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THE PRINCIPLE OF NON-REFOULEMENT

The forcible return of Syrian refugees in violation of international law

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List of Acronyms

APD	Asylum Procedures Directive
CIL	Customary International Law
COI	Commission of Inquiry on Syria
CRC	The Convention on the Rights of the Child
ECJ	European Court of Justice
GC	Geneva Convention
HAP	Humanitarian Admission Programmes
ICCPR	The International Covenant on Civil and Political Rights
ICED	The International Convention for the protection of All Persons from Enforced Disappearance
ICRMW	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IRL	International Refugee Law
LGDPS	Lebanese General Directorate of Public Security
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

Introduction

Amid the intensifying debate over the principle of non-refoulement and the concerning reports of practices viewed as violations of this principle by various actors in countries hosting Syrians, the Syria Regional Desk at the Diakonia IHL Centre seeks to clarify the applicable legal framework through this paper. This initiative aims to support the relevant actors in addressing the issue appropriately and in good faith, ensuring the protection of civilians who are at risk of having their rights violated, whether in host or home countries.

International law balances State sovereignty and the protection of individual rights. States must fulfil their commitments under international instruments and customary international law, including the prohibition of non-refoulement. States that are parties to the 1951 Refugee Convention have specific duties towards asylum seekers and refugees, but even those that are not party to the Convention, have obligations towards individuals seeking international protection or fearing persecution in their home countries. It is essential for all stakeholders, including refugees, to understand their rights and the sovereign considerations of States. The Syria Regional Desk at the Diakonia International Humanitarian Law Centre presents this document in a question-and-answer format to address the complex legal issues arising from various branches of international law related to the ongoing protection needs of Syrian refugees. While this document does not cover all relevant legal provisions exhaustively, it addresses most of the issues and questions brought to the Centre's attention, particularly concerning non-refoulement.

1. What is the difference between the conceptual and legal definition of a "refugee"?

The terms "refugee" and "asylum seeker" are sometimes used interchangeably, and while they share much in common, there are important differences.

An 'asylum seeker' commonly refers to a person who has left their country and is seeking protection in another country from persecution and serious human rights violations, but who hasn't yet been legally recognized as a refugee and is waiting to receive a decision on their asylum claim.

Acquiring refugee status under the 1951 Refugee Convention requires meeting the specific legal definition of a "refugee" outlined in the Convention. According to the 1951 Refugee Convention a refugee is someone who:

> *"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it."*[1]

The right to seek asylum is a fundamental human right, as recognized in the Universal Declaration of Human Rights[2] and other international treaties. However, seeking asylum does not automatically confer the right to be granted asylum. States have the sovereign right to grant refugee status to those who apply, according to their national asylum procedures. In some situations, the United Nations High Commissioner for Refugees (UNHCR) may examine asylum applications. This typically occurs when a State is not a party to the 1951 Refugee Convention or does not have a fair and efficient national asylum procedure in place.[3]

2. Are all Syrians outside Syria considered refugees?

The key criteria for determining refugee status for Syrians outside of Syria are:

- Well-founded fear of persecution. This implies an involuntary and coerced fleeing from Syria.

1. Art 1/A (2) of the 1951 Convention relating to the Status of Refugees.
2. Article 14 of the UDHR.
3. UNHCR, Asylum and refugee status

- Being unable or unwilling to avail themselves of the protection of their country of origin: Syrians outside of Syria must demonstrate that they are unable or unwilling to return to Syria due to the well-founded fear of persecution.

Determining refugee status is based on a person's individual circumstance. Each Syrian asylum seeker's case is assessed to determine if they meet the definition of a refugee.

3. Are all States obliged to provide protection to Syrians outside Syria?

In States that are party to the 1951 Convention, Syrians who do not qualify as refugees under the Convention are classified according to the legislation of the country they are present in . If no protection needs are submitted, they cannot claim refugee status.

Additionally, if a Syrian applies for asylum in a country that is not a party to the 1951 Convention, they will not automatically be granted refugee status. Even if they have a well-founded fear of persecution, they may not receive refugee status but might be eligible for other forms of protection as determined by the host country.

Some States have developed humanitarian admission programmes (HAP) as an expedited process that allows large numbers of asylum seekers to quickly relocate to a safe host country for humanitarian reasons.[4] This process may be used for populations in extremely insecure or vulnerable situations who need urgent protection. Upon admission, the beneficiaries are typically granted a temporary status, with ongoing protection needs reviewed regularly.[5] Several States, including those party to the 1951 Convention, have developed HAPs as a simplified process in order to overcome the lengthy and sometimes complicated process of individual asylum applications assessments.

However, Individuals may be denied refugee status if there are "reasonable grounds" to believe they pose a threat to the national security of the host country or if they have been convicted of a particularly serious crime and are considered a danger to the host community.[6] This legal framework allows States to exclude individuals from protection if they are deemed to pose a threat to the country's security or public order. The concept of "reasonable grounds" is a legal threshold that requires a careful assessment of the evidence, ensuring that the decision to withhold protection is based on credible and substantial information.

While all States must abide by the principle of non-refoulement (see definition below), which prevents States from returning Syrians to Syria if they face persecution, this does not mean that States are required to grant them asylum or full protection. The obligation only means that they cannot forcibly return them to a place where their life or freedom is threatened. Syrians admitted to certain countries based on HAPs do not automatically acquire the refugee status. Since HAPs are temporary and time-limited, States may decide to terminate them if periodic reviews show that the conditions for humanitarian admission no longer exist. Nevertheless, States that terminate their HAPs are still obliged not to forcibly return any Syrian who can demonstrate that their life, freedom, or fundamental rights would be placed at risk. All States must establish clear and accessible procedures for challenging decisions related to return or the termination of temporary protection.

4. What are the differences between the obligations of States parties and States not party to the 1951 Convention towards refugees?

The 1951 Convention Relating to the Status of Refugees, along with its 1967 Protocol, outlines the legal obligations of States parties toward refugees. States parties must adhere to the Convention's definition of a refugee, which includes individuals with a well-founded fear of persecution based on race, religion, nationality, membership of a particular social group, or political opinion.

4. UNHCR, Humanitarian Pathways.

5. IOM, Key Migration Terms.

6. Art. 33(2) of the 1951 Convention relating to the Status of Refugees.

While the Convention does not prescribe a specific procedure for determining refugee status, it may require States to designate a central authority with the relevant expertise to assess applications, ensure procedural safeguards at all stages, and allow for appeals or reviews of initial decisions. The UNHCR assists States in establishing such procedures.

States parties must ensure that refugees enjoy the rights to which they are entitled under the Convention, including the right to work, access to education, public relief, and housing. The Convention must be applied without discrimination based on race, religion, or country of origin. States parties must incorporate the Convention's provisions into their national laws and ensure that refugees are treated as favourably as other non-nationals regarding fundamental rights and freedoms. Finally, States parties are expected to cooperate with the UNHCR in supervising the implementation of the Convention's provisions.

