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Fleeing Deprivation: Deducing *Non-Refoulement* Obligations from Economic, Social and Cultural Rights

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ABSTRACT

While the principle of *non-refoulement* is today acknowledged as the cornerstone of the general human rights regime protecting people on the move, developments of the content of this principle have focused on risks of harm to civil and political (CP) rights. Factors affecting economic, social and cultural (ESC) rights have been addressed only indirectly, where socio-economic deprivation is deemed to amount to inhuman and degrading treatment. Nevertheless, not every instance of severe harm to ESC rights will necessarily equate to ill-treatment. Failure to recognize an autonomous basis for *non-refoulement* obligations in ESC rights may thus lead to gaps in protection and contribute to the trend of underdevelopment of the legal content of ESC rights in comparison to CP ones. This article thus addresses whether obligations of *non-refoulement* can be autonomously deduced from treaty provisions on ESC rights. In doing so, it delves into the legal basis upon which the principle of *non-refoulement* in general human rights law is built, according to the practice of international human rights bodies in interpreting and applying this principle. The article takes into account the practice of all regional human rights frameworks (African, European, and Inter-American) and United Nations treaty bodies that have dealt with the principle of *non-refoulement*, seeking to discern a common foundation to this principle's rationale and scope. It is submitted that *non-refoulement* qualifies as a positive obligation to prevent risks of severe harm to rights by third parties and is, accordingly, inherent in all human rights. The compatibility between ESC rights obligations and *non-refoulement* is then analysed, and ways to render practicable the application of *non-refoulement* in connection with these rights are identified, focusing on immediate obligations stemming from ESC rights and minimum threshold obligations.

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Finally, objections to *non-refoulement* based on socio-economic grounds, namely concerns regarding the potential increase of mass migratory influxes and the added value of such a norm, are addressed. The article concludes that neither legal nor non-legal considerations bar deducing *non-refoulement* obligations from ESC rights and that much of the reasoning applied to *non-refoulement* assessments in cases involving CP rights can be transposed to cases involving ESC rights, especially when immediate ESC rights obligations are at stake.

1. INTRODUCTION

In September 2021, the Committee on the Rights of the Child (CRC Committee), in addressing the communication of *AM v Switzerland*,[1] concluded that the removal of an asylum-seeking child to Bulgaria would expose him to a real risk of harm to several provisions of the Convention on the Rights of the Child (CRC).[2] The CRC Committee acknowledged this risk towards both a civil and political (CP) right – the prohibition of inhuman and degrading treatment (article 37(a)) – and economic, social and cultural (ESC) rights – to an adequate standard of living (article 27), to education (article 28), and to physical and psychological recovery and social integration (article 39), which contains elements of both CP and ESC rights. According to the committee, such a removal would thus violate Switzerland's obligations under these provisions.[3]

The potential of this decision is significant. This is the first time an international human rights body has acknowledged the existence of – and applied – a *non-refoulement* obligation arising directly from ESC rights. Previously, although similar bodies have increasingly admitted that *non-refoulement* obligations may arise from guarantees other than the right to life and the prohibition of torture and inhuman and degrading treatment, discussions on the expansion of *non-refoulement*'s material scope have encompassed solely other CP rights. ESC rights have only been brought into the debate where a risk of socio-economic deprivation has been equated to inhuman and degrading treatment[4] – even though most human rights treaties from which an implicit principle of *non-refoulement* has been deduced contain provisions on ESC rights.[5] Similarly, domestic jurisdictions have usually refrained from directly engaging with ESC rights in *non-refoulement* assessments. In the few cases where this has been done, authorities in New Zealand and Australia held, with little elaboration, that such rights cannot give rise to *non-refoulement* obligations.[6] This situation creates a gap in protection where risks of harm to ESC rights may be severe but cannot be equated to inhuman and degrading treatment, in addition to contributing to the trend among certain jurisdictions of according less weight to ESC rights and leaving their content underdeveloped.

Despite their potential to shape both international and domestic practice on the legality of removals of persons from a State's territory, the CRC Committee's conclusions in this regard have gone largely unremarked. Indeed, the CRC Committee itself was not clear about several points in its reasoning, notably whether the decision's previous finding about a risk of inhuman and

1 *AM v Switzerland*, UN doc CRC/C/88/D/95/2019 (22 September 2021).
2 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
3 *AM v Switzerland* (n 1) paras 10.9, 11.
4 See, in particular, *MSS v Belgium and Greece* (2011) 53 EHRR 2, paras 49–264; *Andrea Mortlock v United States*, Inter-American Commission on Human Rights, Report No 63/08 (25 July 2008) para 89; *ZH v Sweden*, UN doc CRPD/C/25/D/58/2019 (6 September 2021) paras 10.4–10.11.
5 CRC (n 2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3.
6 *Rahman v Minister of Immigration* [2000] NZHC, AP 56/99/CP49/99; 1510755 (Refugee) [2019] AATA 3420, para 18.

degrading treatment upon removal was crucial for its conclusions on the risks to ESC rights; what level of severity the harm risked should attain in order to trigger *non-refoulement* obligations regarding ESC rights, and how this level was attained in the case at hand; and whether the author's status as a child and the consequent application of the principle of the best interests of the child influenced the possibility of deducing *non-refoulement* obligations from ESC rights. Consequently, the decision seems to have brought little light to the question whether the principle of *non-refoulement* can be autonomously deduced from treaty provisions on ESC rights and under what circumstances.

This article addresses this question by focusing on the legal feasibility of transposing the rationale of the principle of *non-refoulement*, as deduced from CP rights, to ESC rights. This discussion deals only with this implicit variant of the principle of *non-refoulement* in human rights treaties and does not deal with the principle as explicitly established under refugee law or under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[7]

The article begins by examining the legal basis of implicit *non-refoulement* obligations in human rights treaties according to the practice of international human rights bodies that have engaged with such obligations: the European Court of Human Rights (ECtHR), the Inter-American Commission and the Inter-American Court of Human Rights (IACommHR and IACtHR), the African Commission on Human and Peoples' Rights (ACHPR), the Human Rights Committee (HRC), the CRC Committee, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), and the Committee on the Rights of Persons with Disabilities (CRPD Committee). The analysis shows that human rights bodies have applied these obligations by reference not to a predefined set of rights, but instead to a specific level of harm; if the potential harm is sufficiently serious, the protection of *non-refoulement* is triggered. Furthermore, even though these bodies have generally refrained from defining the legal basis for *non-refoulement*, the rationale adopted for the application of this principle conforms to the logic of positive human rights obligations, namely States' obligations to prevent third parties from causing harm to human rights.

Having established the basis of *non-refoulement* in positive obligations, which are common to CP and ESC rights, the article discusses whether ESC rights are indeed compatible with the principle of *non-refoulement* and how such a norm can be applied in connection to ESC rights. Human rights bodies acknowledge that harm to ESC rights can give rise to the level of harm necessary to trigger *non-refoulement*, at least in situations amounting to ill-treatment. Still, in referring directly to ESC rights provisions, other serious risks of harm could be deemed sufficient to bar removal, regardless of their transposition to a CP right. The article proposes that this level of harm may be ascertained more easily by reference to immediate ESC rights obligations, including non-discrimination and minimum core obligations.

This article then examines other objections, of a non-exclusively legal character, to deducing *non-refoulement* obligations from ESC rights. These objections relate to 'floodgates' concerns and to whether there is any added value to people seeking protection in recognizing *non-refoulement* based on socio-economic grounds.

The article concludes that the principle of *non-refoulement* can be coherently deduced from ESC rights provisions in human rights treaties and applied by reference to obligations of immediate effect arising from these rights. Practical difficulties and uncertainties as to when *non-refoulement* obligations are triggered in these contexts can be overcome by further engagement

7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

with the development of the content of ESC rights and related obligations by States and relevant human rights bodies.

2. THE IMPLICIT PRINCIPLE OF *NON-REFOULEMENT* IN HUMAN RIGHTS TREATIES: LEGAL GROUNDS

Since the 1960s, various international human rights bodies have repeatedly recognized the existence of *non-refoulement* obligations implicit in their respective treaties. Nevertheless, these bodies – with the notable exception of the CEDAW Committee,[8] as detailed below – have failed to provide a full and coherent explanation of the legal grounds for deducing such a rule.[9] Often, human rights bodies have limited themselves to vague allusions to the object and purpose of the treaty and the importance of the rights involved (ECtHR)[10] or to general obligations to respect, protect, and fulfil human rights (IACtHR, HRC, and CRC Committee),[11] without explaining how any of these considerations would ground a *non-refoulement* duty. The ACHPR, in turn, has bypassed this question entirely, mentioning only on a case-by-case basis that the right to life and the prohibition of ill-treatment contain *non-refoulement* obligations.[12]

The lack of clarity in this respect has led to assumptions that *non-refoulement* only arises in connection with a predefined set of rights – always CP rights – and has drawn attention away from recognition that the risk-based rationale of the principle of *non-refoulement* is also used in connection with the positive obligation to prevent harm to an individual's rights. These issues are now addressed in turn.

2.1 (The myth of) Linkage to specific rights

The principle of *non-refoulement* was initially deduced from human rights treaties by express connection to the prohibition of torture and inhuman and degrading treatment.[13] Even today, most of the cases in which this principle is applied concern risks of ill-treatment. However, over the years, human rights bodies have begun to suggest that *non-refoulement* obligations could arise in relation to other rights as well.

The ECtHR to date has been the body most prolific in applying the principle of *non-refoulement* to a variety of rights. Besides non-derogable provisions of the European Convention on Human Rights (ECHR),[14] such as the right to life[15] and the prohibition of slavery and forced labour,[16] the ECtHR has recognized that *non-refoulement* can be triggered when removal would

8 *YW v Denmark*, UN doc CEDAW/C/60/D/51/2013 (2 March 2015) para 8.7.

9 For a detailed analysis, see Mariana Ferolla Vallandro do Valle, 'Fleeing Destitution: Deduction of the Principle of *Non-Refoulement* from the International Covenant on Economic, Social and Cultural Rights and Its Application' (Master's thesis, Universidade Federal de Minas Gerais 2020) 25–36.

10 *Soering v United Kingdom* (1989) Series A 161, paras 87–88, 90.

11 *Rights and Guarantees of Children in the context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights (19 August 2014) paras 212, 225–26; HRC, 'General Comment No 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc CCPR/C/21/Rev1/Add.13 (29 March 2004) para 12; CMW and CRC, 'Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the context of International Migration', UN doc CMW/C/GC/3-CRC/C/GC/22 (16 November 2017) para 45.

