Strengthening the Principle of Non-Refoulement

Abstract

This work examines the origins of the principle of non-refoulement and how it has evolved during the twentieth and twenty-first centuries. Non-refoulement, or the right not to be repelled or returned, was agreed upon by States as a narrow protection against the return to certain death for all refugees in 1951, as part of the Refugee Convention. Although 1951 marked the inception of non-refoulement as a legal principle, there is evidence to show that it existed in some form previously, through examining religious texts and early writings on international law. However, its adoption by human rights law has meant that the principle has been expanded and has departed significantly from the intention of the original drafters. This is problematic for both refugee law and human rights law: it encourages narrower and narrower interpretations of the right to non-refoulement by States, as shown below, because of the intense concerns States have, and always have had, around mass migration. This work argues for an understanding of the principle of non-refoulement as intended in the 1951 Refugee Convention, to prevent its conflation with the right to asylum and thereby its erosion through ever more limited interpretations.

Keywords

Non-refoulement; international law; refugee law; human rights law

1. Introduction

The concept of non-refoulement is often considered to be a key aspect of asylum law: without being able to move across borders, how can one seek asylum in another State? Non-refoulement thus protects individuals from being expelled or repelled at a border; it remains the right not to be returned to certain death. This has also meant that non-refoulement has been partially conflated with the right to asylum, and attempts made to broaden its application through its adoption by human rights. Tacit consideration of it as the first step towards the right to asylum has undermined it as a distinct principle, and its application by human rights law has made States conscious of its use to prevent deportation. This is a significant departure from the principle which was originally conceived by the States Parties to the 1951 Refugee Convention, and potentially damages the principle itself.

This work argues for an understanding of non-refoulement which falls in line with the 1951 conception of the principle, a rejection of further expansion and, also, conflation with the right to asylum. The distinction is key to preventing the erosion or further limitation of the principle, and to ensure its continued practice by States to protect those who rely upon it from being deported to their death.

To do so, this work examines the right against expulsion for refugees and asylum seekers from religious texts to the twentieth century, and the protection available for refugees against return during the inter-war period. The rules against return of certain groups of refugees placed in the 1933 Convention and the broader protections for all refugees found in the subsequent 1951 Refugee Convention are also examined, as well as its adoption by human rights law. The problems associated with this adoption, demonstrated by State practice, are explored, linking these to the concerns some States have around mass migration and population flows. To preserve the rule, and to ensure adherence thereto, the principle of non-refoulement as intended in the 1951 Refugee Convention should be maintained. Further expansion risks its rejection at the level of State practice, particularly when it is viewed as a potential surrogate for the right to asylum.

2. The development of non-refoulement: From ancient times to the arrangements of the League of Nations

Despite the narrow nature of non-refoulement, it has been referred to as the 'cornerstone'[1] of international refugee law, largely because of its significance in allowing individuals to claim asylum. As will be discussed below, it is not the first step towards an asylum claim. Rather, it is a right in and of itself, limited to an obligation on States not to return those seeking refuge to their deaths. Its origins can be traced to the Refugee Convention in 1951,[2] but there is evidence that the requirement not to return individuals to danger was recognised much earlier. In his study of the roots of non-refoulement, Ben-Nun cites the address of Rabbi Dr Isaac Lewin to the UN Ad Hoc Committee on Statelessness and Related Problems. Lewin quotes the Prophet Amos, who reproaches territories which had expelled Jewish exiles to an enemy power, holding that they would 'never be forgiven' by God. Ben-Nun argues that this provides evidence of the universality of the rule[3] as, similarly to most religious laws, Jewish law would not usually be applicable to non-Jewish peoples. He holds that the extension of the rule to non-Jewish states provides evidence of a rule of international law. Although there is little further evidence to corroborate the existence of an international rule as such from this period, or even a demonstration that the non-Jewish peoples accepted the wrongfulness of their actions, this provides evidence of a rule, and a degree of early support for a very simple, and rather limited, principle of non-refoulement.

Similarly, some evidence for a simple prohibition on expulsion can be found in early writings on international law. Grotius, in particular, made similar assertions to those cited by Ben-Nun regarding the right to be admitted to a State in order to seek asylum, as highlighted by Grahl-Madsen.[4] The right to asylum, at this stage, is separated clearly from the right to be protected from repulsion or expulsion. Indeed, neither the right of non-refoulement nor the right to claim asylum are explicitly acknowledged by early writers on international law. Grotius offers a weak acknowledgement that the acceptance of exiles did not violate States' responsibilities towards one another. He wrote that it would not be 'contrary to friendship' for States to avoid repelling those placed in exile by other, presumably 'friendly' States. Primarily, his idea was States were unable to exercise any 'right over exiles'[5] and that the receiving State was free to admit those whom it wished. It is difficult to see this bearing out in practice: States do not tend to look favourably on those who host their perceived enemies. Neither Grotius nor the sources cited by Ben-Nun point to a decisive prohibition on exclusion or repulsion: expressing the idea in the negative indicates that it is within the gift of the State, but not something it must do, at this stage. Although the concept of exile is evidently present at these times, there remains no clear protection against being returned to one's enemies or one's hostile State of origin.

Even during a period of mass displacement at the beginning of the twentieth century, there was no clear protection for individuals who could not rely on the protection of their 'home' country.[6] In Europe and Russia in the late 19th and early 20th century, numbers of individuals left their homes to seek asylum in other States because of persecution and civil war,[7] and were supported, initially, by the International Committee of the Red Cross.[8] However the volume

of refugees almost overwhelmed the ICRC[9] and it requested that the League of Nations take action.[10] Similarly, individual States recognised that coordinated action was required, and that the League possessed the requisite 'moral authority'[11] to organise such action. The League recognised, openly, in 1921, that the 'civilised' course of action was for its members to offer political asylum to those in need,[12] but no legal rules were created to guarantee either admittance, per non-refoulement, or the right to asylum. A series of agreements, known as 'arrangements'[13] were initiated by the League to offer rights to those who did not 'enjoy the protection of the State to which they previously belonged' and who lacked another nationality.'[14] The arrangements included the Nansen passport system in 1922, for those who had 'lost' Russian nationality,[15] and, in 1926, arrangements to 'any person of Armenian origin (who was) formerly a subject of the Ottoman Empire.'[16] Representatives of the High Commissioner were also appointed to verify the documents of Armenian and Russian refugees across European countries in 1926[17] and all of these arrangements were extended to Turkish, Assyrian and Assyro-Chaldean refugees[18] by 1928. Such individuals were not at immediate risk of being returned, as their statelessness precluded their acceptance by their original home State, and the provision of identification documents allowed them to travel on to a third country to look for work. This means that the Nansen passport system typically applied to those who would not rely on non-refoulement in the first instance; they could not be returned as they lacked a State to which they could be repatriated.

During this period, the German Jewish population would have benefited most from either a declaration of statelessness or the principle of non-refoulement, as their situation was beginning to deteriorate greatly. Unfortunately, they completely lacked both domestic and international protection: not only did they fall outwith the nationalities listed above,[19] they also were in possession of passports and documents. These documents proved useless as the Nazi government sought to undermine their citizenship by failing to recognise their passports. Denied international and domestic protection, the lack of a clear rule against return placed them in inexorable danger: leaving Germany was almost as perilous as staying, as doing so would risk return and the inevitable degrading treatment which awaited them.

