

Shadows in Paradise – Exploring *Non-Refoulement* as an Open Concept

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Abstract

The principle of *non-refoulement* contains a paradox. While states have committed to respecting the principle by joining the 1951 Refugee Convention and key human rights conventions, its content is not established in international law. In other words, states have committed to a principle the content of which is indeterminate. Since no common definition exists, in practice, national and international bodies have extensive powers of discretion to give content to the terms ‘persecution’, ‘torture’, ‘degrading’ or ‘cruel’ treatment. The purpose of this article is to explore *non-refoulement* as an open and ambiguous concept. Acknowledgement of the indeterminacy is important, as open concepts never remain such in practice but are always issued with content or interpreted. This approach calls for a further question: how do interpretations come about and what kind of factors influence them? The conclusion of the article is that different national and international actors promote their own ‘correct’ interpretations of this keystone of refugee protection.

1. *Non-refoulement* and the paradox

Recalling that the 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

(Conclusions of the UNHCR Executive Committee, No.6, 1977)

Under established international law, states have the right to decide whether to allow entry to aliens. Nevertheless, foreigners arriving in the jurisdiction, at the borders or in the territory of a state, must be treated humanely. This principle has been taken into account in international human rights conventions by giving consideration to the rights of these people: under international law, persons fleeing persecution must be provided with an opportunity to seek refugee status, those in fear of torture may not be returned to their home country and protection must be provided against inhuman and degrading treatment. This principle is known as *non-refoulement*, and it is a key principle of refugee law.

From the viewpoint of a person seeking protection, things are not as well as one might expect as the principle of *non-refoulement* contains a paradox. While states have committed to respecting the principle by joining key human

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rights conventions, its content is not established in international law. In other words, states have committed to a principle the content of which has not been defined. Since no common definition exists, national and international authorities and courts have, in practice, extensive power of discretion to give content to the terms 'persecution' or 'degrading' or 'cruel' treatment. If the fundamental object of legal guarantees of *non-refoulement* are open and indeterminate concepts, who can define what they mean? What factors influence the interpretation of the principle and who defines when the fate of people seeking international protection constitutes inhuman treatment?

The purpose of this article is to examine *non-refoulement* as an open and ambiguous concept.¹ It first analyses concepts that are central to *non-refoulement* – 'persecution', 'torture' and 'cruel, inhuman and degrading treatment' – as concepts without a generally accepted content. The openness and ambiguity of the principle of *non-refoulement* has received insufficient attention in the debate on refugee law. It is vital that this ambiguity in the international system of protection is acknowledged because open concepts never remain such in practice but are always assigned content or interpreted. The conclusion will suggest factors and mechanisms that could influence the emergence of interpretations and the differences between them concerning *non-refoulement*.

It is first necessary to briefly define the principle of *non-refoulement*. *Non-refoulement* is a principle included in human rights conventions, according to which a state may not return persons from its borders or territory to inhuman circumstances. The 1951 Geneva Refugee Convention defines *non-refoulement* as follows: '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'.² The key content of the principle is that a refugee or asylum seeker may not, in any manner, be returned to persecution.³

¹ H. L. A. Hart introduced the idea of 'open texture' to discussions of jurisprudence in *The Concept of Law* (Oxford, Clarendon Press, 1977). Terms like 'cruelty' or 'courage' are what philosophers call 'open textured'. Two people, who both know what they mean can reasonably disagree about whether these terms apply in a particular case. International normative language is full of expressions which are indeterminate. The element of indeterminacy is especially embedded in evaluative terminology like 'inhuman and degrading treatment'. For a discussion of indeterminacy in international legal language, see, Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge University Press 2000) 36–70.

² See art. 33 of the Convention relating to the Status of Refugees, adopted on 28 July by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 Dec. 1950. In *Human Rights: A Compilation of International Instruments*, Vol. 1, (Geneva, United Nations Publications, 2002) 629–46.

³ Sir Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 87–177.

Non-refoulement, as defined in the Refugee Convention, is also closely associated with the *non-refoulement* prohibitions of certain key human rights conventions. Under Article 3 of the European Human Rights Convention, no one may be tortured, or treated or punished in an inhuman or degrading way.⁴ When the European Human Rights Convention was drafted, it probably did not occur to anyone that its articles, especially Article 3, could also affect the immigration policies of states, which traditionally have been considered to fall within their sovereignty.⁵ According to the jurisprudence established by the European Court of Human Rights, expelling a foreign national may constitute a violation of the convention, if as a result of conversion or deportation, the person in question stands a real risk of becoming subject to torture or other inhuman treatment, as referred to in Article 3.⁶ In such circumstances measures taken by the expelling state subject the person to prohibited treatment in the receiving state.

Unlike the European Human Rights Convention, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits parties to the Convention from returning a person to another state where they would be subject to torture. In Article 3, it states: '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'. In the opinion of the Committee Against Torture, 'another State' means 'a State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited'.⁷

⁴ Art. 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome, 4 Nov. 1950.

⁵ It is often stated in Article 3 decisions that 'the court recalls at the outset that Contracting States have the right as a matter subject to their treaty obligations including the Convention to control the entry, residence and expulsion of aliens'. See, e.g., *Case of Bensaid v. United Kingdom* (2001), application no.44599/98.

Jens Vested-Hansen has observed that 'the preferred solution for an increasing number of states is to prevent refugees and asylum seekers from ever arriving at their borders, thus keeping asylum seekers from the procedural door'. See, Jens Vested-Hansen, 'Non-admission policies and the right to protection: refugees' choice versus states', in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge University Press 1999) 269.

⁶ 'However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3'. See, *Soering case* (7.7.1989, A 161), section 111.

⁷ See, 'Implementation of Article 3 of the Convention in the context of article 22', CAT General Comment No. 1, A/53/44 annex IX; and J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Penalty* (Dordrecht, Martinus Nijhoff Publishers, 1988) 124–8.