On the other hand, States that are not party to the 1951 Convention are not legally bound by its provisions. This means they are not obligated to follow the specific definitions, standards, and protections established by the 1951 Convention for refugees. Refugees cannot claim rights under the Convention in these jurisdictions because there is no legal framework supporting those claims. However, States not party are still bound by other human rights treaties and customary international law that protect the rights of individuals, including refugees and asylum seekers. This includes the Universal Declaration of Human Rights (UDHR), which States that everyone has the right to seek and enjoy asylum from persecution, and the principle of non-refoulement (see definition below).

5. What is the principle of non-refoulement?

The principle of non-refoulement precludes "States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment, or other serious human rights violations".[7]

6. What are the legal sources of the principle of "non-refoulement" under international law?

The principle of non-refoulement forms an essential protection under International Human Rights Law ('IHRL'), International Refugee Law (IRL), and International Humanitarian Law ('IHL'). Nevertheless, it is well-established that non-refoulement is a rule of Customary International Law (CIL) meaning it is binding on all States.

6.1 Principle of non-refoulement as a rule of Customary International Law

The principle of non-refoulement firstly became universal in the field of IHL mainly through Article 45 of GCIV. Then, it gained legal reinforcement by virtue of Article 33 of the Refugee Convention which is not subject to any reservation by the States Parties. The enshrinement of the principle in several international and regional treaties reflected its customary nature[8] that goes beyond the formal recognition of refugee status under IRL.[9] There is sufficient evidence of State practice and opinio juris to render the principle of non-refoulement a rule of CIL.[10] Consequently, the UNHCR Executive Committee concluded that non-refoulement must

7. OHCHR, The principle of non-refoulement under international human rights law.
8. Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law, Oxford University Press, Third Edition (2007), p. 217.
9. Executive Committee of the High Commissioner's Programme, Non-Refoulement No. 6 (XXVIII) - 1977, 12 October 1977, No. 6 (XXVIII).
10. UN High Commissioner for Refugees (1994). The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93.

be strictly observed in the case of the mass influx of refugees[11] and that it includes non-rejection at frontiers.[12]

In addition to being recognised as a rule of CIL, there is an increasing debate that the principle of non-refoulement has attained the normative value of jus cogens. A jus cogens is a peremptory norm of general international law accepted and recognised by the international community of States as a whole as norm from which no derogation is permitted.[13] The “acceptance” criterion is well demonstrated by virtue of the customary nature of the rule of which the principle of non-refoulement has fulfilled. As for the “non-derogability” criterion, the UNHCR Executive Committee might serve as the most important forum in which the most specifically affected States by issues related to non-refoulement have regularly demonstrated their consensus on the Executive Committee Conclusions determining the jus cogens nature of non-refoulement.[14]

Jus cogens reflect and protect fundamental values of the international community. They are hierarchically superior to other rules of international law and are universally applicable.[15]

Some argue that non-refoulement is of paramount concern to the international community, given its status as an incontrovertible norm (jus cogens) protecting fundamental human interests universally."[16]

However, Others argue that non-refoulement's jus cogens status should only apply to cases when it protects against torture and ill-treatment, not in all cases.. Additionally, under the Refugee Convention by virtue of the cessation clause in the Refugee Convention, countries can cease the protection afforded to a refugee and to extradite them when there are reasonable grounds to consider them as a threat to the national security or the community.[17] Therefore, the prohibition on refoulement cannot be deemed to be absolute, and the non-derogability criterion is therefore not met. Nevertheless, the inclusion of the phrase "in any manner whatsoever" in Article 33(1) unequivocally implies that the concept of refoulement should be interpreted broadly and without restriction, encompassing the exceptions outlined in Article 33(2).[18] Furthermore, advocates for the jus cogens status of non-refoulement assert that it is rooted in human rights principles. They emphasize that even in cases falling under the cessation clause, individuals would still be shielded from return under customary international law (CIL) and other treaty obligations, irrespective of whether they retain refugee status.[19]

6.2 The Principle of Non-refoulement under IHRL

Non-refoulement is a principle of human rights and it is protected under IHRL. It can be expressed as a self-standing right or as an implicit component of other rights.[20] The principle of non-refoulement under IHRL protects any person under a State’s jurisdiction, provided a pertinent danger exists in

11. Executive Committee of the High Commissioner’s Programme, Voluntary Repatriation No. 18 (XXXI) - 1980, 16 October 1980, No. 18 (XXXI) (Available at:).
12. Executive Committee of the High Commissioner’s Programme, General Conclusion on International Protection No. 99 (LV) - 2004, 8 October 2004, No. 99 (LV).
13. United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331, Article 53; UN General Assembly, Report of the International Law Commission, A/74/10 (2019), Chapter V: Peremptory norms of general international law (jus cogens), Conclusion 2, p. 142.
14. See. For example: Executive Committee of the High Commissioner’s Programme, General Conclusion on International Protection No. 25 (XXXIII) - 1982, 20 October 1982, No. 25 (XXXIII); Executive Committee of the High Commissioner’s Programme, General Conclusion on International Protection No. 55 (XL) - 1989, 13 October 1989, No. 55 (XL); and Executive Committee of the High Commissioner’s Programme, General Conclusion on International Protection No. 79 (XLVII) - 1996, 11 October 1996, No. 79 (XLVII).
15. Ibid. Conclusion 3.
16. Check a collection of comprehensive supporting arguments at: Jean Allain, The jus cogens Nature of non-refoulement, International Journal of Refugee Law, 13(2001), 533-558; Lasha Lursmanashvili, The Peremptory Nature of Non-Refoulement Obligation: Juridico-Ethical Argument for Humanity, Lund University, Faculty of Law (2021).
17. Refugee Convention 1951, Article 33(2).
18. Lauterpacht and Bethlehem, 112.
19. For a comprehensive discussion, see, for example: Tamas Molnar, The principle of non-refoulement under international law: Its inception and evolution in a nutshell, Corvinus Journal of International Affairs, 1(2016), 51-61.
20. Emanuela-Chiara Gillard, There’s no place like home: states’ obligations in relation to transfers of persons, International Review of the Red Cross, Volume 90 Number 871 (September 2008), 703-750, at 708.