None of the arrangements noted above made direct reference to non-refoulement, or a prohibition on expulsion. The aim of these arrangements was simply to replace what had been lost: passports and identification documents, without which the individuals could not travel. Indeed, the focus was on maintaining population flows, as the re-issue of documents allowed individuals to travel outwith of the host country to search for work. However, there was movement towards a recognition of non-refoulement for such vulnerable individuals. A clarification in legal status that year moved towards a recommendation in favour of non-refoulement, holding that it was:

"recommended that measures for expelling foreigners or for taking other such action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner. This recommendation does not apply in the case of a refugee

who enters a country in intentional violation of the national law. It is also recommended that in no case should the identity papers of such refugees be withdrawn."[20]

As it remained a recommendation, States were free to return or simply repel at the border those who presented themselves. It was not until the first refugee convention, in 1933, that the duty not to repel individuals at the border became part of international law.

3. The Refugee Conventions: 1933, 1938 and 1951

Thus, States remained able to return individuals, even those from a German Jewish background[21] for much of the inter-war period. The lack of a principle of non-refoulement coupled with rising unemployment in the late 1920s increased the likelihood of rejecting foreign nationals and repelling them at the border, with certain countries also banning the employment of foreign workers. [22] As the precarity of the refugee situation increased, the League of Nations devised the first refugee convention in 1933. The 1933 Convention prevented the arbitrary return of foreign workers and the general expulsion or non-admittance of refugees to places of safety. For the first time, the French concept of non-refoulement had been brought into international law, banning the expulsion and non-admittance of refugees at the border of States Parties. [23] The text in English states that all Contracting States undertake 'not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly.'[24] The right is limited, in that it can be withdrawn on the grounds of public order or national security, but a signatory may not prevent the entry of refugees who are trying to leave their 'country of origin.'[25] The whole Convention applied specifically to former or current citizens of Russia, Syria and Turkey, as well as those of Armenian and Kurdish ethnicity, as well as 'assimilated refugees' and those whom States chose to include at the point of ratification.[26]

However, non-refoulement remained restricted and highly specific: There was no reference to German Jewish refugees, who remained at the mercy of host States. The protection was clear and relatively basic: such individuals were entitled to be admitted at the border of States Parties to the Convention where they were being persecuted in their home State. States Parties created a limited right: the protection applied only to those in the States mentioned above[27] and it could be withdrawn on the grounds of public order or national security, both broad grounds for denial. Secondly, only sixteen States in total[28] ratified the Convention. This rendered the effective protection for refugees to be admitted and not to be expelled limited, and that the reach of the prohibition on non-refoulement remained weak.

As the situation of German Jews deteriorated further, the League took steps, in the form of the provisional arrangements of 1936[29] and the Convention concerning the status of refugees from Germany,[30] to offer a degree of protection. The provisional arrangements mirrored the earlier arrangements for the Russian and Assyrian refugees, allowing Contracting States to provide identity documents to German Jewish refugees,[31] although the protection against refoulement continued to be weak at best.[32] Article 4 of the provisional arrangements framed the protection against expulsion negatively, in that countries may expel on the grounds of 'national security and public order.'[33] Rather callously, this included the power to return refugees to Germany for reasons based on these grounds, where they had been 'warned' of that possibility.[34] This period tends to be glossed over by writers in the area:[35] Holborn[36] and Beck[37] provides two of the few works which look at the meagre extension of refugee protection to the German Jewish refugees.

This time provides a useful demonstration of the limited protection offered to refugees, even in the face of great inhumanity, and the power that remained with each State, to exclude or repel refugees if it was thought necessary. States could also forewarn individuals of an intention to return them to Germany, to the hands of the Nazis: a needlessly cruel inclusion, which was not present in any of the previous arrangements or the Convention. It was evident that the interest at the time in refugee protection was waning, possibly in step with the League of Nations losing grip on any power it had had. The Evian conference, arranged in 1938 to discuss the issue of refugees from Germany and Austria, failed to generate any binding commitments or support from States.[38] Many governments, including the US and the UK, were reluctant to further support refugees and engage with any claims for asylum. The only further arrangements made, in 1939, were to extend the protection available to German Jewish refugees to those who had previously held Austrian nationality.[39] Declarations of war later that year meant that the consideration of refugee protection was set aside until the conclusion of the Second World War.

The development of the UN increased focus on the plight of refugees, and the concept of preventing expulsion attained greater significance than previously. Possibly because of the evidence of barbarity which had emerged since 1939, the previous provisions on returning refugees to countries of origin were undermined by the UN; the principle of non-refoulement was recognised as an important part of the nascent international rules on the protection of refugees. In 1946, the UN General Assembly stated clearly that no refugee should be 'compelled to return to their country of origin,'[40] affirming the principle of non-refoulement. The General Assembly then began to focus on protection of refugees through two resolutions in 1948, which aimed to alleviate the starvation and suffering of Palestinian refugees[41] and a final resolution in 1949 which established a refugee agency with special responsibility for Palestinian refugees.[42] Both developments were in contradistinction to the previous approach, which focused on the responsibility of domestic governments. Arguably, the momentum generated by the end of the Second World War gave the UN greater authority, and consequently, power, to develop supportive agencies and to undertake humanitarian missions. However, the most significant development in relation to non-refoulement was yet to come.

In 1951, the Convention relating to the Status of Refugees was adopted with including two provisions on expulsion, under articles 32 and 33. Article 32 prevented expulsion, generally, unless on the grounds of public order or national security. Article 33 extended the protection to situations of refoulement, defined as 'expel(ling) or return(ing) a refugee in any manner whatsoever to the frontiers of territories' where he or she may be persecuted.[43] However, the path to securing non-refoulement was not straightforward. During the drafting of the Convention, non-refoulement as a concept concerned many States, for two central reasons. The first was linguistic: would the definition of refoulement match the concept in other languages, or would it relate to a broader idea? The second was the potentially absolute nature of the provision: would it impair States' ability to deport dangerous individuals?

The linguistic issue was argued to be problematic for non-Francophone countries, as many countries felt that their obligations should be limited to not returning refugees, rather than allowing them automatic entry for the consideration of their case. France and Belgium were particularly keen on the inclusion of refoulement because of the distinction they made, in domestic law, between refoulement and other forms of expulsion. The concept of refoulement derives from the French administrative power to expel migrants, which can be traced back to 1849,[44] used during the inter-war years to deport foreign-born individuals who were convicted of offences against public order.[45] In the travaux préparatoires of the 1951 Convention, both the Belgian and French representatives noted the use of the concept of refouler in their domestic law, indicating that they were comfortable with the parameters provided by the concept. The Ad Hoc Committee argued that refoulement was an unknown quantity in Anglophone sphere, although Grahl-Madsen substantively refutes this by noting the similar words used in both English, German and Scandinavian languages to reflect the meaning of 'refouler.'[46] He noted that refouler could be translated into English as 'reconduct,' and highlighted the use of 'refouler' in the 1933 Convention.[47] The notion, however, of a responsibility wider than that of simply not returning a refugee was a significant cause for concern. The Swiss representative noted that this extended protection to those who had not yet crossed the border, the consequence of which, Robinson as cited by Grahl-Madsen notes, is that one would be better protected if one evaded the border guards and gained access to the country, rather than presenting oneself to the controls at the border.[48] Similarly, the Italian delegation also wanted clarity on expel or return,[49] as it was felt that the current position of refoulement was unclear, a point also made later by the Swiss delegation, who preferred the use of 'return.'[50]