The United Nations' International Covenant on Civil and Political Rights also contains a prohibition on returning.⁸ Under article 7 of the Covenant, no one shall be subjected to torture or cruel or inhuman or degrading treatment or penalty. It adds that subjecting persons to medical or scientific experimentation without their free consent is particularly prohibited. This provision is also applicable to the expulsion of foreign nationals. The Human Rights Committee, which oversees the implementation of the Covenant, has stated that 'in the view of the Committee, State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or penalty upon return to another country by way of their extradition, expulsion or *refoulement*'.⁹

As the above Articles show, the protection of foreign nationals against expulsion to inhuman circumstances – whether expulsion, return or extradition – seems to be strongly guaranteed in the aforementioned and certain other international human rights conventions. Helene Lambert has rightly observed that States' right to expel foreign nationals is under extremely close international supervision due to the provisions of human rights conventions.¹⁰ This supervision is engaged in by, among others, supranational mechanisms established by these conventions, which in individual cases have the power to decide whether the *refoulement* of a foreign national is in compliance with human rights commitments and, at the same time, to lessen the tension between the sovereignty of States and their international commitments.¹¹

But is the language of *non-refoulement* promising more than it can deliver? There is also reason to ask if the language of human rights is capable of resolving and identifying issues of inhuman treatment and international protection which arise from a complex social reality. Those fearing return to their homeland are often not in need of international protection, in the sense that it is defined in human rights conventions or in national

⁸ Art. 7 of the International Covenant on Civil and Political Rights. Adopted by General Assembly Resolution 2200 A (XXI) of 16 Dec. 1966.

⁹ Human Rights Committee, General Comment 20, art. 9 (Forty Fourth Session, 1992) UN Doc. HRI/Gen//Rev. 1, 30, (1992). *Non-refoulement* is included in many other international instruments that are not covered in this article, see, e.g., 1967 Declaration on Territorial Asylum, UNGA Resolution 2132 (XXII), 14 Dec. 1967; 1969 OAU Refugee Convention, 1001 UNTS 3; 1969 American Convention of Human Rights, 9 ILM 673. Generally, see also, Gunnar Stenberg, *Non-Expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees* (Uppsala, Iustus Förlag, 1988).

¹⁰ On the scope of protection afforded under selected human rights conventions, see, e.g., Helene Lambert, 'Protection Against *Refoulement* from Europe: human rights law comes to the rescue' (1999) 48 *International and Comparative Law Quarterly* 515–44.

¹¹ See, Oldrich Andrysek, 'Gaps in the international protection and potential for redress through individual complaints procedure' 9 *IJRL* 392–414 (1997).

legislation.¹² Because of such reasoning, human rights agreements can give aliens arriving at a frontier with great expectations a false sense of the capability of international law to resolve the problems that made them flee their homeland.

2. *Non-refoulement* – striking a balance

When we move from the actual texts of international human rights conventions to their practical application, what does *non-refoulement* actually mean for a person applying for international protection and what kind of challenges are involved in the application of *non-refoulement*, as referred to in the conventions?

From the standpoint of an alien at a state frontier appealing to the principle of *non-refoulement*, it is essential to know how persecution or inhuman treatment anticipated at home is defined, and against what kind of inhuman treatment the principle offers protection. The key question is, who defines whether the pain and suffering anticipated at home is sufficiently intense to warrant *non-refoulement*?

A state's right to decide whether to allow a foreign national to remain in its territory or to expel them is one of the most strongly protected principles of international law. The problem here is the tension between this right of states and the right of the foreign national to international protection, as guaranteed by international law. This leaves a refugee applying for international protection hanging in the balance between these two opposing principles. In practice, so called absolute rights are not outside balancing.¹³

In the refugee and human rights conventions described above, *non-refoulement* is expressed in abstract and general terms without specific and clear content. What do inhuman treatment and persecution mean and with what criteria should we define them? Can a person appeal to *non-refoulement* if he cannot engage in his profession or practice his religion in his homeland? How should we consider 'mild' torture and violent interrogation techniques? What about a person in fear of a violent spouse,

¹² By this I mean the kind of formulations appearing in the decisions of national asylum authorities, such as a decision concerning asylum by a Finnish administrative court, in which the following was stated concerning a Congolese asylum seeker: 'Based on the matters emerging in the case it is not likely that the appellant has justified reason to fear persecution in his homeland as referred to in section 30, paragraph 1, of the Aliens Act. Moreover, no such matters have emerged in the case based on which a justified reason would exist to assume he is in danger of becoming subjected to serious violations of rights or inhuman or degrading treatment as referred to in section 31 of the Aliens Act'. Administrative Court of Helsinki, case 05/0406/1, 19 Apr. 2005 (unofficial translation).

¹³ See *Ramzy v. the Netherlands* (application no. 25424/05 in the European Court of Human Rights) and the intervention of some European governments to overturn established case law (*Chahal v. United Kingdom*) prohibiting a balancing of the interest of the individual not to be subject to torture or ill-treatment against the interest of national security.

armed conflict or abject poverty and marginalisation?¹⁴ Human rights conventions do not provide answers to these questions. The meaning of *non-refoulement* for an individual depends on the content the authorities and courts give these concepts in particular cases.

Human rights in general and also the principle of *non-refoulement* are open to interpretation and debate because of the way in which human rights norms have been inscribed in conventions. The provisions of human rights conventions can often be restricted, provided that the restriction is based on law and deemed necessary in a democratic society in the interest of national security or public safety. Whether restricting human rights is necessary in a democratic society in the interest of public safety, for example, depends largely on who the question is put to. In some instances human rights articles have knowingly been written so that their protection only covers narrowly defined circumstances. The definition of 'torture' in the UN Convention against Torture, for example, only applies to torture practised by the authorities.

Furthermore, human rights are often criticised for protecting rights that are in conflict with each other.¹⁵ For instance, states have, on the one hand, a right to decide whether to grant entry to foreign nationals and, on the other hand, they have committed to providing protection. Removing foreign nationals may in some cases endanger their right to practise religion in their homeland, but does this constitute prohibited treatment which may prevent removal?¹⁶ Resolving the dilemma of rights that are in opposition in legal language is difficult and depends on the values of the persons and institutions involved and on the particular case. In addition, the doctrine of a margin of appreciation – that national differences and interpretations in the interpretation of human rights conventions must be allowed – supports the view that human rights conventions are open to different interpretations.

