UiO : Faculty of Law
University of Oslo

Out of sight, out of mind?

- The protection of failed asylum seekers

Candidate number: Ingvild Onstad Helle

Submission deadline: 15.05.2014

Supervisor: Kjetil Mujezinović Larsen

Number of words: 19 715

Acknowledgements

I wish to express my deepest gratitude to my supervisor Kjetil Mujezinović Larsen, whose knowledge and guidance have been sources of immense support throughout this process. This experience would not have been as rewarding if not for his ability to motivate and ask the right questions to bring the work with the thesis forward and make me think about the choices made along the way.

I am also indebted to the organizations and state institutions for rewarding discussions and material for the thesis, as well as the Norwegian Red Cross for inspiring me to put the spot-light on the human rights situation in Norway. A special thanks to Elise Kaurin for taking the time to read through the whole thesis in a very short time.

In particular, a warm thanks to Fritt Ord for supporting the thesis financially and providing me with the opportunity to present my thesis and get constructive feedback during my re-search period, and to the Norwegian Centre for Human Rights for allowing me to spend two years on studying human rights.

Heartfelt appreciation also goes to my wonderful fellow students for countless lunches and laughs. To Frida Pareus, thank you for making the long days of study both enjoyable and rewarding during challenging times. A special thanks also to Natasha Telson, for receiving me and my strange questions with a smile and motivation.

To my family, and roommates, you have all been a part of this project in different ways, moral support, proof reading and providing me with food and care during the time I have been writing this thesis. For that I am very grateful.

Abstract

The return of failed asylum seekers is an integral part of each state's migration management policy and border control. However such returns must be balanced by respect for human rights. This is especially pertinent in a time when the Norwegian government has made it a major focus of policy to step up their effort to return failed asylum seekers. The purpose of this thesis has therefore been to analyze what the responsibilities of the Norwegian government are towards failed asylum seekers who are forcefully returned. In answering this question, it has been argued for the existence of an extraterritorial obligation to investigate allegations of ill-treatment in the post-return phase. Several dilemmas and challenges present itself in this phase, lack of knowledge being one of them, another being the lack of priority from the political government in Norway. Additionally it seems that the mechanisms put in place function more as a 'warning' sign, than actual protection of the returnee. It concludes that the responsibilities ensure the protection of the failed asylum seeker to a certain degree, but there is a lack of information about the effects of the return. It has, therefore, become apparent that the government can do more to protect failed asylum seekers.

Abbreviations

AIT	Asylum and Immigration Tribunal
CAT	Convention against Torture
CAT Committee	Committee against Torture
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ECRE	European Council on Refugees and Exils
FRA	European Union's Fundamental Rights Agency
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
HRC	Human Rights Committee
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for former Yugoslavia
IOM	International Organization for Migration
NPM	National Preventative Mechanism
OP-CAT	Option Protocol to the Convention against Torture
OHCHR	Office of the High Commissioner for Human Rights
PU	Police Immigration Service
Refugee Convention	The Convention relating to the Status of Refugees
UDHR	Universal Declaration for Human Rights
UDI	Directorate of Immigration
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNE	Immigration Appeals Board
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

Table of contents

1 Introduction

1.1 Background

Rahim Rostami came from Iran to Norway in search of protection from persecution. His application for asylum was rejected and he was asked to return. Rahim did not return voluntarily and was therefore returned by force. The Norwegian police handed Rahim over to the Iranian police at the airport in Teheran. He was held at the airport for two days before he was transferred to Evin prison where he was tortured. Rahim was released after four months and was then accused of oppositional activities and violations of Sharia law; the latter being the reason for his flight to Norway and the basis of his asylum application.[1] However, the facts of his case are highly contested, which makes it challenging to come to a solution or a remedy for the alleged human rights violations in this case.[2]

At present it seems to be unclear, for the Norwegian government, what happens to many failed asylum seekers after the return has been implemented and the person has reached what is here called the post-return phase. There exists no mechanism for monitoring the post-return phase, nor is protection in this phase included explicitly in the regulations of forced return.[3] Thus, whether failed asylum seekers are returned to torture or ill-treatment is therefore unknown in most cases. Consequently, there is a need to study legal provisions relating to the post-return phase.

The return of failed asylum seekers is an integral part of each state's migration management policy and border control. However such returns must be balanced by respect for human rights. This is especially pertinent in a time when the Norwegian government has

[1] Steen, 2013:222-223, Heinesen, 2011,

[2] Opsahl, 2011, UNE, 2011

[3] Return Directive from 2008 on common standards and procedures in member states of the EU for returning illegally staying third-country nationals (Return Directive)

made it a major focus of policy to step up their effort to return[4] failed asylum seekers, and has set specific removal targets they aim to achieve. The Norwegian government has allocated additional funding for the police to be able to forcefully return 6700 failed asylum seekers in 2014, a remarkable increase from 2013.[5] It is therefore important that the government will manage to protect those who are in real need of protection and return those who do not need protection.

The purpose of this thesis is therefore to investigate what, if any, obligations the Norwegian government has towards failed asylum seekers in the post-return phase. The research question is therefore:

What are the responsibilities of the Norwegian government towards failed asylum seekers who are forcefully returned, and will these responsibilities ensure the protection of the failed asylum seeker in the post-return phase?

1.2 Definitions

By focusing on failed asylum seekers, it is important to know who is a refugee, and who is not. Therefore an overview is necessary, first of the refugee definition and then of the definition of a failed asylum seeker.

The refugee definition in the Norwegian Immigration Act[6] derives from the 1951 Convention relating to the Status of Refugees (Refugee Convention), but has a wider scope as it

[4] Extradition, expulsion, deportation and return are terms which are often used interchangeably. Return is a broad term which covers the different types of acts of removing a person from one country to another, and will mostly be used in this thesis. When the person has returned, he or she will be called a returnee.

[5] Press release Nr.:109 -2013, In 2013 PU returned 5934 persons in total, where 1 270 returned to their home country, 1 400 returned to another Dublin country and the rest were expelled. Forfang, 2014 and PU, 2013

[6] Act of 15 May 2008 on the entry of foreign nationals into the kingdom of Norway and their stay in the realm (Immigration Act).

includes a second group, presented in paragraph (b), of persons traditionally receiving complimentary protection under human rights law. According to § 28(a) of the Immigration Act, a person shall be recognized as a refugee if the foreign national has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or for reasons of political opinion, and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or her country of origin. Further, paragraph (b) of § 28 states that if the person do not fall within the scope of (a) but nevertheless still face a real risk of being subjected to a death penalty, torture or other inhuman or degrading treatment or punishment upon return to his or her country of origin, the person will be recognized as a refugee. If a person is not recognized as a refugee according to § 28(a) or (b),[7] he or she will be referred to as a failed asylum seeker.

A failed asylum seeker is any third country national, coming from outside the Schengen area, which holds a return decision.[8] The return decision means in practice that the application for asylum was rejected and that the person must leave the country and the whole Schengen area within a given deadline, usually within a couple of weeks.[9] If a person fails to comply with the order to leave Norway, or the government suspects that the person will fail to return by himself, the police may intervene and escort the person out of the country; this is when the return process starts.[10]

---

[7] According to § 38 of the Immigration Act, UDI must also consider whether he or she should be granted residence on humanitarian grounds after § 38 of the Immigration Act, however this provision will not be given much attention in this thesis.

[8] Return Directive, article 2

[9] NOAS, 2013:7, Article 11 of the Return Directive states that the return decision shall be accompanied with an entry ban, for example: " (b) if the obligation to return has not been complied with", which will include affect persons who are returned by force.

[10] Return Directive, article 8. Dublin cases will not be looked at in this thesis.

1.3 The Norwegian asylum system

As an introduction to the issues addressed in the analysis of this thesis, a brief presentation over the options a failed asylum seeker has to appeal and set aside the return decision will be made here. Additionally the return process, or in other words the removal of a person from Norway to another country, will be introduced to present the institutions making up the Norwegian asylum system and how they work.

