

Rejection at the Frontier and Human Rights – the UN Treaty Bodies and European Practice

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Abstract

The principle of non-refoulement is often described as the cornerstone of refugee law. It prohibits States from expelling people from their territories to States where their life or freedom would be threatened. The principle of non-refoulement is, however, not only enshrined in refugee law. The United Nations Human Rights Treaty Body System has developed a protection from refoulement that is considerably broader than the protection granted under international refugee law. It is also broader than the human rights protection provided by the ECtHR. This article will show that the UN Treaty Bodies' approach to the principle of non-refoulement gives a much clearer framework for rejections of migrants at a State's frontier.

Keywords

Rejection at the Frontier – Human Rights – Refugee Law – Jurisdiction – United Nations – Treaty Bodies

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I. Introduction

The principle of non-refoulement is often described as the cornerstone of refugee law. It prohibits States from expelling people from their territories to States where their life or freedom would be threatened until it is established that they are not refugees in the sense of the Geneva Convention on the Status of Refugees (Refugee Convention).¹

It is well-established that States generally have the right to control the entry of aliens into their territory.² This includes a right to reject migrants at the frontiers of a State. However, as Article 33 para. 1 of the Refugee Convention is an exception to the general principle of State sovereignty, it has been established that *non-refoulement* can also provide protection for refugees trying to enter a State's territory, albeit under limited conditions.

The principle of *non-refoulement* is, however, not only enshrined in refugee law. The United Nations Human Rights Treaty Body System has developed a protection from *refoulement* that is considerably broader than the protection granted under international refugee law. It is also broader than the human rights protection provided by the European Court of Human Rights (ECtHR). As a vast majority of the complaints concerning *refoulement* brought before the United Nations (UN) Treaty Bodies, a comparison with the European human rights system is imperative. By comparing the role of procedural rights in the context of *non-refoulement* in both the European Convention's (ECHR's) and the UN Treaty Bodies' practise, this article will show that the UN Treaty Bodies' approach to the principle of *non-refoulement* gives a much clearer framework for rejections of migrants at a State's frontier.

II. Rejection at the Frontier

1. States' Jurisdiction in Cases of Rejection at the Frontier

At the outset it must be determined under which circumstances a State has jurisdiction over migrants who have not yet entered a State's territory. Over the past decades, States have developed a variety of means to avoid granting refugees protection. Among those strategies are determinations of 'safe third countries' and 'safe countries of origin', as well as 'internal flight alternatives'.³

¹ Geneva Convention on the Status of Refugees, 28 July 1951, United Nations, Treaty Series, 189, 134.

² Cf. e. g. ECtHR, *Vilvarajah and others v. United Kingdom*, decision of 30 October 1991, nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, para. 102.

³ Cf. e. g. James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press 2021), 366 et seq.

Their strategies of avoiding dealing with refugees go even a step further by not granting migrants access to their territories. There is an ongoing State practise of intercepting migrants long before they can even get close to a State's border. The United States have been intercepting Haitian refugees at sea for thirty years.⁴ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) is conducting similar operations since 2004.⁵ Those migrants who manage to arrive at a State's border are hindered to cross it.⁶

This State practise is an attempt to circumvent obligations under both international refugee law and international human rights law. However, States can only successfully avoid these obligations if their jurisdiction is indeed limited to persons in their State territory.

The UN Treaty Bodies have unanimously established that States exercise jurisdiction not only over persons in their territory, but over all persons within their effective control.⁷ This includes not only military operations in foreign territories, but also interceptions at the high seas and rejections at States' frontiers.⁸ The United Nations High Commissioner for Refugees (UNHCR) has argued that the territorial scope of the Refugee Convention cannot diverge from international human rights standards. Consequently, States' obligations under the Refugee Convention must also apply to any person under the effective control of a State.⁹

⁴ Hathaway (n. 3), 317 et seq.

⁵ Established by Regulation 2007/2004/EC of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349, 1 amended by: Regulation 863/2007/EC of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams, OJ 2007 L 199; Regulation 2016/1624/EC of 14 September 2016 on the European Border and Coast Guard, OJ 2016 L 251; Regulation 2019/1896/EC of 13 November 2019 on the European Border and Coast Guard, OJ 2019 L 295.

⁶ Cf. e. g. Maximilian Pichl and Katharina Vester, 'Die Verrechtlichung der Südgrenze: Menschenrechtspolitiken im Grenzraum am Beispiel des Hirschi-Falls' in: Forschungsgruppe 'Staatsprojekt Europa' (ed.), *Kämpfe um Migrationspolitik* (Bielefeld: Transcript Verlag 2014), 187-206.

⁷ See *infra* III. 2.

⁸ While States clearly exercise effective control over people intercepted at the high seas, there exists no legal obligation to search and rescue migrants from the high seas. The UNHCR Executive Committee has, however, stated that under the Refugee Convention there is an obligation of cooperation and responsibility sharing for states in maritime search and rescue, UNHCR Executive Committee, Conclusion No. 15 (XXX) Refugees Without an Asylum Country (1979), 16 October 1979, U. N. Doc. A/34/12/Add.1, para. h; UNHCR Executive Committee, General Conclusion on International Protection No. 29 (XXXIV) – 1983, 20 October 1983, U. N. Doc. A/38/12/Add.1, para. i; UNHCR Executive Committee, Conclusion on International Protection No. 85 (XLIX) – 1998, 9 October 1998, U. N. Doc. A/53/12/Add.1, paras 1,2.