To form an opinion of *non-refoulement* as one of the keystones of refugee law, we must examine both open legal concepts, the purpose of which is to define the content of protection provided to individuals, and the factors that lead to the formation of a particular interpretation. In concrete cases of returning, two issues must be examined: the legal significance of a particular provision – the meaning of, for example, the legal concept of 'persecution' – and the relevant facts – is the anticipated treatment waiting

¹⁴ See, e.g., 'Amnesty International Report 2005, the State of World's Human Rights' (Amnesty International Publications 2005), 1–14.

¹⁵ On rights language, see, Martti Koskeniemi, 'The Effect of Rights on Political Culture', in Philip Alston (ed.), *The EU and Human Rights* (Oxford, Oxford University Press, 1999), 99–116.

¹⁶ Quaere whether any other article of the European Convention on Human Rights, other than 3, could be engaged in relation to the removal of an individual from the United Kingdom. See, for example, *R v. Special Adjudicator – Do v. Secretary of State for the Home Department*, reprinted in 16 *IJRL* 411–45 (2004).

in the country of origin persecution and does proof exist of the fear of persecution? The following discussion will consider only a few of the key open legal concepts relevant to *non-refoulement*. It will not consider the problems of proof that are often involved in the application of the principle.

3. Persecution

In Article 33 of the Geneva Refugee Convention, *non-refoulement* was formulated as follows: ‘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’. According to the interpretation established in refugee law, the ‘life and freedom’ of refugees is under threat when the refugees or asylum-seekers have justified cause to fear persecution in their home country or country of permanent residence.¹⁷ Erika Feller, for example, has reached the same conclusion. According to Feller, we must give the same content to a threat anticipated in the home country, as referred to in the Refugee Convention, which excludes *refoulement*, and to the justified fear of being persecuted, referred to in the 1951 convention.¹⁸ *Non-refoulement* as referred to in the Refugee Convention in this case grants protection against persecution anticipated in the home or some third country.

So when is a person applying for international protection entitled to receive protection against persecution? It is not a simple matter to define the concept of persecution because it has no definition enjoying general acceptance in international law.¹⁹ Persecution is a fluid concept and depends on the details of particular, concrete cases. Volker Türk and Frances Nicholson have noted that the fact that there is no definition of persecution in international law may also reflect a more profound understanding of the history of persecution: it is difficult and dangerous to

¹⁷ ‘The *travaux préparatoires* do not explain the different wording chosen for the formulations respectively of refugee status and *non-refoulement*; but neither do they give any indication that a different standard of proof was intended to be applied in one case, rather than in other (...) at the international level, no distinction is recognised between refugee status and entitlement to *non-refoulement*’, see, Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford, Clarendon Press, 1996) 137–8; Atle Grahl-Madsen, *The Status of Refugee in International Law*, Vol. II, (Leiden - A. W. Sijthoff 1972) 94; and Gunnell Stenberg, *Non-Expulsion and Non-Refoulement*, above n. 9.

¹⁸ Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law. UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003), 123.

¹⁹ ‘It is generally acknowledged that the drafters of the Convention intentionally left the meaning “persecution” undefined because they realized the impossibility of enumerating in advance all the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state’, see, James Hathaway, *The Law of Refugee Status* (Toronto, Butterworths 1991), 102. See also, Grahl-Madsen, above n. 17, 193. He writes, ‘It seems that the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; or in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men’.

encapsulate the different and changing forms of persecution into a legal definition. The fact that the concept of persecution is not defined is an indication that, in the preparation of the Refugee Convention, the intention was to include within the concept any future methods and practices of persecution not yet known. Hence, the Refugee Convention – or any other international agreement – does not define persecution. The concept was left open and ambiguous on purpose because, as Atle Grahl-Madsen has said, the human imagination knows no bounds when it tries to find ways to persecute fellow humans.

According to the handbook of the United Nations High Commission for Refugees, there is no universally accepted definition of persecution and attempts to define it have not been successful. However, when is a violation of human rights serious enough to constitute persecution and who should define the degree of seriousness? In refugee law, whether harmful actions constitute persecution is decided case-by-case, including the subjective experience of fear of persecution.²⁰ Fear can be assessed by evaluating the opinions and emotions of the person concerned, for example. However, since people differ psychologically, and since situations are not alike, the UNCHR handbook accepts that there are varying interpretations as to what is persecution and what is not.²¹

Discrimination can in some cases be considered as persecution. The UNHCR handbook is very careful in its formulations, however. It states that ‘differences in treatment of various groups do exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution’.²²

Persecution anticipated in the home country only prevents return if it is manifestly substantially prejudicial in nature, including restrictions on the right to earn a living, freedom of religion or the right to study in schools intended for everyone. In practice, it may be difficult to prove that persecution exists in the home country of a foreign national because, in most cases, discrimination is not condoned in legislation or official policies. Discrimination is often structural, discreet and not, necessarily, visible.²³

Guy Goodwin-Gill has attempted to define persecution by describing it as treatment that may include inhuman, cruel or degrading elements. He has also stated that states have been provided with substantial discretion to interpret this fundamental concept, and that their interpretations do not

²⁰ UNHCR, ‘Handbook on procedures and criteria for determining refugee status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees’ (UNHCR 1979), 65.

²¹ Ibid., 14.

²² Ibid., 15.

²³ See John Dugard and Christine Van den Wyngaert, ‘Reconciling Extradition with Human Rights’ (1998) 92 *The American Journal of International Law*, 202.

indicate that there exists coherent or harmonious jurisprudence.²⁴ Goodwin-Gill says that, in the end, it is about degree and proportion. Defining the concept of persecution is not made any easier by his observation that the analysis of persecution should be made in the wider context of human rights.

Some scholars of refugee law have attempted to provide persecution and hence *non-refoulement* with a more detailed legal content. According to James Hathaway, persecution is associated with a state's inability to provide protection against violation of key rights guaranteed by human rights conventions. His objective is to provide persecution with a clear legal yardstick. In his opinion 'persecution is most appropriately defined as the sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community'.²⁵

Persecution should, according to Hathaway, be automatically considered as a violation of human rights. Moreover, discrimination may also, in some circumstances, be considered persecution. He sets out a framework within which persecution is included, within the entitlements the international community has recognised in the UN Universal Declaration of Human Rights and international human rights conventions. In conventions, states have themselves expressed what rights they consider especially significant and to which they are prepared to commit themselves. When these rights are systematically violated in a manner referred to in the Refugee Convention, persons whose rights have been violated have the right to apply for the protection offered by international law.

