted status is enshrined in its provisions. For a construction of refugee status and subsidiary protection in the Directive as a right to asylum, see M-T. Gil-Bazo, “Refugee status and subsidiary protection under EC law: the qualification directive and the right to be granted asylum”, in A. Baldaccini, E. Guild, and H. Toner (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford, Hart, 2007, 229-264, at 236–239.

⁶ M-T. Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law*, Ann Arbor, UMI, 1999.

⁷ United Nations General Assembly, *Universal Declaration of Human Rights*, UNGA res. 217 A (III), 10 Dec. 1948, Art. 14, which reads as follows: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

⁸ American Convention on Human Rights (ACHR), 1144 UNTS 123, 22 Nov. 1969 (entry into force: 18 July 1978), Art. 22(7), which recognises “the right to seek and be granted asylum”; African Charter on Human and Peoples’ Rights (ACHPR), 1520 UNTS 217, 27 June 1981 (entry into force: 21 Oct. 1986), Art. 12(3), which recognises the right “to seek and obtain asylum”; and Charter of Fundamental Rights of the European Union, [2000] OJ C 364/1, 18 Dec. 2000 (entry into force: 1 Dec. 2009), Art. 18 – for an interpretation of Art. 18 as recognising a right to asylum for individuals, see M-T. Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law”, *Refugee Survey Quarterly*, 27(3), 2008, 33-52.

Rights Law –if only of regional scope- has enshrined the right to be granted asylum, thus resulting in States acquiring an international law obligation in that respect.

A further most significant element is the way in which refugees can invoke the protection offered by norms of International Human Rights law in order to conform a standard of treatment at all stages in the forced migration process. While the international regime for the protection of refugees offers a specific and unique standard of treatment, international human rights law strengthens that legal framework by allowing refugees to invoke the protection of norms whose scope of application may be wider than those in the refugee regime, such as for instance, the *absolute* prohibition of *refoulement* to situations where there is a real risk of torture or inhuman or degrading treatment or punishment. This in turn leads to the transformation of the refugee definition.⁹ As Lambert explains, the refugee definition in the Refugee Convention “has no equivalent in human rights law [as international human rights instruments apply] to everyone, including refugees in the broadest sense of the word (particularly asylum-seekers, rejected asylum-seekers and refugees denied protection on grounds of national security or public order).”¹⁰ Chetail argues that

human rights law has become the ultimate benchmark for determining who is a refugee. The authoritative intrusion of human rights has proved to be instrumental in infusing a common and dynamic understanding of the refugee definition that is more consonant with and loyal to the evolution of international law.¹¹

These features of the international regime for the protection of human rights have strengthened the position of refugees in International Law. While the international refugee law regime established by the Refugee Convention and its Protocol remains the primary source of refugee rights worldwide, an attempt to identify the rights of refugees under international law by reference to the rights found solely under these two instruments is severely limited, as it overlooks legal entitlements that refugees may hold (as refugees and in other capacities) under other international instruments of universal and regional scope. In fact, Chetail explains that “human rights law has radically informed and transformed the distinctive tenets of the Geneva Convention to such an extent that the normative frame of forced

⁹ Except when otherwise indicated, the term “refugee” in this paper is used in a broad sense, to mean individuals entitled to protection under various different legal grounds.

¹⁰ H. Lambert, “The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities”, *Refugee Survey Quarterly*, 24(2), 2005, 39-55, at 39.

¹¹ V. Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in R. Rubio-Marín (ed.), *Human Rights and Immigration*, Oxford, Oxford University Press, 2014, 19-72, at 28.

migration has been displaced from refugee law to human rights law”¹² and accordingly he argues that “[a]s a result of this systemic evolution, the terms of the debate should be inverted: human rights law is *the* primary source of refugee protection, while the Geneva Convention is bound to play a complementary and secondary role.”¹³

Key to these developments is the work of the International Human Rights Monitoring Bodies (IHRMBs). Despite the lack of an explicit mandate to receive communications from individuals regarding their immigration status, IHRMBs have developed a sound body of jurisprudence on the rights of refugees¹⁴ in relation to entry, stay and non-removal from their countries of asylum. It is now well established that International Human Rights Law protects individuals against *refoulement*, as it will be examined below.¹⁵ However, the jurisprudence of IHRMBs has moved beyond *non-refoulement* to cover entitlements to status, which shall be examined below.¹⁶

Furthermore, a careful examination of decisions shows that IHRMBs often link the risk of *refoulement* to specific grounds, such as religious beliefs and membership of an ethnic group, which according to the Refugee Convention make the individual facing such risk a refugee. Although decisions by IHRMBs do not establish a precedent (and in the case of the UNHCRs are not strictly speaking legally binding) and IHRMBs do not have jurisdiction to pronounce themselves on the refugee status of complainants, the question arises as to the legislative response that may be necessary in order to reconcile a prohibition of forced removal found by an IHRMB (who can only be seized when all domestic remedies have been exhausted), when such prohibition arises from one of the Refugee Convention ground for refugee status. The work of IHRMBs also raises questions about the role of the United Nations High Commissioner for Refugees (UNHCR), whose mandate is the provision of international protection.¹⁷ This is all the more relevant under EU Law, where subsidiary protection is a right of individuals who qualify for it (notably on *non-refoulement* grounds) but who are not refugees within the meaning of the 1951 Refugee Convention.¹⁸

¹² *Ibid.*, 22.

¹³ *Ibid.*

¹⁴ Except when otherwise indicated, the term “refugee” is used in a broad sense, to mean individuals entitled to protection under various different legal grounds.

¹⁵ Section 2.

¹⁶ Section 4.

¹⁷ United Nations General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, UNGA res. 428(V), 14 Dec. 1950, Art. 1.

¹⁸ Art. 18 Qualifications Directive, see above footnote 5.

This paper examines the contribution of IHRMBs to refugee protection. It first considers the well established position that the principle of *non-refoulement* is enshrined in International Human Rights Law and examines its absolute nature. It then examines some of the recent jurisprudence by IHRMBs where the risk of prohibited treatment arises on account of one of the Refugee Convention grounds for refugee status (namely, race, religion, nationality, membership of a particular social group or political opinion) and identifies the questions that arise from such findings. Last, it examines the jurisprudence of IHRMBs which moves beyond a finding of *non-refoulement* alone to discuss matters of status and in particular of security of residence. The paper argues that IHRMBs have been instrumental in refugee protection by interpreting International Human Rights Law in an inclusive manner, ultimately contributing to the acceptance by States and UNHCR that protection of the broad categories of refugees covered by International Human Rights Law constitutes a legal obligation (and not merely a discretionary decision) of States under International Law, an understanding that has led to the adoption of specific complementary instruments at regional level and the promotion of complementary forms of protection by UNHCR.¹⁹

2. International Human Rights Law and the Principle of *Non-Refoulement*

The understanding that international human rights instruments which do not enshrine a right to asylum or an specific *non-refoulement* clause can offer protection to individuals in need of it but who are outside the framework of the Refugee Convention and its Protocol started as a jurisprudential construction within the European regional framework,²⁰ and later in the context of other international human rights instruments.²¹ This developments eventually led to the consolidation of the principle of *non-refoulement* and to the conceptualisation of refugee protection under International Human Rights Law as “complementary protection”. This section examines these developments.

¹⁹ See Subsidiary Status under the EU Qualifications Directive and Executive Committee for the Programme of the United Nations High Commissioner for Refugees, *Safeguarding Asylum*, EXCOM Conclusion No. 82 (XLVIII), 17 Oct. 1997, para. d (vi): “the *obligation* to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards, as set out in relevant international instruments” (emphasis added).

²⁰ See T. Einarsen, “The European Convention on Human Rights and the Notion of an Implied Right to *de facto* asylum”, *International Journal of Refugee Law*, 2(3), 1990, 361-389; N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights*, Strasbourg, Council of Europe, 2010.

²¹ B. Gorlick, “Human Rights and Refugees: Enhancing Protection through International Human Rights Law”, *Nordic Journal of International Law*, 69, 2000, 117-177; B. Gorlick, “The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees”, *International Journal of Refugee Law*, 11, 1999, 479-495; H. Lambert, “Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue”, *International and Comparative Law Quarterly*, 48(3), 1999, 515-544.

