



INTERNATIONAL MIGRATION LAW INFORMATION NOTE

IML INFORMATION NOTE ON THE PRINCIPLE OF NON-REFOULEMENT

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“...[F]rom the perspective of people applying for protection, the content given to non-refoulement can be a question of life [or] death.”¹

Introduction and Purpose

The purpose of this Information Note is to provide a general overview of the principle of *non-refoulement* and to explain how the principle applies to all migrants. To this end, the Information Note can be used as a tool by those dealing with border management or returns of migrants to avoid the violation of international obligations.

Because most of the existing research and information on *non-refoulement* have focused on situations involving refugees and asylum seekers, this information note is meant to show the extent to which the principle **also protects migrants, regardless of their status**, from expulsion and return to places where they may be at risk of serious human rights violations.

The list of cases covered in this note is non-exhaustive, as the collective jurisprudence and commentary relating to *non-refoulement* cannot be distilled into a short document. The Information Note provides an overview of the main issues and cases in the regional and international human rights framework. Preference has been given to binding international instruments and established lines of jurisprudence.²

The Information Note uses the word “migrant” in a broad sense, as including asylum-seekers, both regular and irregular migrants, and stateless persons.

This Note is divided into four substantive sections. Section I provides an explanation of the concept of *non-refoulement*, describes its theoretical origin and basis, and defines essential terms and standards used in the jurisprudence. Section II covers the general principles of *non-refoulement* and explains the differences between the protections guaranteed under international human rights law and those offered by the United Nations Convention Relating to the Status of Refugees.³ Section III divides the jurisprudence into the specific human rights that have triggered *non-refoulement* obligations and provides references to useful cases and judgments. Section IV deals with other subjects related to *non-refoulement*, such as the use of diplomatic assurances and the prohibition of collective expulsion.

I. Definition and basic concept

1. Definition

IOM defines *non-refoulement* as the “[p]rinciple of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened.”⁴ While the basis of *non-refoulement* is found in the 1951 Refugee Convention,⁵ the expansion of international human rights law has **broadened the scope of this obligation and now requires States to protect non-nationals from being returned to countries in which their life is threatened or where they risk to be subjected to torture or inhuman and degrading treatments, regardless of their immigration status.**⁶

Non-refoulement is included explicitly in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22 of the American Convention on Human Rights (ACHR), Article 16 of the International Convention for Protection of All Persons from Enforced Disappearances, and Article 19 of the Charter of Fundamental Rights of the European Union.⁷ Furthermore, the obligation of *non-refoulement* is derived from a number of provisions enshrined in other international instruments. These instruments include the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, ECHR), the African Charter on Human and Peoples’ Rights (the African Charter), the Convention on the Rights of the Child (CRC), the International Covenant for the Protection of 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).⁸ Often, *non-refoulement* obligations are expressed in the general comments or jurisprudence related to these treaties.⁹ *Non-refoulement* is also a component of many extradition treaties.¹⁰

The above-mentioned international and regional human rights instruments provide protection to migrants who would face violations of a variety of human rights, including first of all the **prohibition of torture and cruel, inhuman or degrading treatment or punishment** and the **right to life**. However, also the **most serious violations of other rights** may trigger the application of the principle. These rights include the **right not to be submitted to slavery and forced labour, the prohibition of enforced disappearances, the prohibition on underage recruitment for military purposes, and the right to a fair trial**.

For the application of the principle it is not necessary that an individual has crossed international borders. The Guiding Principles on Internal Displacement state that “**Internally displaced persons** have: (a) The right to seek safety in another part of the country; [...] and; (d) The right to be pro-

tected against forcible return or resettlement in any place where their life, safety and/or health would be at risk.”¹¹ This recognizes that *non-refoulement* also applies to internally displaced individuals who have not crossed international boundaries.

The prominence of *non-refoulement* in various international instruments to which a very high number of States are party and its general recognition as a cornerstone principle of both refugee and human rights law has led to its acceptance as a **norm of customary international law**.¹² Accordingly, the obligation of *non-refoulement* extends generally to all States in the international community. Furthermore, many argue that *non-refoulement* can be considered as a norm of *jus cogens*,¹³ meaning that it is “accepted and recognized by the international community of States as a whole **as a norm from which no derogation is permitted** and which can be modified only by a subsequent norm of general international law having the same character”.¹⁴

2. Real risk

The standard used to evaluate *non-refoulement* claims depends on the right that is likely to be violated if the migrant is expelled to another country. When considering claims related to the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, and arbitrary deprivations of life, regional human rights courts and the UN treaty bodies evaluate whether there is a “real risk” of violations. Both the Committee against Torture and the European Court of Human Rights require “**substantial grounds for believing**” that the migrant would face a “**real risk**” of human rights violations upon expulsion.¹⁵ The Human Rights Committee also relies on a “real risk” standard.¹⁶ However, the standard before the Inter-American Court of Human Rights seems to be lower, as the Court only requires “algún riesgo de persecución”.¹⁷ On the other hand, the Inter-American Commission relies on a “real risk” standard.¹⁸

Both the Committee against Torture and the Human Rights Committee have further clarified that this means that the violation must be “the necessary and foreseeable consequence of deportation.”¹⁹ The Committee against Torture has also stated that the grounds must “go beyond mere theory or suspicion,” but that “the risk does not have to meet the test of being highly probable.”²⁰

Enforcement mechanisms consider a broad range of information to determine whether there are substantial grounds to believe that there is a “real risk” of human rights violations. This often includes **general statements on the human**

rights situation in a country,²¹ **reports from non-governmental and international organizations,**²² **forensic medical reports,**²³ **and personal histories.**²⁴ The European Court of Human Rights will consider “all the material placed before it” and, if necessary, will seek information on its own.²⁵ Similarly, the Committee against Torture determines whether substantial grounds exist based on “all relevant materials,” which may include the applicant’s ethnic background, political affiliation, history of detention and torture.²⁶

The “real risk” must be assessed in light of both the general human rights situation in the receiving country as well as the individual’s personal circumstances.²⁷

Furthermore, the “real risk” must be based on an evaluation of the conditions and dangers as they exist at the time of expulsion.²⁸ An evaluation of a migrant’s history may help prove a real risk of torture or ill-treatment upon return to his or her State of origin.²⁹ In addition, the existence of a real risk “may be based not only on acts committed in the country of origin [...] but also on activities undertaken by [a migrant] in the receiving country”.³⁰

III. General Principles

1. Non-refoulement applies to migrants regardless of status

The Human Rights Committee has clarified that the ICCPR applies to all migrants regardless of status: “[T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to **all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.**”³¹ The principle of *non-refoulement* which represents a safeguard against the most flagrant violations of human rights instruments also applies to every person subject to State’s jurisdiction, including all migrants, irrespective of their status and regardless of whether the person has entered the State regularly or not. Furthermore, **the application of non-refoulement protection to migrants does not depend on their ability to gain or maintain status as a refugee.**³²

2. Non-refoulement and right to enter the State’s territory

While the principle of *non-refoulement* prohibits States to send a person back to a country where he or she may face torture or treatment contrary to human dignity, it is not



clear whether the principle also imposes an obligation on States to admit migrants to their territory. Providing a teleological interpretation to the principle, it seems reasonable to assume that when it is functional to ensuring the respect of the prohibition of *refoulement*, States have an obligation to allow the person concerned to enter and remain in their territory for so long as the risk persists.³³ However, in some situations, alternative solutions such as transfer of the person to a safe third country or provision of effective protection outside the territory of the host State (for example in a State's embassy or in a regional reception center), may also be in accordance with international obligations. When no such solutions can be envisaged or when all solutions explored entail a risk for the protected individual to be subjected to the proscribed treatments or to be sent back to a country where the same types of risk exist, the State has an obligation to admit the protected individual to its territory, at least temporarily.³⁴