Hathaway distinguishes four distinct types of obligation, which may help us to define the criteria of persecution. The first comprises the entitlements guaranteed in the Universal Declaration of Human Rights and the UN International Covenant on Civil and Political Rights, which cannot be derogated from under any circumstances (including the right to life, prohibition on torture and inhuman treatment, and the freedoms of thought and religion). The second type comprises entitlements guaranteed in the above human rights instruments, which may be derogated from during an emergency which threatens the life of the nation, and the existence of which is officially proclaimed. The third category comprises rights included in the Declaration of Human Rights and carried forward in the UN International Covenant on Economic, Social and Cultural Rights (including rights to health and food). Fourth, a few of the rights are recognized in the Universal Declaration but are not codified in either of the above-mentioned covenants. According to Hathaway, violating the rights of the first three

²⁴ Goodwin-Gill, above n. 17, 67, '... a comprehensive analysis requires the general notion of persecution to be related to developments within the broader field of human rights'.

²⁵ Hathaway, above n. 19, 112.

categories in the manner referred to in the Refugee Convention may constitute persecution. The merit of his approach is that, by binding the concept of persecution in refugee law to rights guaranteed in international agreements, a framework is formed which facilitates and systematises the legal and wider political debate on the concept.

Hathaway provides an interesting and useful legal framework for a systematic analysis of the concept of persecution, presenting arguments and justifying decisions. Linking persecution with rights guaranteed in human-rights conventions does not, as such, clarify the concept, however. The articles of human rights conventions to which Hathaway turns to define persecution have been written in abstract language and, in practice, their content often remains vague or undefined. It is obvious that no one may be treated in an inhuman manner on political grounds, but when is treatment inhuman? There seems to be various opinions. When is the practice of religion disrupted so severely that the limit of persecution and inhuman treatment is exceeded, and when does the lack of social rights, freedom of speech or a clean environment constitute prohibited treatment? Human rights conventions may not, in the end, answer these questions.

The openness of the concept of persecution may also be approached as follows. Goodwin-Gill has proposed that the threshold of persecution may also be reached when an asylum seeker is subjected to financial harm. But what is economic persecution? Could it be abject poverty, for example? According to refugee law, persecution depends on the right it restricts, the manner and degree of restriction and the probability of human rights violation.²⁶ Ultimately persecution remains an open concept.

4. Torture

Non-refoulement prevents returning persons to be subjected to torture. It seems that the protection against returning is strongest in the case of torture. The prohibition of torture is a peremptory norm in international law and many of the human rights conventions mentioned in this article prohibit unconditionally the return of persons to be subjected to torture. However, torture, like persecution, is also a paradoxical legal concept open to interpretation.

In the UN Convention Against Torture, torture is defined as follows:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted

²⁶ Goodwin-Gill, above n. 17, 62.

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The definition of torture in the convention is very narrow. In the first place, torture is intentional action inflicting severe pain or suffering. The first criterion of the definition raises the question: when is suffering anticipated in the country of origin sufficiently intensive to qualify as torture? The concepts of severe pain and severe suffering leave the convention open to interpretation, as Chris Ingelse has observed.²⁷ According to the interpretation of the US Department of Justice, torture means severe pain that 'must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'.²⁸

The definition of torture also requires a purpose such as intimidation or obtaining information. For instance, random torture of a member of a minority cannot be considered torture as defined under the Convention. It is, also, an obvious shortcoming of the Convention that it defines torture as pain or other suffering inflicted by 'a public official or other person acting in an official capacity'. As a result, it excludes family violence, for example.

The criteria of the definition of torture have been reflected in the decisions taken by the Committee Against Torture, which monitors the implementation of the Convention. The Committee has taken the position that assessing whether the expulsion of a foreign national should be refrained from when the returned person could become subjected to torture by a party acting independently of the Government or without its consent or acquiescence does not fall within the scope Article 3 of the Convention against Torture.²⁹ In the case of Mr Luis Jacinho Rocha-Chorlango, for example, the Committee's opinion was that 'as to the complainant's risk of torture at the hands of members of FARE-DP, the State party recalls the Committee's jurisprudence that the issue of whether a State party has an obligation to refrain from expelling a person who might risk torture by a non-governmental entity, without the consent or acquiescence of the Government, falls outside of the scope of Article 3 of the Convention'.³⁰

The decision of the Committee does not address the issue of whether Article 3 of the Convention is applicable to situations where a Government is unable to offer protection against risk from torture by a third party. The Committee has, however, adopted the position that 'quasi-governmental

²⁷ See, Chris Ingelse, *The UN Committee Against Torture. An Assessment* (The Hague, Kluwer Law International 2001), 208.

²⁸ Reported in the Amnesty International magazine of Finland 3/2005, 10–11.

²⁹ Communication No. 83/1997, 15.5.1998, 6.5.

³⁰ Communication No. 218/2002, 23 Nov. 2004, 4.5.

institutions' founded by parties engaged in mutual combat, which have governmental authority similar to a government, may be considered equal to persons acting in an official capacity, as referred to in article 1.³¹ The Committee has stressed that 'a consistent pattern of gross, flagrant or mass violations of human rights refers only to violations by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.³²

Non-refoulement, as defined in the UN Convention Against Torture, offers substantial protection against conventional torture engaged in by governments. Whether torture as referred to in the Convention has occurred can be assessed by analysing the components of the definition. However, people can be 'tortured' in innumerable ways that are not included in the definition of the Convention. This reminds me of a recent article published by Amnesty on the creative interpretations of torture applied by some states, which apply the concept of 'torture lite', defining it as a lesser evil than actual torture, and, therefore, permissible.³³ Light torture can include sleep regulation, manipulation of time and place, sensory deprivation or kicking. Can a person be returned to his home country without being prevented by *non-refoulement* if he will be subjected to light torture, which does not meet the criteria of the definition of torture?³⁴