2.1. The principle of non-refoulement in International Human Rights Law

From the early 1960s, the now disappeared European Commission of Human Rights (ECommHR), established under the (European) Convention for the Protection of Human Rights and Fundamental Freedoms²² (hereinafter, the ECHR) to monitor compliance by State Parties with the ECHR, found that despite its silence on asylum and *non-refoulement* matters, the Convention could be applicable to instances of forced removal.²³ The Commission developed a formula which made it clear that matters involving the forced removal to a risk of prohibited treatment against Article 3 ECHR could trigger State Parties' responsibilities under this instrument:

[A]lthough the right to political asylum and the right for a person not to be expelled are not as such included among the rights and freedoms set forth in the Convention, the Contracting Parties nevertheless have agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the Convention; [...] therefore, the expulsion of a person may, in certain exceptional cases, be contrary to the Convention and, in particular, to Article 3 (Art. 3) thereof [...]²⁴

The well established jurisprudence of the ECommHR was confirmed in 1989 by the European Court of Human Rights (ECtHR) in *Soering*,²⁵ a case involving extradition. The Court confirmed that "in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee".²⁶ Against the position of the United Kingdom (UK) that the principle of *non-refoulement* was explicitly included in other international treaties and that "it would be straining the language of Article 3 (art. 3) intolerably to hold that by surrendering a fugitive criminal the extraditing State has "subjected" him to any treatment or punishment that he will receive [...] in the receiving State",²⁷ the Court found that these circumstances "cannot, however, absolve the

²² European Convention on Human Rights (ECHR), ETS No. 5, 4 Nov. 1950 (entry into force: 3 Sep. 1953).

²³ European Commission on Human Rights (ECommHR), *X v. Belgium*, Appl. No.984/1961, 1961, 6 *Collection of Decisions* 39.

²⁴ ECommHR, *X. v. the Federal Republic of Germany* (Decision), Appl. No. 4162/69, 1969.

²⁵ European Court of Human Rights (ECtHR), *Soering v. United Kingdom* (Judgment), (1989), Appl. No. 14038/88.

²⁶ *ibid.*, para. 85.

²⁷ *Ibid.*, para. 83.

Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.”²⁸ The Court thus found that despite the lack of an express *non-refoulement* provision in the ECHR, such prohibition was “already inherent in the general terms of article 3”.²⁹ The Court referred to its previous case-law to stress that “the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions”.³⁰

Indeed, the rules of Treaty interpretation are not solely based on the literal interpretation of treaties. Rather on the contrary, the general rule of treaty interpretation establishes 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”.³¹ And the context includes “[a]ny relevant rules of international law applicable in the relations between the parties”.³² Therefore, the existence of specific *non-refoulement* provisions in other international instruments rather than imposing a restrictive literal interpretation of Article 3 ECHR, actually call for an interpretation that takes account of the developing rules of international law in relation to *non-refoulement* and in the light of the object and purpose of the ECHR itself. The Court therefore found that

It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, *however heinous the crime allegedly committed*. Extradition in such circumstances, *while not explicitly referred to* in the brief and general wording of Article 3 (art. 3), *would plainly be contrary to the spirit and intent* of the Article, and in the Court’s view this *inherent obligation* not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).³³

²⁸ *Ibid.*, para. 86.

²⁹ *Ibid.*, para. 88.

³⁰ ECtHR, *Tyrer v. United Kingdom* (Judgment), (1978), Appl. No. 5856/72.

³¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entry into force: 27 Jan. 1980), Art. 31(1) (emphasis added).

³² *Ibid.*, Art. 31(2)(c).

³³ *ibid.*, para. 88 (emphasis added).

The ECtHR has reaffirmed its position consistently over the years, including when confronted with the complex challenges posed by circumstances disturbing public order. In the *Chahal* case, the UK argued that

the guarantees afforded by Article 3 (art. 3) were not absolute in cases where a Contracting State proposed to remove an individual from its territory. Instead, in such cases [...] various factors should be taken into account, including the danger posed by the person in question to the security of the host nation. Thus, there was an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds. [...] In the alternative, the threat posed by an individual to the national security of the Contracting State was a factor to be *weighed in the balance* when considering the issues under Article 3 (art. 3). [...] The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.³⁴

The Court's response was unequivocal. While it acknowledged "the immense difficulties faced by States in modern times in protecting their communities from terrorist violence",³⁵ it also reaffirmed that just as "the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, *irrespective of the victim's conduct* [...] even in the event of a public emergency threatening the life of the nation [...]. The prohibition provided by Article 3 (art. 3) against *ill-treatment* is equally *absolute* in expulsion cases."³⁶ The Court's doctrinal position was worded in the following terms:

Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.³⁷

³⁴ ECtHR, *Chahal v. United Kingdom* (Judgment), (1996), Application No. 22414/93, para. 76 (emphasis added).

³⁵ *ibid.*, para. 79.

³⁶ *ibid.*, paras. 79-80 (emphasis added).

³⁷ *ibid.*, para. 80.

This is a pre-copyedited, author-produced PDF of an article accepted for publication in the Refugee Survey Quarterly following peer review. The version of record M-T Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34(1) Refugee Survey Quarterly is available online at: <http://rsq.oxfordjournals.org>.

The Court specifically referred to the interaction between the ECHR and the Refugee Convention in this regard, affirming that “[t]he protection afforded by Article 3 (art. 3) is thus wider than that provided by Articles 32 and 33 of the [Refugee Convention]”.³⁸

Despite attempts to reopen the discussion in the same terms (that is, the need to conduct a balancing test when national security issues are at stake), the Court has maintained its position on the absolute nature of the prohibition to remove someone to a risk of torture or to inhuman or degrading treatment or punishment. In the *Saadi* case, the UK attempted to reverse the *Chahal* doctrine. Although *Saadi* was a case against Italy and the Italian Government was not questioning the absolute nature of Article 3, the UK Government sought to intervene as a third-party in order to try and reverse the Court’s well-established case-law, given that in its view, “because of its rigidity that principle had caused many difficulties for the Contracting States by preventing them in practice from enforcing expulsion measures”.³⁹ The UK argued that “in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* (which did not reflect a universally recognised moral imperative and was in contradiction with the intentions of the original signatories of the Convention) had to be altered and clarified”.⁴⁰

The UK’s reference to a “universally recognised moral imperative” is intriguing, as it is its reference to “the intentions of the original signatories of the Convention”. Either the UK suggests that the prohibition to remove someone to a risk of torture has no strong moral foundation or it persists in attempting to build the argument (consistently rejected by IHRMBs) that although State Parties to the ECHR intended to create a legally binding obligation among themselves to prohibit torture, they also intended to retain the power to put someone at a risk of torture elsewhere, as long as such risk is at the hands of another State.

The morality of torture has been explored at length in the literature and it is beyond the scope of this paper. Suffice to note that one of the scholars who has explored the relationship between the morality and the legality of torture at length concludes that torture must always remain illegal:

Does the possibility that torture might be justifiable in some of the rarefied situations which can be imagined provide any reason to consider relaxing the legal prohibitions against it? Absolutely not. The distance between the situations which must be

³⁸ *ibid.*

³⁹ ECtHR, *Saadi v. Italy* (Judgment), (2008), Application No. 37201/06, para. 117.

⁴⁰ *ibid.*, para. 122.

concocted in order to have a plausible case of morally permissible torture and the situations which actually occur is, if anything, further reason why the existing prohibitions against torture should remain and should be strengthened [...]⁴¹

As for the extraterritorial application of International Human Rights Law which the UK insisted in questioning, IHRMBs have consistently affirmed that States are prevented from doing abroad what they are forbidden to do at home. As early as 1981, the Human Rights Committee (HRC), established by Article 28 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR),⁴² clarified that the duties of State Parties towards individuals subject to their jurisdiction do not refer “to the place where the violation occurred, but rather to *the relationship between the individual and the State* in relation to a violation of any of the rights set forth in the Covenant, *wherever they occurred*.”⁴³ This position has been consistently held by IHRMBs and it has been well explored in the literature.⁴⁴

The ECtHR rejected the UK arguments in *Saadi* and it took the chance to note that it had already done so before: “The Court further observes that similar arguments to those put forward by the third-party intervener in the present case have already been rejected in the *Chahal* judgment cited above.”⁴⁵ The Court reaffirmed that

[s]ince protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule [...]. It must therefore reaffirm the principle stated in *Chahal* [...] that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where

⁴¹ H. Shue, “Torture”, in S. Levinson (ed.), *Torture. A Collection*, Oxford, Oxford University Press, 2006, 47-60, at 58.

⁴² International Covenant on Civil and Political Rights, 999 UNTS 171, 16 Dec. 1966 (entry into force: 23 March 1976).

⁴³ United Nations Human Rights Committee (HRC), *López Burgos v. Uruguay* (1981), Communication No. 52/1979, para. 12.2. The HRC confirmed and developed its position in a General Comment adopted in 2004; United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 10.

⁴⁴ For an analysis of the extraterritorial application of human rights treaties, see for instance R. Wilde, “The extraterritorial application of international human rights law on civil and political rights”, in N. Rodley and S. Sheeran (eds.), *Routledge Handbook on Human Rights*, London, Routledge, 2013, 635-661. For a discussion of the territorial scope of the Refugee Convention, including extraterritorially, see M-T. Gil-Bazo, “Article 40 1951 Convention (Territorial application clause)”, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford, Oxford University Press, 2011, 1567-1588.

