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Note on migration and the principle of *non-refoulement*

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Migration is a global phenomenon that has an impact worldwide. Various factors have contributed to a growing complexity of patterns of mobility: large numbers of people leave, or are forced to leave, their countries of origin; some States have hardened their migration policies, introducing measures intended to prevent and deter foreign nationals from arriving on their territory and submitting asylum claims; and on their routes, migrants regularly have to cross or circumvent armed conflicts, gang violence or collapsing States. Migration movements often include persons who are in need of international protection and others who are not. In light of such "mixed movements", much of the current migration discourse and policies focus on the need to distinguish between "voluntary" migrants on the one hand and "forced" migrants, especially refugees, on the other. In reality, however, this distinction is not clear-cut. In particular, persons who are not considered to be refugees may still be in need of assistance and protection, including against *refoulement*. As a result, the International Committee of the Red Cross (ICRC) uses a broad description of "migrants" that focuses on their vulnerabilities rather than on their legal status. This being said, it is important to recall that while a number of international legal protections must be afforded to all migrants, others – in particular refugee status or subsidiary forms of protection – depend on the treaty obligations and/or domestic law of the State having jurisdiction and on the individual's particular circumstances.

Importantly, although States have the right to regulate migration and to return migrants from their territory if they are deemed irregular, this right is not absolute. Any decision to return an individual migrant must be exercised within

the limits established by domestic and international law, including the principle of *non-refoulement*.

This note recalls the legal basis of the principle of *non-refoulement* in different bodies of international law and presents how certain aspects of the principle have been interpreted by States, courts, human rights treaty bodies, or expert organizations. The note also explains – where relevant – which understanding of the principle of *non-refoulement* the ICRC follows in its dialogue with States.

What is *non-refoulement*?

The principle of *non-refoulement* prohibits the transfer of a person from one authority to another when there are substantial grounds for believing that the person would be in danger of being subjected to violations of certain fundamental rights.[1] This is in particular recognized where there is a risk of torture and other forms of ill-treatment, arbitrary deprivation of life, or persecution on account of race, religion, nationality, membership of a particular social group or political opinion, though it might cover a number of other grounds depending upon the treaties ratified by the States concerned.

The principle of *non-refoulement* is found expressly in international humanitarian law (IHL), international refugee law and international human rights law (IHRL), though with different scopes and conditions of application for each of these bodies of law. In the ICRC's view, the core of the principle of *non-refoulement* has also become customary international law.[2]

The principle of *non-refoulement* prohibits the transfer of individuals irrespective of whether the danger of fundamental rights violations emanates from State or non-State actors. If non-State actors are at the source of such danger, it has to be shown that the authorities in the State of return "were unable

1 For the purpose of this note, the word "transfer" refers to any act by which jurisdiction or control over an individual changes from one authority to another (including returns, expulsions, extraditions, deportations or similar acts, irrespective of their denomination).

2 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 709. See also Office of the 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*, 2007, paras 15, 21; Court of Final Appeal of the Hong Kong Special Administrative Region, *Case of C, KMF, BF and Director of Immigration/ Secretary for Security*, FACV 18, 19 & 20/2011, Intervenor's Case, 31 January 2013, paras 28–71; Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika Feller, Volker Türk and Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003, pp. 87–177. Some States, however, seem to disagree with that conclusion or consider themselves as persistent objectors on some aspects (i.e., not bound by the customary norm). See, for instance, James C. Hathaway, "Leveraging Asylum", *Texas International Law Journal*, Vol. 45, No. 3, 2010.

or unwilling to protect" the person.[3] In such cases in particular, the question might arise as to whether an internal flight or relocation alternative exists that may be taken into consideration in the *non-refoulement* assessment.[4]

Grounds for preventing transfer under the principle of *non-refoulement*

Under refugee law, the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) and its 1967 Protocol prohibit the return of refugees and asylum-seekers to territories where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion (i.e., in case of persecution).[5] Similar norms exist in regional binding or non-binding instruments,[6] some of which have a broader scope and include risks due to events seriously disturbing public order (which would cover armed conflicts; see below). This prohibition applies to refugees or asylum-seekers, regardless of whether their status has been formally recognized. Under refugee law, the principle of *non-refoulement* is subject to exception when a refugee constitutes a danger to the security of the country in which the person is, or if she or he has been convicted of a particularly serious crime.[7] As a limitation