The Committee Against Torture has often had to state in its decisions that 'in light of the foregoing, the Committee finds that the complainant has not established that he himself would face a foreseeable, real and personal risk of being tortured within the meaning of Article 3 of the Convention'.³⁵

The problems related to the open way in which the UN Convention defines torture are also relevant to the interpretation of Article 3 of the European Convention on Human Rights, which also prohibits torture. The definition of torture has not always been clear in the application of the European human rights convention. Van Dijk and van Hoof have written that the difference between torture and inhuman and degrading treatment is largely based on the intensity of the suffering caused.³⁶ What

³¹ Communication No. 120/1988, 25 May 1999, 6.5. Brian Gorlick has observed, regarding *Elmi v. Australia* (Communication No.: 101/1997), that 'The Elmi decision is a significant development in the CAT's jurisprudence, for it shows the Committee's willingness to adopt a flexible and broader protection-based approach in interpreting the Convention'. See, Brian Gorlick, 'The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees' 11 *IJRL* 3 (1999).

³² See, 'General Comment No. 1: Implementation of Article 3 of the Convention in the context of article 22', A 53/44, annex IX.

³³ Reported in the magazine of the Finnish section of the Amnesty International Mar. 2005, 10–11.

³⁴ On the process of outsourcing torture to foreign countries by rendition, see, Naomi Klein, 'Torture's Dirty Secret: It Works', *The Nation*, 12 May 2005.

³⁵ Communication No.: 196/2002, 14 May 2004.

³⁶ *Ireland v. United Kingdom*, Ser. A 25, 66.

remains open to interpretation is how much suffering is required to constitute torture. The European *Commission for Human Rights* defined torture in the Greek case as follows: ‘the word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of penalty, and is generally an aggravated form of inhuman treatment’.³⁷

The ambiguity of the prohibition on torture has also been reflected in the decisions of the European Court of Human Rights. In the case *Ireland v. United Kingdom*, the Court considered five interrogation techniques (forcing detainees to stand in a stressful position, covering detainees’ heads with a hood, loud noise, sleep deprivation and withholding food and drink) as inhuman and degrading treatment but not as torture. In the Court’s opinion, the case did not include ‘very serious and cruel suffering’, which are part of the definition of torture. However, previous to the Court’s decision, the Commission for Human Rights had come to a different conclusion: it considered the interrogation practices in question as torture.³⁸

The case *Selmouni v. France* marked an interesting departure from earlier cases regarding the definition of torture.³⁹ Invoking its doctrine of the Convention as a living instrument, the court stated that it considered that certain acts, which were classified in the past as ‘inhuman and degrading’ as opposed to ‘torture’, could be classified differently in future. In *Selmouni*, the court accepted the open and changing nature of the concept of torture. Sustained beatings, which it would previously have categorised as inhuman and degrading treatment, was now to be considered as torture.⁴⁰

In extreme cases of cruel treatment, identifying torture within a same cultural context or community does not, in practice, often constitute problems of interpretation. It is, however, important to be aware of the openness of the concept and to ask who, in the end, defines the content of an open concept, and how different kinds of interpretations emerge. Concerning *non-refoulement* as referred to in the European Convention on Human Rights, it is also important to note that from the perspective of the individual, it is irrelevant where the border between torture and other prohibited treatment is drawn. In borderline cases, treatment anticipated at home should in any case be considered ‘ordinary’ inhuman treatment, as referred to under Article 3 and, hence, returning should be refrained from. In contrast, the point at which an action warrants enough cause for

³⁷ *Greece v. the United Kingdom* (1969), Yearbook of the European Commission of Human Rights XII, 186.

³⁸ *Ireland v. the United Kingdom*, above n. 36.

³⁹ *Selmouni v. France*, European Court of Human Rights, Judgment, 28 July 1999.

⁴⁰ On the definitions of torture in human rights law and international criminal law, see, Nigel S. Rodley, ‘The Definition(s) of Torture in International Law’, in M. D. A. Freeman (ed.), *Current Legal Problems*, Vol. 55 (Oxford University Press, 2002) 467–93.

authorities not to return a person, according to Article 3, is often more difficult to determine, as will be demonstrated in the following section.

5. Cruel, inhuman and degrading treatment

In a globalising and compacting world the most difficult problem concerning *non-refoulement* deals with the definition of cruel, inhuman and degrading treatment. *Non-refoulement* means that no one should be returned to be subjected to, for example, degrading treatment. But what is degrading treatment? Does it include serious illness, human trafficking, abject poverty or unemployment and environmental destruction? The Commissioner for Human Rights of the Council of Europe has said that 'it is to be recalled that the prohibition of torture or degrading treatment within the meaning of Article 3 of the European Convention is not limited to acts where pain or suffering is intentionally inflicted on a person. The concept is significantly wider than that, and this should be recognised by officials processing applications for international protection'.⁴¹ But it has been stated in legal literature that 'the Strasbourg organs apply rather strict criteria'.⁴²

There is no definition of degrading, inhuman or cruel treatment in international law. The Commission for Human Rights attempted as early as the late 1960s in the Greek case to provide content to these concepts. According to the Commission, 'the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. Treatment or penalty of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience'.⁴³

Unfortunately, it is often very difficult to distinguish between harsh and 'cruel or degrading' treatment.⁴⁴ In the jurisprudence of the European human rights convention, it is the degree of inflicted suffering that most often distinguished torture from inhuman or degrading treatment. Judge Matti Pellonpää of the European Court of Human Rights has sought to unlock the concepts of Article 3 of the Human Rights Convention by saying that 'intentionally inflicted serious psychological or physical suffering which is unjustified in the case at hand has been considered inhuman. Torture, on the other hand, is an aggravated form of inhuman treatment'.⁴⁵ To fall under Article 3 of the Human Rights Convention,

⁴¹ Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, Strasbourg, 17 Oct. 2003, CommDH (2003) 13, 3.

⁴² P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague, Kluwer Law International, 1998), 323.

⁴³ See, *Greece v. the United Kingdom*, above n. 37.

⁴⁴ Above n. 42, 311.