⁴⁵ See above footnote 31, para. 141.

such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the [Refugee Convention]⁴⁶

The absolute nature of the prohibition to remove someone to a risk of torture has also been affirmed by the IHRMBs in the universal system. As in the case of the ECHR, the ICCPR does not include a specific *non-refoulement* provision. Although the HRC's attitude was hesitant at first towards finding an implicit prohibition of *non-refoulement* in the ICCPR (and notably on Articles 6 and 7, on the right to life and the prohibition of torture, respectively), it evolved over time to accept such prohibition, most likely influenced by the case-law of the ECtHR. The HRC was confronted with the question for the first time in an extradition case lodged in 1987.⁴⁷ The author of the communication referred to the jurisprudence by the ECommHR and against the State Party's observations that there is no right to asylum in the ICCPR and that accordingly that aspect of the Communication should be declared inadmissible *ratione materiae*,⁴⁸ the author argued that "his communication does not invoke a right of asylum, and that a distinction must be made between the request for a right of asylum, and *asylum resulting from the establishment of certain mechanisms to remedy violations of the Covenant* alleged by individuals",⁴⁹ which constitutes the object of the Communication. The HRC was however not persuaded to express itself on this matter and declared its lack of jurisdiction noting that "[w]ith regard to article 6 of the Covenant, the author has merely expressed fear for his life in the hypothetical case that he should be deported to El Salvador. *The Committee cannot examine hypothetical violations of Covenant rights which might occur in the future*".⁵⁰ It is worth noting that at that time the ECtHR had not yet expressed itself on an implicit right to *non-refoulement* derived from the prohibition of torture in Article 3 ECHR and perhaps the HRC did not find the ECommHR jurisprudence persuasive enough to go beyond the literal terms of Article 6 ICCPR. A few years later however, and following the *Soering* case, the HRC modified its approach. In the case of *Kindler*, where Articles 6 and 7 ICCPR were invoked, the HRC held that

⁴⁶ *ibid.*, para. 138.

⁴⁷ HRC, *V.M.R.B. v. Canada* (1988), Communication No. 236/1987.

⁴⁸ *ibid.*, para. 4.3.

⁴⁹ *ibid.*, (emphasis added).

⁵⁰ *ibid.* para. 6.3 (emphasis added).

what is at issue is [...] whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant. States parties to the Covenant will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most essential of these rights.⁵¹

Accordingly, “[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”⁵² Although the HRC eventually declared that no violation of Articles 6 and 7 ICCPR had taken place,⁵³ the decision was controversial, resulting in seven members of the HRC issuing individual opinions. Once the principle had been established that force removal resulting in a violation of the ICCPR-guaranteed rights could engage the responsibility of State Parties, the HRC found a violation of Article 7 ICCPR for the first time in an extradition case a few months later, in the case of *Ng*.⁵⁴ This decision was also controversial, resulting in nine members of the HRC issuing individual opinions.

Today the position of the HRC in relation to *non-refoulement* is unequivocal and has been summarised in its General Comment No. 31:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed⁵⁵

The HRC has also confirmed

⁵¹ HRC, *Joseph Kindler v. Canada* (1993), Communication No. 470/1991, para. 13.1.

⁵² *ibid.*, para. 13.2.

⁵³ *ibid.*, para. 16.

⁵⁴ HRC, *Ng v. Canada* (1993), Communication No. 469/1991.

⁵⁵ See above footnote 35, para. 12.

the *absolute nature* of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments *can never be justified on the basis of a balance* to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, *even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency*, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.⁵⁶

Unlike previous human rights instruments, the Convention Against Torture⁵⁷ (hereinafter, CAT) was the first international human rights treaty of universal scope (after the Refugee Convention) to include an express *non-refoulement* provision. Unlike Article 33 of the Refugee Convention, Article 3 CAT does not allow for derogations or exceptions: "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." Negotiations on this article were far from smooth. The *travaux préparatoires* show the divergent positions among delegations on the scope of application of Article 3, but also the strong support that the inclusion of *non-refoulement* provision received by States. The original proposal on Article 3 (presented by Sweden in 1979) contained a clause aimed at delimiting the application of the provision in relation to prosecuting certain international crimes by establishing that the *non-refoulement* clause shall not be invoked in order not to prosecute crimes against peace, crimes against humanity or war crimes.⁵⁸ However further to discussions, States rejected the inclusion of the principle *aut dedere aut judicare* in a second paragraph of Article 3, as delegations feared that it may be interpreted to restrict the scope of application of the principle of *non-refoulement*.⁵⁹

The principle *aut dedere aut judicare* did find its way into the Convention as a separate provision in Article 7(1) -in relation to extradition- and the International Court of Justice (ICJ) has had the chance to pronounce itself on it in the case of Hissène Habré, the former President of the Republic of Chad in the 1980s who found refuge in Senegal. In the

⁵⁶ HRC, *Concluding observations of the Human Rights Committee. Canada*, UN Doc. CCPR/C/CAN/CO/5, 20 Apr. 2006, para. 15 (emphasis added).

⁵⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 Dec. 1984 (entry into force: 26 June 1987).

⁵⁸ UN Doc. E/CN.4/L.1470.

⁵⁹ *Ibid.*, and also UN Doc. E/CN.4/1367 and UN Doc. E/CN.4/L.1567. For an overview and discussion of the drafting history of Article 3, see above Gil-Bazo footnote 6, pp. 233-238.

ICJ's view, the consequence of this treaty obligation is not a prohibition to grant protection (as in fact, States also have a *non-refoulement* obligation under Article 3), but rather a limitation for States to do so. The Court ruled that "Senegal must [...] take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, *if it does not extradite* Mr. Habré" (emphasis added).⁶⁰ The Court noted that while prosecution is an obligation under the CAT, extradition is merely an option: "[e]xtradition is an option offered to the State by the Convention"⁶¹ in order to facilitate State compliance with the Convention's purpose "to prevent alleged perpetrators of acts of torture from going unpunished."⁶² Furthermore, extradition may be hindered if its requirements cannot be met. In the case in question, the Court recalls that the individual can only be extradited "to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him",⁶³ which allows extradition only to States who can claim jurisdiction on the basis of the territorial or nationality principles.⁶⁴

Further evidence of the absolute nature of the *non-refoulement* prohibition under Article 3 CAT can be found in the position of States regarding reservations to this provision. The reservation on Article 3 CAT introduced by Chile at the time of its ratification on 30 September 1988 "by reason of the discretionary and subjective nature of the terms in which it is drafted"⁶⁵ was met with the strongest opposition by other State Parties. Australia, Austria, Bulgaria, Canada, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Norway, New Zealand, Portugal, UK, and Sweden all rejected Chile's reservation immediately on the grounds that it was incompatible with the object and purpose of the treaty,⁶⁶ which is "to strengthen the existing prohibition of torture and similar practices", thus forcing Chile to withdraw it on 7 September 1990.⁶⁷ The strong and unequivocal rejection against the reservation to Article 3 reflects the understanding among State Parties about its non-derogable character.

The Committee Against Torture (CteAT) set up under Article 17 CAT has affirmed consistently the absolute nature of the *non-refoulement* prohibition enshrined in Article 3

⁶⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Reports 422, para. 121.

⁶¹ *Ibid.*, para. 95.

⁶² *Ibid.*, para. 120.

⁶³ *Ibid.*

⁶⁴ Article 5(1) CAT.

⁶⁵ UN Doc. CAT/C/2/rev.5, p. 12.

⁶⁶ *Ibid.*

⁶⁷ See above footnote 57, the Netherlands, p. 28.

CAT, even in cases involving national security: “The Committee recalls that the Convention’s protections are absolute, even in the context of national security concerns”⁶⁸ and where the individual falls under the exclusion clauses of Article 1F of the Refugee Convention:

The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. *The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention*⁶⁹

The CteAT’s contribution to the principle of *non-refoulement* is explored in its various nuances by a separate contribution to this Special Issue and therefore, there is no need to elaborate further on it at this stage.⁷⁰

In sum, the prohibition to remove someone to a risk of prohibited treatment has been unequivocally reaffirmed by IHRMBs, both at the universal and regional levels, either on the basis of an express *non-refoulement* provision (CAT) or more generally as implicitly enshrined in other human rights obligations under relevant international human rights instruments (ICCPR, ECHR). The prohibition is absolute, allowing for no derogation or exception under any circumstances, in the case where the force removal exposes an individual to a risk of torture and other inhuman or degrading treatment or punishment.⁷¹ The principle of *non-refoulement* is accepted by State Parties to the Refugee Convention and its Protocol and by UNHCR as customary international law,⁷² a view generally supported by the

⁶⁸ United Nations Committee Against Torture (CteAT), *Agiza v. Sweden* (2005), Communication No. 233/2003, para. 13.8.

⁶⁹ CteAT, *Tapia Paez v. Sweden* (1997), Communication No. 39/1996, para. 14.5.

⁷⁰ See F. M. Mariño Menéndez, “Recent Jurisprudence by the United Nations Committee Against Torture and the International Protection of Refugees”.