12 *Modise v Botswana* (Communication No 97/1993_14AR) [2000] ACHPR 25 (6 November 2000) para 92; ACHPR, 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' (18 November 2015) para 40.

13 *X c Belgique*, No 984/61, European Commission of Human Rights (29 May 1961) 8; HRC, 'General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)', UN doc HRI/GEN/1/Rev.6 (10 March 1992) para 9.

14 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (European Convention on Human Rights) (ECHR).

15 *Bader v Sweden* (2005) 46 EHRR 1497.

16 *Ould Barar v Sweden* (1999) 28 EHRR CD 213, 6.

expose an individual to risk of a flagrant breach of their rights to liberty and security,[17] fair trial,[18] and private and family life.[19] This standard is a stringent one, alluding to situations where the essence of the right would risk being completely denied or nullified in the receiving country.[20]

Some commentators have suggested that not every human right would entail such a level of harm if breached,[21] and that the ECtHR itself has rejected the contention that any right under the ECHR could give rise to protection from *refoulement*.[22] Indeed, in the 2004 judgment of *F v United Kingdom*,[23] concerning the removal of a homosexual man to a country where his right to private life (article 8 of the ECHR) would be at risk, the ECtHR stated that the obligation of *non-refoulement* was based on the 'fundamental importance' of articles 2 and 3 of the ECHR and that '[s]uch compelling considerations do not automatically apply under the other provisions of the Convention'.[24] However, this statement does not imply that only certain rights can give rise to *non-refoulement*, but rather that not every risk of *violation* of human rights will be able to do so; it all depends on whether the risk of harm attains the level of severity of a flagrant breach. In subsequent cases where such a threshold was met, the ECtHR upheld a violation of article 8 of the ECHR in removal contexts.[25]

This reasoning was made clearer in a case involving the risk to two women's freedom of religion if returned to their country of origin. The ECtHR concluded that a *non-refoulement* obligation could in principle arise in connection with this right, but 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 [of the ECHR]'.[26] Given that freedom of religion also encompasses a person's intimate beliefs regardless of external manifestation, one could indeed argue that nullification of this right could only occur if the victim were subjected to more extreme forms of violence. Therefore, the issue is not that some rights cannot entail a level of harm sufficient for *non-refoulement* obligations to arise, but rather that, in some cases, attainment of this level of harm would also amount to violations of other rights, such as the prohibition of ill-treatment.

The formulation of the principle of *non-refoulement* by reference to a particular level of harm, rather than a set of rights, was adopted in clearer terms by the HRC and the CRC, CEDAW, and CRPD committees. These bodies have indicated that *non-refoulement* applies whenever removal would expose an individual to a risk of irreparable harm, such as, but not limited to, harm arising from violations of the right to life and from inhuman and degrading treatment.[27] Even though to date the CRC Committee is the only one among these bodies to have deduced *non-refoulement* duties from rights other than the prohibition of ill-treatment, in the aforementioned

17 *Al Nashiri v Romania* (2018) ECHR 33234/12, paras 596, 689–92; *Nars et Ghali c Italie* (2016) ECHR 44883/09, paras 244, 299–303.

18 *Husayn (Abu Zubaydah) v Poland* (2015) 60 EHRR 16, paras 453, 556–61; *Othman v United Kingdom* (2012) 55 EHRR 1, paras 250–51, 287.

19 *Al Nashiri v Poland* (2014) ECHR 28761/11, paras 538–40; *El-Masri v Former Yugoslav Republic of Macedonia* (2013) 57 EHRR 25, paras 249–50.

20 *Husayn (Abu Zubaydah)* (n 18) para 553.

21 CW Wouters, 'International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture' (PhD thesis, Leiden University Law School 2009) 26.

22 Kathryn Greenman, 'A Castle Built on Sand? Article 3 ECHR and the Source of Risk in *Non-Refoulement* Obligations in International Law' (2015) 27 International Journal of Refugee Law 264, 280.

23 *F v United Kingdom* (2004) ECHR 17341/03.

24 ibid 12.

25 *El-Masri* (n 19) paras 249–50.

26 *Z and T v United Kingdom*, No 27034/05, ECtHR (28 February 2006) 7.

27 See, in particular, HRC General Comment No 31 (n 11) para 12; CRC, 'General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin', UN doc CRC/GC/2005/6 (1 September 2005) para 27; CEDAW Committee, 'General Recommendation No 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women', UN doc CEDAW/C/GC/32 (14 November 2014) para 21; *NL v Sweden*, UN doc CRPD/C/23/D/60/2019 (28 August 2020) para 6.4.

AM v Switzerland,[28] the fact that other bodies have been careful to frame the principle in open-ended terms is a relevant indication that they do not seek to restrict *non-refoulement* obligations to a predefined group of rights.

The IACtHR has also given indications that it accepts a broad material scope for the principle of *non-refoulement*, although the extent of this scope is not clear. Beyond the explicit *non-refoulement* obligation in article 22(8) of the American Convention on Human Rights (ACHR),[29] which is limited to danger to the rights to life and personal freedom, the IACtHR indicated in its advisory opinion on asylum that *non-refoulement* is a guarantee of 'various *non-derogable* human rights'.[30] Nevertheless, in its earlier advisory opinion on the rights of children in the context of migration, the IACtHR had endorsed the CRC Committee's considerations that a child should not be returned to a country where there is a reasonable risk that their 'fundamental rights' would be violated[31] – a formulation broader than referring exclusively to non-derogable rights. To date, the IACtHR has only applied *non-refoulement* obligations in connection with non-derogable rights under the ACHR,[32] which include the rights of the family and of the child,[33] making it difficult to arrive at a conclusion as to what this court considers as the appropriate standards to engage *non-refoulement*.

The positions of the ACHPR and the IACommHR on the material scope of *non-refoulement* are not clear either. To date, both commissions have applied this principle only in cases involving the prohibition of ill-treatment and have not elaborated on its legal basis.[34]

Despite the doubts regarding the IACtHR's and the ACHPR's positions, the above overview shows a general tendency by human rights bodies to frame *non-refoulement* obligations as applicable when a potential human rights violation attains a given level of severity, instead of linking this obligation to an immutable set of rights.[35] This rationale, as explored below, corroborates the character of this principle as a positive obligation.

2.2 *Non-refoulement* as a positive obligation

Non-refoulement is often described as a negative obligation not to remove a person to a country where they might face ill-treatment,[36] a formulation expressly endorsed by the ECtHR in *Paposhvili v Belgium*.[37] Even commentators who suggest that *non-refoulement* is a hybrid obligation maintain that the norm's positive aspect refers to States' duty to conduct a risk assessment before removing someone to another country and still frame the duty to prevent removal as a negative one.[38] Nevertheless, the idea that *non-refoulement* is a negative obligation does not

28 *AM v Switzerland* (n 1) paras 10.7–10.9.
29 ACHR (n 5), also known as the Pact of San Jose.
30 *The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection*, Advisory Opinion OC-25/18, Inter-American Court of Human Rights (30 May 2018) para 180.
31 Advisory Opinion OC-21/14 (n 11) para 231.
32 *Wong Ho Wing v Peru*, Inter-American Court of Human Rights Series C No 297 (30 June 2015) para 127; *Familia Pacheco Tineo v Bolivia*, Inter-American Court of Human Rights Series C No 272 (25 November 2013) paras 226–29.
33 ACHR (n 5) art 27.
34 *Modise* (n 12); *Mortlock* (n 4).
35 Participants of an Expert Meeting organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2018 observed that 'the principle of *non-refoulement* applies to a range of human rights violations beyond persecution and torture, and … the full scope of the principle of *non-refoulement* has not yet been fully explored by courts and/or human rights treaty bodies'. OHCHR, 'Expert Meeting on Protecting the Human Rights of Migrants in the context of Return' (Informal Summary, 6 March 2018) 6 <https://www.ohchr.org/Documents/Issues/Migration/Return/InformalSummary.pdf> accessed 9 July 2024.
36 Bilal Khan, 'From D v UK to Paposhvili v Belgium: Assessing the Strasbourg Court's Legal and Institutional Approach to the Expulsion of Seriously Ill Migrants under Article 3 of the European Convention on Human Rights' (2019) 25 Columbia Journal of European Law 222, 234.
37 *Paposhvili v Belgium* ECHR 41738/10 (13 December 2016) para 188.
38 Maarten den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10 European Journal of Migration Law 277, 291; Fanny de Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture: The Assessment of Individual Complaints by the European Court of Human Rights under Article 3 ECHR and the United Nations Committee against Torture under Article 3 CAT* (Brill Nijhoff 2017) 137–38.

explain a core feature of this principle: that a State can be held responsible for exposing an individual to a risk of harm outside its jurisdiction, even if the harm never materializes in the receiving country.

Negative obligations are engaged when a State interferes with a certain aspect of life to which individuals are normally entitled, such as moving freely within a country and professing a certain religion.[39] The interference by State authorities when they were supposed to have refrained from doing so implies the existence of concrete prejudice to a right. Otherwise, there was no actual interference, but only a possibility of interference, which does not amount to a violation of human rights. This reasoning is diametrically opposed to that followed by the principle of *non-refoulement*.

Under this principle, the violation is caused by the mere existence of a *risk* of harm; the materialization of the harm is irrelevant. If an individual is removed to a country where there is a real risk – meaning a risk of which the removing State was or should have been aware – of irreparable harm, but no harm comes to pass, the removing State nevertheless breaches its *non-refoulement* obligation. On the other hand, if a person is sent to a country where no such risk existed and is subjected to grave human rights violations, the removing State is not at fault from a *non-refoulement* perspective.

The nuance of this risk-focused assessment has sometimes been lost in statements of the ECtHR, according to which, *non-refoulement* engages the responsibility of a State 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment'.[40] Similarly, in one case, the HRC qualified removal as a 'crucial link in the causal chain' that would have led to the alleged harm.[41] Both statements seem to present the harm as concrete, and not as a risk, which would imply a negative obligation of non-interference.[42] However, in other passages of these decisions, the bodies emphasize that their analysis focused on the applicant's exposure to a risk of harm, regardless of the materialization of the risk.[43] The application of this implicit *non-refoulement* obligation by human rights bodies is thus consistent in not requiring actual interference with a right for a violation to occur, thus departing from the logic of negative obligations.