Although the Ad Hoc Committee made the point that turning back a refugee who is threatened based on beliefs, as long as these do not contradict the UN Charter, is wrong,[51] and that Hitler could have argued that the Jews were a threat to public order,[52] there was still some discomfort with the idea of a broad definition of the idea of 'returning' refugees, based on refoulement, to include the obligation to admit. Returning an individual, as expressed in English, would mean that one turns them away, or sends them back. It was clear that this was the drafters' intention: a ban on returns alone would risk the argument that refugees did not need to be admitted to the State in which they sought asylum. The draft text put forward by the Ad Hoc Committee noted that expulsion and non-refoulement meant that a State should undertake 'not to remove or keep from the territory' individuals, for any reason whatsoever.[53] This phrasing generated a significant amount of concern for certain States, who were worried about their ability to deport dangerous individuals in the face of such rules. The UK voiced its concerns regarding the deportation of those with criminal convictions and wished to 'reserve the right to deport' them to other countries. The point was made, clearly, by the UK delegation that absolute provisions would undermine their ability to deal with refugees who disturb public order.[54] Interestingly, no cases of refugees who has disturbed the public order were cited during the discussions, so the argument remained abstract. The Swiss delegation were similarly concerned regarding the ability to deport dangerous individuals, as were both Sweden and France. Sweden argued that the inclusion of 'for any reason whatsoever' was too broad, and

France argued that it was highly subjective, and could potentially prevent all deportations. The Holy See made the interesting point that an absolute rule was fine, as national security exemptions could always apply, although it is difficult to see how this would work: if the wording did not include a national security exemption, then presumably the absolute nature of the provision would stand. Switzerland made this point again, noting that under article 42, there could be no reservations to these provisions, and the French delegate agreed, voicing their concerns regarding the potential abuse of the right to asylum.[55] Canada agreed, stating that many governments would struggle to accept non-refoulement without conditions. At this point, without much of a link, the President made reference to article 4 of the 1936, which permitted the return of Jews to peril in Germany after being 'warned' of the possibility, on the basis that they were a threat to public order or national security.[56]

This did not have the effect of focusing the minds of the delegates: there continued to be discussions regarding the extent to which exceptions could be included. There was evidently concern regarding influxes of refugees and, critically, the use of non-refoulement as a means of creating a right to asylum, thus precipitating mass influxes of refugees. Both Germany and Switzerland were concerned with mass influxes of refugees, as well as The Netherlands delegation, which was concerned about the scope of the regulation. However, the Swiss and Belgian delegations made the points that the rights applied to individuals not groups. As there was no objection, the President ruled that this interpretation should be placed on record, and that refoulement should be placed in brackets in the English translation. The reference to refugees in the singular meant that it was clear that the right was individual, rather than generalised or applicable to groups.[57] Thus, the use of the concept in the Convention was limited and highly specific; it stood alone as a unique principle to prevent the return of an individual to their death. Indeed, Weis's commentary states this clearly and explicitly: non-refoulement was merely a negative duty not to return people to their death.[58]

This was clearly a motivation for many States: the US delegation expressed that the government did not wish to send anyone to their death and the Israeli government noted that any restrictions on the right could result in the deaths of refugees.[59] The French delegation rejected the return of anyone to territories where they were at risk of death as absolutely inhuman.[60] A non-governmental organisation, Agudas Israel World Organisation attempted to resolve this by positing that there should be no removal save where a court or judicial authority has taken that decision.[61] Despite this, the movement towards restriction on the grounds of public order and national security did not wane. The compromise eventually reached was based on a limitation of the individuals to whom the right would be extended: those whose lives were threatened because of race, religion, nationality or political opinion. Amendments were tabled by the UK, France and Sweden, all on the basis that a new paragraph should be added regarding the danger to public order or national security, or where the individual had been lawfully convicted of a serious crime.[62] These exceptions made the final cut and expulsion could be permitted for serious reasons,[63] such as public order or national security, although not in cases where the life of the individual was in danger.[64] Grahl-Madsen argues that 'expulsion' would relate only to formal measures, which may or may not require

the input of a court, and that some orders may be permanent in nature.[65] The variation of procedures across different jurisdictions necessitated a broad definition of what the Convention intended: that an individual should not be refused entry at a border, that they should not be expelled on arrival, that they should not be returned to their country, and that they should not be removed, generally,[66] where their life was in danger.

Although certain States had some suspicions regarding the practical effect of non-refoulement,[67] the right could only be restricted where there were 'reasonable grounds' to suspect that the individual was a danger to security or where they had been convicted of a serious crime.[68] However, as Goodwin-Gill highlights, the main function of the principle of non-refoulement was to ensure that refugees were not returned without consideration of their case, and further limitations on the principle were rejected.[69] Kalin, Caroni and Heim support this position, noting that the right to non-refoulement requires simply that one is kept away from the persecuting State, without much detail on how refugee status is determined.[70] Equally, the focus of States during the discussions was on their ability to deport dangerous individuals,[71] or avoid mass influxes. There was significant support for a simple prohibition on refoulement, which both protected refugees and alleviated the concerns of States, who did not wish to accept dangerous individuals or mass arrivals of individuals. Despite the attempts to limit it, the principle has found favour in human rights law, as a means of preventing the return of individuals to situations in which their rights will be breached. This complementary protection has extended the concept of non-refoulement, as will be demonstrated below.

4. The development of complementary protection

Recognising that human rights law would be futile if compliant countries could simply export their conscience regarding torture and persecution to other countries, the drafters of the UN Convention against Torture viewed non-refoulement as useful in the pursuit of the universal prohibition on torture. Following some discussion, it was decided that the absolute right not to be tortured or subjected to inhuman or degrading treatment should include the prohibition on refoulement,[72] and that States Parties could choose to attach reservations to the article prohibiting refoulement if they considered it to conflict with prior obligations, such as those under extradition treaties.[73] In a manner similar to the approach undertaken in respect of the Refugee Convention, the Working Group concluded that the greatest protection ought to be afforded to those who were at 'substantial risk' of torture or inhuman or degrading treatment. The delegations for the Convention against Torture took a very different tack to those who had discussed non-refoulement during the Refugee Convention. When reservations were attached to the non-refoulement provisions by Germany, Chile and Pakistan, they were roundly condemned by the other States Parties as incompatible with the object and purpose of the treaty itself. Contrarily, States Parties who have not upheld the prohibition on refoulement to date have not attached formal reservations,[74] while those who made formal objections have tended to honour the obligations.

This broad acceptance of the rule in human rights law created a complementary system of protection[75] and allowed non-refoulement to develop further to protect those attempting to claim asylum. It also closed existing 'protection gaps'[76] and prevented the deportation of individuals who may suffer risk to life upon their removal from a safe country. This complementary system has had a significant impact on non-refoulement that the UN High Commissioner for Refugees could not have made, because of the lack of supervision the office has over individual States.[77] Human rights law has allowed it to be argued as a *jus cogens* norm,[78] as well as a customary norm[79] (despite the questionable nature of State practice.[80]) It has also been characterised as a human right,[81] strengthening its connection with the prohibition on torture[82] and the idea of State responsibility for the human rights of all citizens and individuals within its effective control.[83] Regional regimes bear the greatest responsibility for this development: the European Court of Human Rights in particular has established the strongest degree of protection against non-refoulement on human rights grounds. Among others, the Saadi case, heard by the European Court of Human Rights, affirmed the absolute nature of the right not to be returned[84] where there was a risk to the life of the individual[85] and other jurisprudence notes that individuals may not be returned where they may be subject to 'death row phenomenon,' [86] or where there would be a grave risk to life generated by deporting the individual to a dangerous situation.[87] The ECtHR has supported the principle of non-refoulement as a key part of the enforcement of human rights globally[88] and it has been extended to prevent removal to another State in a regional jurisdiction.[89]

