HUMAN RIGHTS IMPLICATIONS OF THE PRINCIPLE OF NON-REFOULEMENT:
AN OVERVIEW

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Abstract
States are obliged for protection of refugees under international law on account of their membership of United Nations and signature or accession to International Refugee Instruments as well as International Human Rights Instruments. The legal basis for this international protection may either be customary international law or conventional international law. The basic customary international laws applicable to them are those pertinent fundamental human rights found in the International Bill of Human Rights. Hence, it is submitted that all states should protect the fundamental human rights of refugees under customary international law. Principle of non-refoulement is one of them. The refugee regime has generated a serious body of law that elaborates basic human rights norms and has important implications in and beyond the refugee context. There are a number of universal, regional and domestic human rights instruments and mechanisms which can be employed to enhance the protection of refugees and asylum seekers. This research aims at finding out the role of principle of non-refoulement in protecting refugees and asylum seekers under international human rights law.

Keywords: Non-Refoulement; Human Rights; Implication; UDHR; ICCPR; ICESCR; ECHR; ECtHR.

Introduction:
Every state exercise its sovereign authority over its territory by which the state has the right to secure its land from the illegal entrance of aliens. After the First World War a mass influx occurred and people being displaced from their land and compelled to move another land/state. In this regard a new situation arise called refugee situation. The international communities in this situation urge to every state that any refugee seeking shelter shall not be returned to the place of danger. By this way a new principle called Non-refoulement come to light. Now in International law, this principle holds a paramount importance. Every sovereign state exercise their power in their territory relating to refugee law and give rise to challenges in the application of the principle of Non-refoulement and in the protection of asylum seekers and refugees. It is manifest that non-refoulement is inherently connected with a procedure aimed at identifying potential victims of persecution. The procedure can be fair and effective only if it is conducted on state territory Accordingly, the prohibition on refoulement cannot be absolutely guaranteed without access to state territory. So awareness of the issue and attention to such situations in procedures and in field operations are vital in order to ensure the application of the principle of non-refoulement and prevent refugees being returned to a place of danger.
1. Understanding the Principle of Non-Refoulement:

A. Principle of Non-refoulement Described:
The fundamental humanitarian and human right principle of non-refoulement is a core principle of 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. The term 'refoulement' originates from the French word 'refouler,' meaning literally to drive back or repel in the context of immigration control summary reconduction to the frontier of those found to have entered illegally and summary refusal of admission of those without valid documents. 1 Refoulement, as Helene Lambert says, includes and refers to expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e., persecution, torture or inhumane treatment. 2 Article 33 of the 1951 Convention on the Status of Refugees 3 prescribes that no refugee should be returned to any country where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This provision constitutes one of the important Articles of 1951 Refugee Convention, to which no reservation are permitted. The principle of non-refoulement is broader than article 33 and also encompasses non-refoulement prohibitions deriving from human rights obligations, including Article 3 of the United Nations Conventions against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT Convention) and Article 7 of International covenant on Civil and Political Rights (ICCPR).

The principle is considered International customary law. Persons meeting the Refugee definition, whether under Article 1A(1), Article 1A(2) or 2nd paragraph of Article ID of 1951 Convention, are automatically entitled to this fundamental right. The principle also applies when a person seeking asylum, i.e., prior to recognition of refugee status or until it is established that the applicant does not fulfill the refugee definition. There is another concept named "non-refoulement through time" which is a concept located between states' obligation of non-refoïlement and states' discretion in granting asylum. This idea has been supported and explained by Goodwin-Gill. There is also another almost similar concept of "temporary protection". This idea has been developed by Susan Akram and Terry Rempel, who argue for establishment of a global unified temporary protection regime for Palestinian refugees. 4

B. History:
1905: A U.K. Statute enshrined a provision that returning the refugees who fears persecution on return on political or religious grounds should be allowed in the country. 5
1930: Prior to this time the principle of Non-Refoulement did not exist in international law. 6
1933: Principle of Non-Refoulement was first expressed in a Convention relating to Status of Refugees, though ratified by few states. 7
1939-1945: Massive flow of refugees of World War II created an impetus for thorough examination of the rules relating to refugees.
1946: UN General Assembly passed a resolution that refugees should not be returned when they had valid objections. 8
1951: UN Convention on the Status of Refugees was drafted and adopted. 9 It was initially limited to protecting European refugees after World War II but 1967 Protocol removed the geographical and time limits, expanding the Convention's scope.