⁹ UN High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol, 26 January 2007, paras 34 et seq., 43.

Whereas rejections of migrants at a State's frontiers might be justified under international law, they are invariably acts under a State's jurisdiction.

2. Protection Under the Refugee Convention

Article 33 para. 1 Refugee Convention forbids States to return a refugee to the frontiers of territories where his or her life or freedom would be threatened. It contains no explicit reference to rejection and non-admission of refugees at the border of a State. It has been argued that the principle of *non-refoulement* enshrined in Article 33 para. 1 of the Refugee Convention does not apply to persons not yet in the territory of a State. Therefore, a non-admission of a refugee at the frontier of a State would not be prohibited under Article 33 para. 1 Refugee Convention.¹⁰ The *Travaux Préparatoires* permit such an interpretation.¹¹

More recently, it has been conversely argued that the prohibition of *refoulement* 'to the frontiers of territories' must be understood to encompass non-admissions at the border of a State.¹² This interpretation is in line with the conclusions of the UNHCR Executive Committee¹³ and the International Law Commission.¹⁴

Assuming that the prohibition of *refoulement* as enshrined in Article 33 para. 1 Refugee Convention does apply to non-admissions at a State's frontiers, the scope of protection is rather limited. As to the personal scope of Article 33 para. 1; Article 1 A and Article 33 para. 2 Refugee Convention limit the protection to refugees that do not constitute a danger to the security of a State.

¹⁰ Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951: Articles 2-11, 13-37*, re-published by the Department of International Protection in October 1997, Article 33, para. (3).

¹¹ Cf. e. g. Ad Hoc Committee on Refugees and Stateless Persons, UN Doc. E/AC.32/SR.40 (1950), Statement of Swiss representative Schürch, 32. It has to be noted, however, that Israeli Representative Robinson disagreed with this statement, *ibid.*, 32 et seq. The Swiss view is supported by the fact that the 1933 Refugee Convention did contain an explicit prohibition of rejections at the frontier, Art. 3 para. 2 League of Nations Convention relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series, vol. CLIX No. 3663.

¹² Hathaway (n. 3), 357 et seq.; Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Antwerpen: Intersentia 2009), 48 et seq., 55; Philipp Wennholz, *Ausnahmen vom Schutz vor Refoulement im Völkerrecht* (Berlin: Berliner Wissenschafts-Verlag 2013), 22 et seq.

¹³ UNHCR Executive Committee, Conclusion No. 6 (1977), 12 October 1977, para. c; UNHCR Executive Committee, Conclusion No. 22 (1981); UNHCR Executive Committee, Conclusion No. 81 (1997); UNHCR Executive Committee, Conclusion No. 82 (1997); UNHCR Executive Committee, Conclusion No. 85 (1998), 9 October 1998, U. N. Doc. A/53/12/Add.1, para. q.; UNHCR Executive Committee, Conclusion No. 99 (2004); UNHCR Executive Committee, Conclusion No. 108 (2008).

¹⁴ International Law Commission, Draft Articles on the Expulsion of Aliens, with commentaries, 2014, A/69/10 para. 45, Art. 2 Commentary (5), Art. 6 Commentary (7).

States regularly justify the non-admission at their frontiers as a means to protect their country from illegal migration as a threat to the security of the country.¹⁵ Whereas States generally have the right to control their borders, rejections of migrants apply equally to all migrants, including refugees.

Whereas Article 33 para. 2 Refugee Convention does provide for a limitation of protection against *refoulement* when there are reasonable grounds for regarding a person as a danger to the security of the country, according to UNHCR, States are required to make individualised assessments of a person in order to determine whether they constitute a danger to the security of a country.¹⁶ Rejections at the frontiers without an individualised assessment are thus not permitted if the person concerned claims to be a refugee. However, when a person is proven not to be a refugee, non-admission at the frontier is permitted under Article 33 Refugee Convention.¹⁷

Apart from the personal limitations, Article 33 para. 1 Refugee Convention could only dictate States to let refugees into their territories when they are in danger of persecution in the territory they are currently staying. This implies that rejections of refugees at State frontiers to safe third countries would be consistent with the requirements of Article 33 para. 1 Refugee Convention.¹⁷

III. Rejection at the Frontier in International Human Rights Law

While the Refugee Convention contains some exceptions and restrictions to the principle of *non-refoulement*, there exist no comparable provisions in international human rights law.¹⁸ The human rights norms for protection

¹⁵ For a similar argument regarding interception at the high seas cf. U.S. Supreme Court, *Sale v. Haitian Centers Council*, U.S., 21 June 1993, para. 155.

¹⁶ UN High Commissioner for Refugees, Advisory Opinion (n. 9), para. 10. Consequently, apart from illegal entries into States, the indiscriminate rejection of migrants during the COVID-19 pandemic would equally not be justifiable under Article 33 para. 2. Cf. Oona Hathaway, Mark Stevens and Preston Lim, 'COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement,' Just Security, 30 November 2020, at <<https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/>>.

¹⁷ Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion', in: Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge: Cambridge University Press 2003), 89-177 (113), para. 76; Wouters (n. 12) 184. Cf. also the State's argument in CRC (2019), *D. D. v. Spain*, no. 04/2016, 1 February 2019, para. 12.2.