In recent years, a more expansive approach to the idea of non-refoulement has been tabled by authors focusing on European human rights law. Jackson speaks of 'freeing Soering' to extend

the protection of non-refoulement to other articles, [90] and other authors similarly argument that 'fundamental values' ought to prevent refoulement.[91] However, the present position is that non-refoulement cannot be read into other articles without significant evidence.[92] It is unclear what this may or could mean in the context of other rights. However, non-refoulement has been extended to cases which do not directly involve torture or state-sponsored indignity. The return to conditions which would precipitate great suffering in terms of one's health has also engaged the prohibition on non-refoulement. This has lead the Court to hold that the prohibition on non-refoulement should be engaged where there was no medical treatment, family support or shelter while the individual entered the final stages of his illness. [93] The foregoing case is all the more remarkable for the fact that the individual tried to enter the UK to transfer illegal drugs, and the UK government sought to remove him as such. However, better medical treatment alone does not guarantee non-refoulement,[94] although there ought to be an investigation of the circumstances to which a seriously ill individual may be returned. [95] The Court stated that non-refoulement would be directly engaged where expulsion would result in an individual 'being exposed to a risk of treatment prohibited by article 3,' and consequently would engage non-refoulement.[96]

There is a general argument that some States find the idea of returning certain individuals 'unpalatable,'[97] strengthening the idea of non-refoulement. However, it is not evident that one could rely on the unpleasant appearance of being deported to danger, even as a child. In B,[98] Afghani children had sought diplomatic refuge at the British consulate in Australia to prevent their deportation. The High Court of England and Wales held that they were not entitled to benefit from non-refoulement, as the British government was not directly engaged in their deportation. There seemed to be little regard for the fact that the British government could be compliant in their deportation to a dangerous situation, by returning them to the Australian authorities, who in turn would likely deport the children. This is despite the argument that there is a fuller recognition of the idea of non-refoulement in human rights and EU law[99] and seems to reflect the growing suspicion around migration: the preservation, in this instance, of a diplomatic relationship with Australia and a desire not to circumvent the Australian system, appeared to trump any protection which could be offered to the children. Moreover, the children were unable to prove that they were in any greater danger than other children or adults in their situation.[100] A monochromatic approach meant that their suffering was analysed against the matrix of individual persecution and was found lacking. The fears put forward by governments during the drafting of the 1951 Convention, of maintaining individual grounds for persecution to avoid influxes, has limited non-refoulement and meant that two children were deported to a warzone because their situation was not sufficiently 'unique.' The problem here is the reliance on the human rights understanding of non-refoulement, which focuses on the danger to the individual. If a narrower understanding of non-refoulement, per the 1951 Convention, was at issue, it would be harder to argue that they could be repelled or returned to the Australian authorities: the simple prohibition on any expulsion by or from the UK authorities would be more difficult to circumvent.

5. A narrow approach to non-refoulement: examples from the US

As demonstrated above, the European Court of Human Rights has sought to develop a broader understanding of the principle of non-refoulement, broadening rights to where States have not just a border, but effective control. [101] This extension of non-refoulement has been criticised by Gammeltoft-Hansen[102] as beyond the intention of drafters of non-refoulement. This problem has been created by the adoption of non-refoulement by human rights law and the parallel development non-refoulement has then had. However, the broader approach has been rejected by certain States, possibly because of the indication that non-refoulement may then lead to a claim for asylum. The US in particular has held fast to a much narrower understanding of non-refoulement, and has even ignored its relevance in pertinent cases. In *Haitian Refugee Center v Civiletti,*[103] Judge King held that the routine denial of asylum in respect of Haitian refugees, where Cuban refugees had been admitted en masse, [104] was in violation of their rights. The court provides a notable example of non-refoulement being tacitly ignore by the judges, despite its apparent power in this area: the court repeatedly references 'international agreements' and 'treaty obligations,' as well as 'constitutional protections.' However, non-refoulement is never discussed and the main thread of the argument focuses on the immoral act of treating the poorer, black immigrants from Haiti less favourably than those from Cuba, who were less likely to be black or as poor.

Where non-refoulement has been acknowledged, its use as a gateway to the right to asylum has been negligible. In *Sale v Haitian Centers Council*,[105] it was held that an executive order issued by the US President was compatible with non-refoulement in both international law and domestic legal provisions, despite the individuals never being permitted to dock their boards or reach land. The Executive Order stated that there was no need to investigate their status as refugees, on account of the inapplicability of non-refoulement where the individuals had not reached a US border.[106] The US Court's analysis, with the exception of Justice Blackmun, supported a narrow reading of non-refoulement, in which the individuals would only have the right to non-refoulement where they were present on the territory in question. Thus, the idea here was that non-refoulement applies only to those who are already present in the country and does not include the right to transgress a border. The inconsistency of this approach was not lost on Justice Blackmun, who wrote the sole dissenting judgment in *Sale.* Blackmun focused specifically on the idea of non-refoulement and highlighted that refouler is more than simply returning an individual. Instead, Blackmun focused on the concept of refoulement as much more than the idea of returning an individual. Indeed, he denied that physical presence was required to engage the obligation and analysed the travaux préparatoires of the 1951 Convention to substantiate his interpretation of non-refoulement. He found that the plain language of the 1951 Convention should be utilised and that no return of any sort, within borders or on the high seas, should be carried out.[107]

The Inter-American Human Rights Commission supported Blackmun's interpretation: it held that the failure to permit boats to dock, or asylum-seekers to land, was a violation of the US under the 1951 Convention.[108] This flies directly in the face of Sale, which upheld the

President's right to make policy decisions regarding refugees. A similar conclusion was reached *Haitian Refugee Center v. Baker,*[109] in which the interception and interview of Haitian immigrants on the high seas was held to be legal. Those who could not prove, in the course of a short interview with a border control agent, that they were political asylum seekers, would not be permitted to reach the US coastline. A significant difficulty is that of the refusal, with the exception of the Inter-American Human Rights Commission and Justice Blackmun, to examine or enforce the international law on non-refoulement. Characterised as the 'Dred Scott' case of immigration law,[110] there is no recourse for the individuals attempting to claim their rights: they cannot enter the country, nor can they fight return. This exceptionally narrow reading of non-refoulement is more in line with the 1951 Convention expression of the principle than the human rights understanding: indeed, the expansive human rights understanding may have done some damage to the right to be admitted, because of the connection made between admittance and the right to asylum.

The US continues to mount resistance against asylum claims in general, with the launch of the Migration Protection Protocols in December 2018 to 'confront illegal immigration' under the Immigration and Nationality Act.[111] Under these rules, those who arrived from Mexico may be sent back to Mexico for the entirety of their immigration proceedings, justified by domestic legislation which permits return to 'a territory' while removal proceedings take place. Numerous objections have been raised to the policy, including the pursuit of an injunction before the California courts.[112] Interestingly, the basis of the application for the injunction related to the incompatibility of the policy with domestic law and constitutional rights, rather than international law. This abhorrent policy would still be in keeping with a narrow understanding of non-refoulement, and the rule would not do much to save those who flee to safety from Central and South America, but, arguably, the task of humanising immigration is that of the right to claim asylum. This tension, between the arrival in a country, the existence of supposedly protective rules and the desire of the State to evade even minimal responsibility for the protection of the vulnerable, is explored well in Schahar's latest text.[113] She explores the 'shifting border' as one which can be use to support the State's evasion of any responsibility it could arguably have. The above protocols are such a shifting border, in which the US deposits the vulnerable within its control, but outwith its physical State. This movement demonstrates the direction in which border control continues to move, beyond the reach of international law. This strengthens the argument for tightening rules such as non-refoulement, to avoid emptying it of its contents and allow it to maintain what protection it can over the incredibly vulnerable.