⁷¹ R. Bruin and K. Wouters, “Terrorism And The Non-Derogability Of *Non-Refoulement*”, *International Journal of Refugee Law*, 15(1), 2003, 5-29. Although the wording of Art. 3 CAT exclusively refers to torture, the CteAT has taken a wholistic approach, noting a continuity between torture and other categories of prohibited treatment: “The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. [...] In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure” (emphasis added); United Nations Committee Against Torture, *General Comment No. 2: Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 3. The matter is analysed extensively in another contribution to this Special Issue; see F. M. Mariño Menéndez, “Recent Jurisprudence”, see above 70.

⁷² Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of*

This is a pre-copyedited, author-produced PDF of an article accepted for publication in the *Refugee Survey Quarterly* following peer review. The version of record M-T Gil-Bazo, 'Refugee Protection under International Human Rights Law: From *Non-Refoulement* to Residence and Citizenship' (2015) 34(1) *Refugee Survey Quarterly* is available online at: <http://rsq.oxfordjournals.org>.

literature,⁷³ while States in the Latin American region affirm its *jus cogens* nature,⁷⁴ a view which has also found some echo in the literature.⁷⁵

2.2. Protection under human rights law: complementary protection

The principle of *non-refoulement* in human rights instruments, which allows for no derogation or exception and applies without a link to a particular status (race, religion, nationality, membership of a particular social group or political opinion), and thus broadens the protection offered by the Refugee Convention has had an enormous impact on the way in which refugee protection is now conceptualised. Developments by IHRMBs have been incorporated into national legislation, although this has taken different forms, notably, the granting of a single status (as it is the case in the US and Canada, and used to be the case in Spain prior to the 1994 reform), while in the EU they have led to a specific and separate status called subsidiary protection. I have argued elsewhere that individuals who benefit from the protection of this “expanded” principle of *non-refoulement* have a right to asylum, together with individuals who meet the criteria in the Refugee Convention.⁷⁶ The term asylum refers to the institution for protection, which is historically well known, and it is different from refugee status, as the latter refers to one of the categories of individuals –among others- who qualify for such protection under international law and the standard of treatment that they are to receive. The term and content of asylum as the institution for protection known historically to international law, is not defined by any international instruments. State practice shows that it has been conceptualised in different ways through history to include different categories of individuals, including refugees within the meaning of the Refugee Convention, but also others. This is currently the case in a number of constitutions worldwide.⁷⁷

Refugees, 13 Dec. 2001, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002, Preamble, para 4; United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, Jan. 2007, para. 15.

⁷³ Sir 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*, Cambridge, Cambridge University Press, 2003, 89-177, at 155-158; but cf J. Hathaway, “The Rights of Refugees under International Law”, Cambridge, Cambridge University Press, 2005, 363-367.

⁷⁴ “This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*”, Cartagena Declaration, see above footnote 5, para. 5.

⁷⁵ J. Allain, “The *Jus Cogens* Nature of Non-Refoulement”, *International Journal of Refugee Law*, 13, 2001, 533-558.

⁷⁶ See above footnote 6. See also, M-T. Gil-Bazo, “Respuestas del Derecho internacional ante la transformación del régimen de asilo en Europa”, *Migraciones*, 1, 1997, 217-272.

⁷⁷ M-T. Gil-Bazo, “Asylum in the practice of Latin American and African States”, *New Issues in Refugee Research*, 249, Jan. 2013.

Developments in the European Union led to eventually to the adoption of the first legal instrument of supranational nature containing a separate status for individuals protected under international human rights law, which is to be complementary to the Refugee Convention, rather than to the adoption of a single status for all persons granted asylum, whether on Refugee Convention grounds or on international human rights law grounds. This is a regrettable approach and one that the European Commission and EU Member States might need to revise. As McAdam explains

it is essential to appreciate that the 'complementary' aspect of 'complementary protection' [derived from international human rights law] is not the form of protection or resultant status accorded to an individual, but rather the *source* of the additional protection. Its chief function is to provide an alternative basis for eligibility for protection.⁷⁸

The adoption of a Subsidiary Protection Status at EU level finds its roots in the 1996 Amsterdam Treaty, which introduced a mandate for the Council of Ministers of the EU to adopt legislation (minimum standards) "for persons who otherwise need international protection"⁷⁹ (in addition to refugee status and temporary protection). Although Member States already had a variety of so-called "B Statuses", while others granted a single asylum status for everyone in need of protection, regardless of the qualifying grounds, the term "Subsidiary Protection" was only coined later by the European Commission in its paper opening the ground for discussion on a uniform status for persons granted asylum. The Commission considered the option of having "[a] single status, conferring the same types of rights on refugees recognised under the Geneva Convention and on persons enjoying subsidiary protection".⁸⁰ However, this option was not favoured by all Member States and therefore, the Commission's proposal for a Directive on the matter introduced two separate statuses. The Proposal's Explanatory Memorandum notes that Subsidiary Protection is of complementary nature to the Refugee Convention and based on international human rights law:

⁷⁸ J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007, 23.

⁷⁹ Art. 63(3)(a) Treaty Establishing the European Community (TEC), as amended by the Amsterdam Treaty, OJ C 340/173, 10 Nov. 1997.

⁸⁰ European Commission, *Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum*, COM(2000) 755 final, 22 Nov. 2000, p. 12.

The subsidiary protection measures proposed are considered *complementary to the protection regime enshrined in the Geneva Convention and its 1967 Protocol* and are to be implemented in such a manner that they do not undermine but instead *complement the existing refugee protection regime*. The definition of subsidiary protection employed in this Proposal is *based largely on international human rights instruments*.⁸¹

This regional approach seems to have been later endorsed globally by UNHCR, which considered complementary protection in its 2000 Global Consultations and rather than calling for an expanded refugee definition (as in the African or Latin American regions) or a single status for all persons in need of protection, adopted an Agenda for protection with two concrete objectives regarding the complementary protection framework:

Within the framework of its mandate, ExCom to work on a Conclusion containing guidance on general principles upon which complementary *forms* of protection should be based, on the persons who might benefit from it, and on the compatibility of these protections with the 1951 Convention and other relevant international and regional instruments.

States to consider the merits of establishing a single procedure in which there is first an examination of the 1951 Convention grounds for refugee status, to be followed, as necessary and appropriate, by the examination of the possible grounds for *the grant of complementary forms of protection*.⁸²

ExCom's Conclusion was eventually adopted in 2005 promoting the use of complementary protection among States worldwide: "The Executive Committee [...] [e]ncourages the use of complementary *forms* of protection for individuals in need of international protection who do not meet the refugee definition under the 1951 Convention or the 1967 Protocol".⁸³

3. International Human Rights Monitoring Bodies and Findings of Persecution and/or Risk of Prohibited Treatment on Refugee Convention grounds

⁸¹ European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (presented by the Commission)*, COM(2001) 510 final, 12 Sept. 2001, p. 5 (emphasis added). The Directive as eventually adopted in 2004 reflected these two separate statuses, which were later confirmed in the Recast Directive of 2011; Council Directive 2004/83/EC, see above footnote 5.

⁸² United Nations High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection. Agenda for Protection*, UN Doc. A/AC.96/965/Add.1, 26 June 2002, Goal 1, Objective 3, pp. 6-7 (emphasis added).

⁸³ Executive Committee for the Programme of the United Nations High Commissioner for Refugees, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, EXCOM Conclusion No. 103 (LVI), 7 Oct. 2005, para. (i) (emphasis added).

The role of IHRMBs seems to be taking a step beyond the mere finding of a violation of the principle of *non-refoulement* to ascertaining a causal link between the risk of prohibited treatment under international human rights law and one of the Refugee Convention grounds (race, religion, nationality, membership of a particular social group or political opinion). This raises important issues in so far as it suggests that the person –who must have exhausted all domestic remedies before bringing a claim to an IHRMB- is not only protected by international human rights law against *refoulement*, but is also a refugee within the meaning of the Refugee Convention. Yet, IHRMBs have no jurisdiction to determine refugee status and therefore, such findings do not automatically result in the recognition of refugee status.

In recent years a trend seems to be emerging for IHRMBs to go beyond the finding that a forced removal is or would be in violation of the relevant treaty provision to link the risk of such violation to one of the Refugee Convention grounds, such as religious beliefs, ethnicity, membership of a particular social group or (real or imputed) political opinion.

3.1. Risk of prohibited treatment arising from race

IHRMBs have often made reference to the individual's ethnic membership as the source of the risk of prohibited treatment. As Hathaway and Foster explain the term race is to be given a broad meaning "to include all forms of identifiable ethnicity."⁸⁴ They further explain that race within the meaning of the Refugee Convention "may be defined by ethnicity or cultural or linguistic distinctiveness, and frequently overlaps with other Convention grounds."⁸⁵

In the much discussed case of *Salah Sheekh*, the ECtHR found that risk of prohibited treatment in violation of Article 3 ECHR arose from the applicant's membership of a minority and that such membership (given the particular circumstances of the case) was in itself sufficient evidence of a real risk.⁸⁶

Similar findings have been made by other IHRMBs in the universal system. In *SM, HM and AM*,⁸⁷ the CteAT noted that

the complainants' claim that they run a risk of torture in Azerbaijan *on account of S.M.'s mixed origin*, which makes them a target for the authorities in their home

⁸⁴ J. Hathaway and M. Foster, *The Law of Refugee Status*, 2nd ed., Cambridge, Cambridge University Press, 2014, 394.