Moreover, when negative obligations are concerned, the harm is caused by the State authorities themselves. In *non-refoulement* cases, the removing State exposes the individual to a risk of harm, but the actual source of this potential harm is a third party – for instance, authorities in the receiving State or non-State actors therein.

This structure of the principle of *non-refoulement* actually finds its match within positive human rights obligations, more precisely States' duty to prevent third parties from violating human rights[44] – also known in some instances as the obligation to protect.[45] When a State knew, or should have known, of the existence of a real risk of serious harm to the individual, regardless of the source of the harm, this State is required to take reasonable measures to avoid

39 Which is not to say, of course, that there are no positive obligations associated with the rights to freedom of movement and of religion. Like any human right, effective exercise of these rights may require that the State take positive measures to aid certain individuals.

40 *El-Masri* (n 19) para 212.

41 *Judge v Canada*, UN doc CCPR/C/78/D/829/1998 (5 August 2003) para 10.6.

42 Michelle Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) 2 New Zealand Law Review 257, 270–71.

43 *Soering* (n 10) paras 88, 91; *Judge* (n 41) para 10.4.

44 As also maintained, among others, by Vincent Chetail, 'Le droit des réfugiés à l'épreuve des droits de l'homme: Bilan de la jurisprudence de la Cour européenne des droits de l'homme sur l'interdiction du renvoi des étrangers menacés de torture et de traitements inhumains ou dégradants' (2004) 37 Revue belge de droit international 155, 168–69; Vladislava Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-Refoulement*, Socio-Economic Deprivation, and *Paposhvili v Belgium*' (2017) 29 International Journal of Refugee Law 580, 593.

45 *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Rght submitted by Mr Asbjørn Eide, Special Rapporteur*, UN Commission on Human Rights, UN doc E/CN.4/Sub.2/1987/23 (7 July 1987) para 68.

this risk.[46] Whether the measures adopted were successful in preventing the harm is irrelevant; they are meant to address the risk, not the end result.[47] *Non-refoulement* is simply an expression of this obligation in removal contexts: the duty is not to expose a person to a risk of harm (by not removing them from the country) emanating from the conduct of third parties (State or non-State actors in the receiving State's territory) whenever this risk was, or should have been, known (real risk) by the authorities (of the removing State).[48]

The CEDAW Committee has expressly qualified *non-refoulement* as a positive duty, describing it as part of the obligation to protect.[49] While other human rights bodies have not taken a similarly overt position, the link between *non-refoulement* and positive obligations to prevent human rights abuses has not gone unnoticed. In *Soering v United Kingdom*, one of the ECtHR's various considerations to justify reading *non-refoulement* into the ECHR was the idea that States could be held responsible for foreseeable consequences of their acts – that is, the removal.[50] Similarly, the HRC framed *non-refoulement* as an obligation of due diligence in *Ahani v Canada*.[51]

The argument often advanced against classifying *non-refoulement* as a positive obligation is a grammatical one: *non-refoulement* is a duty *not* to remove an individual, requiring the State to *abstain* from taking action.[52] Positive obligations, in turn, require States to take affirmative action towards a goal.[53] The action/inaction dichotomy has the advantage of being clear-cut and easily ascertainable. However, a more precise distinction between positive and negative obligations would be to identify whether a State is interfering with a right, effectively causing the harm, or whether the State failed to prevent a risk of harm or remedy harm caused by others.[54] This distinction is closer to how human rights bodies have framed the obligation to protect in cases where the prevention of harm could be sought by having the State abstain from a given conduct.

This was the case in *Paul and Audrey Edwards v United Kingdom*,[55] where the ECtHR held that the State had violated its positive obligation to protect an individual's life by placing him in a cell with a dangerous prisoner, thus exposing him to a risk of harm.[56] The appropriate measure to prevent this risk would have been for the State to *refrain* from putting the two prisoners together. Likewise, in *Rantsev v Cyprus and Russia*,[57] the complaint centred around the allegation that the State authorities should have *abstained* from releasing a woman into the custody of a man who was later accused of human trafficking, and the ECtHR framed the State's obligation as a positive duty to prevent a risk to the woman's life.[58]

Similar examples are found in the IACtHR's case law. When assessing human rights violations committed by paramilitary armed groups in Colombia, the IACtHR held that the State

46 *Buturugă c Roumanie* (2020) ECHR 56867/15, para 61; *Velásquez Paiz v Guatemala*, Inter-American Court of Human Rights Series C No 307 (19 November 2015) para 109; *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* (Communication No 341/2007) [2021] ACHPR 523 (14 November 2015) paras 124–25; *Portillo Cáceres v Paraguay*, UN doc CCPR/C/126/D/2751/2016 (25 July 2019) paras 7.3, 7.5.

47 *Fernandes de Oliveira v Portugal* (2019) 69 EHRR 8, paras 117–33; *Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights Series C No 4 (29 July 1988) para 175.

48 Hélène Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24(2) Refugee Survey Quarterly 39, 41.

49 *YW v Denmark* (n 8) para 8.7.

50 *Soering* (n 10) para 86.

51 *Ahani v Canada*, UN doc CCPR/C/80/D/1051/2002 (15 June 2004) para 10.6.

52 Greenman (n 22) 272; den Heijer (n 38) 290; Khan (n 36) 234.

53 Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights' (Council of Europe 2007) 11.

54 Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of *Refoulement* under Article 3 ECHR Reassessed' (2009) 22 Leiden Journal of International Law 583, 602, 606.

55 *Paul and Audrey Edwards v United Kingdom* (2002) 35 EHRR 19.

56 ibid para 55.

57 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1.

58 ibid paras 218–23. See also *Florea c Roumanie* (2010) ECHR 37186/03, para 61 (positive obligation to prevent risk to a prisoner's health by not making him share his cell with smokers); *Keenan v United Kingdom* (2001) 33 EHRR 913, paras 89–90, 100 (positive obligation to prevent risk of suicide by refraining from applying the punishment of segregation to a particular prisoner).

had breached its positive obligations both by encouraging the creation of paramilitary groups and by later failing to restrain their violence.[59] One of the measures required of Colombia in those cases was hence to refrain from promoting paramilitary armed groups. Judge Sergio García Ramirez explained this rationale in another case by stating that conformity with positive obligations implies the adoption 'of all the measures necessary to protect such right *and avoid putting it at risk*'.[60] *Non-refoulement* is inserted within this logic, as the State is required to prevent a risk of harm by refraining from acting in a certain way.

Other objections to the classification of *non-refoulement* as a positive obligation concern the contentions that positive duties admit a balancing of interests so as not to impose disproportionate burdens on States[61] and operate on a sliding scale, where States' obligations are stricter the greater the risk.[62] Conversely, *non-refoulement* is an absolute obligation that applies in an all-or-nothing fashion. Both objections can be overcome by a more contextualized analysis of the situations in which *non-refoulement* is engaged.

First, the understanding that positive obligations should not impose disproportionate burdens on States relates to the practical impossibility of requiring States to prevent all risks of human rights violations, and not simply to a balancing of State and individual interests.[63] No international human rights body has ever held, for instance, that a State did not have an obligation to prevent arbitrary deprivation of life because the individual in question was considered a threat to national security or due to a general allegation of lack of resources. Instead, decisions finding no violation of the duty to prevent have been based on the lack of foreseeability of the risk[64] and on the adoption of reasonable preventive measures, even though the risk ultimately materialized.[65]

These operational difficulties, inherent to the obligation to prevent, are taken into consideration in removal contexts. Although States are required to assess the risks an individual might face upon removal, *non-refoulement* does not demand absolute certainty as to the absence of risks. Nor does it require the conditions in the receiving country to fully comply with human rights standards; rather, as seen above, human rights bodies adopt thresholds of the severity of the potential harm ('irreparable harm' or 'flagrant breach') to ascertain whether a *non-refoulement* obligation arises. However, if a real risk of sufficiently severe harm is found, there are no operational difficulties that would render abstaining from removing impossible or impractical, even if it might be onerous or inconvenient.

Moreover, even if one submits that positive obligations should admit a balancing of interests, the circumstances needed to trigger a *non-refoulement* obligation seem to make it impossible, in practice, for the competing interests of the removing State to ever prevail. After all, following the rationale of human rights bodies, *non-refoulement* only applies when the potential harm is irreparable, similarly to the harm arising from the prohibition of ill-treatment, or when the content of the right is completely nullified. Economic or public security concerns could hardly justify submitting a person to such intense suffering.[66]

59 *Valle Jaramillo v Colombia*, Inter-American Court of Human Rights Series C No 192 (27 November 2008) para 76; *Pueblo Bello Massacre v Colombia*, Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 126; *19 Merchants v Colombia*, Inter-American Court of Human Rights Series C No 109 (5 July 2004) para 126.

60 *Anzualdo Castro v Peru*, Inter-American Court of Human Rights Series C No 202 (22 September 2009) Concurring Opinion of Judge García Ramírez, para 21 (emphasis added). See also Laurens Lavrysen, 'Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 7 Inter-American and European Human Rights Journal 94, 99.

61 Khan (n 36) 233.

62 Greenman (n 22) 280.

63 ibid 281–83.

64 *Ceesay v Austria* (2017) ECHR 72126/14, para 119; *Babayev v Azerbaijan* (2017) ECHR 30500/11, para 75.

65 *Watts v United Kingdom* (2010) 51 EHRR SE5, para 92; *Keenan* (n 58) paras 99–102.

66 In this sense, see the decision of *Minister of Justice of New Zealand and Attorney-General of New Zealand v Kyung Yup Kim* [2021] NZHC, SC 57/2019, para 281, holding that '[t]here can be no public interest in extradition to an unfair trial'.

As for the lack of a 'sliding scale', again, this can be explained by the factual scenario in which *non-refoulement* obligations arise. When a real risk has not been identified, or when the potential harm is not severe enough, no obligations arise; the individual may simply be removed. In turn, when a real risk of irreparable harm exists, the removing State's options are quite limited. The State may essentially either refrain from removing, relocate the individual to a safe third country, or seek assurances from the receiving country that the risk will not materialize. The latter two options are often unsatisfactory; the very legality of the safe third country notion is contested[67] and, even if this practice is deemed lawful, the third country must still admit the individual, so that relocation is not merely within the removing State's discretion. In turn, assurances from the receiving State may not be sufficient to reasonably prevent the risk of harm and are usually regarded with scepticism by human rights bodies.[68] Not removing is by far the safest – and often the only – option for complying with *non-refoulement*.