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the State to which the person would be transferred.[21] Therefore, its scope is broader than that contained in IRL, and it applies irrespective of the person's nationality, statelessness, or migration status. The content of the principle of non-refoulement in the context of human rights law is largely derived from the customary prohibition of torture, cruel, inhumane or degrading treatment or punishment (ill-treatment). It is expressly prohibited under Article 3(1) of the Convention against Torture, Cruel, Inhumane and Other Degrading Treatment or Punishment,[23] and under Article 16 of the International Convention for the protection of All Persons from Enforced Disappearance (ICED). Nevertheless, non-refoulement is also derived from a number of provisions enshrined in several IHRL instruments, such as the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). Therefore, refoulement is prohibited when a person is at "real risk" of a range of serious human rights violations, and this prohibition is not dependent on the strict application of the provisions which expressly prohibits refoulement only. These violations include, but not limited to, torture and ill-treatment, flagrant denial of the right to a fair trial,[24] violations to the right to life[25] including extrajudicial killing,[26] integrity and freedom of the person,[27] sexual and gender-based violence,[28] death penalty,[29] and prolonged solitary confinement.[30]

This approach demonstrates that a State can violate its obligations under human rights law not only by its own acts but also if it knowingly puts a person in a situation where it is likely that their rights will be violated.[31]

6.3 The Principle of Non-refoulement under Refugee Law

Under IRL, the principle of non-refoulement applies to both refugees and asylum seekers. This principle protects refugees against returning to places where they may face persecution. Article 33(1) of the 1951 Convention relating to the Status of Refugees provides that 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[32]

Only States Parties to the Refugee Convention are concerned with this contractual obligation, while States not parties cannot be demanded to fulfil the principle of non-refoulement based on Article 33(1) of the Refugee Convention, although they are still bound by the principle under the other applicable legal frameworks. For instance, Türkiye ratified

21. Tilman Rodenhäuser (2018), The principle of non-refoulement in the migration context: 5 key points - Humanitarian Law & Policy Blog (icrc.org) ('Rodenhaüser').
22. OHCHR, The principle of non-refoulement under international human rights law.
23. United Nations (1984). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 3(1).
24. See, for example: ECtHR, Othman (Abu Qatada) v United Kingdom, No. 8139/09, 17 January 2012, para. 235, 258.
25. See, for example: UN Human Rights Committee, General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 12.
26. See, for example: CCPR, Baboeram et al. v. Suriname, Communication No. 146/1983, 4 April 1985, para. 14.3.
27. See, for example: IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013, para 135.
28. See, for example: CAT, Njamba and Balikosa v Sweden, Communication No. 322/2007, 3 June 2010, para. 9.5; CEDAW, General Recommendation No. 32, para. 23.
29. See, for example: CCPR, Judge v Canada, Communication No. 829/1998, 20 October 2003, para. 10.3.
30. See, for example: UN Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 6.
31. Gillard (2008), at 708.
32. United Nations (1951). Convention relating to the Status of Refugees, Art 33(1).

the Refugee Convention in 1962[33] and acceded to 1967 Protocol relating to the Status of Refugees,[34] but it maintained the geographical and temporal limitations of the definition of refugees to those who became refugees due to events occurring in Europe before 1 January 1951 pursuant to Article 1(B)(a) of the Refugee Convention. Therefore, asylum seekers and refugees who do not satisfy this limited definition cannot demand the invocation of Türkiye's obligations under the Refugee Convention. The obligation of Türkiye to non-refoulement is invoked by other applicable conventional and customary obligations.

6.4 The Principle of Non-refoulement under IHL

IHL applies in situations of armed conflict only, and its provisions address all parties involved in that conflict. Therefore, all refugee-related IHL provisions, including non-refoulement, address the protections and obligations of the parties to the conflict and only applies to certain categories of persons that are affected by armed conflicts.[35] For instance, non-refoulement expressly appears in Article 45(4) of the Fourth Geneva Convention, which provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs". However, IHL addresses refugee-related issues from a wider protective perspective and defines a refugee in a broader sense in accordance with the spirit of IHL and beyond the technical and limited definition under IRL.[36] Article 44 of GCIV, for instance, obliges a State party to a conflict to protect nationals of an enemy State who find themselves in its territory, because these nationals – defined as refugees in the broader sense of IHL - no longer claim the protection of their country of origin, and they are particularly vulnerable in the territory of a State which, owing to being in a conflict with their State of nationality, considers them as nationals of an enemy State.[37] Therefore, these individuals must benefit from all the protections granted to persons not participating in hostilities under IHL, which entail, inter alia, protecting them from inhumane treatment, including by transferring or removing them to a place where they might be at risk of such a treatment.

It is essential to recall that IHL applies only to the parties to the conflict, and non-refoulement in the context of the wider protective scope of IHL concerns those parties and not other States who – most likely – will be receiving and hosting refugees fleeing an armed conflict. Therefore, in the Syrian context, addressing non-refoulement as an IHL obligation will only be valid to States parties to the conflict(s) in Syria, and not to any neighbouring or other State who receives and hosts refugees from Syria.

7. Does "non-refoulement" apply to recognised refugees only?

No, the principle of non-refoulement applies not only to recognized refugees, but also to asylum seekers and anyone who meets the conditions of the application of non-refoulement regardless of their status. Under refugee law, the principle of non-refoulement applies to both refugees and asylum seekers.[38] In addition to being protected against refoulement, refugees are entitled to a number of other rights provided under that body of law. In contrast, protection against refoulement under human rights law means a person cannot be returned but will not automatically mean that the person has to be granted refugee status and be afforded all of the rights that refugees are entitled to.[39] In all circumstances, however, a State must respect, protect and fulfil the human rights of all persons under its jurisdiction.

It is important to recall that the principle of non-

33. See the status of ratification of the 1951 Refugee Convention at the United Nations Treaty Collection.

34. See the status of ratification of the 1967 Protocol relating to the Status of Refugees at the United Nations Treaty Collection.

35. Above N. 18.

36. ICRC, Commentary on Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1958 Edition), p. 264.

37. Ibid.

38. UN 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, 26 January 2007.

39. Tilman Rodenhäuser, The principle of non-refoulement in the migration context: 5 key points, ICRC, 30 March 2018.

refoulement has attained the status of customary international law (see above Q6), meaning it is binding on all States regardless of whether they have ratified the 1951 Convention. In addition, many non-signatory States have ratified other human rights treaties that prohibit refoulement, such as the Convention against Torture and the ICCPR. These treaties create obligations for States to not return individuals to a risk of torture, cruel, inhuman or degrading treatment. Last but not least, the principle of non-refoulement is considered to be an extraterritorial obligation, meaning States must respect it even when acting outside their territory, for example during interception or rescue operations at sea.[40]

8. What is the personal scope of application of "non-refoulement"?

The personal scope of application of non-refoulement primarily includes all individuals who may face persecution, torture, or serious harm if returned to their home country. The obligation of non-refoulement stems from the individual rights and guarantees granted by the different branches of international law. Under IRL, the Refugee Convention identifies the threat to life of freedom on account of the recognised refugee's race, religion, nationality, membership of a particular social group, or political opinion, as the risk that invokes the State obligation not to return them. The principle of non-refoulement obligates States to assess the individual circumstances and risk profile of each person seeking protection. This means evaluating the specific threats and dangers the individual would face if returned to their country of origin or a third country.[42] The identification of this risk is originated from the individual assessment and recognition of the refugee status based on Article 1A(2) of the Refugee Convention. If a recognized refugee no longer needs international protection, their return may be considered lawful under the "cessation" clauses in Article 1(C)(5-6). However, the refugee can contest this if they have compelling reasons based on past persecution to refuse to return to their former habitual residence.[43] Therefore, in situations where there has been a significant change in conditions in the refugee's country of origin, leading to the elimination of the factors that forced the refugee to flee, cessation clauses continue to apply on an individual, rather than collective, basis.