The Ministry of Justice and Public Security has the overall responsibility for return of failed asylum seekers, while the Norwegian Directorate for Immigration (UDI) has the responsibility for coordinating the immigration administration in Norway. Further, Landinfo is the Norwegian Country of Origin Center for Information, and provides the other institutions with updated information about the asylum seekers home country, used as one of the sources for assessing the risks of return.[11] Before the return process starts, the asylum seeker will receive a return decision, given by UDI. Thereafter the asylum seeker will have the opportunity to appeal this decision to the Immigration Appeals Board (UNE), according to the Immigration Act § 76. UNE can also set aside its previous decision as long as this is in relation to the foreigner's advantage, as stated in § 35 of the Public Administration Act. There are no further restrictions on how many decisions UNE can set aside.[12] Although, UNE has no duty to conduct a new assessment of the decision, unless the request for assessments concerns non-refoulement, in other words the protection against return.

Moreover, there are three different ways to organize a return from Norway; assisted, accompanied and forced return. UDI is responsible for providing a program of assisted return. Others may be accompanied by the Police Immigration Service (PU) to facilitate the return, which is called accompanied return. Both the assisted and accompanied return option will provide the returnee the opportunity of applying for return and reintegration support

[11] Landinfo, 2014b

[12] NOU 2010:12

through the International Organization for Migration (IOM), commissioned by UDI, and is often called voluntary return.[13] Whether accompanied return is necessary or not, will be assessed by UDI in consultation with PU.[14] Further, PU will implement the forced return of failed asylum seekers who do not return voluntarily.

A number of the forced returns from Norway are carried out on ordinary scheduled flights, where a small number of persons are escorted by police officers from PU. In other cases PU uses their own chartered airplanes for a larger number of returnees. PU can also cooperate with FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, where the airplane will make stops in several European countries before proceeding to the destination outside the Schengen area.[15] Furthermore, article 8(6) of the Return Directive, requires that states shall provide for an effective forced-return monitoring system of all the phases of the return process, from the person is picked up by the police until he or she reaches the country of origin.[16] However, no indication is provided as to what mechanisms are to be put in place for states to comply with this obligation. The Ministry of Justice and Public Security in Norway initiated in 2012 a hearing of guidelines for monitoring forced return. By the end of the year it was informed that the new policy would be ready in the beginning of 2013.[17] Though, in light of the fact that FRONTEX initiated a process of making a code of conduct, the guidelines were delayed. During the negotiations there was a difficulty in agreeing upon a common standard for use of force by all EU member states. FRONTEX did therefore refer back to article 8(6) of the Return Directive.[18] What can be seen from this

[13] Despite the use of the term voluntary, the person has an obligation to return according to§ 66 of the Immigration Act

[14] Ministry of Justice and Public Security, 2011

[15] NOAS, 2013:7

[16] Ibid

[17] Email, Bakke, 20.01.2014

[18] Interview, Frantsvold, 24.01.2014

is that each country will have to interpret what this means in practice and make the conditions for what the monitoring bodies should and should not react on. Thus, the ministry is still undecided on how they will implement a system of monitoring the forced return. However, in other EU countries, National Preventative Mechanisms (NPMs)[19] have been authorized to accompany irregular migrants during flights since 2011, which makes it possible to see whether the returnees are treated humanely and according to the regulations applicable. Nevertheless, they stop to monitor once the returnee has been handed over to the authorities of the country of origin, since escort personnel and supervisory bodies do not have a mandate to go beyond this point at the present time.[20]

Therefore, when a failed asylum seeker reaches the country of origin, there is a transfer before the post-return phase starts. The transfer phase is the most critical phase of the return process, as it is often during the transfer that that the greatest risk of ill-treatment occurs, due to the use of coercive measures by the parties involved.[21] After the transfer has been made, the failed asylum seeker enters the post-return phase. The Return Directive regulates the return process but is silent about the responsibilities of the sending state in the post-return phase, which is particularly interesting for the questions raised in this study.

Moreover, NPMs in EU have noted that conditions on arrival are very difficult; they are often rejected by the local population or their family, and live in total isolation. The Committee on Migration, Refugees and Displaced Persons in EU, therefore argue that this represents a legal vacuum that needs to be filled.[22] As such, the post-return phase and the legal responsibilities of the sending state will be addressed in this thesis.

[19] Established at a national level on the basis of OP-CAT

[20] CoE, 2013:12

[21] Ibid:3

[22] Ibid:12

1.4 Methodology

In view of the complexity of the issue at hand, there is a need to use a multidisciplinary approach, where law and practice are combined together. This thesis is based on the legal tradition referred to as law in context, an approach where the starting point are problems in society which are likely to be generalized. In this approach law may provide a solution to the problem, but other non-law solutions are not excluded and may also be preferred. This is in contrast to the legal tradition of black-letter law, which places the main focus on the law itself as an internal self-sustaining set of principles.[23] Multidisciplinary research can broaden the legal discourse in terms of its theoretical and conceptual framework, and it is therefore chosen as a research methodology.[24]

Two methods of data collection have been used in this study: the examination of documents and conducting interviews with related actors in the field. As such, this study has primarily been a qualitative desk-study, supplemented with a few interviews. In the examination of documents, primary legal sources, *de lege lata*, being treaties, customary law, general principles of law and judicial decisions have been analyzed. The study of these documents have been in accordance with article 38 of the Statute of the International Court of Justice and article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) relating to the interpretation of treaties. Relevant Norwegian and regional legislation, such as the Immigration Act and the Return Directive, will be studied to better understand the legal framework regulating the forced return of asylum seekers. Additionally, international and regional human rights treaties will be analyzed, and a few remarks about its role in the legal framework in Norway will be made here.

The Norwegian Constitution, § 110(c), states that it is the responsibility of the authorities of the state to respect and ensure human rights. The Human Rights Act is a further

[23] McConville and Chui, 2007:1

[24] Ibid:5

realization of this paragraph with the aim of strengthening the status of human rights in Norwegian law, and § 3 of the Immigration Act provides that the law shall be applied in accordance with international law, which Norway is signatory to, when these are intended to strengthen the position of the individual. The main human rights treaty in this study is the European Convention on Human Rights and Fundamental Freedoms (ECHR), were especially article 3 has been analyzed in depth. The Refugee Convention and the Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT) will further be important for the study of the protection of failed asylum seekers. Additionally, relevant international jurisprudence and soft law instruments have been used to better understand the duties embedded in the different articles in the treaties. Broadly stated, international law defines the legal responsibilities of states in their conduct with each other, and their treatment of individuals within their jurisdiction. Different treaties may create different treaty body regimes to encourage the parties to abide by their obligations and undertake actions required for compliance. One such example is the European Court of Human Rights (ECtHR), which is only mandated to interpret possible breaches under the ECHR and not other international treaty provisions.[25]

The secondary sources used in this thesis have been academic articles, reports by civil society, regional and international organizations, press releases by government institutions and newspaper articles. All sources are used in their capacity, in other words according to their reliability and validity as such. In addition, key actors have been interviewed by using an informal interview guide.[26] The aim behind conducting interviews was to find information about the situation of failed asylum seekers and mechanisms working to protect them, especially since there is a lack of public available information on the latter. Actors from both the state and civil society have been interviewed, which was particularly valuable to clarify the different viewpoints from the actors involved.

---

[25] ECHR article 32

[26] Grønmo, 2007:159-165

This thesis will largely be based on qualitative judgments built on the collected data. Thus, it will be influenced by my personal predispositions. The information and conclusions of this thesis have therefore been crosschecked by the use of multiple research procedures and sources to improve the quality of the study, which have been elaborated on in this section.