A publication by the Congressional Research Service,[114] one of the few pieces of research available on the policy, notes that the main arguments against the protocol are based on domestic law. This is particularly interesting because the constitutional link between US domestic law and international law has persisted for a significant period of time. The importance of treaties as part of US law is noted in the US Constitution.[115] This is often referred to as the 'supremacy clause.' Henkin makes the point that international law is part of federal law,[116] while others reference the 'Charming Betsy' canon.[117] As one of the signatories

to the 1967 protocol, which incorporates article 33 of the 1951 Convention, the United States is both able and bound to refer to non-refoulement. The decision of the Courts to ignore this provision is compelling, given the apparent conflict that exists between this and the practice of forcing migrants to seek shelter elsewhere when they are attempting to cross a border.

6. A further narrowing of non-refoulement? The EU perspective

As discussed at the beginning of this work, European states have dealt with the mass movement of refugees previously, working with the League of Nations and the UN to devise protection for them. In the 1990s, similar waves of migration took place and the EU sought to coordinate a response to the arrival of asylum-seekers from third States. The policing of the borders has become harsher over time, because of the changes that Europe as a space has undergone. Since 1994, Africans have been arriving in the Canaries for work[118] where they could earn the equivalent to a year's salary in Mali or Guinea in two weeks.[119] The response to the situation over time has deteriorated: Spain initially responded with rescue operations and NGOs, such as the Spanish Commission for Refugees noting that the 'most basic right…life' of the migrants was prioritised.[120] However, this was married with border management services from Frontex and repatriation agreements with African countries, along with agreements for the Spanish Civil Guard to patrol their coastlines. This policy of 'externalisation' by Spain,[121] has franchised out their non-refoulement responsibilities, allowing them to avoid them entirely. The wider policy of externalisation by the EU[122] also demonstrates the tension of what the EU wishes to do and what it supports. The policy of preventing migration is in direct conflict with the idea of non-refoulement, and there appears some confusion between the principle of non-refoulement and the right to claim asylum.

In 2001, a subsidiary regime[123] was proposed to ensure that vulnerable individuals, who may be in need of protection because of threats to their human rights, were not automatically returned in this way.[124] The doctrine of non-refoulement was included in the Treaty on the Functioning of the European Union,[125] empowering the Council to pass the direct on mass influxes of individuals,[126] which required EU states to take responsibility for those fleeing armed conflict or endemic violence. This evolved into the Qualification Directive[127] and, latterly, the Agenda for Migration, drafted in recognition of the significant increase in migration to the EU: in 2015, there were 1.2 million applications for asylum.[128] The high numbers continued, with over 700,000 applications being received by Germany alone in 2016.[129] The EU sought to create a harmonised system[130] which prioritised 'smart sustainable growth while avoiding further tragedies.'[131] At this point, non-refoulement was not high on the agenda. The subsequent rules and proposals,[132] including the Asylum Procedures Directive of 2013 focused on the right of the State to assess the asylum claim, guaranteeing the right to remain only until the claim has been assessed. By doing so, it prevents some forms of refoulement[133] by guaranteeing that individuals have the right to remain at the border or in a transit zone until their claim has been examined.[134] This subsidiary regime evolved into instruments to create 'international protection'[135] for those whose rights may be engaged by the Geneva Convention. In theory, the EU system recognises that individuals can be granted asylum even where they do not qualify for refugee protection under the 1951 Convention, i.e. on the grounds of persecution.[136] This tends to be where the individual cannot prove he or she is being persecuted, but that they would suffer serious harm if returned to the country of origin. In such cases, they would qualify for subsidiary protection under the qualification directive.[137]

However, these laws cannot disguise the reality: Since the 1990s, there has been a desire in Europe to curb migration, beginning with the Spanish attempts to manage migration from Africa to the Canary Islands,[138] culminating in the agreements under the Barcelona Process and the Treaty of Amsterdam, which gave the EU competence over migration. This included, among other measures, a series of agreements with African countries to both control migration and police the European borders. As Andersson's work notes, there have been enormous efforts made to repel attempts by Africans to reach Europe despite the fact that many of the economic situations can be linked to colonial policies of EU Member States.[139] This has included, among other measures, significant demonstrations of enforcement at the borders of the countries to which African and other migrants are likely to arrive.[140] This is in direct conflict with the idea of non-refoulement; how can one's asylum claim be investigated if the individual cannot transgress the border? Claims that migrants unquestionably based their claim to remain on economic grounds are difficult to understand; until the claim is investigated, there is no way of knowing whether the individual qualifies for refugee protection. This strikes at the very heart of non-refoulement as the 'gateway' to other rights, and directly questions the EU's commitment to human rights in this area.

There is the further issue, made by Andersson, that migrants, when they reach shore, can be left there for a significant period.[141] The consequential right of due process which emanates from the duty of non-refoulement means that the management of the migration flow undermines, directly, the duty of non-refoulement. Moreover, the funding and support for the return of migrants by the Libyan coastguard patrol prevents the individuals from even claiming asylum in the first place.[142] This interesting tension has made the 'rescue missions' mounted by various NGOs nigh on impossible, leading to one individual stating that, 'we were rendered ineffective by politics.'[143] The main political force in this case was the newly-elected Italian government which sought to reduce migration, backed by the EU. Agreements with the Libyan coastguard, armed and aggressive, meant that the policy of return was prioritised over that of rescue. Rejecting their right to access a European land border has the same effect of returning the individuals, and therefore of denying them access to their non-refoulement rights. The Italian government prefer the narrative that NGOs complete the traffickers' work for them, by rescuing the boats and taking the migrants to shore. In a fresh attempt to prevent all attempts at landing, and thus denying non-refoulement, the Italian government has sought to close all of its southern ports to NGO ships during the summer of 2018.[144]

There is therefore a complete confusion over the EU's response to migrants, given that each is viewed as both a threat to the security of the EU's borders and a life to be saved.[145] This approach is not particularly helpful, as the narrowed interpretation of non-refoulement has resulted in deaths in the Mediterranean Sea. [146] The idea that the increase is migration, which was, as Vaughan-Williams notes, retroactively packaged as the '2015 Mediterranean migration crisis' had meant that there was the greatest number of displaced persons as a direct result of violent conflict since the dissolution of the former Yugoslavia.[147] However, there appears to be a conflict between what the European Commission says, and what it does. The enduring

tension between the talk of saving lives and the policy of narrowing, policing and closing borders means that the policy undermines the purported aim of saving the individuals.[148] The saving of the individuals is directly connected to non-refoulement: the conflation between the duty not to repel and the right to asylum has meant that many boats have not been permitted to land (thus avoiding repulsion or expulsion) and many individuals have drowned at sea. The brutal and serious enforcement of border policies is unquestionably in conflict with the doctrine of non-refoulement,[149] and the strength of feeling against the right of asylum appears to make States more willing to disregard non-refoulement as the first step towards the right to asylum. Vaughan-Williams notes, in a more charitable tone, that the tension between border policies and the desire to save lives[150] may be the cause of the conflicting policies. However, the lack of focus on non-refoulement means that the border policies remain the priority.