⁸⁵ *Ibid.*, 397.

⁸⁶ ECtHR, *Salah Sheekh v. the Netherlands* (2007), Application No. 1948/04, para. 148.

⁸⁷ CteAT, *S.M., H.M. and A.M. v. Sweden* (2011), Communication No. 374/2009.

country. It further notes their allegation that due to S.M.'s Armenian origins, the whole family was subjected to *ethnically motivated persecution*⁸⁸

The Committee found that on the basis of the authors' prior experiences and general information available to the Committee, according to which a hostile attitude on the part of the general public *towards ethnic Armenians living in Azerbaijan* is still widespread, [...] *persons of Armenian origin are at risk of discrimination* in their daily life, [...] they are harassed or bribes are requested by low-ranking officials when they apply for passports and they often conceal their identity by legally changing the ethnic designation in their passports, the Committee considers that the complainants' return to Azerbaijan would expose them to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention.⁸⁹

3.2. Risk of prohibited treatment arising from religious beliefs

In *Abdussamatov*,⁹⁰ the CteAT examined a complaint by a group of 29 Uzbeks who were "practitioners of Islam and fled Uzbekistan for fear of persecution for practising their religion. Twelve (12) complainants were recognized as mandate refugees by the Office of the United Nations High Commissioner for Refugees (UNHCR) between 2005 and March 2010."⁹¹ Most of the complainants had been recognised as refugees by UNHCR and others were asylum-seekers at the time of their extradition to Uzbekistan on the grounds of their commission of serious crimes. According to the complainants

Pursuant to article 12 of [Kazakhstan's] Refugee Act, refugee status cannot be granted where there are serious grounds to believe that the interested individuals participate or had participated in the activities of forbidden religious organizations. *On this ground*, having studied the materials on file, *UNHCR has decided to annul the refugee certificates* previously issued to a number of the complainants.⁹²

The complainants also noted that "[a]n expert from UNHCR in Geneva participated in the examination and had access to all meetings and documentation" in the extradition process.⁹³ UNHCR's role in the extradition process as well as its decision to withdraw status -as

⁸⁸ *Ibid.*, para. 9.6 (emphasis added).

⁸⁹ *Ibid.*, para. 9.7 (emphasis added).

⁹⁰ CteAT, *Toirjon Abdussamatov and 28 other complainants v. Kazakhstan* (2012), Communication No. 444/2010.

⁹¹ *Ibid.*, para. 2.1.

⁹² *Ibid.*, para. 6.3 (emphasis added).

⁹³ *Ibid.*, para. 4.1.

communicated by the applicants- is not disputed in the proceedings. In fact, the Committee noted

the State party's assertion that its proceedings were monitored by UNHCR [...] The Committee further notes counsel's claim that in the cases of four of the 29 complainants UNHCR was against their extradition and that counsel did not have access to information about the UNHCR position in other cases⁹⁴

The Committee found that the complainants' extradition was a violation of Article 3 CAT and noted that "all 29 complainants are Muslims reportedly practising their religion outside of official Uzbek institutions or belonging to religious extremist organizations."⁹⁵ The Committee further elaborated on this point:

[T]he Committee considers that in its own concluding observations, as well as in the information presented to it, the pattern of gross, flagrant or mass violations of human rights and the significant risk of torture or other cruel, inhuman or degrading treatment in Uzbekistan, *in particular for individuals practising their faith outside of the official framework*, has been sufficiently established. In addition, it observes that the complainants argued that they were *subjected to religious persecution*, in some cases including detention and torture, before they fled to Kazakhstan."⁹⁶

The HRC has also made similar findings. In Choudhary,⁹⁷

the Committee notes that recent reports point to the fact that *religious minorities*, including Shias, continue to *face fierce persecution* and insecurity; that the Pakistani authorities are unable, or unwilling, to protect them; that the Government of Pakistan has dropped a proposed amendment to section 295(C) of the Criminal Code (i.e. the blasphemy law) [...] and that there has been an upsurge of blasphemy cases in 2012.⁹⁸

The HRC therefore found that expulsion would constitute a violation of Articles 6 and 7 ICCPR:

In the light of the situation prevailing in Pakistan, due weight must be given to the author's allegations. In this context, the Committee has taken note of the allegations that a fatwa had been issued against the author and a First Information Report had

⁹⁴ *Ibid.*, para. 13.5. This author contacted UNHCR Geneva to seek confirmation of its involvement in this case, which was confirmed (exchanges on file with author).

⁹⁵ *Ibid.*, para. 13.7.

⁹⁶ *Ibid.*, para. 13.8.

⁹⁷ *Naveed Akram Choudhary v. Canada* (2013), Communication No. 1898/2009.

⁹⁸ *Ibid.*, para. 9.7.

been filed against him under the blasphemy law, and that blasphemy charges incur the death penalty under the criminal law of Pakistan. While death sentences have reportedly not been carried out, several instances of *extrajudicial assassination*, by private actors, of members of religious minorities accused under the blasphemy law have been reported, without the Pakistani authorities being willing, or able, to protect them.⁹⁹

3.3. Risk of prohibited treatment arising from political opinion

Political dissent has also been noted by IHRMBs as the reason for the risk of prohibited treatment. In *Maksudov*,¹⁰⁰ the HRC examined the case of four complainants, all Uzbek nationals who at the time of submission of their cases had been recognised as refugees by UNHCR and were held in a detention awaiting removal to Uzbekistan on the basis of an extradition request.¹⁰¹ The HRC found a violation of Articles 6 and 7 ICCPR. The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the authors' extradition that there were widely noted and credible public reports that Uzbekistan resorted to consistent and widespread use of torture against detainees¹³ and that *the risk of such treatment was usually high in the case of detainees held for political and security reasons*. In the Committee's view, these elements in their combination show that the authors faced a real risk of torture in Uzbekistan if extradited.¹⁰²

Likewise, in *Hamida*,¹⁰³ the Committee considered "that the author has provided substantial evidence of a real and personal risk of his being subjected to treatment contrary to article 7 of the Covenant, on account of his dissent in the Tunisian police"¹⁰⁴ and concluded that "there is a real risk of the author *being regarded as a political opponent and therefore subjected to torture*. This risk is increased by the asylum application which he submitted in Canada, since this makes it all the more possible that the author will be *seen as a regime opponent*."¹⁰⁵ The Committee found that the expulsion order (if enforced) would constitute a violation of the principle of *non-refoulement* enshrined in Article 7 ICCPR.

⁹⁹ *Ibid.*, para. 9.8.

¹⁰⁰ HRC, *Maksudov et al v. Kyrgyzstan* (2008), Communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006.

¹⁰¹ *Ibid.*, para. 1.1. Interim measures issued by the HRC were disregarded and the complainants were extradited; *ibid.*, para. 1.2.

¹⁰² *Ibid.*, para. 12.5.

¹⁰³ HRC, *Hamida v Canada* (2010), Communication No. 1544/2007.

¹⁰⁴ *Ibid.*, para. 8.7.

¹⁰⁵ *Ibid.*

3.4. Risk of prohibited treatment arising from membership from a particular social group

Membership from a particular social group has also been found to be at the origin of the risk. In *M. I.*¹⁰⁶ the Committee noted “the author’s claim that her return to Bangladesh would expose her to a risk of torture and other cruel, inhuman or degrading treatment or punishment, *due to her sexual orientation.*”¹⁰⁷ The Committee found that expulsion would expose the author of the communication to a risk of torture observing that

the Criminal Code of Bangladesh forbids homosexual acts; and that homosexuals are stigmatized in Bangladesh society. The Committee considers that *the existence of such a law in itself fosters the stigmatization of LGTB individuals* and constitutes an obstacle to the investigation and sanction of *acts of persecution* against these persons. The Committee considers that in deciding her asylum request the State party’s authorities focused mainly on inconsistencies and ambiguities in the author’s account of specific supporting facts. However, the inconsistencies and ambiguities mentioned are not of a nature as to undermine *the reality of the feared risks*. Against the background of the situation faced by persons belonging to sexual minorities, as reflected in reports provided by the parties, the Committee is of the view that, in the particular case of the author, the State party failed to take into due consideration the author’s allegations regarding the events she experienced in Bangladesh *because of her sexual orientation* — in particular her mistreatment by the police — in assessing the alleged risk she would face if returned to her country of origin. Accordingly, in such circumstances, the Committee considers that the author’s deportation to Bangladesh would constitute a violation of article 7 of the Covenant.¹⁰⁸

The Committee further reminded the State Party that it is also “under the obligation to take steps to prevent similar violations in the future.”¹⁰⁹

3.5. Protection under human rights instruments, refugee status and the role of UNHCR

The previous sections have shown that the interpretation of international human rights treaties by IHRMBs cannot be dissociated from its implications for the interpretation of the Refugee Convention. The obvious conclusion to the previous analysis is that if the bodies entrusted by States Parties with the authority to undertake an authentic interpretation of international human rights treaties find that an applicant is at risk of prohibited treatment due to his or her

¹⁰⁶ HRC, *M. I. v. Sweden* (2013), Communication No. 2149/2012.