¹⁸ UN High Commissioner for Refugees, Advisory Opinion (n. 9), paras 11, 20.

against *refoulement* do not contain any possibility of exclusion or exception from protection against *refoulement* comparable to Article 1 D-F or Article 33 para. 2 Refugee Convention. Both regional human rights law such as Article 3 ECHR¹⁹ and the relevant norms in the UN human rights protection system apply to all people without restriction.

The Refugee Convention is not a human rights treaty. While it does have a humanitarian nature, its main purpose is the coordination and sharing of international responsibility among all States to secure international peace.²⁰ While UNHCR does have a mandate to supervise the Refugee Convention,²¹ it has no enforcement mechanism and no possibility to focus on individual cases. This weakens the protection of refugees by making it easier for States to circumvent and limit their contractual obligations.²² International human rights protection mechanisms therefore play a decisive role not only for the human rights protection of migrants in general, but also specifically for refugees.

1. Regional Human Rights Regimes

The American Convention on Human Rights provides protection from *refoulement* in a scope similar to Article 33 para. 1 Refugee Convention, but does not contain a restriction comparable to Article 33 para. 2 Refugee Convention.²³ The Inter-American Court has recently held that the right to asylum under the American Convention on Human Rights²⁴ encompasses a right not to be rejected at the frontier in order to make an asylum claim.²⁵ This is in line with an earlier decision of the Inter-American Commission on Human Rights, which had found that interception of boats at the high seas constituted a violation of the right to asylum based

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, United Nations, Treaty Series, 213, 221.

²⁰ Cf. Preamble, para. 5 Refugee Convention.

²¹ Preamble, para. 6 Refugee Convention, Article 35 para. 1 Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, U. N. Doc. A/RES/428 (V).

²² Chaloka Beyani, 'The Role of Human Rights Bodies in Protecting Refugees' in: Anne F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons, and Migrant Workers* (Leiden/Boston: Martinus Nijhoff 2006), 269-281 (280).

²³ Art. 22 para. 8 American Convention on Human Rights, 22 November 1969, United Nations, Treaty Series, 1144, 123. But note that Art. 27 allows derogations from Art. 22.

²⁴ Art. 22 para. 7 American Convention on Human Rights (n. 23), likewise derogable under Art. 27.

²⁵ IACtHR, *The Institution of Asylum and its Recognition as a Human Rights in the Inter-American System of Protection*, Advisory Opinion, OC-25/18, 30 May 2018, para. 122.

on the fact that by sending the migrants back to their home country, the intercepting State had also stripped the migrants off their right to seek asylum in a third country.²⁶

The European Human Rights System does not only provide for protection against *refoulement* (Article 3 ECHR), but also against collective expulsion (Article 4 Optional Protocol No. 4). The ECtHR shares the view that member States to the ECHR exercise jurisdiction wherever a person is under their effective control.²⁷ This includes cases of non-admissions at States' frontiers.²⁸ The Court does note, however, that where this means that officials of one State act on the territory of another State, both States exercise jurisdiction. While the protection from *refoulement* under the ECHR is absolute,²⁹ there is no general legal obligation to bring people who are in another State's jurisdiction within their own jurisdiction.³⁰

The ECtHR has held that the protection from *refoulement* under Article 3 ECHR in conjunction with Article 13 ECHR encompasses a right to an individualised risk assessment, as well as an effective remedy against a negative decision.³¹ For asylum seekers who apply at a national border this means that they have to be allowed entry and be granted the right to remain on the territory until their claim has been properly reviewed.³² In line with the UNHCR, the ECtHR has held that this encompasses rights to certain procedural aids such as access to interpreters or legal aid.³³

However, this procedural right in connection with the principle of *non-refoulement* requires applicants to present an 'arguable claim' before the

²⁶ IACtHR, *United States*, merits, 10.675, Report No. 51/96, 13 March 1997, para. 163.

²⁷ ECtHR (Grand Chamber), *Hirsi Jamaa and others v. Italy*, judgement of 23 February 2012, no. 27765/09, para. 73. It should be noted, however, that this landmark decision did not have any positive effect on the actual human rights situation, neither for the applicants nor for any migrants thereafter, cf. Pichl and Vester (n. 6) 201 et seq.

²⁸ ECtHR (Grand Chamber), *N.D. & N. T. v. Spain*, judgement of 13 February 2020, nos 8675/15, 8697/15, paras 110 et seq.

²⁹ ECtHR (Grand Chamber), *Chahal v. United Kingdom*, judgement of 15 November 1996, no. 22414/93; ECtHR, *Ahmed v. Austria*, judgement of 17 December 1996, no. 25964/94.

³⁰ ECtHR, *N.D. & N. T. v. Spain* (n. 28), para. 221.

³¹ ECtHR, *Jabari v. Turkey*, judgement of 11 July 2000, no. 40035/98, paras 49, 50; ECtHR (Grand Chamber), *M.S. S. v. Belgium and Greece*, judgement of 21 January 2011, no. 30696/09, paras 289 et seq. For a remedy to be effective, it must have suspensive effect, ECtHR, *Čonka v. Belgium*, judgement of 5 February 2002, 51564/99, paras 81-83.