Non-refoulement prohibits the collective or indiscriminate expulsion of migrants and refugees without an examination of their personal situations. Measures that prevent entry or lead to the removal of people without an individualized determination of risk may constitute prohibited collective expulsion.[44]

9. What is "collective repatriation"? How does it differ from "collective expulsion"?

Collective repatriation refers to the voluntary return of a group of refugees to their country of origin, usually when conditions have improved enough to allow for safe return. In contrast, collective expulsion is to be understood as "any measure compelling aliens, as a group, to leave the country not taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group"[45]

While collective repatriation respects the principle of non-refoulement, which prohibits the return of refugees to territories where their life or freedom would be threatened. Collective expulsion is prohibited under international law, as it violates the principle of non-refoulement and the right of each individual to have their case examined.[46]

40. Above N. 36
41. Refugee Convention 1951, Article 33.
42. UNHCR Executive Committee, Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2, 23 August 1977.
43. Refugee Convention 1951, Article 1(C)(6).
44. European Court of Human Rights (ECtHR). (2012). Hirsi Jamaa and Others v. Italy, Application No. 27765/09.
45. Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens.
46. UNHCR, Fact sheet - Collective expulsions of aliens.

10. How does the principle of non-refoulement relate to the concept of "safety of the country of origin"?

Assessing the safety of the refugee's country of origin should not be construed as a reason for mass repatriation. Rather, it serves as the mechanism through which the host country evaluates whether substantial changes in the country of origin have nullified the grounds for the individual refugee's well-founded fear of persecution.[47] To determine that the country of origin is 'safe' for return, the returning State must be satisfied that the reasons for the displacement have ceased (the 'cessation clause'). The 1951 Refugee Convention lays out that the Convention shall cease to apply to persons where "the circumstances in connection with which [they have] been recognised as a refugee have ceased to exist."[48] In commentary on this article, the Office of the High Commissioner for Refugees described the following requirements for this clause to be satisfied:

a. There must be a fundamental change in the circumstances of the country that is major, profound or substantial and removes the grounds for the fear of persecution;

b. The changes must be durable, and any evaluation of the durability must take into account the changing political situation, especially where the changes arose through violence; and

c. The changes must affect the whole of the country, rather than specific 'safe areas.'[49]

The UNHCR's Handbook on Voluntary Repatriation adds to this that in some cases 'compelling reasons may, for certain individuals, support the continuation of refugee status' even when these criteria are satisfied.[50] The restrictive scope of the cessation clause is further supported by the UNHCR that emphasises that the safety determination should always reflect the individual cases. For example, the UNHCR states that "Refugees who have obtained their status on the basis of dependency maintain their status until they individually fall within the cessation clauses. This means that loss of refugee status on the part of any refugee family member would not, as such, affect the refugee status of any other member of the family".[51] Therefore, assuming that a country of asylum satisfies itself by the criteria to consider a country of origin safe for return, it has to ensure "that all refugees affected by a group or class decision to apply these cessation clauses must have the possibility, upon request, to have such application in their cases reconsidered on grounds relevant to their individual case".[52]

Besides the cessation clauses and the application of IRL, assessing the safety of the country of origin for the return of other categories of persons also involves an individualized assessment. Persons fleeing armed conflict or civil unrest might not fit the criteria of the 1951 Refugee Convention for different reasons. This could include seeking refuge in a country not bound by the Convention or receiving temporary protection during mass influxes when individual refugee assessments are impractical. Nevertheless, and in all these cases, "the fundamental principle of non-refoulement [...] must be scrupulously observed".[53] Thus, it falls upon the host State to impartially evaluate the safety of the country of origin for those who have fled armed conflict. This assessment must take into account the same concerns that prompted these individuals to fear persecution, irrespective of whether conditions in their home country appear suitable for a collective repatriation.

The de-escalation of conflict or level of violence in the

47. United Nations High Commissioner for Refugees (1996). Handbook on Voluntary Repatriation: International Protection, Section 2.2.

48. Refugee Convention 1951, Articles 33(1) and 1C(5).

49. United Nations High Commissioner for Refugees (1999). The Cessation Clauses: Guidelines on their Application, 24-26.

50. United Nations High Commissioner for Refugees (1996). Handbook on Voluntary Repatriation: International Protection.

51. United Nations High Commissioner for Refugees (1999). The Cessation Clauses: Guidelines on their Application.

52. Executive Committee of the High Commissioner's Programme, Cessation of Status No. 69 (XLIII) - 1992, 9 October 1992, No. 69 (XLIII).

53. Executive Committee of the High Commissioner's Programme, Conclusion No. 22 (XXXII) – 1981 – Protection of Asylum-Seekers in Situations of Large-Scale Influx, Section II(A)(2).

country of origin is not the only factor to determine the fundamental change in circumstances that imply the safety of that country. Conditions of legal safety, physical and material security, as well as dignity should be objectively assessed.[54] The returning country has to consider legal safety elements such as patterns of gross, flagrant or mass violations of human rights; discrimination; existing laws and regulations; the meaningfulness of any amnesties; and the credibility of public assurances by the authorities.[55] Other elements of physical security have to be assessed as well, including the general security in the country of origin in general and in the region of return in particular. The returning State must also consider the risks of landmines and remnants of war, as well as the safe routes for the returnees.

11. Are the "reasonable standards of living" an identifying criterion of the safety of the country of origin? Does this play part in the non-refoulement criteria?

The UNHCR defines safety in the context of repatriation to include material security, such as access to land or means of livelihood.[56] However, the designation of a "safe country of origin" is based on the criteria that the reasons for seeking international protection no longer exist (as noted in the previous question). These criteria do not consider the economic situation or standard of living of the applicant. However, in situations of severe economic crises or major damage with inadequate infrastructure, repatriation plans must carefully consider how these conditions could affect the sustainability of the return of refugees. There has been some discussion about whether a country needs basic infrastructure and essential health facilities to be considered safe for refugees. For example, the agreement on refugees in Bosnia and Herzegovina prevented forcing refugees to move to areas 'lacking the basic infrastructure to resume a normal life.'[57] This cannot be considered as a valid reason for individual claims to invoke the non-refoulement principle. The UNHCR supports voluntary repatriation as a durable solution which necessitates the returnees' reintegration into their local community. This reintegration requires improvements in the economic, social and human rights conditions.[58] Therefore, adequate standards of living should be addressed in comparison to the prevailing standards of the home State, while also considering the length of stay in the host State when facilitating voluntary repatriation.