Moreover, it is important to underline that temporary admission is often the only way to verify whether the person is entitled to some forms of international protection, including the protection from *refoulement*. International standards do not expressly oblige States to grant a legal status to the person.³⁵ Nonetheless, the absence of any form of regularization may, over time, become contrary to the right to respect for private and family life.³⁶

3. Non-refoulement can apply extraterritorially

Non-refoulement "applies to the actions of [S]tates, wherever undertaken, whether at the land border, or in maritime zones, including the high seas."³⁷ The concept of "jurisdiction" is not limited to the territorial reach of a State, but also includes cases where a State performed actions or produced effects outside its territories.³⁸ The responsibility to ensure the rights of individuals, and in turn, to prevent *refoulement*, occurs "[w]hensoever the State through its agents operating outside its territory exercises control and authority over an individual".³⁹ For example, *non-refoulement* protects migrants, who are taken aboard a military vessel, from being returned to a State where they face a risk of violations of their rights.⁴⁰

4. Indirect refoulement and expulsion to safe areas

The protection offered by *non-refoulement* also prevents a State from expelling a migrant to a second State where he or she would face expulsion to a third State and subsequent human rights violations. This process is called "indirect *refoulement*." The Human Rights Committee has stated that the "obligation not to extradite, deport, expel or

otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm [...] either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."⁴¹ Similarly the Committee against Torture and the Committee on the Rights of the Child have interpreted the prohibition of *refoulement* to also prevent return "to any State to which the author may subsequently be expelled, returned or extradited."⁴² The Inter-American Court of Human Rights also prohibits indirect *refoulement*.⁴³

With regard to expulsion to safe areas of a country, the European Court of Human Rights has applied the principle in circumstances where a State proposed to return a migrant to a "relatively safe" area of the receiving State or a location of the migrant's choosing, when it is proved that the individual would face a risk of ill-treatment even in that area.⁴⁴

However, it must be noted that in some cases expulsion to another area of a country has been allowed when the applicant has only shown that he or she would face ill-treatment if returned to a specific region.⁴⁵

5. Security exceptions under the 1951 Refugee Convention and human rights instruments

Article 33 (2) of the 1951 Refugee Convention allows exceptions to the principle of *non-refoulement* when the refugee represents a danger to the security of the country or has been convicted for a particularly serious crime.⁴⁶ In contrast, international human rights instruments do not allow security exceptions when expulsion of a migrant would create a real risk of human rights violations that would cause irreparable harm,⁴⁷ notably in case of a real risk of torture and cruel, inhuman or degrading treatment or punishment and arbitrary deprivation of life.⁴⁸ The Committee against Torture, the European and the Inter-American Court of Human Rights do not recognize any exceptions to or derogations from the *non-refoulement* obligation as it applies to the prohibition on torture and inhuman or degrading treatment or punishment.⁴⁹ The European Court of Human Rights has repeatedly stressed that the guarantees provided under Article 3 "apply irrespective of the reprehensible nature of the conduct of the person in question".⁵⁰ The Human Rights Committee has also stated in absolute terms that the *non-refoulement* principle "should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of."⁵¹ Accordingly, even if a State determines that a migrant poses a security threat to the sending State, "[t]he nature of the activities in which the person engaged is not a relevant consideration"⁵² and the

“nature of the offences allegedly committed by the applicant is therefore irrelevant.”⁵³ This interpretation derives from the absolute nature of the prohibition of torture and inhuman and degrading treatments. States remain bound by international human rights law also with regard to refugees. Therefore, they are barred to expel or interdict a refugee when there is a real risk of serious human rights violation in the country of expulsion, even if the refugee has committed a serious crime or represents a threat to national security.

6. Violations can arise from non-State actors

Most international and regional human rights instruments allow *non-refoulement* claims based on the risk of torture, cruel, inhuman or degrading treatment or punishment and for violations of the right to life even when these actions are committed by non-State actors.⁵⁴

In addition to showing that a real risk exists, the applicant must show that the authorities of the receiving state are unwilling or unable to obviate the risk by providing protection to the applicant.⁵⁵

The European Court has held explicitly that there must be “sufficient flexibility” and that it “is not therefore prevented from scrutinizing the applicant’s claim [...] where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country.”⁵⁶

The Convention for the Rights of the Child along the same lines declares that “*non-refoulement* obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.”⁵⁷

Conversely, the Convention against Torture requires that the “pain or suffering [be] inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁵⁸ However, the Committee has found that *non-refoulement* protection applies to threats from non-State actors when the region lacks a central government and factions have assumed a quasi-governmental role.⁵⁹

7. Judicial remedies and suspensive effect

Most international and regional human rights instruments guarantee the right to an effective remedy against decisions which would violate the principle of *non-refoulement*.⁶⁰

At the universal level, in an extradition case where there was a real risk that the person would be submitted to torture and to the death penalty in the country of extradition, the Human Rights Committee held that effective review of an extradition order must take place before the order is enforced, “in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.”⁶¹ If not, the State may be held responsible of a violation of article 2.3 (a) of the Covenant, which protects the right to an effective remedy for a violation of a right recognized by the Covenant, read together with article 6, on the right to life, and with article 7, on the prohibition of torture and inhuman and degrading treatments or punishments. The same view was reiterated in a number of other cases concerning expulsions.⁶² Furthermore, according to rule 92 of its Rules of Procedure, the Human Rights Committee can inform the concerned State party of its view as to whether interim measures are desirable to avoid irreparable damage before forwarding its final views on the communication. If such interim measures are not respected, the Committee can declare the State party to be in breach of its obligations under the Optional Protocol.⁶³

In similar terms, the Committee against Torture requires that, for a remedy to be effective, the appeal has to be concluded before a deportation order is enforced and the deportation should be suspended until the final adjudication of the case.⁶⁴ If irreparable damage is likely to occur and no effective remedy is available, the CAT can request the State to apply interim measures pursuant to rule 114 of the rules of procedure to avoid irreparable damages.⁶⁵

At the regional level, the European Court of Human Rights also considers that a remedy must have suspensive effect to be effective. In various cases the Court has pointed to the lack of automatic suspensive effect as a reason to find a violation of article 3.⁶⁶ To prevent irreparable harm, the Court can also indicate interim measures according to rule 39 of the Rules of the Court and order the suspension of a return procedure until its final judgment is issued.⁶⁷ Furthermore, the Court found violations of the right to an effective remedy under article 13, which gives an applicant the possibility to challenge a decision violating the principle of *non-refoulement*.⁶⁸

The Inter-American Court of Human Rights stated that the protection against *non-refoulement* applies to every foreigner, regardless of legal or migratory status.⁶⁹ As a consequence, if a migrant alleges to be at risk if returned to his or her country of origin, a State party is under the obligation to



at least interview the person concerned and evaluate the risk that person would face if expelled.⁷⁰ Under article 63 (2) of the American Convention on Human Rights and Rule 27 of the Rules of Procedure of the Court, the Court can indicate provisional measures to prevent an irreparable damage,⁷¹ including in cases where the principle of *non-refoulement* is at stake.