³² ECtHR, *M.A. and Others v. Lithuania*, judgement of 11 December 2018, no. 59793/17; ECtHR, *M.K. and Others v. Poland*, judgement of 23 July 2020, nos 40503/17, 42902/17 and 43643/17.

³³ ECtHR, *Sharifi and Others v. Italy and Greece*, judgement of 21 October 2014, 16643/09.

Court.³⁴ This means that the Court will only find a breach of procedural rights (*i.e.* Article 13 ECHR) by a State in cases where the applicants can show during the process before the Court that they would have had a material claim of a potential breach of the principle of *non-refoulement* (*i.e.* Article 3 ECHR).

The prohibition of collective expulsion as enshrined in Article 4 of Optional Protocol No. 4 to the ECHR also provides procedural guarantees, particularly the right to an individual case assessment.³⁵ In its recent decision *N.D. & N.T. v. Spain*, the Court has held that the procedural rights guaranteed by Article 4 of the Optional Protocol are similarly limited as those guaranteed by Article 13 ECHR in conjunction with Article 3 ECHR. The Court ruled that the non-admission of migrants at the frontier between Morocco and the Spanish enclave Melilla without identification of the persons concerned did not constitute a breach of Article 4 of the Optional Protocol No. 4 or Article 13 ECHR.³⁶ While the claim of a violation of Article 3 ECHR had been found inadmissible,³⁷ the Court explained that a State was not *per se* in breach of Article 3 ECHR or the Optional Protocol when it prevented migrants from crossing its border via irregular ways, as long as regular ways of entering the State were available.³⁸ Concerning the fact that the applicants were not identified, let alone granted a risk assessment, the Court found that this procedural shortcoming could only be relevant under the Convention if the applicants had proven that an individual assessment could possibly have given a reason to impede their removal.³⁹

In short, the ECtHR's decision implies that as long as a State provides a possibility for migrants to legally enter its territory, those persons who do not enter regularly are not guaranteed any procedural rights under the ECHR or Optional Protocol No. 4. In this particular case, the two persons who have brought their case before the Court were not refugees nor could they successfully claim to fear *refoulement*. They were, however, collectively

³⁴ ECtHR, *Boyle and Rice v. the United Kingdom*, judgement of 27 April 1988, nos 9659/82 and 9658/82; ECtHR, *Vilvarajah and others* (n. 2); ECtHR, *Chahal* (n. 29); ECtHR, *Jabari* (n. 31). In its recent decision *N.D. & N.T. v. Spain*, the Court noted that this practise differs from the standard in the UN Treaty Body system, ECtHR, *N.D. & N.T. v. Spain* (n. 28), para. 230.

³⁵ ECtHR, *Hirsi Jamaa and Others* (n. 27); ECtHR, *Ćonka* (n. 31); ECtHR (Grand Chamber), *Georgia v. Russia*, judgement of 3 July 2014, no. 13255/07.

³⁶ ECtHR, *N.D. & N.T. v. Spain* (n. 28), para. 244.

³⁷ ECtHR, *N.D. & N.T. v. Spain* (n. 28), paras 3, 4.

³⁸ ECtHR, *N.D. & N.T. v. Spain* (n. 28), para. 210. See also the Court's updated Guide to Article 4 of Protocol No. 4 to the European Convention on Human Rights, 31 August 2021, para. 27, at <https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf>.

³⁹ ECtHR, *N.D. & N.T. v. Spain* (n. 28), para. 230.

hindered to enter Spain in a group of 600 people.⁴⁰ It is well possible that among those 600 people there were refugees or other people fearing treatment prohibited by Article 3 ECHR. While the ECtHR has only ruled on the push-back of the two applicants, the judgement is suggestive of a general lawfulness of Spain's practise of summary push-backs. Scholars have rightfully raised concerns about the implications of this judgement for the protection of refugees under the Refugee Convention.⁴¹

2. The UN Treaty Body Approach: Procedural Rights

At the United Nations level there are nine human rights treaties and one optional protocol, from which 10 Treaty Bodies have been established. Their purpose is to monitor the implementation of the human rights treaties. Even though they do not possess the same legal powers as international courts, their procedures are comparable to those of courts.

In the past decade, there has been a shift in the focus of the UN Treaty Body system towards the protection of migrants. Whereas some Treaty Bodies are particularly concerned about the non-discrimination of migrants residing in a foreign country,⁴² a majority of the Treaty Bodies has developed a sophisticated jurisprudence on matters of entry into a foreign country, expulsion and the principle of *non-refoulement*.⁴³

a) Jurisdiction

It has been established in the United Nations human rights system that States exercise jurisdiction not only over persons in their territory, but over all persons within their effective control. This includes interceptions at the high seas and

⁴⁰ ECtHR, *N.D. & N. T. v. Spain* (n. 28), para. 24.

⁴¹ As shown, summary rejections at the border are not justifiable under Art. 33 Refugee Convention. The ECtHR's argument concerning a differentiation between regular and irregular entries also raises issues under Art. 31 Refugee Convention. Cf. Hathaway (n. 3), 409 fn. 526; Giulia Raimondo, 'N.D. and N. T. v Spain: A Slippery Slope for the Protection of Irregular Migrants', University of Oxford, Border Criminologies blog 20 April 2020, at <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/04/nd-and-nt-v-spain>>.