1.5 Reader's guide

To properly address the main research question, chapter 2 introduces the principle of non-refoulement, and seeks to illustrate the meaning of the protection against return. The chapter provides an insight into issues that need to be addressed before the return is implemented, to be able to ensure the protection after the return has taken place, focusing on the role of the general security situation in the home country. Chapter 3 moves on to explore whether there exists a legal duty to investigate allegations of ill-treatment in the post-return phase, to study the responsibilities of the state after the return has been implemented. Chapter 4 will analyze information about life after return, highlighting a few research projects conducted, to better understand what it can look like. Thereafter a case will be presented, concerning forced return to Eritrea, to study how Landinfo work to collect information, being the primary source of information for objective evidence in an asylum case. As such, the chapter aims to analyze whether research and information collected on general trends, can tell if the responsibilities presented in chapter 2 are protecting the failed asylum seeker in the post-return phase or not. Chapter 5 introduces four mechanisms that are put in place by the Norwegian government to ensure the protection of the failed asylum seeker in the post-return phase. Specifically, it highlights positive actions taken by the government, and their practical effects towards the protection of failed asylum seekers. This is seen in relation to an example of the transfer of prisoners in Afghanistan, where a few lessons may be learned in relation to the mechanisms discussed and the value of collecting information. Chapter 6 offers a brief conclusion.

2 Before the return

The Refugee Convention does not specify the requirements for refugee status determination procedures, as the idea was that state parties would establish appropriate procedures in regard to the particular legal traditions in their respective country.[27] There is in other words a high margin of appreciation for states to decide who should, and who should not, be protected from return.

This chapter focuses on the human rights responsibilities of the Norwegian government to protect the asylum seeker. Firstly, this chapter will address the *travaux preparatoires* of the immigration act to study the protection against indiscriminate violence in Norwegian law. Secondly, the meaning and scope of the principle of non-refoulement will be addressed. Thereafter, the protection against return, embedded in article 3 of the ECHR and the three requirements for making such a case will be addressed. Lastly, this chapter looks at the principle of proportionality in relation to the protection embedded in the principle of non-refoulement.

2.1 *Travaux Prèparatoires* of the Immigration Act

The EU Qualification Directive, a part of the Common European Asylum System, is not legally binding upon Norway, but the Directive was important in the preparatory work of the Immigration Act in Norway. The Committee, working on the new Immigration Act, argued that the Qualification Directive appeared to be a suitable basis for the formulation of detailed rules and that it was smart for Norway to apprehend the same policy in this area as most of the other European countries.[28]

Article 2 of the Qualification Directive states that a person who does not qualify as a refugee, but who would still face a real risk of suffering serious harm, as defined in article 15, would be eligible for subsidiary protection. Article 15 further defines the legal concept of

[27] Gorlick, 2002:1

[28] Ot.prp.nr.75:15

serious harm for the purpose of establishing who is eligible for subsidiary protection. Three harms are referred to: (a) death penalty or execution; (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious or individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Of these, article 15(c) is of particular importance for the discussion in this chapter.

In the Elgafaji case, the Court of Justice of the European Union (CJEU) looked at the interpretation of article 15(c) of the Qualification Directive. The case concerned an Iraqi couple who submitted application for temporary residence permits in the Netherlands. The CJEU held that article 15(b) of the Directive corresponds in essence to article 3 of the ECHR. By contrast article 15(c) is a provision: "the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard of fundamental rights, as they are guaranteed under the ECHR."[29] Further, the CJEU held that article 15(a) and (b) cover situations where the applicant would face a specific type of harm and that article 15(c) covers situations where a more general risk of harm exists. This case and especially the interpretation of article 15(c) have started a debate about the use of paragraph (c) and the reasoning given by CJEU.

In Norway, the Committee working on the Immigration Act chose not to include article 15(c) because this paragraph was seen to be included in article 3 of the ECHR, and therefore already a part of section 28(b). The meaning of article 15(c) in the Qualification Directive was then seen to be superfluous in the Immigration Act. The Committee further argued that any situation where it is shown that a person risk becoming a victim of indiscriminate violence or designated victim of ill-treatment, would be protected by article 3 of the ECHR. It is further worth noting that the Immigration Act in Sweden and Finland include a paragraph equivalent to article 15(c) of the Qualification Directive, and in the pre-

[29] CJEU, Meki Elgafaju and Noor Elgafaji v. Staatssecretaris van Justitie. 17.02.2009 para 28

paratory work, UDI, Norwegian Helsinki Committee and the Norwegian Refugee Council, argued that the Immigration Act should include this paragraph.[30] Whether the act of including this paragraph would provide better protection or not, will not be discussed here. Rather, in the rest of this chapter the law as it is today, *de lege lata*, will be addressed, and therefore the emphasis will be put on article 3 of the ECHR, as was argued for in the preparatory work of the Immigration Act. Though, first, the principle of non-refoulement will be addressed.

2.2 Principle of non-refoulement

The principle of non-refoulement is broadly seen as a provision for protection against return.[31] This principle consists of two main aspects. The first is non-refoulement as a concept which prohibits states from returning refugees or asylum seekers to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. The second is non-refoulement as a concept of human rights concerning the prohibition of torture, cruel, inhuman or degrading treatment or punishment,[32] most commonly referred to as complimentary protection.[33] A brief analysis of these two concepts will be presented focusing on the treaty base of the principle; first the Refugee Convention, and second, the human rights concept of non-refoulement embedded in CAT and the ECHR. Thereafter a brief look at the common feature of the principle of non-refoulement will be provided.

2.2.1 Treaty basis for non-refoulement

2.2.1.1 Refugee Convention

The principle of non-refoulement originates in article 33 of the Refugee Convention. This article states that "states are obliged not to expel or return a refugee in any manner whatso-

[30] Ot.prp.nr. 75:94-95

[31] Goodwin-Gill and McAdam, 2007:201

[32] Lauterpacht and Bethlehem, 2001:1

[33] Goodwin-Gill, 2011:285 complimentary protection can also be referred to as subsidiary protection

ever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion." The final element of this article is referred to as the qualifying phrase, characterizing the nature of the threat. However, what if life or freedom is threatened on account of other reasons than those specified in article 33(1)? This may particularly be a challenge when the flight of the refugee is caused by a situation of indiscriminate violence in the country of origin. However, legal text adopted after 1951 set out the threat considered without qualification. One example is the Cartagena Declaration from 1984 which include in addition to the elements in the Refugee Convention: generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.[34] Additionally the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has in a number of conclusions referred to persecution without specifying the qualifying phrase.[35]

The *ratione personae* of the principle of non-refoulement, as it appears in the Refugee Convention, is that it applies to refugees within the meaning of article 1, which is defining a refugee. The UNHCR has argued for the importance of the principle not only for refugees, but also for asylum seekers reaffirming; "the fundamental importance of the principle of non-refoulement (...) irrespective of whether or not individuals have been formally recognized as refugees".[36] This was later affirmed by the UN General Assembly which "calls on all States to refrain from taking measures that jeopardize the institution of asylum, in particular by returning or expelling refugees or asylum-seekers contrary to international human rights and to humanitarian and refugee law".[37] There is however one exception to this principle. Article 33(2) states that the benefits of non-refoulement may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of

[34] Cartagena Declaration, article 3

[35] See for example UNHCR EXCOM No. 6, 1977 and UNHCR EXCOM No 15, 1979

[36] UNHCR EXCOM No.6(1977)(c)

[37] UN General Assembly, 1998 para 5

the country. This article is prospective in its application, meaning that it refers to a future threat and not a threat in the past.[38] However article 33(2) does not identify the acts that will trigger the application of the national security exception. This is a challenge according to UNHCR, since asylum seekers and refugees are often vilified, criminalized and even stereotyped as terrorists and can, for these reasons, be denied admission to territories and access to protection.[39] Thus, Lauterpacht and Bethlehem argues that this margin of appreciation, which states enjoy in this matter, is limited in scope by two requirements. Firstly, there must be 'reasonable grounds' for believing that a refugee is a danger to the security of the country where he or she is, and the state must provide evidence of a future security risk. Secondly, they argue that the threshold for operation of exceptions to the Refugee Convention must be high, because of the humanitarian character of the convention and the serious individual consequences of refoulement.[40]

2.2.1.2 Torture Convention

The CAT is based on a general agreement that the prohibition against torture is regarded as *jus cogens*.[41] Article 3 of the CAT further reaffirms the principle of non-refoulement, where it states that "no state party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." One thing to notice especially here is that this article only prohibits return to torture and does not mention inhuman, degrading treatment. There is in general no agreement on the meaning and scope of the term torture, and there is a difficulty in identifying the nature of the prohibition involved in treatment or punishment that is cruel, inhuman or degrading.[42] However, article 3 of the ECHR on the other hand, includes

[38] Lauterpacht and Bethlehem, 2001:54

[39] UNHCR, 2007:2

[40] Lauterpacht and Bethlehem, 2001:55

[41] Rehman, 2010:810

[42] Ibid:810-811

both torture and inhuman, degrading treatment. Attention will therefore be given to the ECHR and the case law of the ECtHR to clarify if there is any distinction.