3 See United Nations (UN) Human Rights Committee, *Dawood Khan v. Canada*, Decision, Communication No. 1302/2004, 10 August 2006, para. 5.6; Committee on the Rights of the Child, General Comment No. 6 (2005), UN Doc. CRC/GC/2005/6, 1 September 2005, para. 27; UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc. HCR/GIP/16/12, 2 December 2016 (UNHCR Guidelines on International Protection No. 12), para. 30; European Court of Human Rights (ECtHR), *Case of Salah Sheekh v. The Netherlands*, Application No. 1948/04, Judgment, 23 May 2007, para. 137; 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), 13 September 2011 (EU Qualification Directive), Art. 6 (c); see also, in a more limited manner, Committee against Torture, General Comment No. 2, "Implementation of Article 2 by States Parties", UN Doc. CAT/C/GC/2, 24 January 2008, para. 18.

4 See, for instance, UNHCR Guidelines on International Protection No. 12, above note 3, paras 40–43; EU Qualification Directive, above note 3, Art. 8; ECtHR, *Salah Sheekh v. The Netherlands*, Application No. 1948/04, Judgment, 11 January 2007, para. 141. For further discussions, see the section "Where and When Does the Principle of *Non-Refoulement* Apply?", below.

5 Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954) (1951 Refugee Convention), Art. 33; Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).

6 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, 10 September 1969 (entered into force 20 June 1974), Art. II(3); American Convention on Human Rights, 22 November 1969 (entered into force 18 July 1978), Art. 22(8); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 (Cartagena Declaration), Art. III(3); Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles), 24 June 2001, Art. III(1).

7 1951 Refugee Convention, Art. 33(2).

to the general rule, however, this exception needs to be interpreted narrowly.[8] Moreover, contrary to refugee law, the principle of *non-refoulement* under IHRL allows no exception or derogation and is afforded to every individual, irrespective of his or her legal status. This means that even if a person could be returned in accordance with refugee law, IHRL may still prohibit the transfer.

Refoulement is prohibited under human rights law on a number of grounds. The strongest protections exist in cases of danger of being subjected to torture (found expressly in the Convention against Torture), cruel, inhuman or degrading treatment or punishment, and arbitrary deprivation of life (found expressly in regional IHRL instruments).[9] The United Nations (UN) Human Rights Committee and the European Court of Human Rights (ECtHR) have considered that *non-refoulement* is an integral component of the protection against torture or other forms of cruel, inhuman or degrading treatment or punishment, or arbitrary deprivation of life even when it is not expressly mentioned in the relevant treaty,[10] and the UN Sub-Commission on the Promotion and Protection of Human Rights asserted that it is customary with regard to these grounds.[11] Furthermore, several international and regional instruments, regional courts and treaty bodies extend the prohibition against return to other grounds, including the risk of enforced disappearance,[12] the death penalty,[13] being tried by a special or *ad hoc* court,[14] flagrant denial of justice,[15] or

8 See Andreas Zimmermann and Philipp Wennholz, "Article 33 (2)", in Andreas Zimmermann (ed.), *The 1951 Convention on the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, Oxford, 2011, para. 2.

9 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, Art. 3; Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No. 67, 9 December 1985 (entered into force 28 February 1987), Art. 13(4); Charter of Fundamental Rights of the European Union, 2000/C 364/01, 18 December 2000, Art. 19(2).

10 UN Human Rights Committee, General Comment No. 20 on Article 7, 10 March 1992, para. 9; UN Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12; ECtHR, *Soering v. United Kingdom*, Application No. 14038/88, Judgment, 7 July 1989, paras 88–91.

11 UN Sub-Commission on the Promotion and Protection of Human Rights, Res. 2005/12, "Transfer of Persons", UN Doc. E/CN.4/2006/2, 12 August 2005, p. 25, para. 3.

12 International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Art. 16 (1); furthermore, the Human Rights Committee considers enforced disappearance as an act of torture or cruel, inhuman and degrading treatment (see Human Rights Committee, *Grioua v. Algeria*, Communication No. 1327/2004, UN Doc. CCPR/C/90/D/1327/2004, 16 August 2007, paras 7.6, 7.7, and references therein), which would include the risk of enforced disappearance under the prohibition of transfer in case of risk of torture or other forms of ill-treatment.