C. Article 33 of 1951 Convention:
For our purposes Article 33 of the Convention is of primary relevance. The first paragraph of this article states 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.

Although this was intended to be an absolute right, states remained concerned about the erosion of their sovereignty that this could create. Therefore, a second paragraph was tacked on, providing that the right of non-refoulement could not be claimed by someone who was seen as a risk to the security of the
country, or who had been convicted of a ‘particularly serious crime’.

Since 2013, 145 States (as of August 5, 2013) have signed the Convention, thereby accepting the principle of non-refoulement expressed therein.\(^9\) However, problems have arisen regarding the interpretation of Article 33. Debate continues to surround the issue of whether or not a refugee must be inside the state in order for the right to accrue to them. If so then states would be perfectly within their rights to turn away asylum-seekers at the borders or ships at sea.\(^11\) There was also discussion as to whether a refugee had to meet the strict requirements of the Convention before they could be granted the right of non-refoulement. However, through the work of the United Nations High Commissioner on Refugees (UNHCR), and general state practice, it has been accepted that Article 33 applies to all refugees, whether or not they fit the prescribed definition.\(^12\)

D. Non-Refoulement in Human Rights Law and Humanitarian Law Instruments:

**UN Convention on the Status of Refugees, 1951:** Article 33 of this Convention speaks about the principle of non-refoulement and also the relevance of State security in denying it.

**International Covenant on Civil and Political Rights (ICCPR):** Article 13 of this Convention states that anyone who is lawfully within the territory of a state shall not be expelled from that state without due process.\(^13\) However, this rule does not have to be followed if national security is at stake. The article does not mention refugees specifically, and only refers to aliens 'lawfully' within a state. Article 7 of the ICCPR is also relevant as it protects against torture. The Human Rights Committee has taken this provision into account when dealing with cases of expulsion and extradition.\(^14\)

**UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:** Article 3(1) of this Convention 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' and the authorities must look at whether there is a consistent pattern of serious human rights violations in the country in question. Article 3(1) provides broader protection than the 1951 Convention in that it is an absolute right, however, its effect is restricted in that it only applies to situations involving torture.\(^16\)

**Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention):**\(^17\) The principle of non-refoulement is enshrined in Article 2(3) of this Convention is not as limited as its equivalent in the UN Convention. No requirement of ‘fear of persecution’ is there, and the five reasons for leaving the previous state are greatly expanded. Furthermore, breach of the rule will not be accepted. OAU Convention, unlike many other instruments, explicitly recognizes that particular countries will have to call for help when they are over-burdened with refugees, and it imposes a duty on the other states to assist.\(^18\)

**European Convention on Human Rights:**\(^19\) The European Commission on Human Rights and The European Court of Human Rights (ECtHR) has used Article 3 in order to deal with the non-refoulement issue, which is not itself specifically mentioned in the Convention.\(^20\) Also, the right which the Convention creates (to be protected from torture) is absolute and non-derogable, as is the right to be protected from refoulement in the OAU Convention.

**The Charter of Fundamental Rights of the European Union:**\(^21\) Article 19(2) of the Charter talks and emphasizes about non-refoulement.

**Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures 1995:** Article II (1) provides that the member state's asylum procedures will fully comply with the Refugee Convention 1951, and especially with the non-refoulement provision. Furthermore, Article II (2) states that a potential refugee will not be expelled until a decision on their status has been made.

**American Convention on Human Rights:**\(^22\) Article 22(8), dealing with non-refoulement, states that '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'. This provision seems closest to the UN Convention because it gives specific reasons why the 'alien' would be in danger when returned. Although the situations in which the rule can be breached are not stated, Article 27 allows derogation in certain circumstances of war or emergency. It has been suggested that this provision could possibly be interpreted to allow derogation during massive refugee crises, which would seem to defeat the purpose of the provision.\textsuperscript{23}

**International Convention for the Protection of all persons from Enforced Disappearance:**\textsuperscript{24} Article 16 of the Convention prohibits the transfer of persons who risk the death penalty.

**Fourth Geneva Convention, 1949:** Article 45(4) of the Convention provides that: In no circumstances shall a protected person be transferred to country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.\textsuperscript{25}

**Third Geneva Convention, 1949:** Article 12 of the Convention applies to prisoners of war. Both of these 3\textsuperscript{rd} and 4\textsuperscript{th} Geneva Convention apply to transfers between allied powers in an international armed conflict, and there is no parallel provision for non-international armed conflicts. Nonetheless, if countries contributing troops to a multi-national force in a non-international armed conflict transfer detainees among each other, the principle underlying Article 12(2) of the 3\textsuperscript{rd} and 45(3) of the 4\textsuperscript{th} Geneva Convention should be taken into account.