2.2.1.3 European Convention on Human Rights

Article 3 of the ECHR prohibits torture, inhuman and degrading treatment and in Soering v. UK, the ECtHR held that this article also extend to cases of extradition in which the asylum seeker would be faced by a real risk of exposure to ill-treatment in the receiving state.[43] The ECtHR has further distinguished between torture, inhuman and degrading treatment in its case law. The Court held in Ireland v. UK, that acts, which inflicted intense physical and mental suffering, would fall within the category of inhuman treatment. Further it held that acts were degrading if they: ”arose in their victims, feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly break their physical and moral resistance”.[44] Lastly, the ECtHR held that an act of torture is distinguished by the intensity of the suffering inflicted on the individual. Torture was thereby defined as deliberate inhuman treatment causing very serious and cruel suffering.[45]

However, in the more recent case of Harkins and Edwards v. UK, the ECtHR stated that this distinction between torture and inhuman or degrading treatment is more easily drawn in domestic cases where the Court is called upon to characterize acts which have already taken place. On the other hand, in an extraterritorial context of returnees, there is a need for a prospective assessment, and it is not always possible to determine whether the ill-treatment will be sufficiently severe to qualify as torture.[46] Further, the Court held that the distinction can more easily be drawn in cases where the risk of ill-treatment stems from factors which do not engage the responsibility of the public authorities of the receiving state, which might be difficult to rely on in certain situations. Because of this, the Court

[43] ECtHR, Soering v. UK (1989) para 88

[44] ECtHR, Ireland v. UK (1978) para 167

[45] Ibid para 167

[46] ECtHR, Harkins and Edwards v. UK (2012) para 122

held that whenever a risk of violation of article 3 is found in relation to a proposed return, it has refrained from considering whether the ill-treatment in question should be characterized as torture or inhuman or degrading treatment.[47] One example of this approach can be found in the Chahal case, where the ECtHR held that the Convention prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment, and that this prohibition is equally absolute in expulsion cases.[48] The fact that ECtHR now seem to move away from a practice of distinguishing between torture and inhuman and degrading treatment, will in the end effect the threshold of non-refoulement cases, which will be studied more closely. However, first, the common feature of the principle of non-refoulement will be given some attention.

2.2.2 Common features

As already stated, the principle of non-refoulement consists of two different concepts; one concept deriving from refugee law and the other concept deriving from human rights law. After studying the treaty basis, it can be stated that non-refoulement proscribes that no person should be returned to any country where he or she is likely to face persecution or other ill-treatment. This is the core element of the principle, and constitutes a part of the responsibilities to ensure the protection of failed asylum seekers in the post-return phase. Further in this thesis, focus will be on the ECHR and the requirements of a non-refoulement case.

2.3 Three requirements

UNE and UDI, with the help from Landinfo, provide guidance on which places that can and cannot be conceived as safe enough for failed asylum seekers to be returned to. UNHCR further publish guidelines on which areas it is not advisable to return failed asylum seekers to. Traditionally, Norway has been a country receiving positive feedback from UNHCR, however, this changed in 2004 when the Norwegian policy for the first time contradicted the recommendations from UNHCR by returning failed asylum seekers to areas

[47] Ibid para123

[48] ECtHR, Chahal v. UK (1996) para 79-80

with an armed conflict. When confronted about these contradictions, Erna Solberg, Minister of Local Government and Regions in 2004, said that: "We will not let us dictate, as we make our own assessment on when it is right to forcibly return asylum seekers."[49] The rhetoric behind this response seems to be that the Norwegian asylum system is well-developed, and does not need advice from others. This might be right, but it becomes dangerous when the will to listen to other opinions than our own, goes missing due to our own success.

This section will address whether those who risk ill-treatment due to indiscriminate violence can receive protection under the principle of non-refoulement. Article 3 of the ECHR will be in focus because this is the article referred to in the *travaux prèparatoires* of the Immigration Act. Furthermore, there are three main requirements for a case to meet the threshold of a non-refoulement case in the ECtHR which will be addressed here; the threshold requirement, the proof requirement, and the risk requirement.

2.3.1 Different threshold for non-refoulement cases

Practice shows that the threshold of being accepted in the ECtHR as an article 3 case is higher for non-refoulement cases, than for domestic cases. According to the case law, ill-treatment must attain a minimum level of severity for it to fall within the scope of article 3.[50] Further, in Aswat v. UK, the Court held that the absolute nature of article 3 do not mean that any form of ill-treatment will act as a bar to return a person from a contracting state: "treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity required for there to be a violation of Article 3 in an expulsion or extradition case."[51] The question is why there should be a different threshold for cases concerning non-refoulement? It seems that the acceptance of ill-treatment may be higher for persons returning to their home countries, a practice that

[49] Steen, 2012:150-151, Folkvord, 2004 (Authors translation)

[50] ECtHR, Saadi v. Italy (2008) para 134

[51] ECtHR, Aswat v. UK (2013) para 32

appear to be in contradiction to what was claimed in the Universal Declaration of Human Rights (UDHR); the universal character of human rights.

The doctrine of human rights is based on the idea that each person is a subject of global concern. It does not matter what a person's spatial location might be or which political subdivision or social group the person might belong to because everyone has human rights. Therefore, responsibilities to respect and protect these rights may, at least in principle, extend across political and social boundaries.[52] This was recognized in the UDHR which proclaims that all human beings are born free and equal in dignity and rights, and that everyone enjoys a certain treatment.[53] Yet, the discourse and practice of human rights can also induce a disabling skepticism, even among those who admire its motivating ideas.[54]

2.3.2 Substantial grounds

The ECtHR held in Hirsi Jamaa and others v. Italy that expulsion, extradition or any other measure to remove an alien, may give rise to an issue under article 3 of the convention, and hence engage the responsibility of the expelling state under the convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to article 3 in the receiving country.[55] The case concerned Somalian and Eritrean migrants, travelling from Libya, who had been intercepted at sea by the Italian authorities and sent back to Libya.[56] The ECtHR found in this case that substantial grounds had been shown for believing that there was a real risk that the applicants would be subjected to treatment in Libya contrary to article 3.[57]

---

[52] Beitz, 2009:1

[53] UDHR article 1

[54] Beitz, 2009:2

[55] ECtHR, Hirsi Jamaa and others v. Italy (2012) para 114

[56] Ibid para 115

[57] Ibid para 136

For the ECtHR to assess whether there are substantial grounds for the applicant to face such risk, the Court is required to assess the conditions in the receiving country against the standards of article 3 of the ECHR.[58] However, the standard used by the ECtHR implies that the ill-treatment the applicant alleges that he will face if returned, must reach a minimum level of severity, the threshold requirement, if it is to fall within the scope of article 3 of the ECHR.[59] Providing proof that there are substantial grounds for a real risk, may create a difficulty of obtaining supporting evidence for victims of ill-treatment, especially considering the humanitarian situation they are in, and the lack of functioning state apparatus in their home countries.[60] The available information about the home country will be assessed in chapter four, looking especially on what information the Norwegian asylum system relies on in their assessment. This is further an important point when it comes to the assessment of the individual and general security situation, which will be studied next.

2.3.3 Real risk of ill-treatment

In order to determine whether there is a risk of ill-treatment, the ECtHR examines the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.[61] The individual and general risk will be addressed here.