13 Transferring an individual to a State where s/he faces a real risk of being sentenced to death is prohibited if (a) the transferring State has itself abolished the death penalty, or (b) there is a real risk of being sentenced to death following an unfair trial. See UN Human Rights Committee, *Kwok Yin Fong v. Australia*, UN Doc. CCPR/C/97/D/1442/2005, 23 November 2009, paras 9.4, 9.7. See also ECtHR, *Al-Saadoon v. United Kingdom*, Application No. 61498/08, Judgment, 2 March 2010, para. 137.

14 Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series, 9 December 1985 (entered into force 28 February 1987), Art. 13(4).

15 ECtHR, *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment, 17 January 2012, para. 258, with references therein; see also UN Sub-Commission on the Promotion and Protection of Human Rights, above note 11, p. 26, op. para. 8.

underage recruitment and participation in hostilities.[16] Some regional courts have also held that serious illness may give rise to a prohibition against returning a person in exceptional cases if the return would lead to "a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy".[17] As a result, the ICRC is conscious that whether or not some of the above-mentioned grounds apply depends on the ratification of the relevant treaties by the State concerned.

IHL contains robust prohibitions against transfers of detainees or protected persons that would violate the principle of *non-refoulement* in times of international armed conflict.[18] In the ICRC's view, in non-international armed conflicts the fundamental protections contained in Article 3 common to the four Geneva Conventions are to be understood as prohibiting parties to the conflict from transferring persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights upon transfer.[19] *Non-refoulement* under IHL applies only in situations of armed conflict. While the principle of *non-refoulement* under IHL may, in certain circumstances, also be relevant in the migration context,[20] it will not be further discussed in this note, which focuses primarily on international refugee and human rights law.[21]

The principle of *non-refoulement* also includes the prohibition against transferring a person to an authority where there is a risk that the receiving authority would transfer the person to another authority in violation of the principle of *non-refoulement* (also called secondary, indirect or chain *refoulement)*.[22]

16 See UN Committee on the Rights of the Child, General Comment No. 6 (2005), above note 3, para. 28, which provides that in view of the high risk of irreparable harm involving fundamental human rights, including the right to life, States should not return children 'where there is a real risk of under-age recruitment, including recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties'.

17 ECtHR, *Case of Paposhvili v. Belgium*, Application no. 41738/10, Judgment, 13 December 2016, para. 183; ECtHR, *N. v. United Kingdom*, Judgment, Application No 26565/05, 27 May 2008, para. 42; see also Inter-American Court of Human Rights, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Ser. A, No. 21, 19 August 2014, para. 229.

18 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 12; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 45(3)–(4).

19 ICRC Commentary on GC I, above note 2, para. 708.

20 See, in particular, GC IV, Art. 45(4).

21 For a more comprehensive discussions of the ICRC's view on the *refoulement* prohibition in non-international armed conflict, see ICRC Commentary on GC I, above note 2, paras 708–718. For general discussions of detainee transfers in times of armed conflict, see Cordula Droege, "Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges", *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, p. 675; Laurent Gisel, "The Principle of *Non-Refoulement* in Relation to Transfers", in *Detention in Armed Conflicts: Proceedings of the Bruges Colloquium*, 2015, pp. 113 ff, 117–120. Regarding the question of how IHL protects migrants, see Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", in this issue of the *Review*.

22 UN Human Rights Committee, General Comment No. 31, above note 10, para. 12; Committee against Torture, General Comment No. 1, "Implementation of Article 3 of the Convention in the Context of Article 22", UN Doc. A/53/44, Annex IX, 21 November 1997, paras 2, 3; ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012, para. 147. See also C. Droege, above note 21, p. 677.