⁴² See in particular the state reporting procedures before the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD).

⁴³ See generally Greta Reeh, *Das menschenrechtliche Prinzip des Non-Refoulement vor den Vertragsorganen der Vereinten Nationen* (forthcoming 2022).

rejections at States' frontiers.⁴⁴ Recently, Spain has argued before the Committee on the Rights of the Child (CRC) that it could not be held responsible for the rejection of migrants at the frontier of Morocco and the Spanish enclave Melilla given that a) the acts of Spanish authorities at the frontier had happened in only a brief period of time, b) the Spanish authorities had exercised their legitimate right and international obligation to hinder unlawful border crossings, and c) as the rejected migrants did not reach the Spanish territory before being apprehended, the act could not be considered a deportation.⁴⁵

The CRC rejected these claims arguing that irrespective of the period of time and the territory the acts in question took place, the person in question was under the effective control of Spanish authorities and thus, Spain exercised jurisdiction and is consequently to be held responsible for the rejection of migrants at this frontier.⁴⁶

⁴⁴ CAT, General Comment No. 2, Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para. 16; CAT, General Comment No. 4, The Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, CAT/C/GC/4, paras 4, 10; CCPR, General Comment No. 15, The Position of Aliens Under the Covenant, 1986, para. 5; CCPR, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 2004, CCPR/C/21/Rev.1/Add.13, para. 10; CCPR, Concluding Observations on the Sixth Periodic Report of Hungary, 9 May 2018, CCPR/C/HUN/CO/6, paras 45 et seq.; CCPR, Concluding Observations on the Sixth Periodic Report of Australia, 1 December 2017, CCPR/C/AUS/CO/6, para. 33 (c); CERD, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of Australia, 26 December 2017, CERD/C/AUS/CO/18-20, para. 30; CRC, General Comment No. 6 Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 12; CMW/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, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 46; CMW, Concluding Observations on the Initial Report of the Niger, 11 October 2016, CMW/C/NER/CO/1, para. 51; CMW, Concluding Observations on the Second Periodic Report of Algeria, 25 May 2018, CMW/C/DZA/CO/2, para. 42 (d); CMW, Concluding Observations on the Second Periodic Report of Guatemala, 2 May 2019, CMW/C/GTM/CO/2, para. 13; CMW, Concluding Observations on the Second Periodic Report of Albania, 8 May 2019, CMW/C/ALB/CO/2, para. 32; CMW, Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina, 4 November 2019, CMW/C/BIH/CO/3, para. 31; CED, List of Issues in Relation to the Report Submitted by Switzerland Under Article 29, Paragraph 1, of the Convention, 30 October 2019, CED/C/CHE/Q/1, para. 11; CRPD, *O. O.J. v. Sweden*, 28/2015, 5 October 2017, § 10.3; CRPD, *N. L. v. Sweden*, 60/2019, 28 August 2020, § 6.4. CEDAW, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, 16 December 2010, CEDAW/C/GC/28, § 7; see also Andrew Byrnes, 'Article 2' in: Marsha A. Freeman/Christine Chinkin/Beate Rudolf/Susanne Kroworsch/Allison Sherrier/Sarah Wittkopp, *The UN Convention on the Elimination of All Forms of Discrimination against Women* (Oxford: Oxford University Press 2012), 71-100 (94 et seq.).

⁴⁵ CRC, *D. D. v. Spain* (n. 17), para. 4.1.

⁴⁶ CRC, *D. D. v. Spain* (n. 17), para. 13.4.

b) Individualised Risk Assessment and Review

Like Article 13 ECHR, some of the UN human rights treaties contain provisions that guarantee procedural standards. The Treaty Bodies hold that any person at the risk of expulsion has the right to an individual decision of his or her personal case.⁴⁷ The Human Rights Committee (CCPR) concludes that a national law that allows mass expulsions without individual procedures is *per se* in violation of the International Covenant on Civil and Political Rights.⁴⁸ The same applies for rejections at the frontier.⁴⁹ The Treaty Bodies are also critical of measures that abbreviate or circumvent risk assessment procedures, such as keeping lists of safe third countries.⁵⁰ When a person is removed from a State without any prior risk assessment, this can be in violation of the principle of *non-refoulement*⁵¹ and, additionally, in violation of procedural rights.⁵²

⁴⁷ E.g. CAT, General Comment No. 4, The Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, CAT/C/GC/4, para. 13.

⁴⁸ CCPR, General Comment No. 15, The Position of Aliens Under the Covenant, 1986, para. 10; CCPR, Concluding Observations of the Human Rights Committee – Dominican Republic, 26 April 2001, CCPR/CO/71/DOM, para. 16; CCPR, Concluding Observations of the Human Rights Committee – Italy, 24 April 2006, CCPR/C/ITA/CO/5, para. 15; CCPR, *A. G. et al. v. Angola*, 3106/2018-3122/2018, 21 July 2020, para. 7.9. As to the prohibition of collective expulsion see also CCPR, General Comment No. 27, Freedom of Movement (Art. 12), 1999, CCPR/C/21/Rev.1/Add.9, para. 19; CERD, General Recommendation XXX on discrimination against non-citizens, 2004, U. N. Doc. A/59/18, 93-97, para. 26; Art. 22 para. 1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, United Nations, Treaty Series, 2220, 3; CMW/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, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 47; CESCR, Concluding Observations on the Fourth and Fifth Periodic Report of Angola, 15 July 2016, E/C.12/AGO/CO/4-5, para. 23 (a).