12. How does domestic law affect the designation of safe countries of origin?

In domestic legislation, several countries have adopted phrases amounting to a requirement that there be no threat to "life, liberty or health" in places to where a refugee might be returned.[59] In terms of a more concrete definition, several countries in the European Union have adopted the Asylum Procedures Directive (APD), which allows signatories to designate countries as a 'safe country of origin.' The definition of safety contained in the APD is not endorsed by all the signatories, and some countries have been criticised by the UNHCR for their national definition.[60] The UNHCR and some NGOs have strongly criticised sections of the APD, particularly those that allow for a country to be considered 'safe' even only part of its territory qualifies, a lack of consideration for widespread female genital mutilation as grounds for unsafeness, and the essentially discriminatory nature of some signatories' application of the criteria, among other complaints.[61]

The standard APD definition states that:

54. United Nations High Commissioner for Refugees (1996). Handbook on Voluntary Repatriation: International Protection, Section 2.4.

55. Ibid. See also: Committee against Torture, General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, UN Doc. A/53/44, Annex IX, para. 5.

56. UNHCR, Handbook on Voluntary Repatriation: International Protection (1996), para. 2.4.

57. International Committee of the Red Cross (2023). Practice relating to Rule 132. Return of Displaced Persons, see Djibouti and Peru, annex 7.

58. Ibid. para. 6.1.

59. Ibid.

60. UN High Commissioner for Refugees (UNHCR), Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations, March 2010, Section 13.

61. Ibid, 26.

"A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution... no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict".[62]

To demonstrate that no persecution and other serious human rights violations are taking place generally or consistently in the country requires a thorough examination of the national legislations and practices in the home country as well as their impact on the human right of returnees. The Commission of Inquiry on Syria (COI) has criticised the increasing pressure on Syrian refugees to return despite a prevailing "policy" of instilling fear. This fear is exacerbated by warnings about risks such as arbitrary detention, torture, and enforced disappearance. The COI also noted regulations requiring "security clearance" for matters related to Housing, Land and Property (HLP), which discourages returnees from claiming their HLP rights, even through legal channels.[63] Such laws and regulations must be carefully considered when assessing "safety" of the country of origin, whether in the context of the APD or any other procedure for the same end.

13. When is an individual's decision to return to their country of origin considered voluntary?

The core of voluntariness is that it represents a **free and informed decision**. In their Handbook on Voluntary Repatriation, the UNHCR states that 'the principle of 'voluntariness' must be viewed in relation to both conditions in the country of origin (... an informed decision), and the situation in the country of asylum (... a free choice).'[64] They further asserted that to confirm the voluntary nature of a return decision, they must ascertain that the refugee's choice is primarily influenced by positive factors attracting them to their country of origin, as opposed to factors pushing them away from their host country or negative conditions compelling their return to their homeland.[65] The language of a 'free and informed decision' is additionally present in the article 11(9) of the Kampala Convention.[66]

The United Nations Network on Migration states that for return to be considered voluntary, migrants should be free from real or implied threats, given reliable information in the correct language, and given sufficient time to consider their options before making a decision.[68] Voluntariness in some cases might require that refugees are given the ability to fully examine the conditions they would return to, including potentially visiting in person or via a representative before their final repatriation, as was the case in Georgia.[69] As a further example, NGOs have called on the UNHCR to provide up to date information on conditions in Myanmar to facilitate informed decision making on the part of Rohingya refugees.[70]

The application of voluntariness in practice by States and the UNHCR has at times been criticised as failing to account for the specific factors that might invalidate voluntariness for women refugees, including a failure to allow them to examine the areas to which they are returning independently of their family unit.[71] Additionally, the UN Special Rapporteur on the Human Rights of Migrants in a 2018 report criticised States for failing to provide

62. Ibid, 13.
63. OHCHR, Statement by the Independent International Commission of Inquiry on the Syrian Arab Republic, 29 June 2022.
64. United Nations High Commissioner for Refugees (1996). Handbook on Voluntary Repatriation: International Protection. s 2.3.
65. Ibid.
66. International Committee of the Red Cross (2023). Practice relating to Rule 132. Return of Displaced Persons, Kampala Convention, Article 11(2).
67. The term "migrants" is used comprehensively to describe all individuals entitled to the right to non-refoulement. See, for example: International Organization for Migration (IOM), IML Information Note on The Principle of Non-Refoulement, April 2014.
68. United Nations Network on Migration (2021). For safe and dignified return and sustainable reintegration, 17.
69. International Rescue Committee (2018). 42 NGOs, including the IRC, warn that return of refugees to Myanmar now would be dangerous and premature.
70. Ibid.
71. Yacoub, N. (2023). 'Voluntary' Repatriation: A Thinly Veiled Durable Solution for Refugee Women. Völkerrechtsblog, p. 16

adequate information to migrants making a 'voluntary' return on the conditions of their home country, failing to provide proper documentation and consular support, and sharing sensitive information with the country of origin.

Preventing migrants from appealing against repatriation or expulsion decisions, especially when they claim a real risk of serious violations if returned to their home countries, removes their free choice. Such claims require States to halt any repatriation decision until a thorough and transparent individual assessment is conducted. This also applies to situations involving the designation of "safe third countries or countries of origin" where it is crucial to give every affected person "an effective opportunity to rebut the presumption of safety of the country of origin in [their] individual circumstances".[72] Therefore, when there is a real risk in the home country, it triggers States' obligations under the principle of non-refoulement.

14. What role does the UNHCR play in designating safe countries of origin?

UNHCR does not take direct responsibility for designating safe countries of origin, although it does not oppose this notion.[73] Instead, States are responsible for making and implementing such designations. UNHCR plays a crucial role in reviewing States' policies and regarding these designations. Since designating a safe country of origin requires a comprehensive and transparent analysis, the information and recommendations that UNHCR provides to States are crucial. Thus, UNHCR plays an indirect role by assisting "governmental and private efforts to promote voluntary repatriation" as part of its mandate under its Statute.[74]

15. Is it an obligation on States to repatriate refugees only to their safe original places of residence in the country of origin?

The 1951 Convention and its 1967 Protocol do not explicitly mandate the refugees to be returned to a specific location within the home country. Therefore, States parties to these agreements are not obliged to repatriate refugees to their places of origin in their home country once conditions of safety and voluntariness are met. Similarly, States that are not parties to the 1951 Convention and its 1967 Protocol are not obliged to do so, as none of the IHRL binding instruments explicitly mandate such an obligation. However, States' lawful decision to repatriate refugees and asylum seekers should not be based solely on the absence of an explicit obligation to return them to specific locations. Repatriation processes involve a range of other obligations that may influence specific circumstances, making it contradictory to return refugees to places other than their origin. Among these obligations is to ensure that the refugee's return is voluntary which requires an individual assessment of their circumstances to determine whether returning them to other places in their home country might jeopardise their safety or impose serious risks.

16. Does the obligation of non-refoulement require a State that is not a party to the 1951 Convention to keep refugees on its territory?