2.3.3.1 Individual risk

In order to determine whether there is a risk of ill-treatment upon return, the ECtHR will examine the foreseeable consequences of sending the applicant to the receiving country.[62] Further, the standard used implies that the ill-treatment the applicant alleges he or she will

---

[58] ECtHR, D.N.M v. Sweden (2013) para 44

[59] Ibid: para 44

[60] The issue of assessing whether the applicant is credible or not is a crucial factor in the assessment as has been presented in more detail by Gorlick, 2002, an issue of most interest by civil society organizations in Norway, whereby the Church is especially active. For more info see Steen, 2014, MKR and NKR, 2008

[61] ECtHR, Saadi v. Italy (2008) para 130

[62] Ibid para 130, Email, Dahl, 26.02.2014

face if returned, must attain a minimum level of severity. However, the assessment of this is relative, and will depend on the circumstances of the case and the person in question.[63] Furthermore, denial of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of refoulement built on the essential idea to protect each individual from refoulement.[64]

As such, the risk threshold in a human rights context can best be described as circumstances in which substantial grounds can be shown for believing that the individual would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment.[65] Further, in the case of Hirsi Jamaa v. Italy, the ECtHR held that the fact that a large number of irregular immigrants in Libya found themselves in the same situation as the applicants do not make the risk concerned any less individual where the risk is sufficiently real and probable.[66] In other words, the Court held that the protection is needed just as much in this case, even though there are many people in need of the same protection, referring to the general security risk.

2.3.3.2 General security risk

The general security risk was defined by the ECtHR in the case of Sufi and Elmi v. UK. The case concern the applicants allegations that if returned to Somalia, they would be in real risk of treatment contrary to article 3 of the ECHR.[67] The applicants submitted that the indiscriminate violence in Mogadishu was of a sufficient level of intensity to constitute a real risk to the life or person of any civilian. Though, previously, the Court has indicated that it would only be in the most extreme cases that a situation of general violence would

[63] ECtHR, D.N.M. v. Sweden (2013) para 44

[64] Lauterpacht and Bethlehem, 2001:56

[65] Ibid:85

[66] Ibid:43

[67] ECtHR, Sufi and Elmi v. UK (2011)

be of sufficient intensity to pose such a risk. The ECtHR has not provided any further guidance on how the intensity of a conflict is to be assessed.[68]

Although, in the case of Sufi and Elmi v. UK, the Court recalls that the Asylum and Immigration Tribunal (AIT) of the United Kingdom had to conduct a similar assessment in AM and AM Somalia v. Secretary of State for the Home Department[69], and by doing so it identified the following criteria: firstly, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localized or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting. These criteria are similar to the criteria of a non-international armed conflict that was provided by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic case. The ICTY held that for a situation to qualify as being an internal armed conflict, there must be protracted armed violence, as was referred to by the AIT, and the parties must be organized, not mentioned by the AIT.[70] These criteria are important because they function as a threshold for when international humanitarian law applies in a non-international armed conflict. In the same way, the criteria the AIT set out are important as a benchmark for when indiscriminate violence provide protection under the principle of non-refoulement.[71] Although, the ECtHR held that the criteria provided by the AIT are not to be seen as an exhaustive list to be applied in all future cases. Rather, it was held that in the context of the present case, the Court considered that they formed an appropriate yard-

---

[68] Ibid para 241

[69] AIT, AM and AM Somalia v. The Secretary of State for the Home Department (2009)

[70] ICTY, Prosecutor v. Dusko Tadic a/k/a "Dule" (1995) para 70

[71] The debate on whether the threshold requirements of international humanitarian law and human rights law should be the same when it comes to which situations qualify as an internal armed conflict and the level of indiscriminate violence necessary for it to reach the threshold requirement, is not discussed here. However, the debate will be highly relevant for further research on protection from indiscriminate violence.

stick by which to assess the level of violence in Mogadishu.[72] The Court concludes that the situation of general violence in Mogadishu is sufficiently intense for it to present a real risk of violation of article 3 solely on account of presence there. However, it was further held that if the person is well connected to powerful actors in Mogadishu, it could enable him to obtain protection and therefore he would not receive protection under article 3.[73]

Furthermore, in the case of A.A. and others, the ECtHR observed that the general situation in Yemen remains volatile and extremely tense. However, the Court further stated that the general situation of instability and violence in Yemen was not of such intensity that applicants being returned there would be exposed to real risk of treatment contrary to article 3.[74] This example refers to the threshold requirement, which is arguably high in cases concerning indiscriminate violence. As was held in the case of Vilvarajah and others, the ECtHR explained that the "examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision, and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe."[75] Although, this does not mean that the Norwegian asylum system cannot set a lower threshold, to ensure the protection of failed asylum seekers, also from indiscriminate violence.

Moreover, it can be argued that the threshold is high due to the struggle, or the balancing act between the state and the individual.

---

[72] ECtHR, Sufi and Elmi v. UK (2011) para 241

[73] Ibid: para 293

[74] ECtHR, A.A. and others v. Sweden (2012) para 76

[75] ECtHR, Vilvarajah and Others v. UK (1991) para 108

2.4 The balancing act between the state and the individual

The application of the principle of proportionality in relation to forced return of failed asylum seekers highlights various dilemmas and challenges faced today, and will be given some attention here.

The principle of proportionality is regularly used in cases relating to protection of asylum seekers. The question is then, whether the danger the refugee may meet if returned outweighs the threat to public security that would arise if the person were allowed to stay.[76] Though, the person in question will have protection from the human rights regime where no exception for the principle of non-refoulement is allowed. Although, even the principle of non-refoulement has a threshold, and even here the states have a margin of appreciation as to what constitute severe enough ill-treatment for it to make the principle of non-refoulement applicable, as shown in the previous sections. No state claims that refoulement is permissible under international law, but they would go to a great length to characterize instances of return as standard immigration control, exclusion or not involving refugees.[77]

Studies show, for instance, that the Norwegian return policy has been tightened by the political system from 2000 to 2012, meaning that the policy of protecting asylum seekers are stricter today than what it was a few years ago. These tightening measures are defended by immigration control policies.[78] In other words, it seems that the threat to the public security has been given more weight in Norway the last decade, than the danger the refugee may meet if he or she is returned.

A further development that can be seen as a tightening measure is the new law on the option to set aside a decision for failed asylum seekers. Broadly stated, effective asylum systems rely upon returning persons who do not need protection in favor of persons who really

[76] Lauterpacht and Bethlehem, 2001:57-58

[77] Ibid

[78] Thorgrimsen, 2013:47-62

need protection. In Norway, there are approximately 5700 persons living in asylum centers holding a final return decision.[79] Though, there is a need to strike a balance here. On one hand, it is important to make sure that no mistakes are made because the consequences for the individual can be devastating. Additionally, a case may develop during the waiting time in Norway, as the situation in the home country might change and some may also engage in political or religious activities that may affect the outcome of their case. On the other hand, only a few of the applications to set aside a decision are upheld. In 2009, only about 6% of all the applications resulted in a change in the original decision.[80] In light of this, one of the changes made to the Immigration Act is that if UNE considers it obvious that a request to set aside an individual decision cannot succeed, UNE is not obligated to give an individualized ground in its reply. This does not apply if special circumstances suggest the granting of an individualized ground.[81] However, in practice this may make it more difficult for the person holding the return decision to set aside the decision if there is a real need for protection. Although, it will depend on how this new paragraph is implemented in practice.

Nevertheless, the option to set aside a decision is important because it provides a legal safeguard. It represents the last alternative for the failed asylum seeker, of which may prevent ill-treatment upon return, and therefore plays an important role in the asylum system. The new development to tighten the opportunities for asylum seekers to use this option therefore needs to be handled very carefully, without compromising the rights of the applicants.

[79] NRK, 2014, Haugsbø, 2014

[80] Innst. 124L (2013-2014) Prop. 180 L (2012-2013), NOU 2010:12

[81] LOV-2014-04-04-10

3 After the return: duty to investigate

Rahim Rostami alleged that he was tortured after he was forcefully returned from Norway to Iran.[82] Due to the existence of stories like this one, the question that will be raised in this chapter is whether the Norwegian government has a legal duty to investigate allegations of ill-treatment in the post-return phase, or, if the duties of the Norwegian government stop when the return has been implemented.