¹⁰⁷ *Ibid.*, para. 7.2.

¹⁰⁸ *Ibid.*, para. 7.5.

¹⁰⁹ *Ibid.*, para. 9.

ethnic background, religious beliefs, political opinion or membership of a particular social group, then it follows that the applicant *is* a refugee within the meaning of the Refugee Convention. While IHRMBs do not have jurisdiction to interpret the Refugee Convention, State Parties to this instrument who are also bound by other international human rights treaties *must* find a way to reconcile their obligations under the various instruments.

In particular, the question arises as to the mechanism to implement decisions by IHRMBs in the domestic legal order, and in particular, the consideration that the means that a State Party to the relevant instrument may choose to undertake *must* necessarily be those that reconcile its obligations both under International Human Rights Law and under International Refugee Law. And this may mean that the only appropriate means to do so is by recognising refugee status and granting asylum.

In this regard, the role of UNHCR is crucial. While UNHCR is not an IHRMB and it lacks the impartiality and objectivity that is expected from IHRMBs, its mandate requires UNHCR to be concerned with refugee *protection* and Article 35 of the Refugee Convention imposes on State Parties an obligation to cooperate with UNHCR in the exercise of its functions, and therefore in the provision of protection.¹¹⁰ UNHCR however does not seem to have played a fundamental role in the promotion of refugee-relevant UN human rights standards so far, and it has certainly withdrawn in cases involving national security, as it has been noted above. It appears that this is an area in which UNHCR can develop further creative thinking, perhaps in a similar way as it has already done in the context of the EU.¹¹¹

In the European context, the duty to comply with International Human Rights obligations and to interpret the Refugee Convention in accordance with developments in International Human Rights Law begs the question as to the appropriateness of the decision for the legislator to adopt two different statuses at EU level, one for refugees within the meaning of the Refugee Convention and another one (with a lower level of entitlements) for refugees in the broader sense whose protection grounds arise in International Human Rights Law. Under Article 15 of the EU Qualifications Directive, *non-refoulement* arising from human rights grounds would trigger Subsidiary Protection, and yet if the finding is that the risk of *refoulement* arises from one of the Refugee Convention grounds, the individual in

¹¹⁰ On the supervisory role of UNHCR, see the different contributions to J. C. Simeon, *The UNHCR and the Supervision of International Refugee Law*, Cambridge, Cambridge University Press, 2013.

¹¹¹ The role of UNHCR in the development of judicial standards of protection at EU level is considered extensively in another paper in this Special Issue. See M. Garlick, "International Protection in the Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR".

question *is* a refugee, which questions the primacy of the Refugee Convention and the complementary nature of Subsidiary Protection.¹¹² As it has already been stated above, the review of the Qualifications Directive to consider a single status for both refugees within the meaning of the Refugee Convention and for the broader category of refugees protected under International Human Rights Law –as already discussed by the European Commission- might provide the better way for EU Member States to comply with their international obligations towards refugees.

4. Moving Beyond: Human Rights Protection and Status

While the role of IHMBs in strengthening the protection of refugees against *refoulement* is well established, these bodies have always been cautious about the nature of the measures that States may need to take, stressing that the nature of the obligation to protect is one of result, leaving a margin of appreciation to States on the ways in which this may be achieved. Despite this clear standing, however, a trend seems to be emerging among IHRMBs to pronounce themselves on whether the approach taken by State Parties, and notably the type of immigration status afforded to non-removable non-nationals is sufficient to meet the standards of the relevant international treaty.

The CteAT articulated this position in *Aemei*,¹¹³ noting that [t]he Committee's finding of a violation of article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a declaratory character. Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum; on the other hand, it does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn).¹¹⁴

¹¹² On the challenges to the primacy of the Refugee Convention, see J-F. Durieux, "Salah Sheekh is a Refugee New Insights into Primary and Subsidiary Forms of Protection", *Refugee Studies Centre Working Paper Series*, 49, 2008, 17-19.

¹¹³ CteAT, *Seid Mortesa Aemei v. Switzerland* (1997), Communication No. 34/1995.

¹¹⁴ *Ibid.*, para. 11.

Two years later, the CTeAT qualified its position in a case which did not involve a risk of expulsion, as the complainant had a residence permit and his application for renewal had not yet been decided:

Noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended *temporary permit for medical treatment* is not sufficient to fulfil the State party's obligations under article 3 of the Convention.¹¹⁵

While the CteAT did not identify which particular immigration status would be required in order to comply with Article 3 CAT it made it clear that temporary residence permits based on circumstances whose nature is also temporary were in themselves insufficient to meet the standards of protection against *refoulement* required by the Convention.

Given the more comprehensive nature of other international human rights treaties, notably the ICCPR and the ECHR, their IHRMBs have had the chance to pronounce themselves on issues regarding the specific attachments –other than nationality- between individuals and States which may under certain circumstances require the State not merely not to expel the individual but rather to take positive measures to ensure their stay and integration in the host country.

The HRC has considered quite extensively the relationship between individuals with States other than the one of nationality, and in particular the legal relevance of significant attachments other than nationality.¹¹⁶ In *Stewart*,¹¹⁷ the Committee was asked to define what constitutes one's "own country" within the meaning of Article 12(4) ICCPR: "No one shall be arbitrarily deprived of the right to enter his own country". Mr Stewart was a British citizen who had moved to Canada at the age of seven and although he claimed that he only learnt that he had never acquired Canadian nationality as a result of proceedings resulting from his 42 criminal convictions.¹¹⁸

The HRC elaborated on the notion of own's "own country" in the Convention. The Committee noted that

the scope of *the phrase "his own country" is broader than the concept "country of his nationality"*, which it embraces and which some regional human rights treaties use in

¹¹⁵ CteAT, *A.D. v. Netherlands* (1999), Communication No 96/1997, para. 7.3 (emphasis added).

¹¹⁶ For an analysis of the HRC's position see Gil-Bazo, *The Right to Asylum as an Individual Human Right*, 300-310.

¹¹⁷ HRC, *Stewart v. Canada* (1996), Communication No. 538/1993.

¹¹⁸ *Ibid.*, paras. 2.1 & 2.2.

guaranteeing the right to enter a country. Moreover, in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant. That provision speaks of “an alien lawfully in the territory of a State party” in limiting the rights of States to expel an individual categorized as an “alien”. It would thus appear that “his own country” as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not “aliens” within the meaning of article 13, although they may be considered as aliens for other purposes.¹¹⁹

The question is therefore to determine which categories of non-nationals can invoke the protection of Article 12(4). The Committee acknowledges that determining who, in addition to nationals, is protected by this provision is less clear and it affirms that since

the concept “his own country” is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.¹²⁰

Having established the *principle*, the HRC then goes on to identify *examples* of such categories, such as those arbitrarily deprived of nationality: a) nationals of a country who have there been stripped of their nationality in violation of international law and b) individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them.¹²¹ The list is clearly not exhaustive and the Committee further notes that “the language of article 12, paragraph 4, permits a *broader interpretation*, moreover, that might embrace *other categories of long-term residents*, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.”¹²²

The Committee focused on the arbitrary nature of the measures which prevented individuals from acquiring formal links (that is, nationality) with the country where they live and as this was not an issue in the case in question, it did not find a violation of Article 12. The majority decision resulted in six of the Committee’s members issuing dissenting opinions. In particular, they felt that the finding of the majority that no violation existed reflected a very restrictive interpretation of Article 12(4). The dissenting opinion by

¹¹⁹ *Ibid.*, para. 12.3.

¹²⁰ *Ibid.*, para. 12.4.