As detailed before, States not parties to the 1951 Convention and its 1967 Protocol are not obligated to grant asylum seekers refugee status and the consequent rights and entitlements mandated by these instruments. Therefore, from an international

72. UNHCR, The Safe Country of Origin Concept, p. 2.

73. UNHCR, Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries.

74. UNHCR Statute, Article 8.c.

law perspective, it is inaccurate to demand that States not parties to the 1951 Convention indefinitely and collectively pledge to keep those who escaped armed conflict or civil unrest on its territory or to grant them any status that guarantees their continued presence. Each State by virtue of its sovereignty is entitled to regulate the entry and residence of aliens under its jurisdiction, including the right expulsion.[75]

However, States not parties to the 1951 Convention are still under the customary obligation of non-refoulement, meaning they must not return or expel individuals who can prove they are at real risk of persecution if sent back to their country of origin. Additionally, the expulsion of aliens must always be in accordance with the applicable rules of international law,[76] and must follow a decision reached lawfully.[77] Although the ICCPR specifies this obligation to aliens lawfully present on the territory of the expelling State,[78] the International Law Commission (ILC) considers that the requirement for conformity with law applies "irrespective of whether the presence of the alien in question is lawful or not".[79] However, the ILC reiterates that the procedural rights of aliens subject to expulsion "are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration".[80] Therefore, there is no contractual obligation under international law on States not parties to the 1951 Convention to refrain from expelling aliens who are unlawfully present on their territories, except in cases where non-refoulement applies.

Nevertheless, despite the right of States to practice discretion in regulating the presence and expulsion of aliens according to the lawfulness, unlawfulness, and the duration of their stay, any "simplified procedures" for the expulsion of aliens must be limited to cases of brief stays that, according to the practice of several States, must not exceed six months.[81] Moreover, the decision to expel an alien based on the legality of their entry or stay must be taken in accordance with the guarantees stipulated in Article 13 of the ICCPR and in conjunction with the right to equality before the law enshrined in Article 26.[82]

17. Who is responsible for the relocation of the refugees in third countries when they are staying in countries that are not a party to the 1951 Convention?

UNHCR is mandated by its Statute and UN General Assembly Resolutions to undertake resettlement of refugees from an asylum country to another State that has agreed to admit them and ultimately grant them permanent residence.[83]

Resettlement is a protection tool used to meet the needs of those who seek protection in countries facing serious challenges in providing it. It also forms an international responsibility-sharing mechanism[84] because it involves the support of third States that may not be affected by refugee crises to the same extent of other States.

UNHCR leads the resettlement process which includes mapping global resettlement needs, identifying and assessing individuals for resettlement, mobilising States to admit selected refugees, and collaborating with States and other partners to facilitate pre- and post-departure of refugees, with special focus on integration in their new communities.[85]

75. International Law Commission (ILC), Draft articles on the expulsion of aliens, with commentaries (2014), Article. 3.
76. Ibid.
77. Ibid. Article 4.
78. ICCPR, Article 13.
79. ILC, Draft articles on the expulsion of aliens, with commentaries (2014), Article. 4, commentary, para. 4, p. 7.
80. Ibid. Article 26, commentary, para. 4, p. 39.
81. Ibid. para. 11, p. 45.
82. For further details, see: Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), para. 9.
83. UNHCR, Long-term Solutions, Resettlement.
84. UNHCR, What is resettlement? P. 1.
85. For more details, see: UNHCR, What is resettlement?

Although nothing in the UNHCR mandate limits resettlement efforts to refugees in States not parties to the 1951 Convention, these States are usually the main targets for resettlement efforts. However, it is worth mentioning that resettlement efforts face significant gaps and challenges and are unable to meet all the protection needs as identified by the UNHCR annual mapping, with less than 1% of the world's refugee population benefiting from resettlement".[86]

18. What is the obligation of State not-party to the 1951 Convention under international law when the refugees it hosts pose a threat to national security but fulfil the conditions of non-refoulement? Can a non-recognised refugee appeal a decision of repatriation issued by such a State?

Unlike States parties to the 1951 Convention, States not parties are not governed by Article 33 on the obligation of non-refoulement and its second paragraph that regulates its exceptions. States parties to the 1951 Convention can exceptionally return a refugee on two grounds: in case of threat to the national security of the host country and in case their proven criminal nature and record constitute a danger to the community.

States not parties to the 1951 Convention are obligated to apply the procedural guarantees stipulated in Article 13 of the ICCPR and any other relevant provisions when an expulsion decision is made. Nevertheless, Article 13 contains an exception to its application where there are "compelling reasons of national security". The Human Rights Committee has recalled that Article 13 does not regulate the substantive grounds for expulsion,[87] including "national security" reasons because it is a matter for the State to decide about this substance.

Therefore, the legal grounds demanding a State not party to the 1951 Convention not to return an asylum seeker who poses a threat to national security seem to be invalid in analogy to the same right afforded to States parties to the 1951 Convention under Article 33(2), and as stipulated in Article 13 of the ICCPR. Nevertheless, States must ensure that any person subjected to expulsion for any reason should have access to the procedural safeguards set out in Article 13 of the ICCPR, and this entails their access to legal representation in order to submit the reasons against their expulsion. Therefore, States "should provide information as to the stages of the application procedures at which legal assistance may be had, and whether the assistance is free of charge at all stages for those who cannot afford it".[88] Although the procedural safeguards of Article 13 of the ICCPR apply only to persons who are lawfully present on the territory of a State, the Human Rights Committee has encouraged States to suspend any expulsion decision when asylum seekers – regardless of the lawfulness of their presence – file emergency remedies against such a decision.[89]

19. How does a refugee lose their status? Who determines that the status of refugee is lost? Who is the entity responsible to determine whether the non-refoulement criteria apply to individual refugees?

The 1951 Convention outlines in Article 1C the situations in which refugee status comes to an end, known as the "cessation clause". These situations can be divided broadly into two categories. The first relates to the personal circumstances of the refugee; including when refugee status ends if a refugee voluntarily seeks protection from their home country, regains their nationality or acquires a new one, or willingly returns to their home country after fleeing persecution. The second category relates

86. Ibid. p. 4.

87. Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), para. 10.

88. Human Rights Committee, Concluding Observations on Denmark, CCPR/CO/70/DNK, 31 October 2001, para. 17.

89. See, for example: Human Rights Committee, Concluding Observations on Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 23.

to the changes in the objective circumstances that justified the refugee status; if these circumstances no longer exist, the refugee can no longer continue to refuse to avail themselves of the protection of their home country or former habitual residence. In other words, if the fear of persecution that justified the asylum no longer exists, the person cannot claim the need for protection anymore, and their refugee status will end accordingly.