IV. Specific human rights triggering the application of the principle of *non-refoulement*

1. Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that “[o]ne of the bedrock principles of international law is the express prohibition against *refoulement* of persons to where there are substantial grounds to believe there is a risk of torture.”⁷² Many different international and regional human rights instruments set forth an absolute prohibition of torture and other ill-treatment,⁷³ from which the equally absolute obligation of *non-refoulement* derives subsequently.⁷⁴ Under no circumstances may a migrant be expelled to a State when there are substantial grounds to believe that there is a real risk that he or she will face torture or cruel, inhuman or degrading treatment or punishment.⁷⁵

The distinction between torture and other ill-treatments depends on the intensity of suffering inflicted on the victim.⁷⁶ The finding of **torture** attaches to cases of “deliberate inhuman treatment causing very serious and cruel suffering.”⁷⁷ **Ill-treatment**, falling short of torture, must still reach “a minimum level of severity” that is based on all relevant circumstances of the case, including the duration of treatment, the physical or mental effects, and the sex, age, and state of health of victim.⁷⁸

Inhuman treatment includes treatment that is premeditated, lasts for a significant period of time, and causes bodily injury or “at least intense physical and mental suffering.”⁷⁹ The European Court has defined **degrading treatment** to include acts that “arouse in [its] victims feelings of fear, anguish and inferiority, capable of humiliating and debasing [the victim] and possibly breaking their physical or moral resistance.”⁸⁰ The suffering or humiliation resulting from inhuman or degrading treatment or punishment must “go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”⁸¹ The Inter-American Commission has defined the “concept of inhumane treatment as including that of “degrading treatment,” and torture as “an

aggravated form of inhumane treatment, committed with an objective: that of obtaining information or confessions or inflicting punishment”.⁸²

International bodies and monitoring mechanisms have found violations of the principle of *non-refoulement* based on the prohibition of torture, cruel, inhuman or degrading treatment or punishment in a variety of settings, including: extended time awaiting execution after a death sentence,⁸³ indiscriminate violence in the country of return,⁸⁴ expulsion of a person seriously ill and close to death to a State where necessary healthcare is not available and where the person cannot count on the support of his or her family members,⁸⁵ death sentence imposed as a consequence of an unfair trial,⁸⁶ multiple rapes,⁸⁷ harmful practices such as female genital mutilation,⁸⁸ degrading conditions during detention,⁸⁹ and living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basic needs.⁹⁰

Absolute consistency is not required in an applicant’s retelling of past ill-treatment or in the migrant’s reasons for fearing expulsion to a State.⁹¹ The Committee against Torture has held that “complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome” and that “**the principle of strict accuracy does not necessarily apply when inconsistencies are of a material nature.**”⁹²

2. Right to life

Non-refoulement also prevents a State from returning a migrant to a State where he or she faces a real risk of a violation of the right to life, such as through the imposition of a death sentence,⁹³ but is not limited to such circumstances. The existence of a real risk does not necessarily have to come from the possibility of a death sentence, but may also arise from extrajudicial killings.⁹⁴ *Non-refoulement* also prevents migrants from being expelled to a State where they face violations of the right to life that come from non-State actors. For example, the Human Rights Committee found that the expulsion of a Somali national to Somalia would put him at a “real risk of irreparable harm”, including of the right to life, because he did not speak the local language, had never lived there, and had no clan support or family in the region.⁹⁵ There, the receiving State would have been unable to provide protection from the generalized violence in the area.⁹⁶

In the situations that do involve the imposition of the death penalty, it must be demonstrated that the death penalty would apply to the specific crimes alleged⁹⁷ and that the punishment is usually carried out.⁹⁸ The Human Rights Com-

mittee has deducted this from “the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases.”⁹⁹ However, it is “not necessary to prove [...] that the [migrant] ‘will’ be sentenced to death, but only that there is a ‘real risk’ that the death penalty will be imposed”.¹⁰⁰

Under the ICCPR, if a State party has abolished the death penalty it may not remove a migrant to a State where he or she will face the death penalty.¹⁰¹

The Inter-American Commission stated that the immigration policy of each state is part of its sovereign powers, however, it is subject to limitations; *inter alia*, it must respect the right to life and to **physical and psychological integrity**.¹⁰² The Commission also found a violation of article 1, protecting the right to life, liberty and security, of the American Declaration on the Rights and Duties of Man in the case of the push back of migrants on the high seas to a place where they risked being exposed to acts of brutality by the military.¹⁰³

3. Other rights which may trigger the application of the principle

a. Slavery and Forced Labour

It is also possible that the real risk of slavery and forced labour upon expulsion engage a State’s *non-refoulement* obligation. However, the nature of slavery and forced labour makes it more likely that an enforcement mechanism or regional court would find this situation to be a violation of the prohibition on inhuman or degrading treatment or punishment rather than slavery or forced labour.¹⁰⁴

To determine whether a real risk of enslavement or forced labour exists, consideration should be given to both the general existence and practice of slavery and forced labour in a State as well as the existence of a risk which is personal to the individual. Additionally, account will also be given to the existence of a law prohibiting the practice in the receiving State.¹⁰⁵

Furthermore, because it is likely that the enslavement or forced labour would arise from the actions of non-State actors, it is also necessary to demonstrate that the receiving State authorities are unwilling or unable to obviate the risk by providing protection to the applicant.¹⁰⁶

b. Right to a fair trial

The risk of a “**flagrant denial**” of the right to a fair trial may also prohibit a State from expelling or extraditing a migrant

to another State.¹⁰⁷ Regional human rights courts (in particular the European Court and the Inter-American Court) have noted that the right to a fair trial is especially important in circumstances where the death penalty is a possibility.¹⁰⁸ More generally, the Inter-American Commission found that immigration policy should ensure an individual decision for each case with due process guarantees.¹⁰⁹ However, because situations where a flagrant denial of the right to a fair trial are likely to occur often also involve a demonstrated real risk of torture or ill-treatment, courts and enforcement mechanisms often do not reach the issue of fair trial.¹¹⁰ As a result, this aspect of *non-refoulement* jurisprudence is not as developed as that related to torture and cruel, inhuman or degrading treatment or punishment.

The standard used to determine whether a State would violate *non-refoulement* by expelling or extraditing a migrant to another country to face a flagrant denial of the right to a fair trial is different than the standard used in domestic situations.¹¹¹ It must go “beyond mere irregularities or lack of safeguards in the trial procedure” and **the breach must be “so fundamental as to amount to a nullification, or destruction of the very essence, of the right”**.¹¹²

A flagrant denial may result from “a trial which is summary in nature and conducted with a total disregard for the rights of the defense,”¹¹³ when there is “detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed,”¹¹⁴ or when there is deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country.”¹¹⁵ The European Court of Human Rights has also found that the admission of evidence that was obtained through torture for the purposes of a criminal trial amounts to a flagrant denial of justice and bars an individual’s extradition to another State.¹¹⁶

The applicant must show that there are substantial grounds to believe there is a “real risk” of a flagrant denial of the right to a fair trial.¹¹⁷ The history of violations and procedural protections guaranteed in the State, such as membership in the European Convention on Human Rights, may help determine whether a risk of a flagrant denial of the right to a fair trial exists.¹¹⁸

c. Freedom of Thought, Conscience, and Religion

The responsibility to not expose an individual to violations of their human rights may also apply to the right to freedom of thought, conscience, and religion, but to a different degree. The European Court has stated that it will “not rule out the possibility that the responsibility of a returning State might **in exceptional circumstances** be engaged under Article 9 [freedom of thought, conscience, and religion] of the Convention **where the person concerned ran a real risk**

*d. Prohibition on Enforced Disappearances*

The International Convention for the Protection of All Persons from Enforced Disappearance states that: **“No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”**¹²⁰ This is determined in a similar way to other *non-refoulement* obligations: “the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or serious violations of international humanitarian law.”¹²¹