2. Human rights implications of the Non-Refoulement:

A. Critical Analysis of Application & Omission in Application of Non-Refoulement as well as Human Rights Concerns & Courts' view worldwide:

The practice of non-refoulement is a humanitarian act. If a state unreasonably violates this principle, then it may amount to human rights violations. As we know, the principle 2 documents relating to human rights law are International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7 of the ICCPR prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment. This prohibitions contains an implicit obligation of non-refoulement, according to Human Rights Committee in its General Comment no. 20 (1992). Similarly, sometimes socio-economic deprivations amounting to 'inhuman or degrading treatment' may be a reasonable ground for allowing non-refoulement.

In **Suresh case**\textsuperscript{26}, the Supreme Court of Canada considered whether Canadian law precluded deportation to a country where Suresh ran a risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada (regarding combating terrorism) and whether mere membership of an alleged terrorist organization sufficed. The main legal issue indicated a balancing act between the protection needs of Suresh (that is, the risk of being tortured upon return) and the security interests of Canada. According to the Canadian Supreme Court, A balancing act is permitted but need to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law. In spite of small theoretical possibility to apply a balancing test the Supreme Court leaves the door open that 'in an exceptional case such deportation might be justified (...) in the balancing approach (...)’ (paragraph 129). Ultimately, Suresh was deported to Sri Lanka, as he was a member of LTTE (a listed terrorist organization then in Canada), though he did not committed any act of violence in Canada.

The case of **Soering v the UK**\textsuperscript{27} established the principle that a state would be in violation if its obligations under ECHR if it extradites an individual to a state, in this case the U.S.A., where that individual was likely to face inhuman or degrading treatment or torture contrary to Article 3 ECHR.\textsuperscript{28}

**The Court said:**

*In the Court's view this inherent obligation not to extradite also intends to cases in*
which the fugitive would be faced in the receiving State by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article.

The most significant authority confirming the Soering principle to deportation case is *Chahal v United Kingdom*, the applicant an Indian national belonging to Sikh population, was suspected of having terrorist acts. He had asked for asylum in the U.K. Although, the British authority considered a balancing act between the national security of U.K. and the protection needs of Chahal to be necessary, the European Court ruled that the absolute character of Article 3 does not permit deportation to India if there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the U.K. The Court concluded that ‘if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Therefore, the deportation would lead to a violation of Article 3 ECHR. The Court concluded that Article 3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals.

The question of violating economic, social and cultural rights is also related with violation of the principle of non-refoulement. European Court of Human Rights (ECtHR) has dealt with some socioeconomic rights in this regard. The question whether the lack of medical treatment can be considered ‘inhuman or degrading treatment’ has been considered far more intensely by the ECtHR in the context of interpreting almost identically worded Article 3 of European Convention on Human Rights (ECHR): 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Although an inability to benefit from medical care could potentially enliven consideration of the right to life, most cases have been considered by the ECtHR under the prohibition in Article 3 of ECHR. But, how do we define 'cruel, inhuman or degrading treatment'? The ECtHR has emphasized that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art 3 of the ECHR'. It should be noted at this point that a claim that treatment will amount to 'degrading treatment' requires a higher threshold than 'persecution'. The ECtHR has also explained that the assessment of the 'minimum level of severity' is relative, and 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim'.

The first case in which European Courts of Human Rights was asked to consider whether a state might be prevented from expelling a person where the harm feared took the form of a lack of medical treatment was *D v United Kingdom*, a case concerning a St Kitts citizen with advanced AIDS, whose removal from United Kingdom would ‘hasten his death on account of unavailability of similar treatment in St. Kitts’. The court went on to explain that, in light of the 'fundamental importance' and 'absolute character' of Art 3 of the ECHR, it was entitled to ‘scrutinize an applicant’s claim under Art 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibilities of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article’.

The European court of Human Rights thus concluded that in view of these exceptional circumstances and 'bearing in mind the critical stage now reached in the applicant's fatal illness', the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent state in violation of Art 3 of the ECHR. Importantly, once the treatment was found to have attained the requisite level of severity, the obligation not to return was said not to be subject to any derogation or exaction. Rather, it was absolute. Therefore, the applicant's criminal activity in the United Kingdom could not justify his removal, however 'reprehensible' it might have been. The absolute nature of the protection in Art 3 of the ECHR has been reiterated repeatedly in subsequent case law.
conditions of poverty and squalor in which D would be required to live, in addition to the lack of medical treatment. The significance of this is that it highlights that inhuman or degrading treatment, in the removal context, might be constituted by deprivations of socio-economic rights other than medical treatment.