The fixation with border policies and the conflation of the right to asylum and non-refoulement has created a deadly situation for refugees crossing the Mediterranean. Rather that permitting asylum seekers to reach the borders, the boats have increasingly been intercepted on the high seas. In 2006, the German government argued the legality of such measures in an opinion to the European Parliament, stating that it would extend the EU borders too far. [151] As Gil-Bazo argues, this is not unusual: the creation of international zones[152] to avoid asylum claims is common and the link between non-refoulement and the right to asylum undermines the former as a principle which could potentially encourage States to recognise their very basic obligation to protect. Even in the sphere of human rights law, the restraining effect of the European Court of Human Rights has been limited so far. The Court of Justice delivered an opinion in 2014[153] noting that the accession agreement negotiated should not be finalised because of the impact it could have on, among other things, the autonomy of EU law.[154] The desire of the Court of Justice to retain final control over the issues of human rights was clear, prioritising the right of the EU to delineate its own responsibilities in line with its interpretation of human rights principles. This tension was visible in the case of *Hirsi Jamaa and others v Italy*,[155] in which the European Court of Human Rights held Italy and the EU responsible for the return of migrants to Libya with the aid of Libyan ships, given the likelihood of arbitrary return when they arrived, and the potential for mistreatment. In a separate opinion, Judge Pinto de Alberqueque concluded that the right to non-refoulement exists on the high seas, [156] and noted that the right to seek asylum contains the right to 'leave one's country (in order to) seek asylum.'[157] The distinct nature of the right not to be expelled was not emphasised; a distinction which could prevent the repulsion of boats on the high seas and potentially save lives.

From a human rights perspective, there is a moral obligation to support those who seek shelter, and the Court has recognised the legal rules concerning such responsibility. Indeed, Mann has concluded that the responsibility for doing so was recognised by Italy as well, under its Mare Nostrum programme,[158] and its failure to put in place a suitable alternative should generate political consequences for its moral accountability. Pushing vulnerable individuals into another space, in which their rights may or may not be respected, in the likelihood that they will not be, is unacceptable. [159] However, pushing States to accept the right to asylum is a task

which should be undertaken more generally. An attempt to make non-refoulement carry the weight of the right to asylum undermines it and the protective effect that it could have for those who rely on it most.

Although there are supportive elements in the jurisprudence of the European Court of Human Rights regarding non-refoulement, the rules are by no means perfect and, as demonstrated above, the EU, which remains within the jurisdiction of the Council of Europe has struggled to uphold the provisions. This is not a direct criticism of the attempt to extend protection, but rather a realistic view of the rules themselves. If the current protection does not protect those coming from third countries, particularly those affected by crimes against humanity and war crimes, there is no guarantee of further rules enhancing their protection. This current inclusion appears to be out of step with the domestic rules and with the behaviour of domestic jurisdictions. To separate international law too far from domestic enforcement leads to more empty rules, rather than an enforceable regime. It may be worth bearing this in mind, that the gap between international regimes and domestic enforcement should not be gratuitously widened, particularly as States become more authoritarian and less interested in individual rights.

7. Conclusion

The history of non-refoulement does not demonstrate that it has been fulsomely supported by States, which have generally prioritised their own interests in admitting those in peril. Early references to the duty not to repel those in dire need are limited; even when faced with barbarity in Europe immediately prior to the Second World War, States did not appear sufficiently moved so as to recognise an obligation not to repel those who would otherwise face death and persecution if they were turned away. The limited and specific recognition of the rule against expulsion in 1933 did not indicate a general principle supported by many States, but rather a specific and limited idea which was supported only by those States which were greatly affected by the mass migration at that time. After the Second World War, there was a recognition that what could await those turned away at a border could be 'unpalatable' for the refusing State, and those optics allowed non-refoulement to be included as a general rule in the Convention. However, that inclusion did not mean that States relaxed their self-interest further than their reputation for inhumanity; the interpretation was narrow and to prevent death or serious persecution only.

The adoption of the rule against removal or expulsion by human rights law has broadened non-refoulement beyond that which was originally intended by the drafters of the 1951 Convention. While this may be viewed as a positive step, which 'frees' the doctrine to save individuals from various human rights violations, it does mischief to the prohibition on non-refoulement for refugees. The individual nature of human rights is fine if one arrives in isolation, but the mass movements across the Mediterranean and the wars in Syria and Afghanistan, to name a mere few situations of peril, make it difficult to identify one's situation as unique. The refugee protection one would have requires non-refoulement as a limited, restricted concept that avoids one being returned without having to individualise one's situation. The expansion of non-refoulement coupled with its close connection to the right to asylum has undermined these claims. Those arriving are assumed to be asserting their right to asylum, rather than a basic right not to be returned to danger.

This may seem like an academic distinction, but the historical, enduring fixation on border security means that the principle of non-refoulement should remain restricted and simple. This allows it to be preserved, it argues against the interception of boats on the high seas and rejects governmental fears around asylum claims as distinct from the obligation not to expel. The most important concern for those who flee violence is to reach safety: the preservation and continuation of that right is sacrosanct.

[1] Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in *Human Rights and Immigration*, ed. Rubio-Marin (Oxford: Oxford University Press, 2014) 19-72, 29.
[2] Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137. Hereafter, 'the 1951 Convention.'
[3] *Ibid.*
[4] Atle Grahl-Madsen, 'The European Tradition of Asylum and the Development of Refugee Law') *Journal of Peace Research* 3 (1966).
[5] Hugo Grotius and Stephen Neff, *Hugo Grotius on the law of war and peace* (Cambridge: Cambridge University Press, 2012), 440.
[6] For a full discussion of the situation, see Claudena Skran, *Refugees in inter-war Europe: The emergence of a regime* (Oxford: Oxford University Press, 1995), in particular chapter 2.
[7] See Stanley Payne, *Civil war in Europe, 1905-1949* (Cambridge: Cambridge University Press, 2011).
[8] Hereafter, 'ICRC.'
[9] Gilbert Jaeger, 'On the history of the international protection for refugees' *International Review of the Red Cross* 83 (2001): 728-9.
[10] *Ibid.*
[11] Louise W. Holborn 'The Legal Status of Political Refugees 1920-1938' *American Journal of International Law* 32 (1938): 683.
[12] Katy Long, 'Early repatriation policy: Russian refugee return 1922-1924' *Journal of Refugee Studies* 22 (2009): 142.
[13] For a fuller discussion, see Claudena Skran, 'Historical development' in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A commentary* ed. Zimmermann, Dorschner and Machts (Oxford: Oxford University Press, 2011), 3-36.
[14] Arrangements of 30 June 1928, League of Nations Treaty Series Vol 89 2004-2006.
[15] *Arrangement with respect to the issue of certificates of identity to Russian Refugees*, 5 July 1922, League of Nations, Treaty Series Vol. XIII No. 355.
[16] *Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees*, 12 May 1926, League of Nations, Treaty Series Vol. LXXXIX, No. 2004.
[17] *Arrangement Relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005.
[18] *Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees*, 30 June 1928, League of Nations, Treaty Series, 1929; 89 LoNTS 63.
[19] Louise W. Holborn 'The Legal Status of Political Refugees 1920-1938' *American Journal of International Law* 32 (1938): 694-6.
[20] *Arrangement Relating to the Legal Status of Russian and Armenian Refugees*, 30 June 1928, League of Nations Treaty Series, Vol. LXXXIX, No. 2005, para 7.
[21] Louise W. Holborn 'The Legal Status of Political Refugees 1920-1938' *American Journal of International Law* 32 (1938): 692-6.
[22] *Ibid*, 689 and Robert Beck, 'Britain and the 1933 Refugee Convention: National or State sovereignty? *International Journal of Refugee Law* 4 (1999): 611-2.
[23] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2-11* (Division of International Protection of the United Nations High Commissioner for Refugees 1997) 13-37.
[24] Article 3, Convention on the Status of Refugees 1933.
[25] *Ibid.*
[26] Article 1, Convention on the Status of Refugees 1933.
[27] Belgium, for example, made a reservation in respect of the application of the Convention to individuals from colonial territories such as Rwanda.
[28] Robert Beck, 'Britain and the 1933 Refugee Convention: National or State sovereignty? *International Journal of Refugee Law* 4 (1999): 603.
[29] *Provisonal Arrangement concerning the Status of Refugees Coming from Germany*, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952.
[30] Convention concerning the Status of Refugees coming from Germany, Geneva, February 10th, 1938, League of Nations Treaty Series, Vol. CXCII, No. 4461, page 59.
[31] Article 2, *Provisonal Arrangement concerning the Status of Refugees Coming from Germany*, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952.
[32] Gilbert Jaeger, 'On the history of the international protection for refugees' *International Review of the Red Cross 83* (2001): 731.
[33] Article 4(2), *Provisonal Arrangement concerning the Status of Refugees Coming from Germany*, 4 July 1936, League of Nations Treaty Series, Vol. CLXXI, No. 3952.
[34] *Ibid,*