Transfers to places affected by armed conflict

There has been some debate as to whether the principle of *non-refoulement* protects individuals from being transferred to places affected by "generalized" or "indiscriminate" violence,[23] including countries affected by armed conflicts. In principle, the mere fact that a person fled a territory affected by armed conflict, or fled indiscriminate or generalized violence, does not alter the assessment of whether that person qualifies as a refugee under the 1951 Refugee Convention or falls within the scope of the *refoulement* prohibition under IHRL: the assessment has to be made based on the established criteria under each body of law.[24] Some human rights instruments emphasize that "a consistent pattern of gross, flagrant or mass violations of human rights" or of "serious violations of international humanitarian law" has to be taken into account in the *non-refoulement* assessment.[25] Moreover, in times of armed conflict, entire groups or communities may be at risk of persecution based on a discriminatory ground or systematically threatened with or exposed to fundamental human rights violations, and therefore entitled to international protection.[26] At the same time, the ICRC recognizes that not every person fleeing an armed conflict has a well-founded fear of persecution on account of one of the grounds recognized in the 1951 Refugee Convention,[27] or can be said to face a real risk of fundamental human rights violations as required for a *non-refoulement* claim under IHRL.[28] Yet, the ICRC notes that the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees, which was developed in the Central and Southern American context, include a rather broad scope of persons protected against *non-refoulement*. In addition to the *non-refoulement* prohibition in the 1951 Refugee Convention, these instruments

23 For explanations of the terms "generalized" or "indiscriminate" violence, see UNHCR Guidelines on International Protection No. 12, above note 3, paras 71–73 (generalized violence) and fn. 17 (indiscriminate violence).

24 State practice has varied on whether persons fleeing armed conflict need to show a risk of persecution over and above that of other persons fleeing the same context. However, neither the wording, context or object and purpose of the 1951 Refugee Convention seem to support a "differential risk" requirement regarding persons fleeing armed conflict. See discussion of pertinent State practice in Andreas Zimmermann and Claudia Mahler, "Art. 1 A para. 2", in A. Zimmermann (ed.), above note 8, paras 315–318. For further analysis, see UNHCR Guidelines on International Protection No. 12, above note 3, paras 22–23; Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, Oxford University Press, Oxford, 2007, pp. 126–128.

25 Article 16(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 (entered into force 23 December 2010) refers to both situations; Article 3(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment refers to the former.

26 See A. Zimmermann and C. Mahler, above note 24, paras 311–313; UNHCR Guidelines on International Protection No. 12, above note 3, paras 17–18; ECtHR, *Case of N. A. v. The United Kingdom*, Application No. 25904/07, Judgement, 17 July 2008, para. 116.

27 UNHCR stresses, however, that in its experience, "the targeting of individuals, as well as whole areas and populations, often has ethnic, religious and/or political purposes and links". UNHCR Guidelines on International Protection No. 12, above note 3, para. 33.

28 See ECtHR, *N. A. v. UK*, above note 26, paras 114–115; ECtHR, *S. K. v. Russia*, Application No. 52722/15, Judgment, 14 February 2017, para. 55.

recognize a prohibition against returning persons who fled contexts in which threats might be less individualized but more situational, such as armed conflicts or other situations seriously disturbing public order.[29] In the EU context, "civilians" not qualifying as refugees are entitled to "subsidiary protection" if they face a "serious and individual threat to … life or person by reason of indiscriminate violence in situations of international or internal armed conflict", which includes protection against *refoulement*.[30] The ECtHR has recognized a prohibition against returning individuals to "the most extreme cases of general violence, where there is a real risk of ill-treatment [or violations of the right to life] simply by virtue of an individual being exposed to such violence on return".[31]

In different contexts, States have considered returning individuals to countries affected by armed conflict when the conflict had evolved and parts of the State were considered "safe". The ICRC supports the view that such internal flight or relocation alternatives can only be deemed to exist if it is legally and practically possible for the individual to safely access the "safe" area and if it would be reasonable, meaning not unduly harsh, for the person to stay there. At the very least, the individual would need to be effectively protected from those dangers of fundamental rights violations that forced the person to flee and justified his/her initial *non-refoulement* claim, or other ones that would justify a *non-refoulement* claim. It has been further argued that an internal flight alternative is only reasonable if the person can lead a relatively normal life in the new location.[32] In this respect, in States affected by armed conflict, the possibility of returning persons to certain parts of such a State may exist if the conflict only

29 The Cartagena Declaration is legally non-binding, but it has informed the legislation and practice of Central and South American States. See UNHCR Guidelines on International Protection No. 12, above note 3, para. 63.