It is worth noting introductory that, for human rights treaties to be applicable to a particular individual there is a requirement that a state owes the individual some legal obligations under the treaty in question.[83] This is often what is referred to when the individual is under the jurisdiction of the state, and thereby the state's obligations, under a particular human rights treaty. In many of the international human rights treaties, especially those protecting civil and political rights, it is the jurisdiction clauses which determine their scope of application.[84] The jurisdiction clause therefore functions as a threshold criterion. This means that it needs to be established that the individual is within the jurisdiction of the state in order for a treaty obligation to arise in the first place.[85] A second point is that the returnee will be based within another state's territory in the post-return phase. This does not imply that it falls outside the jurisdiction of the sending state since jurisdiction can be seen in other than territorial terms. Nevertheless, it does complicate the picture and render necessary a further discussion. This section will therefore address the duty to investigate, by looking both at the territorial and extraterritorial application of the duty. Lastly, this chapter will, in brief, view some of the demands from civil society organizations in Norway regarding forced return.

[82] Heinesen, 2011,

[83] Milanovic, 2011:7

[84] Ibid:17

[85] Ibid:19

3.1 Territorial obligations

Territorial application means, broadly, that the individual concerned is physically located within the geographical area over which the state has sovereignty or title at the moment of the alleged violation of a human right, and this is usually how jurisdiction is perceived.[86]

Furthermore, the wording of article 12 and 13 in the CAT requires a state party to investigate when there are reasonable grounds to believe that torture occurred 'in any territory under its jurisdiction', and if a person files a complaint alleging he has been subjected to torture 'in any territory under its jurisdiction'. Additionally, the CAT Committee has stated that it: "observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory."[87] It is quite clear from this example that there is a duty, on behalf of state parties, to investigate within the geographical area over which the state has sovereignty or title. In the case where Norway returns asylum seekers, this duty will only be applicable if the act of ill-treatment occurs within the territory of the Norwegian state.

Similarly, the ECtHR held in Assenov v. Bulgaria, that without a duty to investigate: "the general legal prohibition (…) would be ineffective in practice."[88] That is, within the geographical area as this is a domestic case. However, it is noteworthy that in this case, the Court did not find a violation of article 3 based on the allegations of ill-treatment by the police; but because of the state's failure to carry out an effective investigation into the applicant's allegation of ill-treatment.[89] The ECtHR has implied that there is a duty to investigate under article 2 and article 3 of the ECHR, the right to life and prohibition of torture respectively. This duty has been derived from article 1 of the Convention, which is the

[86] ECtHR, Hirsi Jamaa and others v. Italy (2012) para 71

[87] CAT, Agiza v. Sweeden (2005) para 13.6

[88] ECtHR, Assenov v. Bulgaria (1998) para 102

[89] Ibid

state's general duty to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention. Further, the jurisdiction of a state, within the meaning of article 1, is essentially seen in territorial terms.[90] However, the question of whether the duty to investigate can arise extraterritorially still remains.

3.2 Is there a duty to investigate extraterritorially?

Extraterritorial application means that at the moment of the alleged violation of a human right, the individual concerned is not physically located in the geographical area over which the state has sovereignty or title.[91] For a returnee, this means that the violation takes place when he or she is not within the Norwegian territory. Looking at the human rights treaties, extraterritorial application is usually an issue that will arise from an extraterritorial state act. This can be either commission or omission, which is performed outside the state borders. However, extraterritorial application in general does not require an extraterritorial state act, but solely that the individual concerned is located outside the territory of the state, while the violation of his rights may take place inside the state.[92]

Furthermore, a non-refoulement case will be looked at to study the relation between territorial and extraterritorial obligations in more detail. The complainant Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national, came to Sweden to search for asylum. His application was rejected by the Swedish authorities and he was returned to Egypt in 2001. Following the forced return to Egypt, the complainant alleged that he was tortured while in custody. He therefore claimed that his removal by Sweden to Egypt violated article 3 of the CAT.[93] The CAT Committee came to the conclusion that Sweden failed to provide for a review by an effective, independent and partial judicial body of the Migration Board's decision to expel the complainant. Due to national security concerns in the case, the tribunals

[90] ECtRH, Hirsi Jamaa and other v. Italy (2012) para 71

[91] Milanovic, 2011:8

[92] Ibid:8

[93] CAT, Agiza v. Sweden (2005) para 1.1

(equivalent to UDI and UNE) relinquished the complainant's case to the government, which took the first and final decision to return Agiza. The Committee emphasized that there was no possibility for review of any kind of this decision. Further the Committee recalled that the Convention's protections is absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms.[94]

It is important to look at the reasoning made in the communication by the CAT Committee for two different reasons. Firstly, the CAT Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations.[95] However, the nature of refoulement is such that an allegation of a breach under article 3 concerns an asylum seeker's potential removal. In practice, this means that the right to an effective remedy contained in article 3 of the CAT requires an opportunity for effective, independent and impartial review of the decision to expel or remove the individual.[96] This is important because the focus is on the return decision and the reasoning behind this decision, rather than on the effects of the decision. In other words, these provisions focus on the act conducted by the state within its territorial jurisdiction. Furthermore, representatives in the Norwegian asylum system argues that there is no obligation to follow up on the returnee post-return, since the decision made in Norway has taken all the precautions necessary, within the legal obligations of the state.[97] Nevertheless, since any system may make a mistake, the question still remains whether it can be argued that there is a legal duty to investigate allegations of torture in the post-return phase.

---

[94] CAT, Agiza v. Sweden (2005) para 13.8

[95] Ibid para 13.7

[96] Ibid para13.7

[97] Steen, 2013:207, Interview, Nerby, 03.04.2014

To justify extraterritorial jurisdiction the ECtHR has held, for instance in Issa and others v. Turkey that: "Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory".[98] This implies that the ECHR can apply extraterritorially, and the argumentation for such an application is in line with article 31(1) of the VCLT, which states that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Additionally, looking at the nature of extraterritorial obligations, the question of whether there is any difference between a negative and a positive duty's jurisdictional reach, will be studied. In brief, there is a common assumption that obligations of contracting states cannot be 'divided and tailored', which was held by the ECtHR in the Bankovic case.[99] Based on this line of thought it is reasonable to believe that positive obligations apply in full where human rights law is considered applicable.[100] Looking at the right to life, enshrined in article 2 of the ECHR, the ECtHR has held that this right also obliges the state to take appropriate steps to safeguard the lives of those within its jurisdiction.[101] This means that the right demands both negative and positive actions by the state. However, the ECtHR has also held that the positive obligation is not unlimited as: "the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from mate-

[98] ECtHR, Issa and others v. Turkey (2004) para 71

[99] ECtHR, Bankovic and others v. Belgium (2001) para 74, the developments after the Bankovic case has been discussed in depth by amongst others Martin Sheinin and Rick Lawson arguing for a notion where control should entail responsibility, in *Extraterritorial Application of Human Rights Treaties*. Edited by Fons Coomand and Menno T. Kamminga. 2004.

[100] ECtHR, Bankovic and others v. Belgium (2001) para 74, Larsen, 2012:386

[101] Larsen, 2012:386, ECtHR, LCB v. UK (1998) para 36

rializing".[102] Although in the case of Al-Skeini the ECtHR held that: "It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual."[103] By stating this, the Court once again held that the rights of the ECHR cannot be 'divided and tailored', as was argued for in the Bankovic case.[104] Thereby, stating once again, that the right demands the state to take both negative and positive actions. The distinction between positive and negative duties will be addressed in more detail in the third model of extraterritorial application presented in this thesis.