[35] Jane McAdam, 'Rethinking the Origins of Persecution in Refugee Law' *International Journal of Refugee Law* 25 (2013), Gilbert Jaeger, 'On the history of the international protection for refugees' *International Review of the Red Cross 83* (2001).
[36] Louise W. Holborn 'The Legal Status of Political Refugees 1920-1938' *American Journal of International Law* 32 (1938).
[37] Robert Beck, 'Britain and the 1933 Refugee Convention: National or State sovereignty? *International Journal of Refugee Law* 4 (1999).
[38] Naomi S. Stern, 'Evian's Legacy: The Holocaust, the United Nations Refugee Convention, and Post-War Refugee Legislation in the United States' *Georgetown Immigration Law Journal* 19 (2004).
[39] Situation of Austria in Relation to the League of Nations 19 League of Nations O. J. 237 (1938) and Situation of Austria in Relation to the League of Nations 19 19 League of Nations O. J. 678 (1938).
[40] UNGA Third Committee 'Question of refugees' (12 February 1946).
[41] UNGA Res 212 (III) (19 November 1948) and UNGA Res 194 (III) (11 December 1948).
[42] UNGA Resolution 302 (IV) (8 December 1949).
[43] Article 33(1), 1951 Convention.
[44] Philippe Rygiel, 'Le refoulement des "étrangers indésirables " durant la grande crise, Centre de la France, années 1930' ed. Blanc-Chaléard, Weil, Dufoix *L'étranger en questions, du Moyen Âge à l'an 2000* (Paris: Le Manuscrit, 2005); Mary Dewhurst Lewis, 'The Strangeness of Foreigners: Policing Migration and Nation in Interwar Marseille' *French Politics, Culture & Society* 20 (2002).
[45] Mary Dewhurst Lewis, 'The Strangeness of Foreigners: Policing Migration and Nation in Interwar Marseille' *French Politics, Culture & Society* 20 (2002).
[46] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2-11* (Division of International Protection of the United Nations High Commissioner for Refugees 1997),133-144.
[47] *Ibid.*
[48] *Ibid.*
[49] The Refugee Convention, 1951: The travaux préparatoires analysed with a Commentary by Dr. Paul Weis (UN High Commissioner for Refugees, 1990), 237.
[50] *Ibid,* 238.
[51] *Ibid,* 203.
[52] *Ibid,* 204.
[53] *Ibid,* 233.
[54] *Ibid,* 234.
[55] *Ibid,* 236.
[56] *Ibid,* 238.
[57] *Ibid,* 240.
[58] *Ibid,* 235.
[59] *Ibid,* 234.
[60] *Ibid,* 235.
[61] *Ibid,* 205.
[62] *Ibid,* 235.
[63] *Ibid,* 202.
[64] Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951, Articles 2-11* (Division of International Protection of the United Nations High Commissioner for Refugees 1997),133-144.
[65] *Ibid.*
[66] *Ibid.*
[67] Robert Beck, 'Britain and the 1933 Refugee Convention: National or State sovereignty? *International Journal of Refugee Law* 4 (1999).
[68] Article 33(2), Convention relating to the Status of Refugees 1951.
[69] Guy S Goodwin-Gill, 'International Law of Refugee Protection in ed. Fiddian-Qasmiyeh, Loescher, Long, and Sigona (ed), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford: Oxford University Press, 2014) 36-47, 40.
[70] Walter Kälin, Martina Caroni and Lukas Heim, 'Article 33 para I, 1933 Convention' in *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A commentary* ed. Zimmermann, Dorschner and Machts (Oxford: Oxford University Press, 2011), 1327-1395.
[71] The Refugee Convention, 1951: The travaux préparatoires analysed with a Commentary by Dr. Paul Weis (UN High Commissioner for Refugees, 1990), article 33.
[72] Report of the Working Group on a Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment E/CN.4/L.1470 12 March 1979, pp.8-9.
[73] Report of the Working Group on a Draft Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment E/CN.4/L.1470 12 March 1979, p8 at para 40.

[74] For example, the German Democratic Republic signature and ratification of the Convention on 7 April 1986 and 9 September 1987 had reservations attached, which were objected to by, *inter alia*, France on 23 June 1988 and Luxembourg on 9 September 1988.
[75] Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' *Melbourne University Law Review* 34 (2010).
[76] Jane McAdam, *Complementary protection in international refugee law* (Oxford: Oxford University Press, 2009); Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' *Melbourne University Law Review* 34 (2010).
[77] David Weissbrodt, 'Refugees' in *The Human Rights of Non-citizens* (Oxford: Oxford University Press, 2008), 162.
[78] Jean Allain, 'The *jus cogens* nature of non-refoulement,' *International Journal of Refugee Law* 13 (2001).
[79] Rroda Mushkat, 'Mandatory Repatriation of Asylum Seekers: Is the Legal Norm of Non-refoulement 'Dead'?' *Hong Kong Law Journal* 25 (1995): 45.
[80] Dieter Kugelmann, 'Refugees' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press) 2012, 30.
[81] David Weissbrodt, 'Refugees' in *The Human Rights of Non-citizens* (Oxford: Oxford University Press, 2008), 162.
[82] Article 3, UN Convention against Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987.
[83] Bankovic and Al-Skeini v UK (*2011*) 53 *EHRR* 18.
[84] *Saadi v Italy* (2008) 47 EHRR 17, para 127.
[85] *Ibid.*
[86] *Soering v UK* (1989) 11 EHRR 439.
[87] *Chahal v UK* (1997) 23 EHRR 413.
[88] William Schabas, 'Non-Refoulement', in *Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism*, ODIHR.GAL/14/07 (2007) at 47.
[89] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.
[90] Miles Jackson, 'Freeing Soering: the ECHR, state complicity in torture and jurisdiction' *European Journal of International Law 27* (2016).
[91] Hemme Battjes, 'The Soering threshold: why only fundamental values prohibit refoulement in ECHR case law' European Journal of Migration Law 11 (2009).
[92] Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law' *International Journal of Refugee Law* 27 (2015).
[93] *D v UK* (1997) 24 EHRR 423.
[94] *GS (India) and Ors v SSHD* [2015] EWCA Civ 40, N v UK Application no 26565/05 27 May 2008.
[95] *Paposhvili v Belgium* (Application no. 41738/10) 13 December 2016.
[96] (Application no. 41738/10) 13 December 2016, para 197.
[97] Robert L Newmark, 'Non-refoulement runs afoul: The questionable legality of extraterritorial repatriation programs' *Washburn Law Quarterly* 71 (1993): 844.
[98] *B's case*, [2005] QB 643.
[99] Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?' ed. Satvinder S Juss *The Ashgate Research Companion to Migration Law, Theory and Policy* (Farnham: Ashgate 2013), 129-155, 27.
[100] See Hugo Storey, 'Armed Conflict in Asylum Law: The "War-Flaw"' *Refugee Survey Quarterly* 31 (2012), Vincent Chetail, 'Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law' ed. Clapham and Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014) 700-734, 710 and James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge: Cambridge University Press, 2014), 174.
[101] Article 1, European Convention on Human Rights. See also Al-Skeini v UK (*2011*) 53 *EHRR* 18.
[102] Thomas Gammeltoft-Hansen, 'Extraterritorial migration control' in *Research Handbook on International Law and Migration*, ed. Chetail and Bauluz (Cheltenham: Edward Elgar 2014), 113-132, 116.
[103] 503 F Supp 441
[104] 503 F Supp 441, 451.
[105] 509 U.S. 155 (1993). See Guy S. Goodwin-Gill and Jane McAdam, 'Non-Refoulement in the 1951 Refugee Convention' in *The Refugee in International Law* (Oxford: Oxford University 2007), 247.
[106] Thomas David Jones 'The Haitian Refugee Crisis: A quest for human rights' *Michigan Journal of International Law* 15 (1993): 94.
[107] Blackmun dissent IA.
[108] *The Haitian Centre for Human Rights et al. v. United States,* Case 10.675, 13 March 1997.
[109] 949 F.2d 1109
[110] Thomas David Jones 'The Haitian Refugee Crisis: A quest for human rights' *Michigan Journal of International Law* 15 (1993): 125.
[111] Section 235(b)(2)(C)