"Voluntariness" is a pre-condition to invoke the cessation clause to the first category of personal circumstances. For instance, "protection of their nationality" refers to diplomatic protection by the country of nationality, including consular assistance and services from its diplomatic mission in the asylum State. This situation invokes the cessation clause and the refugee will be considered as re-availing themselves of the protection of their country of nationality, except when they were compelled to do so, such as at the instructions of the authorities in the country of asylum.[90]

Another debated issue is the "voluntary re-establishment" of a refugee in their country of origin and whether short visits are sufficient to invoke the cessation clauses or not. According to the UNHCR, the "term "re-established" denotes not only return to the country of origin but also re-settlement there".[91] However, and despite that no official reservations or declarations were made on Article 1C by States parties to the 1951 Convention, the interpretation and application of this clause by those States are significantly different. A mere visit by a refugee to their country of origin may result in invoking this clause and terminating their status since it was granted because the person is deemed in need of protection from the country of origin, which is why they have sought out refugee status in another country, and visiting that country implies that they do not fear persecution. Some States, such as Germany, prefer to assess each case individually because the general rule is that refugees should not visit their countries of origin, and the exception would be permitting that in very exceptional cases such as "attending a funeral or visiting a severely ill family member".[92] Therefore, if the travel is for holiday reasons, or a long-term stay in the home country, this can be an indication that the refugee faces no fear of persecution." In this case, refugee protection can be revoked in accordance with the German asylum law.[93]

Granting and revoking the refugee status are usually commissioned to a dedicated administrative authority in the receiving States parties to the 1951 Convention in line with Article 26. However, refugees should have access to any existing remedies – administrative or judicial – to challenge any decisions that affect their status including invoking the cessation clauses and any expulsion decisions. Article 32(2) obligates States parties to ensure a due process of law which encompasses the right for judicial remedy. Therefore, a refugee who wants to challenge an expulsion decision based on the principle of non-refoulement, should be allowed enough time and assistance to use all the available judicial avenues for that end.

The same applies to non-recognised refugees in States not parties to the 1951 Convention who are subject to proper and legal expulsion decisions. They can challenge such decisions in accordance with the State obligations towards aliens under IHRL and in accordance with their national legislation (Check the previous question).

90. See, for example: UNHCR, The Cessation Clauses: Guidelines on their Application, Geneva, April 1999.

91. Ibid.

92. Charlotte Hauswedell, Refugees and home visits: What you need to know, INFOMIGRANTS, 20 August 2019.

93. Ibid.

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20. What are the obligations of a host country towards refugees who have entered illegally and haven't regularized their stay, including whether they can be prosecuted or repatriated for illegal entry, and if the host country is not a party to the 1951 Convention, is it still required to allow them to remain?

Each State has complete discretion over regulating entry and stay within its territory. This includes, inter alia, imposing pre-permission requirements for entry, fines and other measures for illegal entry, and expulsion. Concerning refugees, Article 31(1) of the 1951 Convention requires States parties not to impose any penalties on refugees who enter or stay in their territories illegally considering that they do that for "good cause" which is satisfied with the proof of well-founded fear of persecution.[94] This requirement implies certain obligations on asylum seekers and refugees, mainly presenting themselves without delay to the authorities.

This provision is in fact an exception to the general rule guaranteeing States' discretion, but it is still subject to various interpretations and implementation by States parties to the 1951 Convention.[95] States not parties to the 1951 Convention are not bound by this exception and they are entitled to practice their same discretion to regulate the entry and stay of asylum seekers in accordance with their national legislations concerning the treatment of aliens. This discretion should never be interpreted as a permission to violate the principle of non-refoulement. Therefore, for a State not party to the 1951 Convention to exercise its right to repatriate an alien due to illegal entry or stay, it must guarantee all feasible measures to allow them to challenge such a decision based on the principle of non-refoulement.

94. See, for example: Cambridge University Press, Summary Conclusions: Article 31 of the 1951 Convention, June 2003, para. 10(e).

95. For more details, see: Dr. Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), Article 31 of the 1951 Convention Relating to the Status of Refugees, Legal and Protection Policy Research Series, UNHCR, July 2017.

21. Can the host country impose measures that restrict the freedom of the refugees within its borders, even if these measures potentially lead to what might amount to "involuntary return"?

Limitations to freedoms – mainly freedom of movement – of aliens in general are subject to their legal status in the concerned State and whether they lawfully or unlawfully present on its territory. This applies to both States parties and not parties to the 1951 Convention. Article 31(2) of the 1951 Convention requires States parties not to impose restrictions on the movement of refugees who are still not enjoying the official refugee status and/or the rights and entitlements granted by the Convention except those restrictions that are necessary. Necessity in this context concerns "considerations of security or special circumstances such as great and sudden influx of refugees or any other reason which might necessitate restrictions on the movement of refugees".[96] Therefore, States parties to the 1951 Convention may impose restrictions on movement of asylum seekers who – in most cases – would have entered the State in an unlawful manner. Furthermore, Article 9 of the 1951 Convention allows for certain "provisional measures" in exceptional circumstances that concern national security regarding particular refugees, including restrictions on the freedom of movement.

It should also be emphasised that refugees are obliged to conform to the laws and regulations of the host State especially those that concern the maintenance of public order pursuant to Article 2 of the 1951 Convention. Such regulations must be clearly communicated and explained to the refugees by the competent authorities in a language that they understand to enable their conformity with it and to hold them accountable for breaching it.

96. Nehemiah Robinson, Convention Relating to the Status of Refugees: Its History and Interpretation,: A Commentary, Institute of Jewish Affairs, Reprinted by the Division of International Protection of the UNHCR (1997), p. 154.

In States not parties to the 1951 Convention, restrictions on freedom of movement and the implementation of certain measures against aliens are subject to the concerned State's obligations under IHRL regardless of whether the affected person is an asylum seeker or not. National laws and regulations regulate the conditions of such measures and should always be in conformity with the rights and freedoms guaranteed by IHRL instruments especially ICCPR. The lawful or unlawful entry of an alien into the territory of a State may be a crucial factor to differentiate between the protection of an alien against certain measures pursuant to Article 13 of the ICCPR. The Human Rights Committee "has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of art 12 [freedom of movement]".[97] The regularization of the status of illegal entrants is governed by the national laws and regulations of the concerned State. Therefore, the Committee has conditioned the alien's enjoyment of the right to freedom of movement with their lawful presence in the State.[98]

It is worth noting that unjustified restrictions on the enjoyment of freedom of movement and other rights might be one of the "push" factors that deprive a refugee from their voluntary and informed decision to return (see Q 13 above). All States are under the obligation to respect and protect the human rights of persons under their jurisdiction including equality before the law and the entitlement without any discrimination to the equal protection of the law pursuant to Article 26 of the ICCPR. Therefore, the lawfulness or unlawfulness of entry and stay in a State should not be a justification to deprive a person from his right to challenge restrictive measures against them especially when they demonstrate well-founded fear of return which triggers the State obligation under the principle of non-refoulement in all circumstances.

97. Human Rights Committee, Communication No. 456/1991, Celepli vs. Sweden, para. 9.2.

98. Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant (1986), para. 8.