4. Specific protection for children

While all the previously discussed principles and protection provided by *non-refoulement* also apply to migrant children, the Convention on the Rights of the Child provides further protection specific to children. The CRC requires a State to make a child’s well-being the primary concern and consideration in all decisions, including the decision to expel.¹²² The Committee for the Rights of the Child has explained this with regard to unaccompanied or separated children: “States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child[...].”¹²³ The Committee has also clarified that “[r]eturn to a country of origin is not an option if it would lead to a ‘reasonable risk’ that such return would result in the violation of fundamental human rights of the child [...]”.¹²⁴ A State should only return a child to a country of origin when it is in the **“best interests of the child.”**¹²⁵ These obligations “apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction.”¹²⁶

Similarly, States are forbidden from “returning a child in any manner whatsoever to the borders of a State where there is a real risk of **underage recruitment**.”¹²⁷ This prohibition extends to risks of “recruitment not only as a combatant but also to provide sexual services for the military or where there is a real risk of direct or indirect participation in hostilities, either as a combatant or through carrying out other military duties.”¹²⁸

V. Other issues related to non-refoulement*1. Diplomatic assurances*

When a State initiates expulsion or extradition proceedings against a migrant, the expelling State will often attempt to obtain assurances from the receiving State that the individual will not face ill-treatment or other violations of his or her rights. These promises are often called “diplomatic assurances.” Diplomatic assurances frequently **arise in situations where a migrant is to be extradited to another country to stand trial for an offense and may receive the death penalty** as a result of a conviction.¹²⁹ Diplomatic assurances are also common **when a receiving State has a history of torture, ill-treatment, or arbitrary detention.**¹³⁰ Similarly, diplomatic assurances are solicited **when there is the danger that a migrant will not receive a fair trial.**¹³¹

The use of diplomatic assurances is controversial and it is unclear whether they are truly an effective way to prevent violations of human rights.¹³² The Working Group on Enforced or Involuntary Disappearances has stated that **diplomatic assurances** “for the purpose of overcoming the obstacle of the *non-refoulement* principle **do not release States from their obligations under international human rights, humanitarian and refugee law, in particular the principle of non-refoulement.**”¹³³ Similarly, the existence of diplomatic assurances does not foreclose a court or monitoring mechanism from examining the promise to determine whether it provides sufficient protection.¹³⁴ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has found that “post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.”¹³⁵ The Working Group on Arbitrary Detention is similarly skeptical of the ability of diplomatic assurances to protect individuals from ill-treatment.¹³⁶

According to the Working Group on Arbitrary Detention, “[diplomatic] assurances are only acceptable if very stringent conditions are met.”¹³⁷ First, the diplomatic assurance cannot be used to circumvent a higher standard or obligation, such as the terms of an extradition treaty.¹³⁸ Second, the sending State must **have reason to believe that the assurance is reliable and that it is being offered by an authority in the receiving State that can ensure compliance with the terms.**¹³⁹ Third, there must be a **mechanism for monitoring and enforcing** the receiving State’s compliance with the assurance.¹⁴⁰

The European Court of Human Rights has clarified the path

that should be followed in determining whether diplomatic assurances can be relied upon. According to the Court, the preliminary question is whether **“the general human rights situation in the receiving State excludes accepting any assurances whatsoever.”**¹⁴¹ However, this assessment will lead to a finding of a violation of the Convention in case of expulsion only in exceptional cases. In the majority of cases, the Court will assess, “first, the **quality of the assurances** and, second, whether in light of the receiving State’s practices **they can be relied upon.**”¹⁴² Moreover, the Court will also take into account, among others, the following specific factors: whether the assurances are specific or are general and vague; the length and strength of bilateral relations between the sending and receiving States, including the receiving State’s record in abiding by similar assurances; whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers; whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), whether the applicant has previously been ill-treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending/contracting State.¹⁴³ Finally, the presence of international protection or activities of agencies, such as IOM and UNHCR, within a receiving State does not act as an assurance that the migrant will not face violations of his or her rights.¹⁴⁴

The Inter-American Commission stated that where there are “substantial grounds” for believing that there is a danger of torture or other mistreatment, the State should ensure that the detainee is not transferred and that diplomatic assurances are not used to circumvent the State’s *non-refoulement* obligation.¹⁴⁵

2. Collective Expulsions

The general prohibition of collective expulsions is also related to the issue of *non-refoulement*. The collective expulsion of migrants violates their rights and may support a claim against the expelling State.¹⁴⁶ The European Court of Human Rights has defined “collective expulsion” as: “[A]ny measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group”.¹⁴⁷ The lack of an individualized assessment of the individual’s situation prevents States from adequately verifying whether reasons exist not to expel or return a migrant in observance of the principle of *non-refoulement*.

Many international and regional instruments set out an explicit prohibition of collective expulsion of non-nationals.¹⁴⁸ The Inter-American Court, for example, condemned the practice of massive expulsions by ordering provisional measures to avoid, among others, violations of the rights to life and personal integrity in case of deportation.¹⁴⁹ Similarly, the African Commission held that “it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts.”¹⁵⁰

The prohibition of collective expulsion can also be inferred from other treaty provisions that require individualized decisions on each migrant’s claim to remain in the country. The Human Rights Committee has found this to be true of the ICCPR and has stated that the guarantees provided in Article 13 “entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions.”¹⁵¹ In principle Article 13 only applies to migrants lawfully present on the territory of the State. However, the Human Rights Committee stated that: “discrimination may not be made between different categories of aliens in the application of article 13.”¹⁵²



Summary of Key Principles

General Principles

- The *non-refoulement* principle prohibits States from returning an individual in **any manner whatsoever** to a country or territory in which their lives, physical integrity or freedom may be threatened or in which they risk being submitted to torture or inhumane and degrading treatment or punishment.
- The *non-refoulement* principle is widely accepted as a **peremptory norm of customary international law**.
 - ◊ In other word, derogation or exceptions to this principle are neither allowed nor possible.
 - ◊ The principle of *non-refoulement* in human rights law has an absolute character: **security concerns, including conviction for serious crimes**, cannot be invoked to limit its application.
- The principle of non-refoulement applies to **all migrants**:
 - ◊ Regardless of their status in the returning country.
 - ◊ Its application does not depend on the ability to be granted or maintain the **refugee** status.
 - ◊ It also applies to **internally displaced individuals** who have **not** crossed an international boundaries.
- When no safe alternative solutions exist, the principle of *non-refoulement* implies that the State must **admit the individual to its territory**, at least temporarily.
- The principle also prevents a State from expelling a migrant to a second State where he or she would face expulsion to a third State and subsequent human rights violations. This process is called “**indirect refoulement**.”
- *Non-refoulement* can apply **extraterritorially**, when the States’ authorities have an effective control over the migrant, such as when a person is taken aboard a State’s vessel temporarily.
- The risk faced by the individual can derive from non-State actors.

A person cannot be returned or expelled to a country where he or she risks to suffer a violation of the following rights:

- Prohibition of torture and cruel, inhuman or degrading treatment or punishment, including in case of:
 - ◊ Extended time awaiting execution after a death sentence;
 - ◊ Indiscriminate violence in the country of return;
 - ◊ Death sentence imposed as a consequence of an unfair trial;
 - ◊ Multiple rapes;
 - ◊ Harmful practices such as female genital mutilation;
 - ◊ Inhuman and degrading conditions of detention;
 - ◊ Living conditions contrary to human dignity in cases in which the person is unable to cater for his or her basic needs;
 - ◊ In exceptional circumstances, expulsion to face death as a result of a serious illness.
- Right to life, including in case of:
 - ◊ Death sentence;
 - ◊ Extrajudicial killings;
 - ◊ Indiscriminate violence;
 - ◊ Threats to life by non-State actors.
- Prohibition of enforced disappearances.
- The best interests of the child.
- In exceptional cases:
 - ◊ Prohibition of slavery and forced labour;
 - ◊ Flagrant denial of the right to a fair trial;
 - ◊ Freedom of thought, conscience and religion.