Moreover, the question that will be raised in this part of the thesis is whether the Norwegian state has a duty to investigate allegations of torture committed by another state or third party inside the territory of another state. Different analyzes have been conducted on the existing jurisprudence suggesting that the exercise of jurisdiction can relate to different targets which allows the development of certain categories of extraterritorial conduct. In this thesis three models of extraterritorial application will be addressed for the purpose of studying the reach of state obligations. However, it is not always clear how a particular set of facts should be categorized, making the foundation of this discussion complicated. It is therefore beyond the scope of this thesis to provide a clear analysis of the concept of extraterritorial jurisdiction. An effort will however be made within the limitations of this thesis, as extraterritorial jurisdiction is a crucial concept in the assessment of the legal duties of the state in the post-return phase.

[102] ECtHR, Kontrovà v. Slovakia (2007) para 50

[103] ECtHR, Al-Skeini v. UK (2011) para 137

[104] Ibid

3.3 Three models of extraterritorial obligations

The first model looks at jurisdiction as control over territory and is called the spatial model. This model was articulated by the ECtHR in the Loizidou case,[105] and has also been applied by the International Court of Justice, which found the International Covenant on Civil and Political Rights to apply during occupation of the Palestinian territory and in the case of Congo v. Uganda.[106] According to this approach, a state has human rights obligations towards a territory's inhabitants, if the state exercises control over the territory of another state that in many ways replicates the extent of control it has over its own territory. Arguably, for the present matter under discussion, this approach may be too limiting. If this jurisdiction is applied too strictly, it may allow many human rights abuses to slip through the cracks.[107] A returnee in the post-return phase would not be protected by the sending state in this approach, since he or she is located outside the territory of the sending state.

The second model looks at jurisdiction as control over individuals and is called the personal model. This model was first set out by the European Commission, and has later been used by the Human Rights Committee, which essentially makes an appeal to the universality of human rights in order to justify the personal model.[108] In its General Comment No. 31, it states that a "State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[109] However, the reference to jurisdiction over individuals runs against the language of some treaties, which explicitly mentions state jurisdiction in territorial terms. Opponents of this model argue that this type of jurisdiction cannot

[105] ECtHR, Luizidou v. Turkey (1995)

[106] ICJ, Advisory Opinion: Legal Consequences of constructing a Wall in the occupied Palestinian territories (2004), Democratic Republic of Congo v. Uganda (2005)

[107] Milanovic, 2011:119

[108] Milanovic, 2013

[109] HRC, General Comment No. 31para 10

be limited on any principled basis, and therefore loses any meaning as a threshold.[110] Unlike the spatial model, the personal model can be said to be too broad in its scope. This approach simply falls into the position that a state has human rights obligations whenever it can actually violate the rights of the individuals concerned.[111] Returnees in the post-return phase will not be covered by this category however, because it is not the Norwegian state that will commit the human rights violation of torture or ill-treatment in the post-return phase. The two models already addressed, both concern the extraterritorial conduct of the state, meaning the acts of the Norwegian state in another territory.[112] However, the individual will fall within the jurisdiction of the sending state, even though the direct human rights violation does not. This is because the return is the relevant human right violation and not the acts in the post-return phase according to these models, which was also held by the CAT Committee in the case of Agzia v. Sweden.[113]

Marko Milanovic argues for a third model. This model is based on the distinction between the positive obligation of states to secure or ensure human rights, requiring states to undertake various steps to fulfil and protect the rights of individuals, and the negative obligation of states to respect human rights, which requires a state to refrain from interfering with the rights of individuals without sufficient justice. The provisions defining the scope of application in the human rights treaties often distinguish between these two types of state obligations.[114] The jurisdiction of the state is conceived of only territorially, but the threshold criterion applies only to positive obligations of states to secure or ensure human rights. It is argued by Milanovic, that only through a sufficient degree of control over a territory can the positive obligations be realistically kept. When it comes to negative obligations to respect human rights, no threshold criterion should apply because states can control the ac-

[110] Milanovic, 2011:119

[111] Ibid:119

[112] Larsen, 2012:174

[113] Ibid:216

[114] Milanovic, 2011:8

tions of their organs or agents.[115] Milanovic argues that the positive obligation of a state to ensure the human rights of persons within its jurisdiction from violations by private parties is not absolute, but the state must exercise due diligence. As such, the state has to take all measures reasonably within their power to prevent violations of human rights.[116]

Milanovic further gives an example which is relevant to the focus of this thesis; he argues that extraterritorial killing by third parties can engage the state's positive obligations to do all it reasonably can to prevent such killings, and the obligation to investigate them.[117] He supports his argument by referring to the judgment from the Inter-American Court of Human Rights where it held that: "An illegal act which violates human rights and which is initially not directly imputable to a State (…) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." As such, Milanovic argues that there exist different categories of positive obligations, where the first category exists only to make the state's negative obligations truly effective. This category of positive obligations should apply coextensively with the negative obligations themselves, in other words extraterritorially. On the other hand, those positive obligations which flow from the state's duty to secure or ensure human rights or prevent violations hence require a threshold that sets out the limits of realistic compliance, which is the threshold of state jurisdiction.[118] It can therefore be argued that the Norwegian government has a duty to investigate allegations of torture after the return has been implemented. The investigation is part of what Milanovic calls the first category of positive duties, necessary to make the negative duties of the state effective, such as the obligation not to torture. By returning a person to a country where he or she is tortured, there is a violation of the prohibition of torture, as was described in the previous chapter. Therefore, a duty to investigate allegations of torture may

[115] Ibid:119, HRC General Comment No. 31 para 8

[116] Milanovic, 2011:210

[117] Milanovic, 2011:121

[118] Ibid:211

be seen as necessary to make the state's duty not to torture truly effective, and should therefore also apply extraterritorially.

Further, the third model is however neither free of weaknesses. Adopting this model would require a radical rethinking of the approach of the ECtHR, and also that of other human rights bodies.[119] Nevertheless it is not impossible for the ECtHR to rethink its approach since it sees the convention as a living instrument, as was held in Soering: "the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions".[120] Additionally, the ECtHR held in the Al-Skeini case that the rights of the ECHR cannot be 'divided and tailored,' and that states have to secure the rights of the ECHR which are relevant to the situation of the individual.[121] It can therefore be argued that it is within reason to state that the ECtHR could in principle argue for an obligation to investigate, if not full investigation, than at least to demand that the sending state provide some mechanisms to ensure its obligations under article 3.

However, Milanovic further brings to light that the positive duty need to be judged reasonably and within the scope of what can realistically be expected from the state.[122] It therefore seems crucial to take into the assessment what the Norwegian asylum system ought to have known at the time when the return was implemented. This will be addressed in the next chapter.

The third model presented here provides a foundation that allows the discourse to move from the question of when human rights treaties apply extraterritorially to the question of how they do so;[123] a discussion that should be given more attention. Though, various civil

---

[119] Ibid

[120] ECtHR, Soering v. UK (1989) para 102

[121] ECtHR, Al-Skeini v. UK (2011) para 137

[122] Milanovic, 2011:211

[123] Ibid:222

society organizations have already addressed the issue of investigation in the post-return phase.

3.4 Demands from civil society organizations

It is important to remember that any system will make mistakes, and it should therefore not be assumed that the asylum system will be any exception; a mechanism that can handle mistakes when they occur is arguably needed.

The Committee on Migration, Refugees and Displaced Persons recommended to European states in 2013, that there should be drawn common rules on the procedures to be followed after unsuccessful return, including compulsory reporting.[124] The procedures to handle an unsuccessful return are usually not systematic, but rather based on ad hoc arrangements. Christine Dahl, senior advisor at UNE, said that in some cases UNE has received information about reactions upon return in the post-return phase. She further argued that UNE always takes such statements seriously and investigates allegations closer if they see the basis for it. In some cases it has been shown that the returnee has been temporarily detained by the authorities in connection with entry control and identity determination. In other cases, it has not been possible for UNE to investigate the allegations further.[125] UNE does not function as a fact-finding body but it can cooperate with embassies and UNHCR to follow up on the returnees in special circumstances. As such, it is argued that the Norwegian asylum system is rather focusing on the pre-assessment, to the extent that there is no doubt that it is safe to return the asylum seeker.