¹²¹ *Ibid.*

¹²² *Ibid.*

Committee members Ms Evatt and Ms Medina Quiroga (co-signed by Mr Aguilar Urbina and endorsed by Ms Chanet, Mr Prado Vallejo and Mr Bhagwati) strongly rejected the narrow focus of the majority:

In our opinion, the Committee has taken too narrow a view of article 12, paragraph 4, and has not considered the *raison d'être* of its formulation. Individuals cannot be deprived of the right to enter “their own country” because it is deemed unacceptable to deprive any person of close contact with his family, or his friends or, put in general terms, with the web of relationships that form his or her social environment. This is the reason why this right is set forth in article 12, which addresses individuals lawfully within the territory of a State, not those who have formal links to that State. For the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it. This is what article 12, paragraph 4, protects.¹²³

They argued that “there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality.”¹²⁴ In their view, the wording of the provision invites “consideration of such matters as long standing residence, close personal and family ties and intentions to remain (as well as to the absence of such ties elsewhere).”¹²⁵

In his individual dissenting opinion, Bhagwati goes further in explaining what he sees as the correct approach to interpret Article 12(4):

This is not a case of one single individual. Its decision will have an impact on the lives of tens of thousands of immigrants and refugees. [...] If the view taken by the majority of the Committee is right, people who have forged close links with a country not only through long residence but having regard to various other factors, who have adopted a country as their own, who have come to regard a country as their home country, would be left without any protection. The question is: are we going to read human rights in a generous and purposive manner or in a narrow and constricted manner? Let us not forget that basically, human rights in the International Covenant are rights of the

¹²³ *Ibid.*, Section C, para. 5.

¹²⁴ *Ibid.*, para. 6.

¹²⁵ *Ibid.*

individual against the State; they are protections against the State and they must therefore be construed broadly and liberally.¹²⁶

Hailbronner agrees with a broader interpretation of the right to return to one's own country. Writing in the same year than the HRC was discussing the scope of the right, Hailbronner notes that the right to return as a matter of international law is not restricted to nationals. He explains that nationality may not always be clear and that States may be able to deprive certain groups among their population from nationality, and he affirms that international law offers legal basis for the recognition of a right to return to aliens who have been lawfully resident for a long period of time.¹²⁷

The HRC formalized its position in its General Comment on Article 12, where it reproduced its line of reasoning in *Stewart* but added a significant paragraph which seems to take account of the minority position in the same decision. The HRC listed the examples that it had already identified in *Stewart* and noted that “[s]ince other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on *the rights of permanent residents to return to their country of residence*.”¹²⁸

More recently, the HRC pronounced itself again on the notion of one's own country, in two controversial decisions. In *Nystrom*,¹²⁹ the majority in this case “borrowed” language from the minority in *Stewart*, which later found its way into the General Comment on Article 12, to note that there may be close and enduring connections between a person and a country, which may be stronger than those of nationality, and that the determination of one's own country required consideration of long standing residence, close personal and family ties and intentions to remain.¹³⁰ The HRC then found that the complainant had established that Australia was his own country and that

there are few, *if any*, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of

¹²⁶ *Ibid.*, Section E, p. 23.

¹²⁷ K. Hailbronner, “Comments on: The Right to Leave, the Right to Return and the Question of a Right to Remain”, in V. Gowlland-Debbas (ed.), *The Problems of Refugees in the Light of Contemporary International Law Issues*, The Hague, Martinus Nijhoff, 1996, 109-118, at 116.

¹²⁸ United Nations Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 Nov. 1999, para. 20.

¹²⁹ HRC, *Stefan Lars Nystrom v. Australia* (2011), Communication No. 1557/2007.

¹³⁰ *Ibid.*, para. 7.4. See *Stewart*, Section C; see above footnotes 111 & 112.

nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.¹³¹

Like in *Stewart*, the decision prompted dissenting opinions by Neuman, Iwasawa, Rodley, Keller, and O'Flaherty who considered that the interpretation of Article 12 necessarily required a link with nationality or that it would only apply when the individual was deprived from any effective nationality.¹³² The Australian Government has also expressed its disagreements with the HRC's views and despite the authority of this body to undertake an authentic interpretation of the ICCPR and of Australia's recognition of its jurisdiction to hear individual communications, it declared that it would not comply with the Committee's requests to allow and facilitate Mr Nystrom's return to Australia.¹³³

The position of the majority was also expressed in *Warsame*,¹³⁴ where the Committee further elaborated on the circumstances in which the deprivation of the right would be reasonable, noting that "the author's deportation to Somalia impeding his return to his own country would be disproportionate to the legitimate aim of preventing the commission of further crimes and therefore arbitrary."¹³⁵ This decision also resulted in dissenting opinions by the minority.

Despite that the Committee's views seem to be polarized in these two cases, as Whittle argues, "these decisions are not radical departures from *Stewart*; rather, they are best seen as gradual broadenings of the scope of art 12(4) to cater for the unique factual circumstances" of the cases.¹³⁶ As he notes, in both cases "there were clear, ongoing and longstanding connections to the resident state and also no connection between the person and the ostensible state of his nationality."¹³⁷

At regional level, the debate on the right of long term migrants to protection against expulsion from "their own country" has been held in the context of the ECHR. Protocol No. 4

¹³¹ *Ibid.*, para. 7.6 (emphasis added).

¹³² *Ibid.*, Appendix, pp. 22-25.

¹³³ Australian Government, *Response of the Australian Government to the Views of the Committee in Communication No 1557/2007, Nystrom et al v Australia (18 July 2011)*, para. 14, available at: <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf> (last visited 22 Sept. 2014).

¹³⁴ HRC, *Jama Warsame v. Canada* (2011), Communication No. 1959/2010.

¹³⁵ *Ibid.*, para. 8.6.

¹³⁶ D. Whittle, "Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011)", *Australian International Law Journal*, 2012, 19, 235-243, at 243.

¹³⁷ *Ibid.*

to the ECHR (adopted before the ICCPR) protects *nationals* against expulsion.¹³⁸ In *Beldjoudi*,¹³⁹ Judge Martens elaborated on the notion of one's own country in a concurring opinion. Recalling that the expulsion of nationals is prohibited, he stated that

in a Europe where a second generation of immigrants is already raising children (and where violent xenophobia is increasing to an alarming extent) it is high time to ask ourselves whether this ban should not apply equally to aliens who were *born and bred in a member State* or who have otherwise, *by virtue of long residence*, become fully integrated there (and, conversely, become completely segregated from their country of origin). In my opinion, *mere nationality does not constitute an objective and reasonable justification* for the existence of a difference as regards the admissibility of expelling someone from what, in both cases, may be called his "own country".¹⁴⁰

Martens' position has been endorsed explicitly or implicitly in different opinions over the years to the Court's case-law.¹⁴¹ In *Boujlifa*,¹⁴² Judges Baka and Van Dijk noted that "[t]he Court has been divided on the issue of the deportation of "second generation" immigrants for quite some time"¹⁴³ and called on the Court to "abandon its casuistic approach to the matter and take a clear position on the question whether and to what extent so-called "second generation" immigrants constitute a special category for whose deportation very serious reasons have to be advanced to make it justifiable [...]"¹⁴⁴

The ECtHR's case-law shows that the case-by-case approach remains dominant. Yet, the Court has gone as far as declaring that the denial of residence, of permanent residence and even of citizenship may constitute violation of ECHR-guaranteed rights. In *Sisojeva*,¹⁴⁵ the

¹³⁸ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, ETS No. 46, 16 Sept. 1963 (entry into force: 2 May 1968), Art. 3(1).

¹³⁹ ECtHR, *Beldjoudi v. France* (Judgment), (1992), Application No. 12083/86.

¹⁴⁰ *Ibid.*, Concurring Opinion of Judge Martens, para. 2 (emphasis added).

¹⁴¹ *Ibid.*, Separate Opinion of Judge de Meyer, p. 30. See also ECtHR, *Nasri v. France* (Judgment), (1995), Application No. 19465/92, Partly Dissenting Opinion of Judge Morenilla (referring to the HRC, *ibid.*, para 4); ECtHR, *Boughanemi v. France* (Judgment), (1996), Application No. 22070/93, Dissenting Opinion of Judge Baka; ECtHR, *Bouchelkia v. France* (Judgment), (1997), Dissenting Opinion of Judge Palm; ECtHR, *El Boujaïdi v. France* (Judgment), (1997), Case No. 123/1996/742/941, Dissenting Opinion of Judge Foighel (who further notes that "[t]he criminal law of the country of residence should normally be sufficient to punish criminal acts committed by an integrated alien, in the same way as it is deemed sufficient to punish criminal acts committed by a national.", *ibid.*, para. 4).

¹⁴² ECtHR, *Boujlifa v. France* (Judgment), (1997), Case No. 122/1996/741/940.

¹⁴³ *Ibid.*, Joint Dissenting Opinion of Judges Baka and Van Dijk, p. 17.

¹⁴⁴ *Ibid.*

¹⁴⁵ ECtHR, *Sisojeva and others v. Latvia* (Judgment), (2005), Application No. 60654/00. The case was eventually struck out of the Court's list of cases in accordance with Article 37(1)(b) ECHR; ECtHR (Grand Chamber), *Sisojeva and others v. Latvia* (Judgment), (2007), Application No. 60654/00.