30 EU Qualification Directive, above note 3, Art. 15(c). In order to establish an individual threat, the provision has been interpreted as requiring such a high level of indiscriminate violence that every civilian would face a real risk of suffering serious harm "solely on account of his presence on the territory". European Court of Justice, *Elgafaji v. Staatssecretaris van Justitie*, Case No. C-465/07, 17 February 2009, para. 35. If a person is granted "subsidiary protection" under the EU Qualification Directive, Article 21 of the Directive reiterates: "Member States shall respect the principle of non-refoulement in accordance with their international obligations." In this respect, the jurisprudence of the ECtHR mentioned in the subsequent footnote is particularly important.

31 ECtHR, *N. A. v. UK*, above note 26, para. 115; ECtHR, *S. K. v. Russia*, above note 28, paras 55–63. In the *S. K. v. Russia* case, such an extreme case of general violence was recognized to exist in Syria, in particular in Aleppo, in 2015–17, where the Court found that "various parties to the hostilities have been employing methods and tactics of warfare which have increased the risk of civilian casualties or directly targeting civilians. The available material discloses reports of indiscriminate use of force, recent indiscriminate attacks, and attacks against civilians and civilian objects" (para. 61). Another extreme case of general violence was found to exist in Mogadishu in 2010. See ECtHR, *Case of Sufi and Elmi v. The United Kingdom*, Applications Nos 8319/07 and 11449/07, Judgment, 28 November 2011, para. 248.

32 See UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/03/04, 23 July 2003, paras 22–30. However, there is debate on which civil, political, economic and social rights need to be respected, protected or fulfilled for an internal relocation not to be "unduly harsh". For discussion of relevant case law, see Andreas Zimmermann and Claudia Mahler, "Part Two General Provisions, Article 1 A, Para. 2", in A. Zimmermann (ed.), above note 8, paras 645–662; and G. S. Goodwin-Gill and J. McAdam, above note 24, pp. 123–126.

affects a specific part of a State while other parts of the State remain largely unaffected. As the Office of the United Nations High Commissioner for Refugees (UNHCR) cautions, in other cases returns may not be relevant or reasonable because armed conflicts are regularly "characterized by widespread fighting, are frequently fluid, with changing frontlines and/or escalations in violence, and often involve a variety of state and non-state actors, who may not be easily identifiable, operating in diverse geographical areas".[33]

Where and when does the principle of *non-refoulement* apply?

Under international refugee law, the principle of *non-refoulement* "applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State", with the decisive criterion being whether persons "come within the effective control and authority of that State".[34] Similar positions have been taken by regional human rights courts and human rights treaty bodies.[35] Thus, the ICRC understands that the central question for determining if a State is bound by the principle of *non-refoulement* is whether it exercises jurisdiction over the persons concerned, namely if they are within the territory, in the territorial sea,[36] or under the effective control of that State.[37] For instance, if migrants find themselves in the territorial sea of a State or to the extent that a State exercises effective control over individuals on a boat during interception or rescue operations (including on the high seas), it will be bound by the principle of *non-refoulement*. This is crucial, as the first contact between migrants and national authorities increasingly takes place outside the land territory of a State. Once a State exercises jurisdiction over an individual, the State has to assess – on a case-by-case basis – whether or not that individual would be at risk of fundamental rights violations upon return (see the section on procedural safeguards below).

The application of the principle of *non-refoulement* to admission and non-rejection at the border is mostly recognized today. Non-rejection at the border was

33 UNHCR Guidelines on International Protection No. 12, above note 3, para. 40.

34 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*, January 2007, paras 24, 43.

35 Committee against Torture, *J. H. A. v. Spain*, Communication No. 323/2007, 21 November 2008, para. 8.2; UN Human Rights Committee, General Comment No. 31, above note 10, para. 10; ECtHR, *Jamaa*, above note 22, paras 72, 74, 136. For further discussion, see Tilman Rodenhäuser, "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control", *International Journal of Refugee Law*, Vol. 26, No. 2, 2014, pp. 242–245.