It is worth clarifying that classifying *non-refoulement* as a positive duty is not contrary to the argument that this principle stems from human rights treaties' object and purpose, as a way to render their provisions practical and effective.[69] Mere allusion to a treaty's object and purpose does not actually elucidate what kind of obligation, positive or negative, is at stake. Indeed, human rights bodies' main justifications to deduce positive obligations from their instruments have been based on the notion of effectiveness.[70]

Accordingly, the risk-based rationale under which *non-refoulement* is applied by human rights bodies sits within the framework of positive obligations to prevent harm to human rights. This classification explains how States can be held responsible for exposing an individual to a risk of harm, regardless of any material consequences, and why removing States are not required to have comprehensive knowledge of the human rights situation in receiving States before proceeding with the removal. This notion is further reinforced by these bodies' tendencies to admit an indeterminate material scope to the principle of *non-refoulement*, as positive obligations to prevent are inherent to all rights.[71]

3. DEDUCING *NON-REFOULEMENT* OBLIGATIONS FROM ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Having established that *non-refoulement* should be understood as a positive duty to prevent harm, it does not seem unreasonable to assume that this obligation can also arise in connection with ESC rights. The Committee on Economic, Social and Cultural Rights (CESCR) has often referenced States' positive obligations within the International Covenant on Economic, Social and Cultural Rights (ICESCR),[72] including obligations to prevent third parties from impairing the enjoyment of ESC rights.[73] Even if *non-refoulement* is understood as a negative duty, these kinds

67 Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration and Refugee Protection in the 21st Century: International Legal Aspects* (Martinus Nijhoff 2015) 665.

68 *Saadi v Italy* (2009) 49 EHRR 30, para 148; *Valetov v Kazakhstan*, UN doc CCPR/C/110/D/2104/2011 (17 March 2014) paras 14.5–14.7.

69 As held by the ECtHR in *Soering* (n 10) para 87.

70 *Marckx v Belgium* (1979) Series A No 31, para 31; *Velásquez Rodríguez* (n 47) paras 166–67; *Legal Resources Foundation v Zambia* (Communication No 211/98) [2001] ACHPR 31 (7 May 2001) para 62; *Portillo Cáceres* (n 46) para 7.8.

71 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (Communication No 155/96) [2001] ACHPR 35 (27 October 2001) para 44.

72 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

73 See, in particular, CESCR, 'General Comment No 19: The Right to Social Security (Art 9)', UN doc E/C.12/GC/19 (4 February 2008) para 45; CESCR, 'General Comment No 15: The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights', UN doc E/C.12/2002/11 (20 January 2003) paras 20, 23. Even though the CESCR has usually referred to private parties when describing the obligation to protect, this has been done in exemplificatory rather than exclusionary terms as the potential of the ICESCR to protect in removal cases has never been raised by either the CESCR or States parties.

of obligations are also present in ESC rights,[74] and, given the principle's broad material scope, deducing it from ESC rights could be envisaged. The question then becomes whether breaches of ESC rights can give rise to a level of harm sufficiently severe to trigger a *non-refoulement* obligation and whether the particular characteristics of ESC rights would render them incompatible with *non-refoulement*.

3.1 The severity of breaches of ESC rights

As seen above, two main standards have been advanced to determine whether the risk of harm to a right other than the prohibition of ill-treatment gives rise to *non-refoulement* obligations: the 'irreparable harm' standard, by four United Nations (UN) treaty-monitoring bodies, and the 'flagrant breach' standard, by the ECtHR. Nevertheless, much is still unclear about what these standards mean in practice. The ECtHR has described a flagrant breach as voiding the essence of a right[75] and provided concrete examples of these situations regarding the rights to liberty and security[76] and to fair trial,[77] but has not developed comprehensive guidelines for identifying a flagrant breach. The standard of irreparable harm is even more elusive, as the UN committees have never clarified its content.

Based on a purely textual analysis, it seems that denying the very core of a right through a flagrant breach will result in irreparable harm in most, if not all, situations. The contrary, however, is not clear; one may envisage irreparable harm in situations that do not necessarily amount to the complete denial of a right. Say, for instance, that a child is sent by a State to live with another family, for arbitrary reasons, and is only allowed to have contact with their parents once a week. One could argue that the right to family life is not flagrantly violated, as the child still meets their parents periodically, but that this situation brings irreversible prejudice to the development of this family life. Still, the lack of practice by human rights bodies in differentiating between the two standards makes this exercise highly speculative and contributes to confusion for States.[78]

Despite this scenario, human rights bodies generally seem to accept that harm to ESC rights may lead to a *non-refoulement* obligation, at least when this harm amounts to inhuman and degrading treatment. This has been recognized in cases where removal would expose the individuals to risks of not receiving adequate medical treatment for a pre-existing illness, leading to severe deterioration of their health and life expectancy,[79] or to grave material destitution, including lack of access to proper food, shelter, sanitation, and medical care.[80] In the first group of cases, the ECtHR and the IACommHR have framed *non-refoulement* as triggered only exceptionally in cases evincing a high degree of personal suffering.[81] In the second group, the

74 CESCR, 'General Comment No 12: The Right to Adequate Food (Art 11)', UN doc E/C.12/1999/5 (12 May 1999) para 15; CESCR, 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, Para 1(a) of the International Covenant on Economic, Social and Cultural Rights', UN doc E/C.12/GC/21 (21 December 2009) para 48.

75 *Husayn (Abu Zubaydah)* (n 18) para 553.

76 *Al Nashiri v Romania* (n 17) para 596.

77 *Othman* (n 18) para 259.

78 In a case involving a *non-refoulement* claim based on art 14 of the International Covenant on Civil and Political Rights, the New Zealand High Court applied the ECtHR's flagrant breach standard without even mentioning the notion of irreparable harm. *Kyung Yup Kim* (n 66) paras 277–78. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

79 See, in particular, *Paposhvili* (n 37) paras 181–83; *Mortlock* (n 4) para 89; *KS and MS v Denmark*, UN doc CCPR/C/121/D/2594/2015 (7 November 2017) paras 7.5–7.7; *ZH v Sweden* (n 4) paras 10.4–10.11. For a deeper analysis and comparison of how health cases were dealt with by the ECtHR, the IACommHR, and the HRC, see Ferolla Vallandro do Valle (n 9) 56–62, 66–69.

80 *MSS v Belgium and Greece* (n 4) paras 249–64, 366–68; *Osman Jasin v Denmark*, UN doc CCPR/C/114/D/2360/2014 (22 July 2015) paras 8.4, 8.9–8.10.

81 *Savran v Denmark* (2019) ECHR 651, para 65; *Mortlock* (n 4) para 89. On the other hand, the HRC referred to the exceptionality standard in *Fan Biao Lin v Australia*, UN doc CCPR/C/107/D/1957/2010 (21 March 2013) para 9.4 and *Z v Australia*, UN doc CCPR/C/111/D/2049/2011 (18 July 2014) para 9.5, but not in *C v Australia*, UN doc CCPR/C/76/D/900/1999 (28 October 2002); *SYL v Australia*, UN doc CCPR/C/108/D/1897/2009 (24 July 2013); *AHG v Canada*, UN doc CCPR/C/113/D/2091/2011 (25 March 2015); *KS and MS* (n 79). The CRPD Committee has not referred to this standard in similar cases either.

ECtHR and the HRC have justified successful *non-refoulement* claims by referring to the highly vulnerable situations in which the concerned individuals – mostly asylum seekers – found themselves.[82] Conversely, rejected claims have been grounded on the contention that the applicants had not proven themselves to be particularly vulnerable, especially in comparison to other refugees and asylum seekers.[83] Accordingly, these bodies have required a considerably high level of severity for socio-economic harm to give rise to ill-treatment and, consequently, to *non-refoulement* obligations.

The bodies most often seized with claims of *non-refoulement* based on socio-economic grounds, the ECtHR and the HRC, take this restrictive approach because they may only decide such claims by transposing the allegations of harm into CP rights. Despite the interdependence between different human rights, the prohibition of ill-treatment was not conceived as an umbrella provision covering all kinds of serious harm to human rights. Not all grave violations of ESC rights necessarily give rise to ill-treatment or a breach of other CP rights. Whereas human rights bodies may be hesitant to read the prohibition of ill-treatment as implying a right to minimum standards of living,[84] ESC rights were conceived precisely to establish such standards. Instances of serious violations of ESC rights could thus give rise to harm that, even if not characterized as ill-treatment, may be deemed irreparable and could, in principle, trigger a *non-refoulement* obligation on its own.

The CRC Committee generally acknowledged this possibility in the aforementioned *AM v Switzerland* communication. The case concerned the removal of an asylum-seeking boy and his mother to Bulgaria, where they had previously been accommodated in a camp with restricted access to quality food, shelter, medical care, and employment for the mother, as well as no opportunities for the child's education and social integration.[85] The CRC Committee found that the reception conditions in Bulgaria would expose the child to a risk not only of inhuman and degrading treatment, but also to a potential violation of his rights to an adequate standard of living, education, and to physical and psychological recovery and social integration.[86] Nevertheless, the CRC Committee analysed these provisions in a cluster and did not clarify how the potential violations ensuing from the ESC rights at stake amounted to irreparable harm.

One could argue that the CRC Committee's omission reinforces the traditional position of admitting *non-refoulement* based on socio-economic grounds only when the potential harm amounts to inhuman and degrading treatment and when highly vulnerable groups, such as children and asylum seekers, are involved, thereby limiting the reach of the committee's conclusions. However, the CRC Committee still referred to the standard of irreparable harm in its decision[87] and held the potential violations of ESC rights as autonomous from the potential ill-treatment.[88] Regarding specifically the right to education, it is difficult to argue that a violation of this right alone could also constitute inhuman and degrading treatment; while education is highly important for the full exercise of other rights,[89] its denial does not entail such immediate acute

82 *Tarakhel v Switzerland* (2015) 60 EHRR 28, paras 120–22; *RAA and ZM v Denmark*, UN doc CCPR/C/118/D/2608/2015 (28 October 2016) paras 7.7–7.9.

83 *AME v Netherlands* (2015) ECHR 51428/10, paras 34–36; *Mohammed Hussein v Netherlands and Italy* (2013) ECHR 27725/10, para 71; *MAS and LBH v Denmark*, UN doc CCPR/C/121/D/2585/2015 (8 November 2017) para 8.12; *Fahmo Mohamud Hussein v Denmark*, UN doc CCPR/C/124/D/2734/2016 (18 October 2018) para 9.9. It is worth noting, however, that the HRC did not refer to exceptional circumstances or vulnerability in *Teitiota v New Zealand*, UN doc CCPR/C/127/D/2728/2016 (24 October 2019).