ANNEX I: Selected Instruments and documents

Selected Instruments and Documents

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.
- International Covenant on Civil and Political Rights, 16 December 1966.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.
- Convention on the Rights of the Child, 20 November 1989.
- United Nations Convention and Protocol Relating to the Status of Refugees, 28 July 1951.
- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.
- United Nations High Commissioner for Refugees, Executive Committee Programme, *Non-refoulement*, Conclusion No. 6 (XXVIII) (1977).
- CCPR, General Comment No. 6: The right to life (art. 6), 30 April 1982.
- Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986.
- Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 03 October 1992.
- Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (*Refoulement* and Communications), 21 November 1997.
- Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 01 September 2005.
- Guiding Principles on Internal Displacement, U.N. Human Rights Commission, Resolution 1998/50 of 17 April 1998.

Regional Instruments

- European Convention on Human Rights, 4 November 1950.
- American Convention on Human Rights, 22 November 1969.
- African Charter on Human and Peoples' Rights, 27 June 1981.
- Charter of Fundamental Rights of the European Union, 2 October 2000.
- Arab Charter on Human Rights (revised), 22 May 2004.

Endnotes

1. P. Leino-Sandberg, 'Particularity as Universality: The Politics of Human Rights in the European Union', *The Erik Castren Institute Research Reports* No. 15/2005, 52, cited in J. Pirjola, 'Shadows in Paradise—Exploring Non-Refoulement as an Open Concept,' *International Journal of Refugee Law*, Vol. 19 (4), 2007, at 656.
2. It is worth noting that the decisions made by treaty monitoring bodies, such as the Committee against Torture, the Human Rights Committee, and the Committee for the Rights of the Child are not binding *per se*. However, the Human Rights Committee has found that there is a duty to cooperate with its decisions based on the principle of good faith in observance of all treaty obligations. See Human Rights Committee, *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, General Comment No. 33, 5 November 2008, UN Doc. CCPR/C/GC/33, in particular para. 15. Furthermore, the general comments provided by treaty-monitoring bodies are also not binding, but provide a valuable source of information on the purpose and scope of *non-refoulement* protections.
3. United Nations Convention Relating to the Status of Refugees (1951) (hereinafter "1951 Refugee Convention").
4. IOM, *Glossary on Migration*, International Migration Law Series No. 25, 2^o edition, 2011, at 68. Note that while the definition states that *non-refoulement* pertains to "refugees," the protection also applies to all migrants regardless of recognized refugee status.
5. See Article 33(1) of the 1951 Refugee Convention which 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"; The principle of *non-refoulement* is also enshrined, without any limitation on security grounds, in Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa and reaffirmed as a rule of *jus cogens* in the Cartagena Declaration on Refugees (at para. 5). The principle also appears in Article 3(3) of the Principles concerning Treatment of Refugees adopted by the Asian–African Legal Consultative Committee in 1966, with a limitation on security grounds.
6. See Human Rights Committee (CCPR), General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, at 1 which states that "[...] each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness." See also CCPR, General Comment No. 31: the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at para. 10; Inter-American Court of Human Rights (IACtHR), Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, (2003) Series A, No. 18.
7. Article 3(1) of the Convention Against Torture provides that: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."; Article 22 [8] of the American Convention for Human Rights (ACHR) states: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."; Article 16 [1] of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPAPED) states: "No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."; Article 19 [2] of the Charter of Fundamental Rights of the European Union (CFREU), 2000/C 364/01 states: "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"; See also Article 21 [1] of the 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, which states: "Member States shall respect the principle of *non-refoulement* in accordance with their international obligations."



8. For example, Article 56, para. 3 of the Convention on the Rights of Workers states that “[i]n considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations”, which arguably includes *non-refoulement*.
9. CCPR, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 03 October 1992 at 9; CCPR, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at 12; European Court of Human Rights (ECtHR), *Soering v. the United Kingdom*, Application No. 14038/88, Judgment 7 July 1989, at 88; African Commission on Human Rights (ACHPR), *Modise v. Botswana*, Communication No. 97/93, 23 October–06 November 2000, at 88.
10. Article 3 of the European Convention on Extradition (ECE); Article 4(5) of the Inter-American Convention on Extradition; Article 3 of the Model Treaty on Extraditions.
11. Guiding Principles on Internal Displacement, Principle 15. Available at: <http://www.idpguidingprinciples.org> (accessed on 10 December 2012).
12. United Nations High Commissioner for Refugees, Executive Committee Programme, *Non-refoulement*, Conclusion No. 6 (XXVIII) (1977) states: “[T]he fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.” UN High Commissioner for Refugees, *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*, 31 January 1994, at 1, 3.
13. J. Hathaway, ‘The Rights of Refugees under International Law’, 2005, at 363-7; J. Allain, ‘The Jus Cogens Nature of Non-refoulement’, 13 *International Journal of Refugee Law* 533 (2001); Guy S. Goodwin-Gill, ‘The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement’, 23 *International Journal of Refugee Law*, at 443-444 (2011); Inter-American Court of Human Rights Advisory Opinion, *Juridical Condition and Rights of the Undocumented Migrant, Concurring Opinion of Judge A.A. Cançado Trindade*, OC-18/03, at 41.
14. IOM Glossary, entry for “*jus cogens*” (2011).
15. CAT, *C.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005, at 7.3; ECtHR, *Cruz Varas v. Sweden*, Application no. 15576/89, Judgment 20 March 1991, at 75 (requiring “substantial grounds [...] for believing the existence of a real risk of treatment contrary to Article 3”).
16. CCPR, *A.R.J. v. Australia*, Communication No. 692/1996, 11 August 1997, U.N. Doc. CCPR/C/60/D/692/1996, at 6.9; CCPR, *G.T. v. Australia*, Communication No. 7061/1996, 4 December 1997, U.N. Doc. CCPR/C/61/D/706/1996, at 8.2.
17. Inter-American Court of Human Rights (IACtHR), *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 153.
18. Inter-American Commission on Human Rights (IACnHR), *Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Inter-Am.C.H.R./OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), at 167 and *John Doe et al v. Canada*, Report N. 78/11 - Case 12.586 (21 July 2011), at 110-112.
19. CCPR, *A.R.J. v. Australia*, *Ibid.*, at 6.14; CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 9.5; ECtHR, *Vilvarajah and Others v. United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment 30 October 1991, at 108.
20. CAT, *S.M.R. and M.M.R. v. Sweden*, Communication No. 103/1998, 11 May 1999, U.N. Doc. CAT/C/22/D/103/1998, at 9.4.
21. CAT, *Motumbo v. Switzerland*, Communication no. 13/1993, 27 April 1994, U.N. Doc. CAT/C/12/D/013/1993, at 7.4-7.5.
22. CAT, *Karoui v. Sweden*, Communication No. 185/2001, 08 May 2002, U.N. Doc. A/57/44, at 198.
23. *Id.*, which relies on medical records showing torture trauma.
24. CCPR, *Hamida v. Canada*, Communication No. 1544/2007, 11 May 2010, U.N. Doc. CCPR/C/98/D/1544/2007, at 8.7.
25. ECtHR, *Cruz Varas v. Sweden*, Application no. 15576/89, Judgment 20 March 1991, at 75, citing *Ireland v. United Kingdom*, Application No. 5310/71, Judgment 18 January 1978, at 160.
26. Art. 3(2) of CAT (“the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”); CAT, General Comment No. 1, 21 November 1997, Annex IX at 8 which provides a non-exhaustive list of relevant information.