D v. United Kingdom represented a significant conceptual development in the jurisprudence of European Court of Human Rights and prompted a number of member states of the Council of Europe to amend their domestic law and policy to accommodate it. For example, the French Code de l'entree et du Sejour des Etrangers et du droit d' Asile now sets out a list of persons who may not be the subject of an expulsion order (other than in exceptional circumstances). In the United Kingdom, the Asylum Policy Instructions have been amended to include some medical claims also.

But, while States have accepted the important conceptual shift represented in D v United Kingdom, they have been careful to limit it, at least in the medical cases, to exceptional situations. This emphasis on the 'exceptional' nature of an Article 3 claim based on lack of medical treatment is in fact consistent with the way in which the ECtHR explained its reasoning in D, as set out above. Indeed, the ECtHR has repeatedly emphasized that the ECtHR does not permit non-citizens to remain in the territory of a Contracting State 'in order to continue to benefit from medical social and other forms of assistance provided by the expelling state'. Rather, the ECtHR has continued to emphasize the extreme circumstances that gave rise to the successful claim in D, particularly by 'distinguishing most other subsequent claims from D and thus finding them inadmissible.

The European Court of Human Rights was recently presented with the opportunity to revisit the scope of D v. United Kingdom in N v Secretary of the State for the Home Department (Terrence Higgins Trust intervening), a recent case involving the decision by the United Kingdom to expel a woman suffering from HIV/AIDS to Uganda. The decision to expel was upheld by the House of Lords and N challenged this decision in the ECtHR. Rather than taking the opportunity to overrule D, in fact the ECtHR in N v United Kingdom reiterated the position articulated in D that: The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.

Although the European Court of Human Rights did not overrule D v United Kingdom, it does appear to have been at pains to stress its exceptional nature, and thereby to have limited any potential for an expansive approach to medical care cases in the future.

Although we have already noted above the reference by the ECtHR to policy issues in discussing the scope of the implied non-refoulement doctrine, this passage from N v United Kingdom is significantly more far-reaching as it suggests that not only are policy reasons able to justify a limited application of the non-refoulement principle to the full range of rights in the ECHR, but such concerns also permits exceptions to the absolute nature of the protection in Art 3 in certain expulsion cases. This results in a differentiated understanding of the same right depending on whether the person is a European Union citizen seeking protection against violation Art 3 of the ECHR within a state party, or a non-citizen liable to removal. While this may be possible (albeit difficult) to justify in respect of the question of which rights may be protected under the non-refoulement principle, it is impossible to justify as a matter of principle in respect of the scope of the Art 3 of the ECHR, which, as the ECtHR has repeatedly reminded us is absolute. Indeed this was emphasized by the joint dissenting opinions of judges Tulkens, Bonello, and Spielman in N v United Kingdom. As the judges noted, the majority of the Court added ‘worrying policy considerations’ to its reasoning. They expressed their ‘strong disagreement’ with the ‘highly controversial’ statement that a balancing exercise is inherent in the
whole ECHR. As the judges noted, 'the balancing exercise in the context of Article 3 was clearly rejected by the Court in its recent Saadi v Italy judgment'. In Saadi v Italy, the Court stated:

Since protection against the treatment prohibited by Art 3 is absolute, that prohibition imposes an obligation not to ... expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from the rule....

Indeed, so much is born by an analysis of post-N decision in the United Kingdom Courts. For example, in CA v Secretary for the State for the Home Department, the intended removal of a woman whose (unborn) child was at risk of contracting HIV who would not have access to adequate treatment to prevent transmission of infection was held to violate Art 3 of the ECHR, 'since there will be substantial risk of exposing the child to HIV/AIDS and this would amount to exposing the appellant [the mother] to inhumane or degrading treatment'. In AJ (Liberia) v Secretary of State for the Home Department, a claim by a 17-year old former child soldier was remitted to the United Kingdom Asylum and Immigration Tribunal because it had failed to consider whether having 'no money, no home, and no support', the applicant 'would obtain the necessary medication in Liberia on return'.