⁴⁹ CCPR, Concluding Observations on the Sixth Periodic Report of Hungary, 9 May 2018, CCPR/C/HUN/CO/6, paras 45 et seq. See also CED, Concluding Observations on the Report Submitted by Italy Under Article 29 (1) of the Convention, 10 May 2019, CED/C/ITA/CO/1, paras 27 (b), (c).

⁵⁰ CCPR, Concluding Observations on Estonia, 15 April 2003, CCPR/C/77/EST, para. 13; CCPR, Concluding Observations on New Zealand, 7 April 2010, CCPR/C/NZL/CO/5, para. 16; CCPR, Concluding Observations on France, 31 July 2008, CCPR/C/FRA/CO/4, para. 20; CCPR, Concluding Observations on the Third Periodic Report of Serbia, 10 April 2017, CCPR/C/SRB/CO/3, para. 33; CED, List of Issues in Relation to the Report Submitted by Switzerland Under Article 29, Paragraph 1, of the Convention, 30 October 2019, CED/C/CHE/Q/1, para. 11; CED, List of Issues in Relation to the Report Submitted by Slovakia Under Article 29 (1) of the Convention, 14 May 2019, CED/C/SVK/Q/1, para. 11; CERD, Concluding Observations on the Combined Second to Fifth Periodic Reports of Serbia, 3 January 2018, CERD/C/SRB/CO/2-5, para. 26.

⁵¹ E.g. CED, *E. L. A. v. France*, 03/2019, 25 September 2020, para. 7.6; CRC, *D. D. v. Spain* (n. 17), para. 14.6.

⁵² Cf. CRC, *D. D. v. Spain* (n. 17), para. 14.7.

While all Treaty Bodies handle cases concerning the principle of *non-refoulement*, the CRC has so far dealt with rejections at the frontier in the most detailed manner. Whereas the ECtHR has found in the above-mentioned case that there is no general legal obligation to grant a person access to a State's territory, the CRC has found in the complaint *D. D. v. Spain* that in accordance with Article 37 of the Convention on the Rights of the Child⁵³ (prohibition of torture) and the principle of *non-refoulement*,⁵⁴ 'children have to be granted a right to ,access the territory, regardless of the documentation they have or lack, and be referred to the authorities in charge of evaluating their needs in terms of protection of their rights, ensuring their procedural safeguards'.⁵⁵ The CRC found a violation of Article 37 of the Convention based on the fact that the complainant did potentially face a real risk of irreparable harm in Morocco and that the Spanish authorities had not conducted any assessment of such risk.⁵⁶ Additionally, the CRC found a separate violation of Article 37 because of the manner in which the push-back was conducted.⁵⁷

Like in the decision before the ECtHR, the complainant had tried to cross the border from Morocco to Melilla irregularly with a group of other migrants. The rejecting State had indicated that the complainant could have entered the State by other, regular means. Spain went so far as to claim that it had a right to self-defence under Article 51 of the UN Charter against irregular migrants.⁵⁸ The CRC did not deem necessary to state that such exceptions from the principle of *non-refoulement* were not possible. It did indicate that alternative entry options are not legal remedies with regard to rejections at the frontier.⁵⁹

This decision is in line with the practise of other UN Treaty Bodies. The Committee on Enforced Disappearances (CED) has condemned the criminal prosecution of irregular border crossings as incompatible with the principle of *non-refoulement* as enshrined in Article 16 of the Convention for the Protection of all Persons against Enforced Disappearance.⁶⁰ The Committee on the Protection of the Rights of all Migrant Workers (CMW) has recently stated that the COVID-19 pandemic is no reason to make exceptions from the absolute principle of *non-refoulement*. This includes that non-admissions

⁵³ International Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, 1577, 3.

⁵⁴ Cf. CRC, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras 26-28.

⁵⁵ CRC, *D. D. v. Spain* (n. 17), para. 14.4.

⁵⁶ CRC, *D. D. v. Spain* (n. 17), para. 14.6.

⁵⁷ CRC, *D. D. v. Spain* (n. 17), para. 14.8.

⁵⁸ CRC, *D. D. v. Spain* (n. 17), para. 12.1.

⁵⁹ CRC, *D. D. v. Spain* (n. 17), para. 13.6.

⁶⁰ CED, Concluding Observations on the Report Submitted by Armenia Under Article 29, Paragraph 1, of the Convention, 13 March 2015, CED/C/ARM/CO/1, para. 16.

at the frontier cannot be justified.⁶¹ Even the Committee on Economic, Social and Cultural Rights (CESCR), a Treaty Body that has not yet explicitly mentioned the principle of *non-refoulement* in its practise, has stated that push-backs are in violation of the non-discrimination principle as enshrined in Article 2 para. 2 of the International Covenant on Economic, Social and Cultural Rights.⁶²

Furthermore, the Treaty Bodies' practise suggests that an abbreviated cursory risk assessment outside a State's borders would not be in line with their procedural requirements. One indication for this is that there are special requirements for the assessment of vulnerable groups: The Convention on the Rights of the Child provides guarantees only for children.⁶³ It follows that in order to be able to claim child-specific rights, a young person claiming to be a child has a right that his or her age be determined by State authorities as quickly as possible, including at the border of the State.⁶⁴ Where doubts remain, the person has to be treated as a child.⁶⁵ These standards do not only apply before the CRC. Other Treaty Bodies have required the same.⁶⁶ Similarly, the Committee on the Elimination of Discrimination against Women (CEDAW) has made a variety of gender-specific requirements for asylum procedures that have to be respected from the moment of arrival at a State's border.⁶⁷ Gender-sensitive risk assessments are also required by other Treaty Bodies.⁶⁸

⁶¹ CMW/UN, Special Rapporteur on the Human Rights of Migrants Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 26 May 2020, para. 9.