[112] Innovation Law Lab et al., Plaintiffs, v. Kirstjen Nielsen, et al., Defendants. Case No. 19-cv-00807-RS Northern District of California courts, 8th April 2019.
[113] Ayelet Shachar, *The shifting border: Legal cartographies of migration and mobility* (Manchester: Manchester University Press, 2020).
[114] Ben Harrington and Hillel R. Smith, "Migrant Protection Protocols": Legal Issues Related to DHS's Plan to Require Arriving Asylum Seekers to Wait in Mexico, Congressional Research Service 7-5700 9th May 2019
[115] U.S. Constitution art. III, § 2.
[116] 175 U.S. 677 (1900).
[117] Louis Henkin, 'International Law as Law in the United States' *Michigan Law Review* 82 (1984) 1555–56 and Kevin Cope, '*Congress's International Legal Discourse*' *Michigan Law Review* 1115 (2015): 1141.
[118] https://www.efe.com/efe/english/world/spain-s-handling-of-the-cayuco-boat-crisis/50000262-3294645
[119] https://www.efe.com/efe/english/world/spain-s-handling-of-the-cayuco-boat-crisis/50000262-3294645
[120] https://www.efe.com/efe/english/world/spain-s-handling-of-the-cayuco-boat-crisis/50000262-3294645
[121] Maribel Casas, Sebastian Cobarrubias, John Pickles 'Stretching Borders Beyond Sovereign Territories? Mapping EU and Spain's Border Externalization Policies' *Geopoliticas* 2 (2011).
[122] Georgia Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' *European Journal of Migration Law* 15 (2013); Thomas Demmelhuber, 'The European Union and illegal migration in the southern Mediterranean: the trap of competing policy concepts' *International Justice of Human Rights* 15 (2011).
[123]Jane McAdam, *Complementary protection in international refugee law* (Oxford: Oxford University Press, 2009), 55.
[124] Ryszard Piotrowicz and Carina van Eck, 'Subsidiary Protection and Primary Rights' *International and Comparative Law Quarterly* 53 (2004): 109-10.
[125] Article 78(1), TFEU.
[126] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
[127] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[128] http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/
[129] UNHCR website – 2016 at a glance.
[130] Jan-Paul Brekke and Grete Brochmann, 'Stuck in Transit: Secondary Migration of Asylum Seekers In Europe, National Differences, and the Dublin Regulation' *Journal of Refugee Studies* 28 (2015).
[131] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'An open and secure Europe: Making it happen' 11 March 2014 COM (2014) 154, para 1.2.
[132] Proposal for a regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents; Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM (2016) 0465 of 13.7.2016, 2016/0222(COD).
[133] Article 3(1), 6(1), and 9, Directive of the European Parliament and of The Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).
[134] Andreas Fischer-Lescano , Tillmann Löhr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' *International Journal of Refugee Law* 21 (2009): 260.
[135] Jane McAdam, *Complementary protection in international refugee law* (Oxford: Oxford University Press, 2009), 59.
[136] Joined Cases C 57/09 and C 101/09 *Bundesrepublik Deutschland v B & D* [2010] ECR I-10979.
[137] 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.
[138] Ruben Andersson, *Illegality Inc* (University of California Press, 2014), 1-3.
[139] *Ibid,*), 6.
[140] *Ibid,* 138.
[141] Ruben Andersson, 'Time and the migrant other: European border controls and the temporal economics of illegality', *American Anthropologist* 116 (2014).
[142] https://www.washingtonpost.com/world/europe/the-retreat-of-rescue-ships-from-the-mediterranean-is-a-sign-of-changing-odds-for-migrants/2018/06/15/099b74f0-6e61-11e8-b4d8-eaf78d4c544c_story.html?utm_term=.feb3f98246bf
[143] *Ibid,*

[144] https://www.thelocal.it/20180629/italy-will-close-ports-to-ngo-migrant-ships-all-summer-despite-drownings
[145] Nick Vaughan-Williams, *Europe's border crisis: Biopolitical security and beyond* (Oxford: Oxford University Press 2015).
[146] *Ibid.*
[147] Adrian Little and Nick Vaughan-Williams, 'Stopping boats, saving lives, securing subjects: Humanitarian borders in Europe and Australia' *European Journal of International Relations* 23 (2017): 534.
[148] *Ibid,* 534-5
[149] Fiona McConnell, Merje Kuus, Alex Jeffrey, Heaven Crawley, Nick Vaughan-Williams and Adrian Smith, 'Interventions on Europe's political futures' *Political Geography* 60 (2017).
[150] Nick Vaughan-Williams, *Europe's border crisis: Biopolitical security and beyond* (Oxford: Oxford University Press, 2015).
[151] Answer of the Federal Government to the brief question put by Members of Parliament Winkler, Beck, further delegates and the Bündnis 90/Die Grünen parliamentary group – Drs. 16/2542 –, BT-Drs. 16/2723 of 25 Sept. 2006, 6: 'The rules of German and European asylum and refugee law come into effect through territorial contact, i.e, at or within a country's borders. The same applies, according to predominant state practice, to application of the *non-refoulement* principle in the Geneva Convention' quoted in Andreas Fischer-Lescano , Tillmann Löhr, and Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' *International Journal of Refugee Law* 21(2009): 258.
[152] Maria-Teresa Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' *International Journal of Refugee Law 18* (2006).
[153] Opinion 2/13 pursuant to Article 218(11) TFEU, 18th December 2014.
[154] *Ibid,* 194.
[155] (2012) Application no 27765/09.
[156] Hirsi Judge Paulo Pinto de Alberquerque separate opinion, 75.
[157] *Ibid,* 69.
[158] Itamar Mann, 'Killing by Omission' *EJIL Talk* 20 April 2016, available at https://www.ejiltalk.org/killing-by-omission/ (accessed 30 November 2017)
[159] Francesco Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?' in Satvinder S Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy* (Farnham: Ashgate 2013), 129-155.