27. ECtHR, *Omar Othman v. the United Kingdom*, Application no. 8139/09, Judgment 17 January 2012, at 187; *Hirsi Jaama and others v. Italy*, Application No. 27765/09, Judgment 23 February 2012, at 117; and *Sufi and Elmi v. the United Kingdom*, Application Nos. 8319/07, 11449/07, Judgment 28 June 2011, at 293-296.
28. ECtHR, *Chahal v. the United Kingdom*, Application No. 70/1995/576/662, Judgment 15 November 1996, at 86. If expulsion has already occurred, then the enforcement mechanism will evaluate the facts as they were known or should have been known by the expelling State at the time of removal. See ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application no. 61498/08, Decision 30 June 2009, at 149.
29. CAT, *Motumbo v. Switzerland*, Communication no. 13/1993, 27 April 1994, U.N. Doc. CAT/C/12/D/013/1993, at 9.4 which relies on history of detention.
30. CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 9.5 which finds that the applicant's involvement in political opposition group after arrival in Switzerland contributed to existence of a real risk of torture upon expulsion.
31. CCPR, General Comment No. 31, *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, at 10; See also CCPR General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, at 1.
32. ECtHR, *Ahmed v. Austria*, Application No. 25964/94, Judgment 17 December 1996, at 42, 47, stating that the applicant lost refugee status because of criminal conviction, but was granted *non-refoulement*. IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 135, stating that the Inter-American system recognizes the right of every foreign person regardless of legal or migratory status, and not only of asylum seekers and refugees, not to be returned to a place where his/her life, integrity and/or liberty risk being violated. See also Convention Against Torture (CAT), *Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, U.N. Doc. A/49/44, at 2.5, 9.7; CCPR, *Hamida v. Canada*, Communication No. 1544/2007, 11 May 2010, U.N. Doc. CCPR/C/98/D/1544/2007, at 8.7, 9.
33. In this sense, K. Wouters, *International Legal Standards for the protection from refoulement*, Antwerp, Oxford Portland, 2009, at 569. See also CRC, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, UN Doc. CRC/GC/2005/, at 62: "States should [...] take into account that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child".
34. CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 11.
35. CAT, *M.B.B. v. Sweden*, 21 June 1999, Application No. 104/1998, at 6.4.
36. See, *mutatis mutandis*, ECtHR, *Kuric and others v. Slovenia*, Application No. 26828/06, 26 June 2012, at 358-359; ECtHR, *Slivenko v. Latvia*, Application no. 48321/99, Judgment 9 October 2003, at 96, 125, 128 and 129.
37. IACnHR, *Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), at 171; ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment 23 February 2012 at 77-78. See also J. C. Hathaway, "Refugee and asylum", in *Foundations of International Migration Law*, B. Opeskin, R. Peruchoud, J. Redpath-Cross Eds., Cambridge, 2012, at 194-195: "[e]xtraterritorial deterrence is therefore as much a breach [of the State's obligation] as expulsion from within a State's territory."
38. ECtHR, *Bankovic and Others v. Belgium and Others*, Application No. 52207/99, Decision 12 December 2001, at 67; ECtHR, *Hirsi Jamaa and Others v. Italy*, *Ibid.*, at 72, 136.
39. ECtHR, *Hirsi Jamaa and Others v. Italy*, *Ibid.*, at 74.
40. *Idem*, at 77-78: "Where there is control over another, this is *de jure* control exercised by the State in question over the individuals concerned" and "the instant case does indeed constitute a case of extraterritorial exercise of jurisdiction by Italy capable of engaging that State's responsibility under the Convention."
41. CCPR, *The Nature of General Obligation Imposed on States Parties to the Covenant*, General Comment No. 31[80], 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, at 12.
42. CAT, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), A/53/44, Annex IX, 21 November 1997, at 2; See also CAT, *S.M.R. and M.M.R. v. Sweden*, Communication No. 103/1998, 11 May 1999, at 9.8. CRC, *General Comment No. 6: Treatment of Unaccompanied and Separated Chil-*



43. IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 153.
44. ECtHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, Judgment 23 May 2007, at 140-41, 149. The Court found that a Somali citizen belonging to the Ashraf minority could not be returned to a “relatively safe” area of Somalia, because even there he would face a real risk of ill-treatment due to his lack of clan protection in the area.
45. CAT, *B.S.S. v. Canada*, Communication No. 183/2001, 17 May 2004, U.N. Doc. CAT/C/32/D/183/2001, at 11.5, which states: “The Committee considers that the complainant has failed to substantiate that he would be unable to lead a life free of torture in another part of India.”
46. Article 33 (2) reads as follow: “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final Judgment of a particularly serious crime, constitutes a danger to the community of that country.”
47. CCPR, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at 12; CCPR, General Comment No. 20: Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7), 3 Oct. 1992, U.N. Doc. CCPR/C/21, at 9.
48. CAT, *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996, at 14.5; CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 & 1477/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461,1462,1476 & 1477/2006, at 12.4-12.6.
49. ECtHR, *Chahal v. the United Kingdom*, Application No. 70/1995/576/662, Judgment 15 November 1996, at 80; IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 151; CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 9.8.
50. See, for instance, ECtHR, *D. v. the United Kingdom*, Application No. 30240/96, Judgment 2 May 1997, at 47.
51. CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 & 1477/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461, 1462,1476& 1477/2006, at 12.4.
52. CAT, *Aemei v. Switzerland*, Communication No. 34/1995, 29 May 1997, U.N. Doc. CAT/C/18/D/34/1995, at 9.8.
53. ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment 28 February 2008, at 137. See also CAT, Concluding Observations on Canada, 07 July 2005, U.N. Doc. CAT/C/CR/34/CAN, at 4.
54. CCPR, *Dawood Khan v. Canada*, Communication No. 1302/2004, 10 August 2006, U.N. Doc. CCPR/C/87/D/1302/2004 (2006), at 5.6; ECtHR, *H.L.R. v. France*, Application No. 11/1996/630/813, Judgment 29 April 1997, at 40.
55. ECtHR, *H.L.R. v. France*, *Ibid.*, at 40. See also CCPR, *Dawood Khan v. Canada*, Communication No. 1302/2004, 10 August 2006, U.N. Doc. CCPR/C/87/D/1302/2004, at 5.6. Note that the Inter-American Court of Human Rights held states responsible in the case of violations committed by non-State actors, however, the Court has not ruled on the principle of *non-refoulement* in the context of violence by non-State actors, see *inter alia*, IACtHR, *González et al. (“Cottonfield”) v. Mexico*, 16 November 2009, Series C No. 205, at *inter alia*, 389, 402 and 409-11; and Advisory Opinion, *Juridical Condition and Rights of the Undocumented Migrant*, OC-18/03, for example at 149.
56. ECtHR, *D. v. the United Kingdom*, Application No. 30240/96, Judgment 2 May 1997, at 49 which finds that the risk of inhuman or degrading treatment or punishment may arise from lack of access to medical care in certain circumstances; ECtHR, *T.I. v. United Kingdom*, Application No. 43844/98, Decision 7 March 2000, at pg. 14; ECtHR, *Bensaid v. United Kingdom*, Application No. 44599/98, Judgment 6 February 2001, at 33.
57. Committee on the Rights of the Child (CRC), General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 01 September 2005, U.N. Doc. CRC/GC/2005/6, at 27.
58. Article 1(1) of the Convention against Torture (CAT). See also CAT, *G.R.B. v. Sweden*, Communication No. 83/1997, 15 May 1998, U.N. Doc. CAT/C/20/D/083/1997, at 6.5 stating “the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.”
59. CAT, *Elmi v. Australia*, Communication No. 120/1998, 25 May 1999, U.N. Doc. CAT/C/22/D/120/1998, at 6.5: “For a number of years Somalia has been without a central government” and where “factions operating in Mogadishu have set up quasi governmental institutions” and “members of those factions can fall [...] within the phrase ‘public officials of other persons acting in an official capacity’”.