Court considered “that the prolonged refusal of the Latvian authorities to grant the applicants *the right to reside in Latvia on a permanent basis* constitutes an interference with the exercise of their right to respect for their private life.”¹⁴⁶ It is important to note that this case did not involve the expulsion of the applicants, but rather the lack of regularization of their immigration status, and that two of the applicants had Russian nationality and an officially registered residence in Russia. The Court’s position was unequivocal in stating that “it is not enough for the host State to refrain from deporting the person concerned; *it must also, by means of positive measures if necessary*, afford him or her the opportunity to exercise the rights in question without interference.”¹⁴⁷ The Court attached particular significance to the length of residence and the integration of the applicants in Latvia and the lack of *effective* attachment to their country of origin. The applicants had spent all, or almost all, of their lives in Latvia (both Latvia and their country of origin –Russia- were once part of the same State) and for the Court

the fact remains that they have developed personal, social and economic ties *strong enough* for them to be regarded as *sufficiently well integrated* in Latvian society [...] [and] none of the three applicants appears to have developed personal ties in [Russia] comparable to those they have established in Latvia”.¹⁴⁸

Accordingly, the Court found that “taking all the circumstances into account, and in particular *the long period of insecurity and legal uncertainty* which the applicants have undergone in Latvia”,¹⁴⁹ there had been a violation of the right to respect for private life enshrined in Article 8 ECHR.

On 13 July 2010 the ECtHR ruled on the situation of the so-called “erased” in Slovenia in the case of *Kurić and Others*¹⁵⁰. The “erased” were former Yugoslavian nationals who prior to 1991 did not enter Slovenia as aliens, but rather settled there as Yugoslavian citizens and registered their permanent residence in the same way as citizens of what was at the time the Socialist Republic of Slovenia. At the moment of the “erasure” (that is, the automatic transfer without notification of a significant number of former Yugoslavian citizens from the Register of Permanent Residents to the Register of Aliens without a Residence Permit) on 26 February 1992, the applicants had a particularly strong and privileged residence

¹⁴⁶ *Ibid.*, para. 105 (emphasis added).

¹⁴⁷ *Ibid.*, para. 104 (emphasis added).

¹⁴⁸ *Ibid.*, para. 107.

¹⁴⁹ *Ibid.*, para. 110.

¹⁵⁰ ECtHR, *Kurić and Others v. Slovenia* (Judgment), (2010), Application No. 26828/06.

status.¹⁵¹ The Slovenian Constitutional Court had already ruled that the “erasure” was unconstitutional. The Court found that

the prolonged refusal of the Slovenian authorities to regulate the applicants’ situation comprehensively, in line with the Constitutional Court’s decisions, in particular the failure to pass appropriate legislation [...] and *to issue permanent residence permits* to individual applicants, constitutes an interference with the exercise of the applicants’ rights to respect for their private and/or family life, especially in cases of statelessness.¹⁵²

And it ruled that such interference did not meet the standards required by Article 8 ECHR and accordingly constituted a violation of the Convention. The Court further noted that “an arbitrary denial of citizenship might in certain circumstances raise an issue”¹⁵³ under the ECHR, thus opening the way for future findings. The case was referred to the Grand Chamber, which confirmed the earlier decision, ruling that “measures restricting *the right to reside in a country* may, in certain cases, entail a violation of Article 8 of the Convention”.¹⁵⁴

While IHRMBs have been cautious in maintaining the principle of State sovereignty and noting the exceptional nature of restrictions to the power of the State to control its population, a trend is emerging among IHRMBs expressed in the debates just discussed, to affirm entitlements in terms of attachment and belonging for refugees in the political community, thus moving beyond the exceptional nature of international human rights law interference with State sovereignty.¹⁵⁵

This approach may be slowly emerging and perhaps not yet consolidated among decision-makers but it was already postulated by Grahl-Madsen when he examined the plight of refugees without a country of asylum. He argued that when the State is unable to remove a refugee, he gains

freedom of movement and residence [and it] follows that he must be considered ‘lawfully’ (and ‘lawfully staying’) in the territory. And after a number of years

¹⁵¹ For a discussion on the “erasure”, see J. Zorn, “Non-citizens in Slovenia: erasure from the register of permanent residents”, in C. Sawyer and B. K. Blitz (eds.), *Statelessness in the European Union: Displaced, Undocumented, Unwanted*, Cambridge, Cambridge University Press, 2011, 195-229.

¹⁵² *Ibid.*, para. 361 (emphasis added).

¹⁵³ *Ibid.*, para. 353 (emphasis added).

¹⁵⁴ ECtHR (Grand Chamber), *Kurić and Others v. Slovenia* (Judgment), (2012), Application No. 26828/06, para. 355.

¹⁵⁵ For a discussion of membership in the political community beyond the legal bond of nationality see, M. Gibney, “The rights of non-citizens to membership”, in Sawyer and Blitz (eds.), *Statelessness*, see above footnote 151.

(normally about three years) *his interest in growing roots must override any other considerations*, which means that he may not be caused to leave the territory, merely because another country should prove willing to accept him.¹⁵⁶

Grahl-Madsen argued this position on the grounds that “[i]t has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities”¹⁵⁷ and that “as a State would not dream of expelling its own nationals [...] there is hardly any reason for a State to press too hard for the expulsion of refugees”¹⁵⁸ and therefore, “after a period of some three years, the interests of the refugee in remaining where he is, must normally be held to override any other considerations.”¹⁵⁹

While the Refugee Convention does not enshrine a right of residence, and in fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee (some can only be enjoyed by refugees “lawfully present” while others only by refugees “lawfully resident”), the notion of permanence is not alien to the Refugee Convention. Article 34 imposes obligations on States Parties regarding naturalization: “The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” The significance of this provision is often overlooked. Its relevance lies in the recognition that States’ obligations towards refugees include *every effort* to facilitate the full integration of refugees into the political community of the State of asylum. The inclusion of this article among the provisions of the 1951 Refugee Convention (immediately after the prohibition of *refoulement*) seeks to restore the legal bond between the individual and the State, which had been previously severed by persecution and flight, and thus correct the “anomaly” that refugee status actually represents.¹⁶⁰ The practice of States shows largely that domestic legislation has incorporated article 34 of the 1951 Refugee Convention.

5. Conclusion

¹⁵⁶ A. Grahl-Madsen, *The Status of Refugees in International Law, Vol. II*, Leiden, Sijthoff, 1972, 442 (emphasis added).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, 443.

¹⁵⁹ *Ibid.*, 437.

¹⁶⁰ For a discussion on the background of article 34 of the 1951 Refugee Convention, see R. Marx, “Article 34 (Naturalization/Naturalisation)”, in A. Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary*, Oxford, Oxford University Press, 2011, 1441-1456. For a political analysis of asylum as surrogate membership of a political community in the asylum State, see M. E. Price, *Rethinking Asylum: History, Purpose, and Limits*, Cambridge, Cambridge University Press, 2009.

This paper has examined the contribution of IHRMBs to refugee protection. It has explored the contribution of IHRMBs to the absolute nature of the principle of *non-refoulement* and with it, to its acceptance by State Parties, UNHCR, and the majority view in the literature as a rule of customary international law. The work of IHRMBs has led to the acceptance that protection of the broad categories of refugees covered by International Human Rights Law constitutes a legal obligation (and not merely a discretionary decision) of States under International Law, an understanding that has led to the adoption of specific complementary instruments at regional level and the promotion of complementary forms of protection by UNHCR.

It has also shown that a trend may be emerging among IHRMBs to enter into the details of the source of the risk of prohibited treatment and in particular to note that such risk may arise for reasons of race, religious beliefs, membership of a particular social group or political opinion, thus raising questions about the interpretation of the refugee definition in the Refugee Convention undertaken by State Parties and the available means for that State Party to reconcile its obligations both under International Human Rights Law and under International Refugee Law. This may mean that mechanisms need to be developed at domestic level for States to recognise refugee status and to grant asylum to refugees whose protection entitlement has been recognised by IHRMBs when the risk arises for one of the Refugee Convention recognised grounds.

This paper has examined the jurisprudence of IHRMBs which moves beyond a finding of *non-refoulement* to discuss matters of status and in particular of security of residence and ultimately membership of the political community. The jurisprudence of IHRMBs suggests that refugees may have a legal entitlement to membership of the political community by virtue of their strong attachment to the State. This may not necessarily take the form of full nationality,¹⁶¹ although the arbitrary denial of citizenship may under certain circumstances constitute a violation of International Human Rights Law and in any case, States also have a duty to make *every effort* to expedite naturalization proceedings for refugees. Yet, the development of strong links between refugees and the State where they find themselves

¹⁶¹ In the context of the EU, refugees and people entitled to subsidiary protection have a right to long term residence status, which in turn includes the right to freedom of movement across the EU; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, [2004] OJ L 16/44, 23 Jan. 2004, as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, [2011] OJ L 132/1, 19 May 2011.

This is a pre-copyedited, author-produced PDF of an article accepted for publication in the Refugee Survey Quarterly following peer review. The version of record M-T Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34(1) Refugee Survey Quarterly is available online at: <http://rsq.oxfordjournals.org>.

ultimately requires the State to “regularize” the situation of unlawfully present refugees and to provide them a country of asylum, which ultimately and by virtue of International Human Rights Law may become a country of citizenship.