The Canadian Federal Court of Appeal in Covarrubias v Canada has now rejected the argument that a claim can be made where a country has the 'financial ability to provide emergency medical care, but chooses, as a matter of public policy, not to provide such care freely to its underprivileged citizens'.

Although the Federal Court in Singh v Canada had previously acknowledged that 'it is not entirely clear what Parliament's intent was in this regard', 'Inability', therefore, includes inability either to provide any medical treatment or to provide medical treatment that is free of charge (or at least affordable), but it does not include unwillingness to provide medical care. Claims based on unwillingness may still be made out in Canada, as exemplified in Re X.

Although most discussion concerning the application of Art3/Art7 to removal has focused on the right to medical treatment, there is an important question as to whether it can apply to other contexts as well other than the medical treatment. In Dulas v Turkey, the ECHR found that the action of the Turkish security forces in burning down the applicant's home, who was aged over 70 at the time of the events, in the course of a security operation amounted to a violation of Article 3 of the ECHR.

In the United Kingdom there is developing jurisprudence on the extent to which Art 3 of the ECHR prohibits the removal of a person in circumstances where he or she will face seriously disadvantaged economic conditions on return, other than a lack of medical treatment. In GH (Afghanistan) v Secretary of State for the Home Department the special adjudicator had found that to return the applicant and his family to Kabul would amount to inhuman and degrading treatment in view of the fact that the family would be 'reduced either to living in tent in a refugee camp or... in a container with holes knocked in the side to act as windows'. In addition the applicant would not be likely to obtain work and he would be competing with others for scarce resources of food and water as well as accommodation'. The Special Adjudicator was particularly concerned about the impact of these conditions on the 'five young (some of them very young) children'. The Secretary of State appealed against this decision on the basis that 'a disparity in the social medical and other forms of assistance in the two States not by itself sufficient'. But the English Court of Appeal rejected the appeal.

In more recent decision in Mayeka v Belgium, the ECHR found that Belgium had violated Art 3 of the ECHR in connection with the manner in which it expelled a child, namely, in the fact that it did not ensure that she was accompanied or that she was met on return to Kinshasa in the Congo.

B. Non-Refoulement and Outsourcing Torture:
The issue of non-refoulement in many ways constitutes the background to the subject of
“outsourcing torture” through Renditions, Memoranda of Understanding, Diplomatic Assurances and extraction of Evidence under torture. All of these practices in some respects involve, or implicate a violation of the absolute prohibition of non-refoulement.

The practice of renditions, whereby an individual is handed over by the authorities of one state to the authorities of another state, in secret, and without any formal process, constitutes by definition a violation of the right not to be returned to torture. The Committee against Torture has ruled on this issue in the case of JosuArkaz Arana v. France, which involved a member of the Bask separatist organization ETA finding that rendition can so significantly heighten the risk of torture as to bring the claim within the purview of article 3 of the Convention against Torture, even in the context of a country which does not practice torture systematically against detainees. The reasoning in this case leads one to conclude that the Committee would not have found a violation had the French authorities afforded the applicant in that case proper procedures which would have allowed him to raise a claim to protection under article 3 of CAT.

Similarly, diplomatic assurances are used by states to refoule persons to other states where there is a real risk of torture, because in the absence of such a clear risk diplomatic assurance would not be necessary. Here also, the Committee against Torture has had an opportunity to pronounce itself on these practices in the recent case of Agiza v. Sweden where it stated that that the procurement of diplomatic assurances did not suffice to protect the applicant against the manifest risk of torture.

And lastly, regarding evidence extracted under torture and other ill-treatment, such evidence is often extracted in situations where persons have been rendered or otherwise returned to other countries in violation of the non-refoulement rule, often deliberately so that the state of destination can extract evidence through torture and share it with the state that returned the individual. One example of this practice is the well known case of Maher Arar where it appears that the objective of the US authorities in returning him to Syria, rather than to Canada, which they could have done, was specifically in order that information be extracted from him in Syria by means which the US or Canadian authorities were more reluctant to use.

Conclusion:

There are number of Universal, Regional and Domestic Human Rights instruments where principle of Non-Refoulement has been annotated. All there instruments give an implicit obligation to the state under non-refoulement principle to protect the rights of refugees and asylum seekers. Not only civil and political rights but also sometimes socio-economic deprivations amounting to inhuman or degrading treatment may be a reasonable ground for allowing non-refoulement.