84 *MSS v Belgium and Greece* (n 4) para 249; *RAA and ZM* (n 82) Joint opinion of Committee members Yuval Shany, Yuji Iwasawa, Photini Pazartzis, Anja Seibert-Fohr, and Konstantin Vardzelashvili (dissenting) paras 2–3.

85 *AM v Switzerland* (n 1) paras 2.7, 10.6–10.8.

86 ibid paras 10.9, 11.

87 ibid para 10.4.

88 ibid para 10.9.

89 CESCR, 'General Comment No 13 (Twenty-First Session, 1999): The Right to Education (Article 13 of the Covenant', UN doc E/C.12/1999/10 (8 December 1999) para 4; CRC Committee, 'General Comment No 1 (2001) Article 29 (1): The Aims of Education', UN doc CRC/GC/2001/1 (17 April 2001) para 2.

humiliation or suffering that is usually associated with ill-treatment.[90] Accordingly, the CRC Committee's decision seems to open the way, albeit shyly, for risks of breaches of ESC rights amounting to irreparable harm to be used directly as bases for *non-refoulement* regardless of whether the prohibition of ill-treatment is also engaged.

3.2 The compatibility of ESC rights with the principle of *non-refoulement*

Although it is generally admitted that violations of ESC rights may give rise to irreparable harm, one might inquire whether these rights are truly compatible with the rationale of the principle of *non-refoulement*. Indeed, to date, no human rights bodies other than the CRC Committee have alluded to this possibility. Furthermore, the CESCR has carefully avoided the implication that an obligation of *non-refoulement* might be found in the ICESCR: in its 2017 statement regarding States' duties towards refugees and migrants,[91] the CESCR did not include any reference to *non-refoulement* or to the possibility that persons removed to another country may be at risk of ICESCR violations. While this omission, of itself, does not mean that the CESCR rejects the existence of such an obligation, it does reinforce the impression that *non-refoulement* claims cannot be assessed under the ESC rights framework.

A few domestic jurisdictions have taken this latter position in rather strict terms. In *Rahman v Minister of Immigration*, when confronted with a *non-refoulement* claim made under article 4 of the ICESCR (right to an adequate standard of living), the New Zealand High Court held that New Zealand had not undertaken an obligation 'to allow the rest of the world to be safer or more comfortable'.[92] The court further asserted that rights under the ICESCR are subject to progressive realization and may be restricted on behalf of the general well-being, especially in what concerns the New Zealand society.[93] Hence, they could not be the basis of a *non-refoulement* duty. The Administrative Appeals Tribunal of Australia also opposed such a possibility by stating that the right to health under the ICESCR 'is not considered to be a basis for non-refoulement obligation in its own right'.[94] However, the Australian tribunal offered no further explanation for this conclusion.

These decisions seem to reflect the decades-old discourse that ESC rights obligations have little or no meaningful legal content, unlike CP rights, which are 'true legal rights'. Instances of socio-economic deprivation are thus seen as an unfortunate lack of resources rather than as human rights violations. However, deeper scrutiny shows that distinctions between CP and ESC rights are not so watertight, especially given States' and human rights bodies' subsequent practice in implementing such rights.

When deciding to adopt two separate human rights covenants – the ICESCR and the International Covenant on Civil and Political Rights – States defended this course of action by advancing the view that ESC rights: (1) imply positive action, whereas CP rights generate negative obligations; (2) might not be justiciable; and (3) should be progressively implemented.[95]

90 Notably, the ECtHR understands treatment to be inhuman when it is premeditated, prolongated, and causes actual bodily injury or intense physical or mental suffering, whereas degrading treatment humiliates or debases an individual or arouses feelings of fear, anguish, or inferiority capable of breaking the person's moral and physical resistance. *MSS v Belgium and Greece* (n 4) para 220. In analysing a claim to the effect that the mismanagement of public resources that should have been used to fund educational services to detainees constituted degrading treatment, the ACHPR held that this set of facts disclosed a violation only of the right to education. *Free Legal Assistance Group v Zaire* (Communication Nos 25/89, 47/90, 56/91, 100/93) [1995] ACHPR 13 (11 October 1995) paras 4, 48.

91 CESCR, 'Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights', UN doc E/C.12/2017/1 (13 March 2017).

92 *Rahman* (n 6) para 44.

93 ibid paras 59–62.

94 1510755 (Refugee) (n 6) para 18, Annexure C.

95 UN General Assembly (UNGA), 'Draft International Covenants on Human Rights: Annotation Prepared by the Secretary-General', UN doc A/2929 (1 July 1955) 23, para 9.

The first distinction is hardly acceptable today, given the widespread recognition that CP and ESC rights both entail positive and negative obligations, as previously discussed. A variation of this attempted distinction is that ESC rights demand a higher cost of implementation than CP rights, a view that is also debatable.[96] The realization of CP rights often requires the provision of training for State officials, establishing monitoring mechanisms, and providing certain equipment or infrastructure, such as the distribution of polling places for the effective realization of the right to vote, or the implementation of accessible public transportation to ensure freedom of movement without discrimination.[97] On the other hand, not all measures adopted towards the implementation of ESC rights place a significant strain on the public budget, as States may choose to pursue a regulatory framework that allows private parties to move in the direction of certain rights, such as housing.[98]

The idea that ESC rights are not justiciable has also been increasingly contested. Although some States have expressed concerns that the justiciability of ESC rights would open the door for domestic courts to interfere in budgetary and policy decisions that are commonly attributed to other branches of government,[99] the same concern can be advanced regarding any human right requiring positive measures for its implementation.[100] Central to this discussion is the question of judicial restraint and propriety in determining applicable remedies in each case rather than the possibility of a judicial body ascertaining a breach of ESC rights. Several methodologies have been advanced in different domestic jurisdictions to deal with this issue, allowing for the adjudication of ESC rights to various extents.[101] Additionally, over past decades, the number of international human rights bodies capable of deciding on claims of ESC rights violations has grown.[102] Amidst these developments, the blanket assertion that ESC rights are not justiciable no longer, if it ever did, rings true.

What persists as a difference between these sets of rights is the notion that ESC rights are subject to progressive realization, whereas CP rights are not. Indeed, the precise content of many ESC rights obligations depends on States' available resources, while the standards for compliance with CP rights are meant to be the same across all States, regardless of their resources.[103] The logic of progressive realization may render the operation of *non-refoulement* difficult in some

96 Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 172; Ida Elisabeth Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 17–18.

97 See, in particular, *Sentencia T-595/02* [2002] Corte Constitucional de Colombia.

98 Rory O'Connell and others, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014) 67.

99 UN Commission on Human Rights, *Report of the Open-Ended Working Group to Consider Options regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, UN doc E/CN.4/2004/44 (15 March 2004) para 61.

100 As noted in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] SA 744 (CC) para 78. See also CESCR, 'General Comment No 9: 'The Domestic Application of the Covenant', UN doc E/C.12/1998/24 (3 December 1998) para 10.

101 To mention a few examples, courts in South Africa and Peru have referred to a standard of reasonableness (*Government of the Republic of South Africa v Grootboom* [2000] CCT11/00 ZACC 19, paras 65–69; *EXP N° 2016–2004–AA/TC* [2004] Tribunal Constitucional de Perú, paras 34–36), whereas Brazilian and Colombian courts have assessed whether the State had ensured a minimum level of ESC rights, regardless of alleged resource constraints (*ARE 745745 AgR/MG* [2014] Supremo Tribunal Federal do Brasil; *Sentencia T–833/10* [2010] expediente T–2709592, Corte Constitucional de Colombia).

102 The ACHPR, since the African Charter's entry into force in 1986 (n 5); the African Court on Human and Peoples' Rights, since the entry into force in 2004 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU doc OAU/LEG/EXP/AFCHPR/PROT; and the CEDAW, CRPD, CESCR, and CRC committees, whose individual complaints procedures were implemented in 2000, 2008, 2013, and 2014 respectively. Starting in 2017, the IACtHR also began asserting its jurisdiction over ESC rights through a broad interpretation of art 26 of the ACHR (n 5) (*Lagos del Campo v Peru*, Inter-American Court of Human Rights Series C No 340 (31 August 2017) paras 141–53).

103 *Giri v Nepal*, UN doc CCPR/C/101/D/1761/2008 (24 March 2011) para 7.9; *Vélez Loor v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010) para 198.

cases. If the removing State does not have detailed information about what resources are available in the receiving State, the former might hardly be able to verify whether there is a risk of violation of progressive ESC rights duties, compromising the requirement of foreseeability associated with *non-refoulement*. This difficulty is aggravated as the receiving State is not usually party to the removal proceedings and will not be called upon to clarify the circumstances awaiting the individual post-removal. Furthermore, if a State fails to comply only with obligations of progressive realization but guarantees a certain level of ESC rights to people under its jurisdiction, there is a chance that this harm will not rise to the level of severity required to trigger *non-refoulement*.

Two caveats are in order, however. First, even the invariability of the content of CP rights has been questioned, as the ECtHR has recognized that different standards for compliance with the prohibition of ill-treatment apply when the State is faced with an exceptional situation that creates objective difficulties of an organizational, logistical, and structural character.[104] That is, the ECtHR has admitted some degree of consideration for States' available resources when assessing the breach of a non-derogable CP right. Secondly, and more importantly, ESC rights contain obligations that States must observe immediately, regardless of their available resources.[105] The existence of a risk of irreparable harm upon removal can be ascertained more easily in relation to two of these obligations: non-discrimination and the guarantee of minimum levels of satisfaction of ESC rights.

3.2.1 Non-discrimination

The obligation of non-discrimination is common to all human rights treaties dealing with ESC rights. With the exception of those treaties created specifically to combat discrimination against certain groups, human rights conventions provide a non-exhaustive list of grounds upon which discrimination cannot be founded, such as race and social origin.[106] Human rights bodies tend to use the same standards for assessing whether differential treatment regarding the enjoyment of certain rights is lawful – albeit with slight variations in terminology – namely whether this distinction pursues a legitimate goal and is necessary and proportionate in relation to the said goal.[107]

State representatives at the time of the ICESCR's drafting,[108] and later the CESCR[109] and the IACtHR,[110] all considered that States' obligation of non-discrimination concerning ESC rights was one of immediate effect. Accordingly, States cannot justify discrimination solely by claiming that their resources were only enough to guarantee the right to a given section of the population.[111] Any resources directed at furthering the realization of ESC rights should be applied in a way that benefits individuals as uniformly as possible, seeking to eliminate discrimination as a matter of priority.[112] Since the question of available resources is not at stake, removing States

104 *Khlaifia c Italie* (2016) ECHR 16483/12, paras 180–85; *NH c France* (2020) ECHR 28820/13, 75547/13, 13114/15, para 182.