⁴⁵ Matti Pellonpää, *Euroopan ihmisoikeussopimus* (European Convention on Human Rights) (Jyväskylä, Kauppakaari 2005) 214.

prohibited treatment must meet a certain minimum level of seriousness. What, then, is the minimum level? According to the Court of Human Rights, ‘assessing the minimum is relative due to the nature of the matter; it depends on every relevant circumstance such as duration of the treatment, its physical and psychological impacts and, in some cases, the gender, age and state of health of the victim’.⁴⁶

There are no precise limits in international law as to when treatment anticipated at home is degrading, inhuman or cruel. Firstly, an assessment has to take into account the circumstances in which the prohibited treatment occurs. Whether a penalty anticipated at home is inhuman depends on the crime it is for – a harsh penalty for a minor offence may violate Article 3. A person’s age and his or her mental capacity may also influence where the minimum level is set. And in some instances the way in which a penalty is put into effect, not the penalty itself, may make treatment prohibited. The issue is further complicated by the view expressed in legal literature that an embarrassing or even harsh situation does not constitute prohibited treatment because they fall within a different category than humiliation or degrading treatment.⁴⁷ The distinction between prohibited and non-prohibited treatment awaiting a returned person is indefinite and different but, equally, reasoned conclusions can be reached in a given case of returning. Cases where serious humanitarian problems or personal state of health are appealed to are especially open to arguments based on different values and viewpoints.

In the case *D. vs. United Kingdom*, for example, the European Court of Human Rights decided that returning an HIV patient in the final stages of the illness is against Article 3 of the European Human Rights Convention. It was the Court’s opinion that, while the applicant’s circumstances in his home country were not, as such, in discord with Article 3, his return ‘would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment’. The Court’s conclusion was that ‘in the very exceptional case circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to the applicant would be a violation of Article 3’.⁴⁸ On the other hand, it allowed the return of a schizophrenic Algerian to his home country. According to the decision in this case, ‘the court did not find that there was a sufficiently real risk that the applicant’s removal in these circumstances would be contrary to the standards of article three’.⁴⁹

⁴⁶ *Ireland v. United Kingdom*, above n. 36.

⁴⁷ Above n. 42, 314.

⁴⁸ *D. v. United Kingdom* (1977), application no. 30240/96. See also, *Tanko v. Finland* (1994) application no. 23634/94.

⁴⁹ See, *Bensaid v. United Kingdom*, above n. 5.

The origin or cause of prohibited treatment does not have relevance to Article 3 of the European Human Rights Convention. Religious and cultural reasons may also limit the authorities' opportunity to return foreign nationals to their home countries.⁵⁰ In the case of *Jabari v. Turkey*, for example, the threshold of prohibited treatment was clearly exceeded and the Court of Human Rights decided that returning an Iranian woman to her home country would violate Article 3 because she could be punished by stoning or whipping.⁵¹ Moreover, returning a woman to circumstances where she could be circumcized would violate the prohibition on *refoulement*.⁵²

Since the objective of *non-refoulement* is to prevent persons from being returned and subjected to serious violations of human rights, it is important to note that the European Court of Human Rights has not given cruel or degrading treatment a content that would render returning a person to, for example, a country in civil war the sort of treatment that is prohibited under Article 3. In the case *Ahmed v. Austria*, however, both the Commission for Human Rights and the Court of Human Rights considered it justified for Ahmed to fear arrest, torture and execution were he returned to Somalia, which was in civil war at the time. In Ahmed's case, however, the Court emphasised the risk of persecution as a result of the civil war and not from having to take part in the war as the grounds for protection.⁵³

The legal debate on inhuman and degrading treatment is probably most confusing when it involves returning a person to a waiting death sentence. A death sentence, does not make returning a person to his home country unconditionally prohibited.⁵⁴ Van Dijk and van Hoof have written concerning Article 3 of the European Convention on Human Rights that, since article 2 allows the death sentence, returning a person to a death sentence is not a violation of Article 3.⁵⁵ Nevertheless, the method of execution may be prohibited.

In the well-known *Soering* case, being put on death row was considered treatment that breaches Article 3. While this was an important decision, it is also a good example how ambiguous Article 3 is. In its reasonings, the Court stated:

Whether the treatment or penalty was to be brought under Article 3 in the *Soering* case depended on the particular circumstances of the case, the length of detention

⁵⁰ On concepts of culture and human rights, see, Jari Pirjola 'Culture, Western Origin and the Universality of Human Rights' *Nordisk Tidskrift for Menneskerettigheter* (Nordic Journal of Human Rights 2005) Vol. 23, No. 1 (2005), 1–15.

⁵¹ *Jabari v. Turkey*, (2000), paras. 34, 35 and 42.

⁵² Walter Kälin, *Grundrechte im Kulturkonflikt: Freiheit und Gleichheit in der Einwanderungsgesellschaft* (NZZ Verlag, 2000), 214.

⁵³ *Ahmed v. Austria* (1996), Reports and Judgements and Decisions, 1998-VI, 220.

⁵⁴ No human rights convention outlaws the death penalty, although protocols to the ICCPR, European Convention on Human Rights and the American Convention of Human Rights do so. See, Dugard and Van den Wyngaert, above n. 23.

⁵⁵ P. van Dijk and G. J. H. van Hoof, above n. 42, 325.

prior to execution, conditions of death row and the applicant's age and mental state.