⁶² CESCR, Concluding Observations on the Fifth Periodic Report of Italy, 28 October 2015, E/C.12/ITA/CO/5, paras 18 et seq.

⁶³ Arts 1, 2 International Convention on the Rights of the Child.

⁶⁴ CRC, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras 13, 32. CRC, *S. M. A. v. Spain*, 40/2018, 28 September 2020, para. 7.7; CRC, *L. D. and B. G. v. Spain*, 37/2017, 38/2017, 28 September 2020, para. 10.8.

⁶⁵ CRC, General Comment No. 6, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 31; CRC, *D. D. v. Spain* (n. 17), para. 14.3.

⁶⁶ CCPR, *O. A. v. Denmark*, 2770/2016, 7 November 2017, para. 8.11; CED Guiding Principles for the Search for Disappeared Persons, 8 May 2019, CED/C/7, Principle No. 4 para. 2.

⁶⁷ CEDAW, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, 14. November 2014, CEDAW/C/GC/32, para. 24; CEDAW, *Y. W. v. Denmark*, 051/2013, 2 March 2015, para. 8.9.

⁶⁸ CCPR, General Comment No. 28, Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add.10, para. 17; CMW/CRC, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 4.

Another indication for a general prohibition of rejections at the frontier within universal human rights protection is the right to an effective remedy. Not only do the Treaty Bodies unanimously require an individualised risk assessment, States also have to provide an effective remedy, that is, an independent review of the assessment or any lack thereof. Such remedial procedures must have suspensive effect.⁶⁹ While the ECtHR does provide comparable protection in cases of *refoulement*,⁷⁰ the CRC's decision in the case of *D. D. v. Spain* indicates that the procedural right to an effective remedy applies to all removals of persons, independently of a material claim of protection against *refoulement*.⁷¹

⁶⁹ CAT, General Comment No. 4, The Implementation of Article 3 of the Convention in the Context of Article 22, 9 February 2018, CAT/C/GC/4, para. 35; CCPR, General Comment No. 15, The Position of Aliens Under the Covenant, 1986, para. 10; CCPR, Concluding Observations of the Human Rights Committee – Ukraine, 28 November 2006, CCPR/C/UKR/CO/6, para. 9; CCPR, Concluding Observations of the Human Rights Committee – Estonia, 4 August 2010, CCPR/C/EST/CO/3, para. 11; CCPR, Concluding Observations of the Human Rights Committee – Uzbekistan, 7 April 2010, CCPR/C/UZB/CO/3, para. 12; CCPR, Concluding Observations of the Human Rights Committee – Azerbaijan, 13 August 2009, CCPR/C/AZE/CO/3, para. 9; CCPR, Concluding Observations on France, 31 July 2008, CCPR/C/FRA/CO/4, para. 20; CCPR, Concluding Observations of the Human Rights Committee – Libya, 15 November 2007, CCPR/C/LBY/CO/4, para. 18; CED, List of Issues in Relation to the Report Submitted by Austria Under Article 29 (1) of the Convention, 16 October 2017, CED/C/AUT/Q/1, para. 14 (b); CED, Concluding Observations on the Report Submitted by Italy Under Article 29 (1) of the Convention, 10 May 2019, CED/C/ITA/CO/1, para. 27 (d); CED, Concluding Observations on the Report Submitted by France Under Article 29, Paragraph 1, of the Convention, 8 May 2013, CED/C/FRA/CO/1, para. 27; CED, Concluding Observations on the Report Submitted by Austria Under Article 29 (1) of the Convention, 6 July 2018, CED/C/AUT/CO/1, para. 21 (c); CED List of Issues in Relation to the Report Submitted by Switzerland Under Article 29, Paragraph 1, of the Convention, 30 October 2019, CED/C/CHE/Q/1, para. 12; CED, Concluding Observations on the Report Submitted by Peru Under Article 29 (1) of the Convention, 8 May 2019, CED/C/PER/CO/1, para. 23 (c); CED, Concluding Observations on the Report Submitted by Slovakia Under Article 29 (1) of the Convention, 24 October 2019, CED/C/SVK/CO/1, para. 15 (b); CMW, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families, 28 August 2013, CMW/C/GC/2, para. 53; CMW/UN, Special Rapporteur on the Human Rights of Migrants Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, 20 May 2020, para. 14; CMW, Concluding Observations on the Third Periodic Report of Mexico, 27 September 2017, CMW/C/MEX/CO/3, para. 44 (a); CMW, Concluding Observations on the Third Periodic Report of Bosnia and Herzegovina, 4 November 2019, CMW/C/BIH/CO/3, paras 35, 36; CRC, *D. D. v. Spain* (n. 17), para. 14.7; CESCR, Concluding Observations: Libya, 20 May 1997, E/C.12/1/Add.15, para. 16.