105 CESCR, 'General Comment No 3: The Nature of States Parties' Obligations (Art 2, Par 1)', UN doc HRI/GEN/1/Rev6 (14 December 1990) paras 1–2, 10.

106 ICESCR (n 72) art 2(2); ACHR (n 5) art 1(1); African Charter (n 5) art 2; CRC (n 2) art 2(1).

107 CESCR, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights', UN doc E/C.12/GC/20 (2 July 2009) para 13; *IV v Bolivia*, Inter-American Court of Human Rights Series C No 329 (30 November 2016) paras 240–41; *Good v Republic of Botswana* (Communication No 313/2005) ACHPR 106 (26 May 2010) para 219; CRC Committee, 'General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence', UN doc CRC/C/GC/20 (6 December 2016) para 21.

108 UNGA, *Draft International Covenants on Human Rights*, UN doc A/C.3/SR.1206 (10 December 1962) paras 10–11, 17; UNGA, *Draft International Covenants on Human Rights: Report of the Third Committee*, UN doc A/5365 (16 December 1962) para 64.

109 CESCR General Comment No 20 (n 107) para 7.

110 *Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, Inter-American Court of Human Rights Series C No 407 (15 July 2020) para 172.

111 CESCR General Comment No 20 (n 107) para 13.

112 ibid.

can, in principle, ascertain the existence of unlawful discrimination and assess the severity of the ensuing harm in the same way as happens with CP rights in removal contexts.[113]

One could nevertheless argue that the way States prioritize their resources to eliminate discrimination in the enjoyment of ESC rights is largely subject to their discretion[114] and thus that removing States would not have the necessary information to scrutinize the matter. Two observations are merited. First, States' discretion regarding how to employ their resources is not boundless; ESC rights provisions establish important limitations to that discretion that must be taken into consideration, such as the guarantee of minimum levels of socio-economic rights in all scenarios[115] and ensuring that any differential treatment has a legitimate aim, is necessary, and is proportionate.[116] Secondly, reference to States' discretion impacts considerations on the *standard of evidence* necessary to prove that a State risks breaching its non-discrimination obligations, not on the *content* of the right. There is no need for such a detailed analysis of receiving States' budgets to decide whether the obligation of non-discrimination is breached. If the removing State deems that sufficient evidence has been produced showing that the differential treatment does not meet the criteria for being lawful under human rights law,[117] all that is left to do is to assess whether the ensuing level of harm is sufficient to trigger *non-refoulement* obligations.

Moreover, non-discrimination gives rise to immediate obligations not only to provide certain socio-economic conditions but to avoid retrogressions as well. Even if States are faced with resource constraints, as in the case of an economic crisis,[118] this withdrawal may be seen as discriminatory if it disproportionately affects specific individuals or groups. In these cases, where the discussion revolves around the negative obligation not to interfere with the enjoyment of human rights, it may be easier to identify a risk to ESC rights and not to attribute the situation to lack of resources.

This kind of assessment is not novel to States. In refugee status determination proceedings dealing with claims of socio-economic persecution, these claims are often examined by reference to whether the feared treatment reaches a level of discrimination that is severe enough to constitute persecution.[119] The same rationale can be applied to the context of *non-refoulement* under ESC rights provisions in human rights treaties generally, requiring only adaptation of the standards applicable to the removal – focusing on irreparable harm rather than persecution. If this risk of irreparable harm is found by reference to a risk of prohibited discrimination, applying *non-refoulement* from ESC rights should be as straightforward as it is from CP rights.

3.2.2 Minimum core obligations

The obligation to guarantee minimum levels of enjoyment of ESC rights is not explicit in treaties. Instead, it has been put forward by the CESCR under the argument that, if States did not have such an obligation, the ICESCR 'would be largely deprived of its raison d'être'.[120]

113 *C v Australia* (n 81) para 8.5; *Ergashev v Russia* (2012) ECHR 49747/11, para 72.
114 This idea has been endorsed, notably in *Ponomaryovi v Bulgaria* (2014) 59 EHRR 20, para 52.
115 CESCR General Comment No 3 (n 105) para 10.
116 CESCR General Comment No 20 (n 107) para 13.
117 For instance, as examined by the HRC in cases concerning discrimination in access to unemployment benefits: *Zwaan-de Vries v Netherlands*, UN doc CCPR/C/29/D/182/1984 (9 April 1987) paras 12.1–15.
118 Even in these cases, the CESCR considers that any deliberately retrogressive measures must be thoroughly justified under the full use of the maximum available resources. CESCR General Comment No 3 (n 105) para 9.
119 This was observed in a study analysing the judicial interpretation of the refugee definition in 15 States across Europe and North America, as seen in Dirk Vanheule, 'A Comparison of the Judicial Interpretations of the Notion of Refugee' in Jean-Yves Carlier and Dirk Vanheule (eds), *Europe and Refugees: A Challenge?* (Kluwer Law International 1997). See also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.4 (1979, reissued 2019) 54–55, and the examples in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) 93–110.
120 CESCR General Comment No 3 (n 105) para 10.

Furthermore, the notion of a minimum core can be derived from the obligation to take steps to progressively realize ESC rights. Since the taking of such steps must be immediate, as it is excluded from the caveat of progressive realization that appears later in the sentence of article 2(1) of the ICESCR,[121] then there is at least some level of rights that must be guaranteed by States from the beginning. This latter reasoning seems to be the most legally sound, finding purchase in treaty interpretation and effectively excluding the minimum core from the scope of obligations to which the standard of progressive realization applies.[122]

Despite this initial logic, the CESCR's practice in delineating the specific obligations that compose the minimum core has been confused at best.[123] Instead of pinpointing these obligations by reference to whether they can be realized immediately in practice, independently from the level of resources available to any State, the CESCR seems rather to have selected these obligations on the basis of their perceived importance to the realization of the right as a whole. For instance, regarding the right to health, the CESCR listed as core obligations those relating to access to certain goods and services and equitable distribution of these goods and services, but also to the adoption and implementation of a national public health strategy and plan of action.[124] The CESCR did not explain, however, how developing national health strategies and plans could be subject to the same immediacy as the provision of basic health care. The development of such policies, if this is to be done seriously and effectively, requires time and research and may need a higher level of organizational resources than the provision of basic goods and services. Even if one puts forward the – debatable – argument in the sense that such a plan could be developed with relatively few resources, some progressive element remains given the complexity of the task. One could thus reasonably question whether this obligation is truly part of the minimum core of the right to health.

Another point of confusion in the CESCR's formulation of the minimum core concerns the extent to which these obligations are independent from the available resources and thus the same across all States. In its General Comment No 3,[125] the CESCR affirmed that each State has the obligation 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the [ICESCR] rights', but later conceded that, if a State has made every effort and used all resources to comply with this obligation as a matter of priority, this duty is met, even if these minimum levels were not reached. Nevertheless, when detailing the core content of the rights to health[126] and water,[127] the CESCR took the view that States could not justify non-compliance with minimum obligations under any circumstances. Subsequently, in General Comment No 19[128] and in its decision in *Trujillo Calero v Ecuador*,[129] both concerning the right to social security, the CESCR reverted to its previous formulation, indicating that a State could be excused from failure to satisfy the minimum essential levels of this right by demonstrating that, despite all its efforts, it lacked the resources to do so. Conversely, the IACommHR[130] and the ACHPR[131]

121 ibid para 2.
122 For an analysis of the bases put forward to justify the minimum core concept, corroborating the one that links the minimum core to the immediacy of obligations, see John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now', Research Paper (Nordic Trust Fund, October 2017) 12–18.
123 See, in particular, the discussion in Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 155–56.
124 CESCR, 'General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (article 12 of the International Convention on Economic, Social and Cultural Rights', UN doc E/C.12/2000/4 (11 August 2000) para 43.
125 CESCR General Comment No 3 (n 105) para 10.
126 CESCR General Comment No 14 (n 124) para 47.
127 CESCR General Comment No 15 (n 73) para 40.
128 CESCR General Comment No 19 (n 73) para 60.
129 *Trujillo Calero v Ecuador*, UN doc E/C.12/63/D/10/2015 (26 March 2018) paras 14.2–14.3.
130 IACommHR, *Annual Report of the Inter-American Commission on Human Rights* (1993).
131 *SERAC and CESR* (n 71) paras 65–66.

seem to support an absolutist position regarding core obligations, at least in relation to their respective human rights mechanisms.

The lack of clarity in the CESCR's reasoning has led to various criticisms of the concept of a minimum core of ESC rights. Some scholars have questioned the usefulness of the concept to advance the realization of ESC rights,[132] as it would seem to create artificial hierarchies between human rights obligations or disregard the realities of States' resources when implementing the ICESCR. These concerns have been addressed in more depth by other scholars,[133] but, essentially, they can be resolved by better comprehending the nature of the minimum core, namely that this core denotes only obligations that can, from a practical standpoint, be fully accomplished immediately. This does not mean that other obligations arising from the right are less important or are not true legal obligations, but rather that specification of their content requires a deeper analysis in light of States' resources. Core obligations, in fact, set out a base standard for all States that is still subject to the general rules of international law concerning preclusion of wrongfulness of a State act,[134] where applicable, and keep the flexibility of progressive realization for the majority of duties arising from an ESC right.

The most pressing point of criticism concerning the minimum core seems rather to be the difficulty in pinpointing the content of core obligations or disagreement with the CESCR's pronouncements on the matter. This is indeed a challenge that should be acknowledged. While addressing it in depth is outside the scope of this article, clearer definition of the minimum core is something that can be solved through further and more consistent practice not only from the CESCR but also from other competent international human rights bodies and domestic jurisdictions. In fact, different domestic courts around the world apply the idea of the minimum core in their practice, albeit often under a different terminology.[135] Hence, this criticism does not seem to compel a rejection of minimum core obligations but rather the active development of this concept as judicial practice deepens its engagement with ESC rights.