36 According to Article 2(1) of the Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994): "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

37 It should be noted, however, that although the extraterritorial application of the principle of *non-refoulement* under human rights law has wide support, it is still contested by a small number of States.

included in the principle of *non-refoulement* in several key instruments on refugee protection subsequent to the 1951 Refugee Convention.[38] This is further supported by various Conclusions of UNHCR's Executive Committee, including in relation to migration by sea, as well as by regional human rights courts and treaty bodies.[39] It should be noted, however, that simply denying entry or returning a boat to the high seas is not necessarily in breach of the principle of *non-refoulement* if it does not have the effect or result of returning persons where they could be at risk. Denying entry or disembarkation would have the practical effect of *refoulement* if this leaves persons with no option but to return to a State in which there are substantial grounds to believe that the person would be in danger of fundamental rights violations. This would be the case, for instance, if the ship's next port of call is in a country in which the person is in danger of fundamental rights violations, including through secondary *refoulement*. The applicability of *non-refoulement* to interdiction operations (also sometimes referred to as interception or "push-back") and to rescue operations on the high seas is also generally recognized.[40] However, the practical application of the principle of *non-refoulement* in these cases is often less clear. In particular, the ICRC is conscious that some questions remain on when persons are considered to be under the jurisdiction of a State.

Although there is no general obligation to grant admission to, or disembarkation onto, a State's territory, it is argued that under international refugee law, States should ensure admission of asylum-seekers, at least on a temporary basis, in order to carry out a fair and effective procedure to determine their status and protection needs.[41] As emphasized below, IHRL requires States to provide procedural safeguards when assessing a protection claim of any person under their jurisdiction, which is normally done on a State's territory. If it is found that a person would be at risk upon return, the State must adopt measures that would not amount to *refoulement* (i.e., granting refugee status, temporary protection or removal to a safe third country).

In addition to prohibiting direct measures to transfer a person to a place where there are substantial grounds to believe that the person would be in danger of fundamental rights violations, it has also been argued that the principle of *non-refoulement* prohibits indirect or disguised measures with the same effect

38 UN General Assembly, Declaration on Territorial Asylum, UN Doc. A/RES/2312(XXII), 14 December 1967, Art. 3(1); Convention Governing the Specific Aspects of Refugee Problems in Africa 1969, Art. II (3); Cartagena Declaration, Art. III(5); Bangkok Principles, Art. 3(1).

39 See, for example, UNHCR Executive Committee Conclusion No. 6 (XXVIII), 1977, para. (c); UNHCR Executive Committee Conclusion No. 15 (XXX), 1979, para (c); UNHCR Executive Committee Conclusion No. 22 (XXXII), 1981, Section II; UNHCR Conclusion Executive Committee No. 53 (XXXIX), 1988, para. 1. Moreover, as seen in the references in above note 35, States have to protect individuals from *non-refoulement* once these individuals fall under the State's jurisdiction.

40 Inter-American Commission on Human Rights, *Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, 13 March 1997, para. 171; ECtHR, *Jamaa*, above note 22, paras 77–78; UNHCR Executive Committee Conclusion No. 97 (LIV), 2003, preamble and para. (a).

41 See, for example, UNHCR Executive Committee Conclusion No. 81 (XLVIII), 1997, para. (h); UNHCR Executive Committee Conclusion No. 82 (XLVIII), 1997, para. (ii); UNHCR Conclusion Executive Committee No. 85 (XLIX), 1998, para. (q); UNHCR Executive Committee Conclusion No. 99 (LV), 2004, para. (l). See also A. Zimmermann and P. Wennholz, above note 8, paras 105–109.

(also referred to as "constructive *refoulement*").[42] Indeed, the ICRC would be guided by the view that if a State cannot lawfully return an individual, the principle of *non-refoulement* should be understood as also prohibiting indirect measures designed to circumvent this prohibition. This would mean that States may not create circumstances which leave an individual who is protected by the principle of *non-refoulement* with no real alternative other than returning.[43]

Procedural aspects of *non-refoulement*

It follows from the prohibition on *non-refoulement* that a State which is planning to return a migrant must assess carefully and in good faith whether there are substantial grounds for believing that the person runs the risk of being subjected to a fundamental rights violation. The policies and practices of the country of return and the particular circumstances of the individual migrant are both relevant for the assessment.[44] The person must not be returned if there are substantial grounds for believing that she or he would be in danger of being subjected to a fundamental rights violation.

Under IHRL, a person who has grounds to allege a violation of his or her rights has the right to an effective remedy.[45] In the context of *non-refoulement*, the right to a remedy means the right to challenge the return or transfer before an independent and impartial body.[46]

42 See, for instance, Walter Kälin, Martina Caroni and Lukas Heim, "Article 33(1)", in A. Zimmermann (ed.), above note 8, para. 111.