In this case the Court interpreted the concepts of Article 3 in a way that made extraditing Soering to the United States a breach of the article.⁵⁶

The Human Rights Committee, has also stated that, while every execution can be considered cruel and inhuman treatment as referred to in article 7 of the Covenant, executions must be carried out in way that causes the least possible physical and mental suffering.⁵⁷ The requirement of 'least possible physical and mental suffering' – an open and ambiguous requirement in itself – was not met in, for example, the case *Ng v. Canada*, which involved *non-refoulement*. In this case, execution would have been by gas asphyxiation, which could have caused death throes lasting longer than ten minutes. In its decision, the Committee stated that gas asphyxiation does not meet the requirement because it can lead to pain and suffering that exceeds ten minutes in duration.⁵⁸

Interestingly, a minority of two Committee members interpreted the matter differently. In their opinion, gas asphyxiation is not cruel or inhuman treatment, unlike death by stoning, which would contravene article 7 of the Covenant because the objective of stoning is to cause pain and suffering. According to the differing opinion, the Committee should not look into details such as 'acute pain of limited duration or less pain of longer duration'.⁵⁹ Debate like this in an international human rights body is likely to reinforce the openness and ambiguity of the concepts of human rights. Martin Scheinin has written: 'The combination of a permissive, a restrictive and an abolitionist dimension in CCPR, the consideration of states reports and the adoption of general comments to deciding individual complaints, and the plurality of legal systems and civilizations in the 150 States subject to the monitoring functions of the Covenant make the application of the CCPR article an interesting puzzle, to say the least'.⁶⁰

Like 'persecution' and 'torture', cruel, inhuman and degrading treatment remain open concepts, the precise definition of which is the task of State authorities, national courts, the Court of Human Rights, the Council of Europe or the UN Refugee Agency, UNHCR, for example. And when decisions depend on each circumstance of a case or 'pressing humanitarian consideration' or personal circumstances, or age and mental state, it is obvious that interpretations will lead to diverse conclusions. The content

⁵⁶ Ibid., 326.

⁵⁷ See, Raija Hanski and Martin Scheinin (eds.), *Leading Cases of the Human Rights Committee* (Jyväskylä, Gummerus, 1993), 93.

⁵⁸ *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 16.2.

⁵⁹ Ibid., individual opinion by A. Mavrommatis and W. Sadi (dissenting).

⁶⁰ Hanski and Scheinin, above n. 57, 60.

of a right cannot be deducted from the right itself. The question is how indeterminate words are turned into practical measures? Implementation of human rights require divergent interpretations or priorities under the surface of the universal language.⁶¹ Open concepts will always receive meaning and content, and from the perspective of people applying for protection, the content given to *non-refoulement* can be a question of life and death.

6. From openness to interpretation: emergence of alternative interpretations

As I have sought to demonstrate, *non-refoulement* as referred to in human rights conventions does not in itself guarantee a consistent interpretation of the conventions or provide them with 'the correct' content. The content of *non-refoulement* is incomplete in each case and, hence, it must be defined. In practice, legal concepts do not remain open because each decision *fills* them with content and meaning. *Non-refoulement* as referred to in human rights conventions receives content on a national and an international level through interpretation. On the national level, the content of *non-refoulement* is ultimately approved, depending on the national judicial system, by the composition of judges, which changes according to the stage of appeal. The meaning assigned to prohibited treatment during an appeal process may vary considerably depending on the processing authorities and judges.

Thus, open concepts must be assigned with content and a decision must be reached on who can stay and who can be returned. Considering *non-refoulement* as an open concept, therefore, calls for a further question: how do interpretations come about and what factors influence them?⁶² Why does one interpretation feel more correct than another? I often dwelled on this problem during the five years I sat on the Finnish Asylum Appeals Board. The result of votes taken on asylum could often be predicted from the persons and organisations involved in a case.

Interpretation is a process which is influenced by a large number of different factors. I will conclude my article by presenting some of the points of view and emphases that form the basis of interpretations. First, a look at the various emphases relevant to the purpose and objective of *non-refoulement*. Is the purpose of *non-refoulement* to protect the rights of the protection-seeker or do states have other objectives as well? If the objective of

⁶¹ Päivi Leino-Sandberg, *Particularity as Universality: The Politics of Human Rights in the European Union* (The Erik Castren Institute Research Reports 15/2005) 52.

⁶² I thank professor Martti Koskeniemi, Director of the Erik Castren Institute of International Law and Human Rights, University of Helsinki, for his comments regarding emergence of alternative interpretations.

the system is to protect the state from, for example, international crime – an acceptable goal – instead of protecting refugees, the question of *refoulement* may have to be resolved accordingly. If the objective is to prevent terrorism, a little torture back home or lack of care in a refugee camp – some might think – should not weigh more than the objective. However, in human rights conventions *non-refoulement* prohibitions are entered in absolute form and, hence, many do not accept this interpretation. Respecting *non-refoulement* is the goal of every state that honours human rights. On the other hand, does not every sovereign state have the ultimate power to decide if it wants to allow a foreign national in its territory?

What about costs and benefits? These considerations are often in opposition to each other. A benefit to an asylum seeker may be at a cost to a state or to the credibility of the human-rights system, depending on the angle taken to the issue. For instance, the Swedish Government considered it permissible to return a small child to Macedonia, despite its human-rights obligations and criticism from human rights organisations.⁶³ Authorities in charge of granting asylum may defend a narrow interpretation of *non-refoulement*, both to uphold the credibility of the system and to manage related costs. Persons applying for international protection and human rights organisations defending them see things differently and, perhaps, assess benefits and costs in another way. Can financial arguments override human dignity? For those who defend refugees, whether authorities or organisations, every decision in favour of granting protection is a case won and an indication that the state takes its international obligations seriously.

Formal and open interpretations can also lead to different results. A judge who emphasises the literal and formal interpretation of *non-refoulement* is tied to the wording of the norm and its ‘established’ interpretation. *Non-refoulement* does not cover civil war because the European Court of Human Rights has not unambiguously approved the relevant interpretation. Hence, *non-refoulement* may not prevent the return of a person to a home country at war, even if the judge feels bad in doing so. Another approach is to refuse to accept the right as a mere technical issue and, instead, to emphasise a just result. This approach is based on a wide interpretation of *non-refoulement* and considers it a living instrument. In other words, under this approach *non-refoulement* prevents the return of a person not only into a country in a civil war, but also to poor humanitarian conditions.

But who defines what a just result is? An open interpretation of *non-refoulement*, which emphasises the correct purpose of the concepts, may not always be humanitarian and humane. This non-formal interpretation of human rights norms may also favour those who wield power against those who do not. In fact, anti-formalism often shifts power to those who are certain of what the correct interpretation is. Hence, a narrow and formal

⁶³ See <<http://www.svt.se>>; Uppdrag granskning. Last visited 1 Nov. 2005.

interpretation has its benefits because it allows a more equal debate on different interpretations of *non-refoulement* between those in power and those who are not. The openness of *non-refoulement* and the formal interpretation of the provisions of conventions promote the examination of *non-refoulement* as a subject of debate where even the marginalised have an opportunity to voice their arguments in the language of the human rights conventions.