⁷⁰ *Supra* III. 1. Regional Human Rights Regimes.

⁷¹ This is implied by the CRC's finding of two independent violations of the Convention in this regard, cf. CRC, *D. D. v. Spain* (n. 17), paras 14.6 and 14.7.

IV. Conclusions

The UN Treaty Bodies provide a stronger and more stringent protection from rejections at the frontiers than the ECtHR. As the case of *N.D. & N.T. v. Spain* has shown, the Court does not only hold that collective rejections at the frontier are compatible with the ECHR (and its optional protocols) as long as there would have been a regular way to enter a country. The Court has also assigned the burden of proof that a proper individualised risk assessment would have been useful to the applicants.⁷² Conversely, the CRC has found a violation of its complainant's procedural rights independent of the actual existence of a risk of harm.⁷³

While this decision by the CRC is in line with the general practise of the UN Treaty Bodies, it is particularly interesting when compared to the ECtHR's decision: Both decisions concern the same border between Melilla and Morocco where large groups of people attempted to climb the fences. While only concerned with particular persons, both decisions factually stipulate very different requirements for the individualised assessment of all persons attempting to cross this border.

Additionally, these two decisions are especially interesting as they both concern Spain. Decisions of UN Treaty Bodies are generally considered to be non-binding. Whereas many States, especially European States, tend to comply with the Treaty Bodies' requirements in individual complaints as far as they concern the specific individual who has filed the complaint,⁷⁴ these decisions do not tend to have any more general consequences, such as an effect on the overall migration policies of a State. Vastly differing from this general tendency, the Spanish Supreme Court has held that decisions of UN Treaty Bodies are in fact legally binding.⁷⁵

⁷² ECtHR, *N.D. & N.T. v. Spain* (n. 28), para. 230; cf. also ECtHR (Grand Chamber), *Khlaifia and others v. Italy*, judgement of 15 December 2016, no. 16483/12, para. 253.

⁷³ See *supra* n. 71.

⁷⁴ For an overview of States' compliance in individual complaints procedures see Kate Fox Principi, 'United Nations Individual Complaint Procedures – How Do States Comply? A Categorized Study Based on 268 Cases of "Satisfactory" Implementation Under the Follow-Up Procedure, Mainly Regarding the UN Human Rights Committee', *HRLJ* 37 (2017), 1-30; Kate Fox Principi, 'Implementation of Decisions Under Treaty Body Complaints Procedures – Do States Comply? How Do They Do It?', Sabbatical leave report, Treaty Bodies Branch, UN Office of the High Commissioner for Human Rights, January 2017. Compliance is above average in cases concerning deportations, Claire Callejón, Kamelia Kemileva and Felix Kirchmeier, *Treaty Bodies' Individual Communication Procedures* (Geneva: Geneva Academy of International Humanitarian Law and Human Rights 2019).

⁷⁵ For decisions by CEDAW Tribunal Supremo de España, 1263/2018, R. CASACION/1002/2017, 17 July 2018.

Over the past few years, there have been various individual complaints before the CRC concerning events at Spanish border regions, especially at the borders of the Spanish enclaves Ceuta and Melilla. Not only has the CRC criticised risk assessment procedures and especially age assessment procedures, it has also made a variety of recommendations as to legal reforms for general improvements of these procedures.⁷⁶

When a group of people, in this case, children, are considered to have certain procedural rights when trying to cross a State's border, consequentially all people at the border must have access to such procedures. Considering that Spain is one of the major points of entry for migrants to the European Continent and the Schengen Area, Spanish reforms on requirements concerning individualised assessments at its borders will have an effect on the overall European practise of rejections at the frontier. This can then, in turn, strengthen refugee protection as a whole.

The CRC's approach in this case is in line with a general trend of the proceduralisation of human rights in the UN Treaty Body system.⁷⁷ The focus on procedural aspects of rights does not only permit broader recommendations such as legal reforms. Arguably, one reason for the increasingly rigorous border controls in Europe is an attempt of preventing people from having access to the high human rights standards. By concentrating on procedural standards rather than material rights, the UN Treaty Bodies can grant equal access to human rights independent of a person's location. This approach does not grant a person access to a State's territory. Assessment centres, for instance in North African countries, may well be permissible, as long as equal access to such centres is guaranteed and the risk assessments are conducted in accordance with the Treaty Bodies' standards.

⁷⁶ CRC, *M. T. v. Spain*, 17/2017, 18 September 2019; CRC, *R. K. v. Spain*, 27/2017, 18 September 2019; CRC, *N. B. F. v. Spain*, 11/2017, 27 September 2018; CRC, *L. D. and B. G. v. Spain* (n. 64); CRC, *M. B. S. v. Spain*, 26/2017, 28 September 2020; CRC, *M. B. v. Spain*, 28/2017, 28 September 2020; CRC, *S. M. A. v. Spain* (n. 64). See also CRC, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Spain, 5 March 2018, CRC/C/ESP/CO/5-6, paras 44, 45.

⁷⁷ See generally Kasey McCall-Smith, 'Human Rights Treaty Bodies, Proceduralization and the Development of Human Rights Jus Commune', ESIL Conference Paper Series 5 (2015).