43 See Committee against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, para. 14. Likewise, in the view of the International Law Commission (ILC), "any form of disguised expulsion of an alien is prohibited" under international law. See ILC, *Draft Articles on the Expulsion of Aliens, with Commentaries*, UN Doc A/69/10, 2014, Article 10. This prohibition finds support in the jurisprudence of the Iran–US Claim Tribunal (see references in *ibid*., paras 4–5 on Art. 10) and the Eritrea–Ethiopia Claims Commission (see *Partial Award, Civilians Claims – Ethiopia's Claim 5*, The Hague,17 December 2004, paras. 125–127). At the same time, some States have questioned whether "disguised expulsions" are prohibited under international law, and others see a need for further clarification of the scope of that prohibition. See ILC, *Expulsion of Aliens: Comments and Observations Received from Governments*, UN Doc. A/CN.4/669, 21 March 2014; see also Committee against Torture, Written Submissions on the Draft Revised General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22, available at: www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx (all internet references were accessed in February 2018).

44 If the ICRC conducts detention visits on the basis of its own conventional or statutory mandate in the potential State of return, it does not – in light of its confidential working method – contribute to assessments made by the returning State of the situation in the potential State of return; in particular, it does not share information about conditions of detention or detainee treatment with third States.

45 See in particular Article 2(3) of the International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976); Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, 4 November 1950 (entered into force 3 September 1953); and Article 25 of the American Convention on Human Rights.

46 See UN Human Rights Committee, General Comment No. 31, above note 10, para. 15; Committee against Torture, General Comment No. 4 (2017), above note 43, para. 13. Both committees require such review to take place before a judicial or administrative authority, emphasizing that such review must be independent and impartial. For its part, the ECtHR requires "independent and rigorous scrutiny" of any complaint. See ECtHR, *Jamaa*, above note 22, para. 198.

In the ICRC's experience, for an assessment under the principle of *non-refoulement* to be effective, a number of minimum procedural guarantees are essential:

i) timely information to the person concerned of the intended return or transfer, in a language that s/he understands;
ii) the opportunity for the person concerned to express to an independent and impartial body any fears s/he may have about the return or transfer and explain why s/he would be at risk;
iii) suspension of the transfer during the review of the well-foundedness of the person's fears because of the irreversible harm that would be caused if the person were indeed found to be at risk.[47]

Some human rights bodies or courts demand additional guarantees, including a right to legal support during the process and other due-process guarantees.[48] For the transfer or expulsion of migrants from the transferring State's territory, the effective remedy is typically before national courts or a dedicated board or committee. While court review is not a strict requirement, human rights law requires that the remedy has to be effective – i.e., the person concerned needs to have a meaningful opportunity to obtain an independent and impartial decision ensuring that s/he would not be transferred in violation of the principle of *non-refoulement*.[49] For its part, the UNHCR Executive Committee has recommended a set of minimum procedural guarantees to be respected in determining refugee status and protection against *non-refoulement* under the 1951 Refugee Convention, which include the guarantee that a person should be given the possibility to appeal a first-instance negative decision on refugee status.[50]

As a result, the ICRC is conscious that applicable international (including regional) law as well as national law must be analyzed to know the full extent of the procedural requirements in a particular situation.

Readmission agreements and diplomatic assurances

In the context of the determination of asylum claims or the return of migrants, States (in particular destination countries) have declared certain countries "safe",

47 To varying degrees, these guarantees are also found in recommendations of human rights bodies or the jurisprudence of human rights courts. See, for example, Committee against Torture, General Comment No. 4 (2017), above note 43, para. 13; ECtHR, *Jamaa*, above note 22, paras. 197–207.

48 See, for example, Committee against Torture, General Comment No. 4 (2017), above note 43, paras 13, 18; ECtHR, *Chahal v. The United Kingdom*, Application No. 70/1995/576/662, Judgment, 11 November 1996, para. 154; ECtHR, *MSS v. Belgium and Greece*, Application No. 30696/09, Judgment, 21 January 2011, para. 301.