22. Is being called for compulsory military service in the country of origin that is at war a ground for non-refoulement?

Draft evasion does not in itself constitute a valid ground to claim the need for international protection, neither the mere prosecution or punishment for it.[99] The crucial factor, according to UNHCR, in establishing the likelihood of persecution for draft evaders is their genuine religious, moral, or political convictions for which they refuse to perform military service. In such cases, the UNHCR considers that "general" punishment for draft evasion may amount to persecution, even if this punishment is generally not regarded as such.[100]

However, the European Court of Justice (ECJ) concluded that "in the context of armed conflict, particularly civil war, and where there is no legal possibility of avoiding military obligations, it is highly likely that the authorities will interpret the refusal to perform military service as an act of political opposition, irrespective of any more complex personal motives of the person concerned".[101] Therefore, the ECJ countered the UNHCR interpretation and re-affirmed that "when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution".[102] Therefore, prosecution or punishment for refusing to perform military service in a conflict where military service involves crimes or acts that would disqualify someone from obtaining refugee status is likely considered persecution.[103]

99. UNHCR, UNHCR's Position on Certain Types of Draft Evasion, January 1991.

100. Ibid.

101. European Court of Justice (ECJ), Judgment of 19 November 2020, EZ, C-238/19, ECLI:EU:C:2020:945, para. 60.

102. Ibid.

103. 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, Document 32011L0095, Official Journal of the European Union, L 337/9, Article 12(2).

This position aligns with the European Union Gency for Asylum in its Syria Country Guidance in which it emphasized the inability of recruits to control their role within the armed forces, and the consequent likelihood of committing crimes, directly or indirectly. This substantiates their well-founded fear of persecution due to their refusal to perform military service.[104]

Nevertheless, it is crucial to highlight that the ECJ reiterated that "it is for the competent national authorities to ascertain, in light of all circumstances at issue, whether [the connection between punishment and reasons for persecution] is plausible".[105] In this context, a German court has dismissed the claim of a Syrian asylum seeker who was granted refugee status after he escaped military service. The court justification relied on its conclusion that draft evaders in Syria are no longer subject to systematic punishment and are not considered political opponents of the State.[106] Therefore, it should be emphasised that draft evasion in itself is not regulated under IRL as a substantial reason to acquire the refugee status. Consequently, it is not solely a sufficient justification to invoke non-refoulement unless the concerned person proves to the competent authorities the real and individual risk they will face upon return.

23. Is UNHCR obligated to share the data of registered refugees with the host State?

The UNHCR is mandated by the UN General Assembly to provide "international protection, under the auspices of the [UN], to refugees [...] and [to seek] permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organisations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities".[107] Therefore, regardless of a State being a party to the 1951 Convention or not, the UNHCR should strive to support the Government in solving the problem of refugees. This cannot be achieved without implementing coordination and assistance activities with the Government to promote voluntary repatriation or resettlement and to execute any measures to improve the situation of refugees.[108]

The "assistance" mandate is based on the assumption that "the responsibility for refugee protection lies with the central Government".[109] In order for a Government to be able to satisfy this responsibility, it requires the UNHCR's collaboration especially when the latter performs its refugee mandate to provide international protection and humanitarian assistance and seek permanent solutions for persons within its core mandate responsibilities, including the promotion and facilitation of their admission, reception, and humane treatment.[110]

Since there is no unified procedures for such collaboration especially in cases where States not parties to the 1951 Convention face situations of mass influx, this collaboration is usually regulated through special agreements between UNHCR and the concerned State. In this context, the UNHCR Executive Committee "[e]ncourages States and UNHCR [...] to develop further and implement registration guidelines to ensure the quality and comparability of registered data" and "to introduce new techniques and tools to enhance the identification and documentation of refugees and asylum-seekers". The Committee further "recognizes that the appropriate sharing of some personal data in line with data protection principles can assist States to combat fraud, to address irregular movements of refugees and asylum-seekers, and to identify those not entitled

104. European Union Agency for Asylum, Country Guidance Syria 2023.

105. European Court of Justice (ECJ), Judgment of 19 November 2020, EZ, C-238/19, ECLI:EU:C:2020:945, para. 62(4).

106. INFOMIGRANTS, German court dismisses refugee claim by Syrian draft evader, 23 March 2021.

107. UNHCR Statute of 1950, para. 1.

108. Ibid. paras 8(b) and (c).

109. UNHCR, Emergency Handbook, Working with the host government.

110. UNHCR Executive Committee, Conclusion on international protection, in UN General Assembly, Report of the Fifty-Second Session of the Executive Committee of the High Commissioner's Programme (Geneva, 1-5 October 2001), A/AC.96/959, p. 7, para. 22(c).

to international protection" and requests States to seek the support and cooperation of UNHCR "to take all necessary measures to register and document refugees and asylum-seekers on their territory as quickly as possible upon their arrival".[111]

Accordingly, by virtue of the responsibility of States and the UNHCR mandate to assist them in upholding this responsibility, and in accordance with the agreements between them, UNHCR is expected to share all the relevant data and information that it acquires about asylum seekers on the territory of the concerned State, while maintaining practical measures to ensure the confidential nature of personal data and the security of the concerned individuals. An illustration of such an agreement is the MoU signed by the UNHCR and the Lebanese General Directorate of Public Security (LGDPS) on 9 September 2003.[112] Since Lebanon is not a State party to 1951 Convention, the MOU states that the Lebanese State considers that any "asylum seeker" who enters or stays in its territory should be treated as an asylum seeker in a third country and not in Lebanon. Therefore, the UNHCR should perform its mandate in this regard by registering asylum seekers and facilitate their resettlement in third countries. Concerning the sharing of data and information, the MOU requires the UNHCR to share with the LGDPS the asylum applications including the supporting documents on a weekly basis. The LGDPS issue a movement permit for each applicant valid for 3 months to enable the UNHCR to decide about the application. The UNHCR must provide the LGDPS with the lists of accepted and rejected applications, and the LGDPS issues another permit for 6 months to enable the UNHCR to facilitate the resettlement of the accepted applicants. This permit shall be renewed once only for 3 months. Additionally, the UNHCR should provide the LGDPS with clear and comprehensive details of personal and collective assistance projects targeting asylum seekers in Lebanon.

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111. UNHCR Executive Committee, Conclusion on Registration of Refugees and Asylum-seekers No. 91 (LII) – 2001, 05 October 2001, paras. (c), (d), (f), and (g).

112. Lebanese University, Center for Research and Studies in Legal Informatics, Memorandum of understanding between the General Directorate of Public Security and the regional office of the United Nations High Commissioner for Refugees regarding dealing with applicants for asylum at the UNHCR office in Lebanon (Available only in Arabic).

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Diakonia International Humanitarian Law Centre Lebanon
Al Alam St. Badaro, Beirut

Syria-ihl@diakonia.se
www.diakonia.se/ihl

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International
Humanitarian
Law Centre