In this context, another relevant point of debate concerns whether minimum core obligations are absolute[136] – that is, hold all States against the same standard regardless of available resources – or relative.[137] Given the CESCR's inconclusive position, some commentators have nevertheless suggested that minimum obligations actually refer to two sets of duties: an invariable core and variable minimum thresholds.[138] Indeed, the logic behind the minimum core requires this

132 Brigit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, Kluwer Law International 2001) 176; Max Harris, 'Downsizing Rights: Why the "Minimum Core" Concept in International Human Rights Law Should Be Abandoned' (2014) 1 Public Interest Law Journal of New Zealand 32; Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Economic and Social Rights and the Myth of the Minimum Core' (2006) 22 American University International Law Review 163; Young (n 123).

133 Tasioulas (n 122) 27–29.

134 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' [2001] II(2) Yearbook of the International Law Commission.

135 In particular, see George Jotham Kondowe, 'Implementing Economic and Social Rights in "Domestic" Jurisdictions: Understanding the Minimum Core Obligations Approach' (2020) 46 Commonwealth Law Bulletin 1, 7–8. Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 24; S Muralidhar, 'India' in Langford (ed) 116–18.

136 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1986) 37 ICJ Review 43 para 25; 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Human Rights Quarterly 691, 695.

137 David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 South African Journal on Human Rights 1, 17; Sandra Liebenberg, 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 Human Rights Quarterly 48, 82.

138 Gregor T Chatton, 'Vers la pleine reconnaissance des droits économiques, sociaux et culturels' (PhD thesis, University of Geneva 2013) 242–44; Audrey R Chapman, 'The Status of Efforts to Monitor Economic, Social and Cultural Rights' in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press 2007) 143, 154; Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 South African Journal on Human Rights 206, 250.

core to be absolute, as seen above.[139] The CESCR's own test for discharging States from their minimum core obligations – proving that they have exhausted all their resources,[140] including those available through international cooperation and assistance[141] – is so stringent that it creates an almost irrefutable presumption of a violation if a State fails to ensure the minimum core. Even so, minimum thresholds could still be a useful concept if thought of as a first step in progressive realization. In other words, the minimum threshold corresponds to the basic level of enjoyment of ESC rights that a given State must guarantee to individuals under its jurisdiction according to its available resources.[142] If the State has more resources at its disposal, the minimum threshold will be higher; if the State has fewer resources, the minimum threshold will be lower and may even be the same as the core. The logic here is that, when a State has obtained a certain level of resources and is progressively promoting ESC rights, even if certain retrogressive measures may be called for to address eventual resource constraints,[143] there is a line below which it is not reasonable for that State to fall.

Accordingly, both the minimum core and the minimum threshold are useful references for applying *non-refoulement* duties deduced from ESC rights, as they require no (in the case of the minimum core) or little (in the case of the minimum threshold) assessment of a third State's available resources. Regarding the minimum core, when confronted with proof that there is a real risk that this core will be harmed in the receiving State, the removing State cannot attribute this harm to unavailability of resources. The removing State need only identify the core obligations arising from the ESC right at stake, which, as mentioned, can draw from the CESCR's General Comments and emerging case law, decisions of other international human rights bodies, the domestic practice of other States, and its own interpretation of applicable obligations. The task will require some effort, certainly, but it should not be deemed very different from determining what constitutes 'inhuman and degrading treatment' or even 'irreparable harm' to CP rights.

As for minimum threshold obligations, the variability of their content may render the application of *non-refoulement* difficult, depending on the information available to the removing State regarding the receiving State's available resources. Even if it is possible to have a general idea of another State's financial resources by looking, for instance, at its gross domestic product,[144] there is no consensus regarding the appropriate methodology for measuring what degree of realization of ESC rights should be achieved for each level of resources.[145] The CESCR itself has provided little guidance on the matter. In this context, requiring a State to determine the content of another State's minimum threshold obligations, and whether these obligations are being observed, could result in decisions based on prejudices and misconceptions, establishing a threshold too low for some States and too high for others.

139 However, as noted by Sandra Liebenberg, 'Reasonableness Review' in Malcolm Langford and Katharine G Young (eds), *The Oxford Handbook of Economic and Social Rights* (Oxford University Press 2023) <https://doi.org/10.1093/oxfordhb/9780197550021.013.48>, CESCR practice suggests that, instead of seeing minimum core obligations as absolute, the CESCR applies a heightened standard of review to claims of violations of these obligations.

140 CESCR General Comment No 3 (n 105) para 10.

141 ibid para 13.

142 Chatton (n 138) 243–44.

143 Even then, retrogressive measures must conform to human rights standards, notably the requirements of temporariness, necessity, reasonability, proportionality, and non-discrimination. See further in OHCHR, 'How to Make Economic Reforms Consistent with Human Rights Obligations: Guiding Principles on Human Rights Impact Assessment of Economic Reforms' (2020) Principle 10. See also *Ben Djazzia and Bellili v Spain*, UN doc E/C.12/61/D/5/2015 (20 June 2017) para 17.6.

144 O'Connell and others (n 98) 58, have suggested that comparing the GDP percentage dedicated to ESC rights among countries with a similar level of development or to the percentage of investment recommended by international organizations may be useful in assessing compliance with ICESCR obligations of progressive realization. Still, GDP analyses should be treated with caution, as financial investments do not necessarily translate into greater enjoyment of rights.

145 As discussed by Roberto Cuéllar, 'Actividades sobre Indicadores de Derechos Económicos, Sociales y Culturales (DESC)' (2011) 21 Vox Juris 111, 112; Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights' (2009) 1 Journal of Human Rights Practice 402, 407–08; Chapman (n 138).

These difficulties can be overcome, however. Since these obligations represent the essential minimum a State with a certain level of resources should guarantee, there is no need for removing States to carry out a comprehensive analysis of the receiving State's resources. Having a broader picture of what these resources are may suffice to ascertain what kind of situation falls well below them. In doing so, removing States may take into consideration different tools, including official documents of the receiving State, reports by international and civil society organizations, Concluding Observations of UN committees, and academic and media publications, among others. Again, it is for the authorities of the removing State to determine what they consider as reliable and sufficient evidence.

As for the standards for assessing whether minimum threshold obligations are at risk of violation, one might refer to the 'reasonableness' test.[146] This test was included in the Optional Protocol to the ICESCR[147] as a method for assessing compliance, in the CESCR's individual communications mechanism, with obligations of progressive realization – which, as established, the minimum threshold is part of, representing the first steps of a State, in light of its available resources, towards the full realization of ESC rights. This method could thus be used for the individual assessment of cases of *non-refoulement* based on socio-economic grounds. In evaluating the reasonableness of a State's measure that affects ESC rights, the CESCR has deemed it relevant to consider: whether the measure was deliberate, concrete, and targeted towards the fulfilment of ESC rights; whether it represented the option that least restricted ESC rights; and the time frame in which the measure was taken.[148] Even though the necessary information for the removing State to make a full assessment of reasonableness may not be available, recourse to this test allows States to find potential risks to ESC rights in situations in which the unreasonableness is more manifest. For instance, if it is proven that a receiving State's public health services are in pitiful condition while that State has been allocating an expressive amount of its financial and technological resources to the army, without being implicated in an ongoing armed conflict, it is difficult to justify the use of these resources as reasonable.[149] Ultimately, this conclusion will depend on what the removing State's authorities consider sufficient evidence to establish a potential breach of ESC rights.

In sum, despite the potential difficulties in assessing risks of violation of minimum threshold obligations in receiving States, there are some situations in which this can be achieved. This exercise will depend on the evidence presented and the information available to the removing State, but not on a purportedly inherent limitation to the principle of *non-refoulement* regarding ESC rights.

It is important to stress that, even if minimum core or minimum threshold obligations are found to be at risk of violation in the receiving State, *non-refoulement* will not be triggered unless this situation amounts to irreparable harm. Not all ESC rights will necessarily give rise to such a level of harm on their own, even if completely denied, such as the right to form trade unions. This scenario is no different from what happens to some CP rights, such as freedom of conscience and religion. As noted by the ECtHR, although a risk of flagrant violation of this right could in principle trigger *non-refoulement* obligations, 'it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 [of the ECHR] would not also involve treatment in violation of [the prohibition of ill-treatment].'[150] Similarly, although the prohibition of

146 See further in Liebenberg (n 139).

147 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) 2922 UNTS 29.

148 CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', UN doc E/C.12/2007/1 (10 May 2007) para 8.

149 O'Connell and others (n 98) 57. See also CESCR, 'Concluding Observations on the Second Periodic Report of Korea', UN doc E/C.12/1/Add.59 (21 May 2001) para 9; CESCR, *Report on the Twenty-Fifth, Twenty-Sixth, and Twenty-Seventh Sessions*, UN doc E/2002/22 (23 April–11 May 2001, 13–31 August 2001, 12–30 November 2001) para 349.

150 *Z and T v UK* (n 26) 7. See also *Razaghi v Sweden* (2003) ECHR 64599/01, 9.

forming trade unions may not of itself be sufficiently serious to trigger *non-refoulement*, if this prohibition results in discrimination concerning the right to work or even a denial of the latter – which could then have implications for the right to an adequate standard of living – the severity of the harm could reach the necessary threshold.

Therefore, reference to obligations to ensure the minimum core and the minimum threshold of ESC rights allows removing States to determine the existence of a risk to these rights without delving too deeply into the receiving State's available resources. In these scenarios, an obligation of *non-refoulement* could be deduced from ESC rights as part of the removing State's positive obligation to prevent risks of harm to human rights.

4. ADDRESSING OTHER OBJECTIONS TO *NON-REFOULEMENT* BASED ON SOCIO-ECONOMIC GROUNDS

Regardless of the possibility of deducing *non-refoulement* obligations from ESC rights from a legal standpoint, some commentators dispute the practical feasibility of recognizing such obligations and the utility of doing so.

The first objection is intrinsically linked to a 'floodgates' argument: deducing *non-refoulement* obligations from ESC rights would lead people around the world who live in unfavourable socio-economic conditions to flee their countries and request protection in 'richer' States. This, in turn, would strain host States' resources to accommodate migrants and render States unable to comply with other international obligations, including human rights ones. As stated by Bossuyt, such a practice would seem 'to be "only a small step" away from a future prohibition of the removal of any asylum seeker, or by extension any foreign national, to his country of origin if he is not sure to find in that country decent living conditions'.[151]

Nevertheless, this argument is ultimately speculative. People living in poor socio-economic conditions today already resort to migration in vast numbers, even when they do not fit the Convention refugee definition[152] or that of other internationally protected groups – for example, people displaced across borders by environmental conditions.[153] Many of these people migrate not because they have a clear intention of applying for international protection abroad, but because they seek an opportunity to improve their living conditions, which sometimes barely surpass the minimum needed for survival. Regardless of whether *non-refoulement* is recognized under ESC rights, these people will continue to leave their countries, even if they risk having only precarious status in host States.