49 See e.g. Committee against Torture, *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003, 2005, para. 13.8.

50 See UNHCR Executive Committee, Determination of Refugee Status No. 8 (XXVIII), 1977, para. (e)(vi). See also UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, 2011, para. 192.

including countries of origin or transit, in order to facilitate the transfer or return of non-nationals. For this purpose, States have also concluded readmission agreements. Although these measures are not *per se* incompatible with refugee law or human rights law, they often raise *refoulement* concerns. A person may be at risk of fundamental rights violations – or onward transfer in violation of the principle of *non-refoulement* (secondary *refoulement*) – even in a country that has been declared "safe" and with which a readmission agreement exists. Thus, the ICRC would concur with the view that declaring a country "safe" or concluding a readmission agreement does not relieve a State from its obligations under the principle of *non-refoulement* as discussed in this note, including the provision of procedural safeguards.[51] Moreover, UNHCR's Executive Committee has concluded that additional conditions should be fulfilled in order to safeguard the rights of refugees, including that no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case, that the person will be readmitted to that country, will have the possibility to seek and enjoy asylum, and will be treated in accordance with accepted international standards.[52]

In order to extradite, expel or return persons while ensuring compliance with their obligations under international law – in particular the principle of *non-refoulement* – States have also made use of diplomatic assurances or transfer agreements in which the receiving authority provides assurances to the transferring State that transferees will be treated in accordance with international standards. These assurances or agreements are normally concluded with regard to specific individuals. The ICRC notes that there is ongoing debate among States and human rights institutions as to whether, and if so to what extent, such agreements may be taken into account when assessing whether there are substantial grounds to believe that an individual is in danger of fundamental rights violations.[53] In the ICRC's view, diplomatic assurances can in no case exonerate the transferring State from its obligations under the principle of *non-refoulement*, in particular the obligation to proceed to an individual assessment of whether the person concerned will face a risk upon return. To determine the

51 See also Inter-American Commission on Human Rights, *John Doe et al v. Canada*, Report No. 24/11, 23 March 2011, para. 111; ECtHR, Decision as to the Admissibility of Application No. 32733/08 by K. R. S. against the United Kingdom, 2 December 2008.

52 UNHCR Executive Committee Conclusion No. 15 (XXX), 1979; UNHCR Executive Committee Conclusion No. 58 (XL), 1989; UNHCR Executive Committee Conclusion No. 85 (XLIX), 1998; UNHCR Executive Committee Conclusion No. 87 (L), 1999; UNHCR Executive Committee, "Note on International Protection", 4 June 1999, paras 19–20. UNHCR has further elaborated upon these criteria. See, for example, UNHCR, "Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-Seekers", Division of International Protection, May 2013.

53 Most recently, a number of States expressed disagreement with a draft general comment by the Committee against Torture, which stated that "diplomatic assurances from a State party to the Convention to which a person is to be deported are contrary to the principle of 'non-refoulement', provided for by article 3 of the Convention". Committee against Torture, General Comment No. 1 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, Draft Prepared by the Committee, UN Doc. CAT/C/60/R.2, 2 February 2017, para. 20. States' written submissions on the draft are available at: www.ohchr.org/EN/HRBodies/CAT/Pages/Submissions2017.aspx.

weight, if any, to be given to these agreements, the review body should be guided by the positions adopted by various human rights bodies,[54] including:

- in case of transfer to States where there is "systematic practice of torture", assurances are unlikely to remove the risk and should not be resorted to;
- general assurances to the effect that the receiving State will abide by international standards, without specific assurances related to the particular individual in question, do not remove the risk for that person;
- transfer agreements may only remove the risk if they are accompanied by an effective post-transfer monitoring mechanism.[55]

In all cases, the effectiveness of diplomatic assurances or transfer agreements should be considered with caution because such assurances are not always complied with by the receiving State. In case of doubt about the receiving State's compliance with a transfer agreement or the effectiveness of post-transfer monitoring mechanisms agreed between the returning State and the receiving State, and therefore about the potential breach of the principle of *non-refoulement*, States must not transfer the individual in question.

54 See, for instance, UN Human Rights Committee, *Mohammed Alzery v. Sweden*, UN Doc. CCPR/C/88/D/1416/2005, 10 November 2006, paras 11.3–11.5; ECtHR, *Qatada*, above note 15, para. 189.

55 Contrary to IHL, there are no explicit post-transfer obligations under IHRL or refugee law. However, post-transfer monitoring is a key element to ensure that diplomatic assurances are complied with. For post-transfer obligations under IHL, see Article 12 of GC III and Article 45 of GC IV, which apply in international armed conflict, and ICRC Commentary on GC I, above note 2, para. 716, with regard to non-international armed conflict.