60. For example, CAT, *Agiza v. Sweden*, Communication No. 233/2003, 20 May 2005, U.N. Doc. CAT/C/34/D/233/2003, at paras. 13.6 and 13.7; CCPR, *Jonny Rubin Byahuranga v. Denmark*, Communication no. 1222/2003, 9 December 2004, U.N. Doc. CCPR/C/82/D/1222/2003, at para. 13; and CoE, Recommendation No. R (98) 13 of the Committee of Ministers on the right of rejected asylum-seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights.
61. See CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 & 1477/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461,1462,1476&1477/2006, at 12.7.
62. CCPR, *Choudhary et al. v. Canada*, Communication no. 1898/2009, 28 October 2013, U.N. Doc. CCPR/C/109/D/1898/2009, at 10 and 11. Note that usually, if the Committee finds the right to life to be violated, it will also find a violation of the prohibition of torture and inhumane or degrading treatments or punishments. There are few exceptions, see for example, CCPR, *Novaković v. Serbia*, Communication no. 1556/2007, 21 October 2010, U.N. Doc. CCPR/C/100/D/1556/2007, at 8, where the Committee finds a violation of article 2.3 (a) in conjunction with article 6.
63. CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, op. cit., at para. 8.1.
64. CAT, *Mafhoud Brada v. France*, Communication No. 195/2002, 24 May 2005, U.N. Doc. CAT/C/34/D/195/2002, at 7.8.
65. See *Ibid.*, at 8.2. Rule 114, formerly rule 108, states: "At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations."
66. See, *inter alia*, ECtHR, *Hirsi Jamaa and others v. Italy*, Application no. 27765/09. Judgment of 23 February 2002, at 200.
67. See, for example, ECtHR, *M.M.S. v. Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011, at 40.
68. ECtHR, *Chahal v. the United Kingdom*, Application no. 22414/93, Judgment 15 November 1996, at 145-47.
69. IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, judgment 25 November 2013, Series C. No. 272, at 135.
70. *Ibid.*, at 136.
71. IACtHR, Order for Provisional Measures in the matter of *Haitians and Haitians origin Dominicans in the Dominican Republic*, 18 August 2000, Series E, No. 3, cons. 8.
72. Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 30 Aug 2005, U.N. Doc. A/60/316, at 30.
73. Article 7 ICCPR. See also Article 3 ECHR; Article 2 CAT; Article 5(2) ACHR.
74. See, *ex multis*, ECtHR, *Vilvarajah and Others v. United Kingdom*, Applications Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Judgment 30 October 1991, at 108; CAT, *Paez v. Sweden*, Communication No. 39/1996, 28 April 1997, U.N. Doc. CAT/C/18/D/39/1996, at 14.5; CCPR, *Maksudov and Rakhimov v. Krygyzstan*, Communication Nos 1461, 1462,1476 and 1477/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461, at 12.4.
75. CAT, *Mutombo v. Switzerland*, Communication No. 13/1993, 18 November 1993, U.N. Doc. A/49/44 at 45 (1994), at 9.3; CCPR, *Maksudov and Rakhimov v. Krygyzstan*, *Ibid.*, at 12.4; IACtHR, *Lori Berenson-Mejía v. Peru*, 25 November 2004, Series C No. 119, at 100.
76. ECtHR, *Saadi v. Italy*, Application 37201/06, Judgment 28 February 2008, at 134; ECtHR, *Chahal v. the United Kingdom*, Application No. 70/1995/576/662, Judgment 15 November 1996, at 74.
77. ECtHR, *Saadi v. Italy*, *Ibid.*, at 13. The CAT provides a slightly different definition of torture. See also Article 2(1) of CAT.
78. ECtHR, *Ireland v. the United Kingdom*, Application No. 5310/71, Judgment 18 January 1978, at 162.
79. ECtHR, *Ireland v. the United Kingdom*, *Ibid.*, at 167; ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment 7 July 1989, at 162; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Judgment 2 March 2010, at 121.
80. ECtHR, *Soering v. the United Kingdom*, *Ibid.*, at 162. See also ECtHR, *Ireland v. the United Kingdom*, *Ibid.*, at 167; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, *Ibid.*, at 121.



81. ECtHR, *Saadi v. Italy*, Application 37201/06, Judgment 28 February 2008, at 135; ECtHR, *Labita v. Italy*, Application No. 26772/95, Judgment 6 April 2000, at 120.
82. IACtHR, *Tibi v. Ecuador*, 7 September 2004, Series C No. 114, at 139 (Pleadings of the Commission).
83. ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment 7 July 1989, at 103-04.
84. ECtHR, *Sufi and Elmi v. the United Kingdom*, Applications nos. 8319/07 and 11449/07, Judgment 28 June 2011, at 225, 226 and 241-250.
85. ECtHR, *D. v. the United Kingdom*, Application no. 146/1996/767/964, Judgment 2 May 1997, at 53. However, see also the following judgments which did not find a violation of Article 3: ECtHR, *Bensaid v. the United Kingdom*, Application No. 44599/98, Judgment 6 February 2001, at 36-40; ECtHR, *N. v. the United Kingdom*, Application no. 26565/05, Judgment 27 May 2008, at 35-40.
86. ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, Judgment 12 May 2005, at 175.
87. CAT, *V.L. v. Switzerland*, Communication No. 262/2005, 20 November 2006, U.N. Doc. CAT/C/37/D/262/2005, at 8.10.
88. CCPR, *Kaba and Kaba v. Canada*, Communication No. 1465/2006, 21 May 2010, U.N. Doc. CCPR/C/98/D/1465/2006, at 10.1, 10.4.
89. ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment 21 January 2011, at 233-35, 363-68.
90. *Ibid.*, at 236-264.
91. CAT, *Haydin v. Sweden*, Communication No. 101/1997, 16 December 1998, U.N. Doc. CAT/C/21/D/101/1997, at 6.6.
92. CAT, *Haydin v. Sweden*, *Ibid.* at 6.7; CAT, *Kioski v. Sweden*, Communication No. 41/1996, 12 February 1996, U.N. Doc. CAT/C/16/D/41/1996, at 9.3; CAT, *C.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, U.N. Doc. CAT/C/37/D/279/2005, at 7.6.
93. ECtHR, *Al-Saadoon v. the United Kingdom*, Application No. 61498/08, Judgment 2 March 2010, at 143.
94. CCPR, *Baboeram et al. v. Suriname*, Communication 146/1983, 4 April 1985, U.N. Doc. CCPR/C/24/D/146/1983, at 14.3; CCPR, General Comment No. 6: The right to life (art. 6), 30 April 1982, at 3; See also IACnHR, *The Haitian Centre for Human Rights et al. v. United States*, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), at 168.
95. CCPR, *Warsame v. Canada*, Communication No. 1959/2010, 1 September 2011, U.N. Doc. CCPR/C/102/D/1959/2010, at 8.3.
96. *Idem*, at 8.2.
97. CCPR, *Kwok Yin Fong v. Australia*, Communication No. 1442/2005, 23 November 2009, U.N. Doc. CCPR/C/97/D/1442/2005, at 9.5, 10; ECtHR, *Bader and Kanbor v. Sweden*, Application No. 13284/04, Judgment 8 November 2005, at 44-48.
98. *Idem*.
99. CCPR, *G.T. v. Australia*, Communication No. 7061/1996, 4 December 1997, U.N. Doc. CCPR/C/61/D/706/1996, at 8.4.
100. CCPR, *Kwok Yin Fong v. Australia*, Communication No. 1442/2005, 23 November 2009, U.N. Doc. CCPR/C/97/D/1442/2005, at 9.6. See also CCPR, *G.T. v. Australia*, *Ibid.*, at 8.1, 8.4.
101. CCPR, *Kwok Yin Fong v. Australia*, *Ibid.*, at 9.4; CCPR, *G.T. v. Australia*, *Ibid.*, at 8.2-8.3.
102. IACtHR, *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Order of the President of the Inter-American Court of Human Rights, 14 September 2000, Series E No. 3, at 11(a), referring to the Commission's request to adopt interim measures.
103. IACnHR, *Haitian Centre for Human Rights v. United States*, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), at 171.
104. ECtHR, *Mohammed Lemine Ould Barar v. Sweden*, Application no. 42367/98, Decision 19 January 1999, at 1.
105. ECtHR, *Ould Barar v. Sweden*, *Ibid.*, at 1-2.
106. CCPR, *Khan v. Canada*, Communication No. 1302/2004, 10 August 2006, U.N. Doc. CCPR/C/87/D/1302/2004, at 5.6; ECtHR, *H.L.R. v. France*, Application No. 11/1996/630/813, Judgment 29 April 1997, at 40.
107. ECtHR, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment 7 July 1989, at 113; ECtHR, *Mamatkulov and Askarov v. Turkey*, Applications Nos. 46827/99 and 46951/99, Judgment 4 February 2005, at 88.