References

5 Ibid.
7 See Supra note 4,
8 See supra note 4 at 119.
9 Ibid.
11 See supra note 4.
12 See for example: Howland, Todd., 'Refoulement of Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law’ (1998) 4 U.C.DavisJ.Int'l L&Pol'y 73.
13 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
15 Convention against Torture or other Cruel, Inhuman or Degrading Treatment (10 December 1984) 1465 UNTS 113.
16 See supra note 14.
20 See supra note 15.
21 Drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. However its then legal status was uncertain and it did not have full legal effect until the entry into force of the Treaty of Lisbon 1 December 2009.
23 See supra note 14.
26 Suresh v Canada, (11 Jan, 2002), Supreme Court of Canada, 2002 SCC 1, File no. 27790. Published on www.lexum.umontreal.ca/cscv-sec/en/rec
28 ECtHR, Soering v UK. 7 July 1989.
29 Chahal v United Kingdom, (15 November, 1996), ECtHR, Appl. No. 22414/93; See also Ahmed v Austria, (17 December, 1996), Appl. No. 25964/94.
30 See for example, AH (Sudan) v. Secretary of State for the Home Department [2007] EWCA Civ 297, Para 30.
31 N v United Kingdom (ECtHR, Application no. 26565/05, 27 May 2008), Para 29.
32 (1997) 24 EHRR 423 (ECtHR).
33 Ibid at Para 40.
34 Ibid.
35 Ibid.
36 Ibid at Para 53.
37 See, for example Saadi v Italy [2008] INLR 621 (ECtHR), Para 127, citing previous authority on this point.
38 This is how D v United Kingdom (1997) 24 EHRR 423 (BCtHR) is usually described in the later cases, see especially N v Secretary of the State for the Home Department (Terrenes Higgins Trust intervening) [2005] 2 AC 296 (HL), Para 15.
39 McAdam, Complementory protection in International Refugee Law (3rd Ed, 2007) 314.
40 For example, in the case of behavior that ‘threatens the fundamental behavior of the State, or which is linked to terrorist activity, or which constitutes deliberate provocation of discrimination, hatred or violence against a person or a group of persons’; see Code de l’entree el du Sejout des Etrangers et du droit d’ Asile, Art L521-3 (translation by Nawaar Hassan)
41 United Kingdom Border Agency. Asylum Policy Instructions (October 2006) V5.;see, for example. O v Independent Federal Asylum Board (URAS) (26 September 2007) Case 1282: Administrative Court (Austria), Case no.2006/19/0521 (translation by Anne Kallies).
The post-D case law is discussed at length by the House of Lords in *N v Secretary of the State for the Home Department (Terrence Higgins Trust intervening)* [2005] 2 AC 296 (HL), paras 37-50. As their Lordships noted (at para 34), the ECtHR 'has never found a proposed removal of an alien from a Contracting State to give rise to a violation of Art 3 on grounds of the Applicant's ill-health'. However, some post-D cases were settled after the ECtHR found them admissible; see, for example, *BB v France* (1998) RJD 1998-IV 2595 (EComHR).


See, for example, *R (on the application of Limbuela) v Secretary of State for the Home department* [2006] 1 AC 396 (HL), where such policy concerns were not permissible.

See McAdam, above note 14, where the author refers to this as a 'geographically based rights hierarchy'.

The impossibility of justifying this position was explicitly acknowledged by Sedley LJ in *ZT v Secretary of state for the Home Department* [2005] EWCA Civ 1421, paras 41-42.

See above note 44.

Ibid at para 6 (joint dissenting opinion)

Ibid at para 7 (joint dissenting opinion)

Ibid at para 138. Interestingly, Haines suggests that the balancing concerns introduced into the medical treatment cases 'may force a re-examination of the unexplained ruling that the rights of citizens and of the State to exist in safety and security are irrelevant under Art 3 of the ECHR'; see Haines, 'National Security and non-refoulement in New Zealand: Commentary on *Zattui v Attorney General (No. 2)*', JnMcAdam(ed), *Forced Migration, Human Rights and Security* (2008) at 86.

[2004] EWCA Civ 1165. This and the decisions below are classified as 'post-N' as they were handed down after the House of Lords decision in *N*, although prior to the European Court's affirmation of the Lord's approach.

[2006] EWCA Civ 1736.

[2007] 3FCR 169 (Can FCA)

[2004] 3 FOR 323

(Immigration and Refugee Board on Canada. RPD File No TA7-00927, 25 January 2008, Cliff Berry).

(ECHR, Application No 25801/94, 30 January 2001)

[2005] EWCA Civ 1603.


414 F.Supp.2d 250 (E.D. N.Y. 2006),