The content of *non-refoulement* as referred to in human rights conventions may also vary between subjective and objective interpretations. Based on their values, experiences or worldview, a judge, public official or an employee of the UN High Commissioner for Refugees, for example, may reach different subjective conclusions on what constitutes persecution or inhuman treatment. People may have widely differing views. On the other hand, we can search for an objective interpretation of *non-refoulement* in the decisions taken by bodies that interpret international human rights conventions. Finding an objective interpretation is difficult, however, because there is no agreement on the content of *non-refoulement* prohibitions.

In fact, *non-refoulement* receives its content when the above-mentioned background and other conditions are met. These conditions are often largely ignored in national and international refugee policy debates. *Non-refoulement* concerns a legal principle expressed in absolute form, which means that the debate surrounding it is sometimes blind to the non-legal arguments and factors that influence the selection of interpretations in different forums, even when the interpretations of given institutions themselves do not change.

It is interesting that the various interpretations of the content of *non-refoulement* seem rather stable within institutions. For instance, the Court of Human Rights has ultimately been rather constant in interpreting Article 3 of the European Convention on Human Rights in recent years. National authorities in charge of asylum matters, border control authorities, courts and human rights organisations defending refugee rights, such as UNHCR, also promote their own, 'correct' interpretations of this keystone of refugee law. As a result, the inalienable right guaranteed in the human rights conventions becomes an issue of the politics of these institutions.

7. Conclusion: *Non-refoulement* and pain

The 'majestic' language of international conventions makes persons crossing national frontiers a comprehensive and absolute promise of international protection.⁶⁴ But when the return of a person, who has

⁶⁴ Cf., David Beatty has observed 'the great majestic phrases characteristic of all constitutional texts provide little practical guidance on such controversial questions as whether women have a right to abort a foetus or whether gays and lesbians have the right to marry. Whether religious communities have a right to establish and seek state support for separate schools and whether those schools can refuse to admit and/or employ people whose morals and/or religion are different than their own (...)', David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press, 2004) 4.

applied for international protection, is assessed in a real situation, a clear limit to prohibited treatment no longer exists. In other words, placing an abstract human right into a concrete situation causes problems of interpretation and balanced reasoning. According to the European Union Qualification directive, a person is eligible for subsidiary protection should there be a real risk of ‘serious harm’ in the home country or in the country of former habitual residence.⁶⁵ A person applying for international protection and opposing return may have a completely different opinion of what constitutes ‘harm’ or degrading treatment to a government official or judge sitting in a body overseeing international human rights.

Moreover, is it even possible to meaningfully describe and resolve in formal legal language the problems that arise from the complex social realities which many asylum seekers are fleeing?⁶⁶ Can legal language be used to describe or resolve economic injustice, the loss of human dignity caused by poverty, the loss of cultural identity of a member of a minority or the suffering caused by loss of a clean environment? It would seem that an immigrant who, for example, makes a request for protection at a frontier and the judge deciding his or her case have different priorities and talk different languages. The immigrant may be fleeing poor treatment or poverty, while the representatives of the state apply laws and protect the rights of the sovereign state.

The question is, how efficiently can such opposing priorities be accommodated and regulated with the provisions of human rights conventions? *Non-refoulement* as inscribed in human rights conventions seems a rather strong principle because it involves norms that have been written in an absolute form. Despite the value neutrality, the debate on the content of *non-refoulement* is, ultimately, a political debate, conducted in various institutions on communal good or competing values. There is a danger that human rights become ‘human rights talk’ which legitimises existing circumstances.⁶⁷

If principles that are critical to an individual, such as *non-refoulement*, are examined as political issues between or internal to states, we cannot avoid the question: is the principle of *non-refoulement* in some instances actually a harmful smokescreen to obscure, for example, the restrictive and stringent refugee policies of the European Union? A stringent visa policy is, after all, acceptable when states have committed to the principle of *non-refoulement*.⁶⁸ However, rights and any other institutions can be used for good as well as

⁶⁵ See, Council Directive 2004/83/EC of 29 Apr. 2004, art. 15.

⁶⁶ See, David Kennedy, ‘The International Human Rights Movement: Part of the Problem’ (2001) 3 *European Human Rights Law Journal* 245–60.

⁶⁷ ‘The priority of the right over the good proves an impossible demand and insisting upon it will leave political discretion unchecked’, Koskeniemi, above n. 15, 99.

⁶⁸ See, Ryszard Cholewinski, ‘Borders and Discrimination in the European Union’ (Immigration Law Practitioners’ Association (ILPA) and Migration Policy Group, 2002).

evil, which is why it is important that the debate on them is not separated from critical social debate and the background factors that influence interpretations. This is why a debate on *non-refoulement* as a key legal protection concept and principle is important. The debate must be open, and acknowledging it as such can reinforce international protection. But if we are blind to openness, talk about honouring *non-refoulement* may be revealed as politics of the particular. When an abstract right is made practice, it may become servant to the particular instead of the universal.

The purpose of this article is not to claim that the principle of *non-refoulement* as referred to in the conventions mentioned in this article is insignificant to the individual and the progress of refugee law. It is a central principle of human rights and its objective is to protect people from serious infringements of human rights. The principle of *non-refoulement* has opened up a debate between political and legal actors and civil society on the state's responsibility to protect persons against expulsion. After all, appealing to the principle of *non-refoulement* is a demand made by an individual: do not return me to my home country because, if you do, I may be subjected to pain or humiliation. Klaus Günther has written that the content of human rights is always associated with social activity we consider painful or humiliating. It is about individuals who suffer or fear and raise their voice to demand a stop to inhuman treatment.⁶⁹ Appealing to *non-refoulement* could be such a demand.

⁶⁹ 'The idea of human rights emerges from the rejection of pain and humiliation, caused by the state or by an overwhelming social power, as an injustice', see, Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in Philip Alston (ed.), *The EU and Human Rights* (Oxford, Oxford University Press 1999), 117–44.