108. ECtHR, *Tomic v. the United Kingdom*, Application No. 17837/03, Decision 14 October 2003, at 3; IACtHR, *Case of Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, Judgment 1 September 2001, at 148. See also IACtHR, Advisory Opinion, *The right to information on consular assistance in the framework of the guarantees of due process of law*, OC-16/99, 1 October 1999, at 134-36.
109. IACtHR, *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic*, Order of the President of the Inter-American Court of Human Rights, 14 September 2000, Series E No. 3, at 11.
110. CCPR, *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006, U.N. Doc. CCPR/C/88/D/1416/2005, at 11.9 ECtHR, *Bayasakov and Others v. Ukraine*, Application No. 54131/08, Judgment 18 February 2010, at 61.
111. ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment 17 January 2012, at 260.
112. ECtHR, *Othman v. the United Kingdom*, Ibid., at 260.
113. ECtHR, *Bader and Kanbor v. Sweden*, Application No. 13283/04, Judgment 8 November 2005, at 46-48.
114. ECtHR, *Al-Moayad v. Germany*, Application No. 35865/03, Decision 13 February 2003, at 101.
115. ECtHR, *Al-Moayad v. Germany*, Ibid., at 101; See also ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment 17 January 2012, para 259.
116. ECtHR, *Othman v. the United Kingdom*, Ibid., at 267.
117. Ibid., at 261.
118. ECtHR, *Tomic v. the United Kingdom*, Application No. 17837/03, Decision 14 October 2003, at 3.
119. ECtHR, *Z. and T. v. the United Kingdom*, Application No. 27034/05, Decision 28 February 2006, at 1.
120. Article 16(1) of International Convention for the Protection of All Persons from Enforced Disappearance (CPED); See also Article 8(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, GA/47/133. For a definition of enforced disappearances see IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Series C No. 4, at 155-57.
121. Article 16(2) of CPED; See also Article 8(2) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, GA/47/133.
122. Article 3(1) of Committee on the Rights of Child (CRC) stating: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
123. CRC, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, UN Doc. CRC/GC/2005/6 at 27, specifically mentioning Arts. 6, [right to life] and 37 [torture or other cruel, inhuman or degrading treatment or punishment, liberty], but not limiting application of *non-refoulement* to those rights.
124. CRC, General Comment No. 6, Ibid., at 84.
125. Idem.
126. CRC, General Comment No. 6, Ibid., at 27.
127. Ibid., at 28.
128. Idem.
129. CCPR, *Maksudov and Rakhimov v. Kyrgyzstan*, Communication No. 1461, 1462, 1476 and 1477/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461,1462,1476&1477/2006, at 12.5.
130. CCPR, *Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006, U.N. Doc. CCPR/C/88/D/1416/2005, at 11.5; ECtHR, *Kaboulov v. Ukraine*, Application No. 41015/04, Judgment 19 November 2009, at 113.
131. ECtHR, *Klein v. Russia*, Application No. 24268/08, Judgment 1 April 2010, at 59-61.
132. CCPR, *Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006, U.N. Doc. CCPR/C/88/D/1416/2005.
133. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/13/42 at 43, citing General Assembly resolution 63/166, at 15; Human Rights Council resolution 8/8, at 6 (d). See also U.N. doc. A/HRC/4/40, at 52-56 and E/CN.4/2006/6.
134. ECtHR, *Chahal v. the United Kingdom*, Application No. 70/1995/576/662, Judgment 15 November 1996, at 105; ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment 28 February 2008, at 148.



136. Working Group on Arbitrary Detention, U.N. Doc. A/HRC/4/40, at 55.
137. *Ibid.*, at 52 referring specifically to assurances in situations involving detention or questions of fair trials.
138. *Ibid.*, at 53.
139. *Ibid.*, at 54.
140. CCPR, *Maksudov and Rakhnimov v. Kyrgyzstan*, Communications Nos. 1461/2006, 31 July 2008, U.N. Doc. CCPR/C/93/D/1461,1462,1476 and 1477/2006, at 12.; CCPR, *Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006, U.N. Doc. CCPR/C/88/D/1416/2005, at 11.
141. ECtHR, *Othman v. the United Kingdom*, Application No. 8139/09, Judgment 17 January 2012, at 188.
142. *Ibid.*, at 189 and at 118.
143. *Ibid.*, at 189.
144. ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, Judgment 23 February 2012, at 97, 130-31.
145. IACnHR, *Extension of Precautionary Measures (N. 259) regarding Detainees in Guantánamo Bay, Cuba*, 28 October 2005, at 10.
146. *Ibid.*, at 186. See also ECtHR, *Čonka v. Belgium*, Application No. 51564/99, Judgment 5 February 2002, at 62-63; *Institute for Human Rights and Development in Africa* (on behalf of Esmaila Connateh & 13 others) *v. Angola* (African Commission on Human and People's Rights), Communication 292/2004, May 2008, at 66-70, 85.
147. See, *ex multis*, ECtHR, *Hirsi Jamaa and Others v. Italy*, *Ibid.*, at 166.
148. Article 22(1) of the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families which states: "Migrant workers and members of their families shall not be subject to measures of collective expulsion."; Protocol 4, Article 4 of the European Convention on Human Rights which states: "Collective expulsion of aliens is prohibited."; Article 22(9) of the American Convention on Human Rights which states: "The collective expulsion of aliens is prohibited."; Article 12(5) of the African Charter on Human and Peoples' Rights which states: "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."; Article 26(2) of the Arab Charter of Human Rights which states: "Collective expulsion is prohibited under all circumstances."; Article 19(1) of the Charter of Fundamental Rights of the European Union which has it that "collective expulsions are prohibited."
149. IACtHR, Order for Provisional Measures in the matter of *Haitians and Haitians origin Dominicans in the Dominican Republic*, 18 August 2000, Series E, No. 3, at 9, p. 11.
150. ACmHR, *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Liges des Droits de l'Homme and Others v. Angola*, Communication No. 159/96, 1997, at 20. See also ACmHR, *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambia*, Communication No. 71/92, October 1996, at 31, referring to a flagrant violation of the Charter.
151. CCPR, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, at 10.
152. *Idem.*

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- The protection of unaccompanied migrant children
- International standards on immigration detention and non-custodial measures
- The principle of *non-refoulement*

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