Applying *non-refoulement* directly under ESC rights will not create an obligation for States to host all these people but only those at a real risk of being subjected to irreparable harm in their countries of origin. As the preceding analysis has shown, not every human rights violation will reach this level of severity. Some people fleeing irreparable harm are already encompassed by *non-refoulement* as it is currently applied, since socio-economic deprivation may amount to ill-treatment, as the practice of the ECtHR and the HRC highlights.[154] The purpose of *non-refoulement* obligations is not simply to ensure better living conditions to a greater number of people, but rather to prevent individuals who have escaped some of the most serious forms of harm from being returned to such a predicament. The focus then should be on the severity

151 Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court' (2012) 8 European Constitutional Law Review 203, 234. Similar concerns were voiced by the New Zealand High Court in *Rahman* (n 6) para 44.

152 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A(2).

153 UNHCR, 'Policy Brief: Protection of Persons Displaced across Borders in the context of Disasters and the Adverse Effects of Climate Change' (14 December 2023). Numbers concerning cross-border displacement due to environmental factors are, however, difficult to obtain, and most of the statistics on this issue concern internally displaced persons.

154 *MSS v Belgium and Greece* (n 4); *Osman Jasin* (n 80).

of the harm, and not on the classification of the right concerned, especially as the division between ESC and CP rights becomes less and less clear. It is not reasonable to accept that a person cannot be returned to a country to face a flagrantly unfair trial but that the same prohibition would not apply if a person were sent to a country where they are denied the most basic means of subsistence, which poses a much graver and more direct danger to their life and personal integrity.

Accordingly, it does not seem possible to conclude beforehand that recognizing autonomous *non-refoulement* obligations from ESC rights would lead to a sudden and significant increase in migration influxes and overburden host States or that it would not. Both arguments are speculative in the end. This uncertainty is not particular to the proposition developed herein but to any or all developments in the application of *non-refoulement* and other human rights norms. Notably, when the ECtHR first applied this principle to halt the removal of severely ill people in 1997,[155] or when it recognized that extreme forms of socio-economic deprivation could give rise to ill-treatment in removal contexts in 2011,[156] such decisions may have encouraged people in similar situations to migrate and claim protection based on these new developments. However, there is no clear causal link between them and the number of migrants and asylum seekers trying to reach Europe in subsequent years. Likewise, when the ECtHR set a very high threshold of harm for applying *non-refoulement* to health cases in 2008,[157] it is not possible to say that this decision directly caused the number of people seeking protection on that basis to decrease.

Migratory flows and their intensity are determined by a multitude of factors, of which legal developments are only one. Mass influxes have already happened in recent years, such as the situation of persons displaced by armed conflicts in Ukraine and Syria, and by political and economic turmoil in Venezuela. Similar occurrences may happen in the future also for countless reasons, even if protection against *refoulement* is not extended to other groups. The appropriate solution would seem to be finding a way to safely accommodate these people and ensuring that their rights are respected among host States rather than seeking to exclude from protection people who are also at risk of serious human rights violations just because their situation may fall under different treaty provisions. The 'floodgates' argument is thus too vague and uncertain to justify not applying *non-refoulement* to ESC rights in similar parameters as is done to CP rights.

A second objection that may be advanced relates to the practical utility of deducing the principle of *non-refoulement* from ESC rights. One may argue that the situations of irreparable socio-economic harm to which this principle could be applied would already qualify as ill-treatment under CP rights. Hence, there would be no added value to an autonomous *non-refoulement* obligation flowing from ESC rights.

Indeed, there are cases where a risk of irreparable harm to ESC rights overlaps with the prohibition of inhuman and degrading treatment, as seen above.[158] However, not every serious human rights violation necessarily amounts to ill-treatment. Notably, the ECtHR has prohibited removal due to risks to the rights to fair trial[159] and to liberty and security[160] independently and on the basis of considerations different from its assessment of the risk of ill-treatment. Some ESC rights violations that amount to irreparable harm are likewise difficult to translate to inhuman and degrading treatment, such as a denial of education. As previously mentioned, this denial by itself does not entail the kind of suffering associated with ill-treatment,[161] but the

155 *D v United Kingdom* (1997) 24 EHRR 423.
156 *MSS v Belgium and Greece* (n 4).
157 *N v United Kingdom* (2008) 47 EHRR 39.
158 *MSS v Belgium and Greece* (n 4); *Osman Jasin* (n 80).
159 *Othman* (n 18) paras 198–205, 281–87.
160 *Al Nashiri v Romania* (n 17) paras 670–75, 690–92.
161 See generally *Free Legal Assistance Group* (n 90) paras 4, 48.

risk of this violation was deemed sufficient to impede removal by the CRC Committee in *AM v Switzerland*.[162] The same could be said, for instance, of the rights to work and to participate in cultural life.

Attempting to fit all possible scenarios of irreparable harm to ESC rights into the notion of inhuman and degrading treatment could thus lead to an erroneous assessment of *non-refoulement* claims and exclude serious situations that may not fall within a State's interpretation of ill-treatment. This risk is particularly prominent in States that consider that ill-treatment requires the adoption of deliberate measures causing harm to an individual.[163]

Applying the principle of *non-refoulement* directly to ESC rights is also useful to deepen States parties' comprehension of what the obligations stemming from these rights actually require. Specifically, it could reinforce the understanding that some ESC rights obligations must be satisfied immediately and that failure to meet these duties can result in harm as serious as that arising from breaches of CP rights. Claims concerning minimum core and minimum threshold obligations could also contribute to clarifying the content of each of these concepts. Finally, more opportunities for domestic authorities to familiarize themselves and engage with ESC rights in removal contexts could improve their analysis of socio-economic claims for international protection within other legal frameworks, such as the 1951 Refugee Convention.

Therefore, concerns about the consequences of deducing *non-refoulement* obligations from ESC rights do not seem sufficient to exclude people facing irreparable socio-economic harm from this kind of protection.

5. CONCLUSION

As migratory flows continue to intensify and States seek to tighten their borders, the principle of *non-refoulement* offers an important first step in the protection of people on the move, ensuring at least that they will not be summarily returned before having their claims heard. Still, this protection remains quite limited by the way the application of this principle has focused on CP rights, especially the prohibition of inhuman and degrading treatment, and the strict standards human rights bodies have adopted for ESC rights to qualify as such treatment. In this scenario, risks of socio-economic deprivation remain largely ignored in removal proceedings, disregarding the obligations of removing and receiving States relating to the protection of ESC rights under different human rights treaties.

As the preceding analysis has shown, this omission is not justified, since the principle of *non-refoulement* is not, in fact, restricted to a specific set of rights. Although few human rights bodies to date have applied *non-refoulement* in connection with rights other than the prohibition of ill-treatment, most of them have taken care to frame this principle in open-ended terms by referring to a particular level of harm as the trigger for *non-refoulement* obligations – 'irreparable harm' by the HRC and the CRC, CEDAW, and CRPD committees, and 'flagrant breach' by the ECtHR. This broad reading is reinforced by the finding that *non-refoulement* is an expression of States' more general duty to prevent risks of harm to a person's human rights whenever the State knew, or should have known, about the existence of such risks. This positive obligation to prevent harm can be deduced from any human right, as long as the required threshold of severity of the potential harm is met.

There is little dispute that ESC rights violations can give rise to severe harm, as certain scenarios of socio-economic deprivation have even been classified as inhuman and degrading treatment.[164] Furthermore, the particularities of the ESC rights framework do not seem to

162 *AM v Switzerland* (n 1) para 10.9.
163 Notably Australia: 1910307 (Refugee) [2019] AATA 4673, para 141.
164 *MSS v Belgium and Greece* (n 4) paras 249–64.

render these rights incompatible with *non-refoulement* or the application of this principle impracticable. While the notion of progressive realization may pose difficulties for removing States in assessing whether receiving States are in compliance with their obligations, ESC rights also contain a relevant set of obligations of immediate effect, which can be examined without substantially looking into a State's available resources.[165] Removing States can thus refer to the duties of non-discrimination and guaranteeing the minimum core of ESC rights to facilitate their assessment of whether a risk of socio-economic harm exists in the receiving State. Obligations of progressive realization concerning the minimum threshold of ESC rights can also be relevant in *non-refoulement* contexts. Although establishing the content of minimum threshold obligations requires a degree of inquiry into the receiving State's available resources, the removing State's authorities may be able to broadly ascertain resources and the corresponding obligations by resorting to different sources of information and methodologies. If the removing State's authorities deem that the evidence before them is sufficient for finding a risk of violation of ESC rights in the receiving State, and this risk would lead to irreparable harm, the conditions for applying the principle of *non-refoulement* are met in much the same way they would be in relation to a CP right.

Hence, from a legal perspective, there do not seem to be any characteristics intrinsic to ESC rights that would exclude the possibility of an obligation of *non-refoulement* arising. Moreover, concerns about the potential overburdening of host States do not seem a compelling argument to limit the application of *non-refoulement* to CP rights. States would not be obligated to grant protection to all persons fleeing ESC rights violations, but only in situations amounting to irreparable harm; it would not be reasonable to consider that this harm merits protection only when it concerns CP rights, especially when harm to ESC rights can have similarly severe and long-lasting effects. The causes of migration flows are varied and complex, so that deducing *non-refoulement* from ESC rights would not automatically entail an increase in migratory influxes. In this scenario of speculation, efforts to prevent the overburdening of host States seem more beneficial if directed at the establishment of mechanisms for increasing the self-reliance of migrants and responsibility sharing among States.

The recognition of *non-refoulement* obligations stemming directly from ESC rights would allow socio-economic harm to be assessed by reference to its own legal framework and thus enable a more nuanced view of how these rights also entail obligations of immediate effect and can be violated through States' omissions. Accordingly, situations of irreparable harm could be found beyond those constituting ill-treatment. Encouraging the application of *non-refoulement* to ESC rights could also contribute to the analysis of socio-economic claims in other kinds of migratory proceedings, since domestic authorities would have further opportunities to familiarize themselves with the framework of these rights. The time thus seems ripe for unequivocally acknowledging *non-refoulement* as a general obligation under human rights treaties to prevent irreparable harm, and not only harm connected with one category of rights.

165 CESCR General Comment No 3 (n 105) paras 1–2, 10.