In light of this, civil society organizations in Norway have formulated eight demands on how to improve the legal safeguards in the Norwegian asylum system. They argue, amongst others, that there have been several cases where there are reasons to fear that asylum seekers have been subjected to persecution after returning to their home country.

[124] CoE, 2013:3

[125] Email, Dahl, 26.02.2014

Therefore they argue that there should be established an obligation to follow up on allegations of torture and ill-treatment in the post-return phase. It is further stated that this must include an obligation to assist returnees if there was an unsuccessful return.[126] During conversations with civil society organizations, it has become quite clear that there is a need for better mechanisms to follow up on the decisions made to return a person. Additionally there is a need to address the duties of the Norwegian government, also after the return has been implemented.

In the next chapter, general trends regarding the post-return phase will be looked at more closely to see whether they can provide more information on the life of returnees after the return, and on the struggle between the government and the asylum seeker which can take place when a person is asked to return voluntarily.

[126] Steen, 2014

4 After the return: lack of information?

In the previous chapter the duty to investigate was addressed, concerning situations where the Norwegian state receives complaints about alleged torture or ill-treatment. In this chapter the analysis will be more general, looking at what research and Landinfo can tell about life after return. This knowledge is believed to be important to ensure the protection of failed asylum seekers, especially because it might not be that those who manage to contact the Norwegian government with a complaint that they have been tortured or ill-treated, are the ones in greatest need of protection.

This chapter will start by addressing suggestions from previous research, to see what can be told about life after return. This analysis will not give the complete picture of what is known about the post-return phase since very few research projects have been chosen for the analysis, but it will provide an insight into a few important aspects about the life of a failed asylum seeker. Additionally this chapter will highlight a public debate concerning lack of knowledge about the persons who are forcefully returned from Norway. Thereafter the question of how, and what kind of information, Landinfo collects by looking at information concerning Eritrea, will be addressed. Lastly this chapter will, in brief, argue for a need for further attention by the government to the issue at hand.

4.1 Suggestions from research

A few research projects will be presented here to see whether there are any general trends that can be presented about the post-return phase.

4.1.1 Durable solutions

Dr. Chase and Allsopp have produced a working paper about the contested futures of independent young migrants in Europe which is providing useful insight into life after return.[127] Their research is focusing on young independent migrants above the age of 18, but they highlight several general trends which are applicable to other age groups as well. They

[127] Chase and Allsopp, 2013

identify and critically examine assumptions upon which the European policy response to independent youth migration is based. One of the assumptions is that returning young people to countries of origin, or previous residence, is a durable solution. Two main points will be highlighted here, looking at what a durable solution is, and who defines what a durable solution is for whom.

The first point relates to the lack of knowledge about long-term outcomes for those who are in fact returned. It is argued that there is practically no empirical evidence concerning the extent to which outcomes could be defined as a durable solution.[128] A durable solution means, in broad terms, the integration of refugees into a society. This can be reintegration into their home country after voluntary return, integration into the country of asylum if settlement is permitted, or integration in a third country through resettlement.[129] A small, but growing body of evidence, points to patterns where re-migration are becoming part of the durable solution constructed by the migrant;[130] a solution which is the opposite of integration into the society. This suggests that there is a lack of knowledge about the whole reintegration process.

Hence, there is a bias of return as a future option for independent migrants, and lack of follow-up or accountability following their return. This suggests that durable solutions are primarily contrived to serve the state rather than the individual, which relate to the discussion on proportionality in chapter 2 of this thesis. It is for example reported that European countries continues to return individuals to Kabul, in spite of clear warnings from Afghan officials that they are not in a position to uphold the rights of returnees.[131] This is also the

[128] Chase and Allsopp, 2013:23

[129] Stein, 1986:265

[130] Chase and Allsopp, 2013:23

[131] Ibid:23

case in Norway, where the government has been criticized for returning migrants to an internal flight option in Kabul since the home area is not safe enough.[132]

The second point relates to the term deportation gap; emphasizing the gap between the number of people eligible for return at any time, and the number of people a state actually returns.[133] One case that shows the applicability of these trends in the Norwegian context is the story of Yemane Teferi. He has lived in thirteen different reception centers for more than 22 years. Yemane is from Eritrea and applied for asylum in Norway, but was rejected. He has later tried to set aside the decision, but his effort has been unsuccessful. Though, PU is not able to return him to Eritrea either, because that would be against the regulations regarding return to Eritrea set out by UDI.[134] Yemane is therefore staying in Norway illegally due to the return decision he holds.

There are 5700 persons like Yeamane, they have a return decision but are not returning voluntarily and are therefore waiting for PU to return them by force.[135] In addition, there are people who live outside the reception centers who hold a return decision. Statistics Norway (SSB) calculated that the number of irregular migrants in 2008 was 18 000. The director of UDI expects that this number has grown since 2008, and is addressing this issue under the heading: "How to make failed asylum seekers return?"[136] In this article the Director of UDI refers to the number of returns in 2013, where PU has reported that they returned 5934 persons in total. Of these, only 1 270 were failed asylum seekers who were sent back to their home country, 1 400 were sent to another Dublin country and the rest were expelled because of crimes they had committed. The Director admits that these numbers show that the Norwegian asylum system is very far away from a situation where all

[132] NOAS, 2007, NOAS, 2010

[133] Chase and Allsopp, 2013:21

[134] Haugsbø, 2014, UDI, 2014

[135] Ibid

[136] Forfang, 2014

failed asylum seekers, who refuse to return voluntarily, are returned with force. He is therefore, in his article, encouraging any person who is in contact with asylum seekers, to help them understand that they need to return on their own. If they do not return voluntarily, there is a great chance that they will end up in what is here called the deportation gap.[137]

4.1.2 The struggle

The deportation gap also refers to a struggle between the rejected asylum seeker and the government. Marko Valenta classifies this struggle as a real conflict. On the one hand, there are a large number of rejected asylum seekers who for various reasons oppose the final rejection and the return. On the other hand, the Norwegian authorities are trying to return these asylum seekers using motivation through reintegration programs or force.[138] Valenta conducted interviews with rejected asylum seekers opposing the return decision, and one man from Somalia said:

> The Norwegian government has decided that I can return, but everything I read about Somalia indicate that the situation is worse now than before (….) I have been outside Somalia since I was seven years old. I don't know what the Norwegian government thinks. Perhaps they think that if I wait long enough at the reception center, I will volunteer to go back, but I will not.[139]

This quote demonstrates clearly the struggle between the state and the asylum seeker. The European Union's Fundamental Rights Agency (FRA) notes in a report from 2011, that in cases where a person has been ordered to return but the removal cannot be enforced, the Return Directive and other policy papers from EU do not provide for a mechanism to put an end to the situations of protracted non-removability.[140] This suggests that the Norwegian government should look elsewhere for inspiration to ensure a better life for failed asylum seekers.

---

[137] Ibid

[138] Valenta, 2012:232

[139] Ibid:229 (authors translation)

[140] FRA, 2011:38

4.1.3 A voiceless group

Another research project should be mentioned here, where two Norwegian researchers have done a comparative analysis of two land-based return and reintegration programs under IOM, focusing on Iraq and Afghanistan.[141] In this research, Strand and Paasche argue that irregular migrants are overwhelmingly voiceless. When they have left the country by a voluntary return, they become totally silenced, while their voluntary return is used by the host state to legitimize forced return of others. After 30 asylum seekers from Iraq were returned by force 6 December 2009 to areas the UNHCR described as very uncertain, the Minister of Justice, Knut Storberget, defended the return operation, by amongst others, showing to the fact that voluntary return took place in the same areas. If that was the case, it should be safe enough for those who are returned by force, it was argued.[142] It is not stated here that these arguments are used by UDI or UNE in their proceedings; it is rather to show how arguments are built without empirical evidence that the persons returned voluntary are doing fine. UDI and UNE will, however, in most cases rely on Landinfo, the primary mechanisms for collecting information within the asylum system.

4.2 Public debate

Doing research on the post-return phase has been debated in the public sphere in Norway, and a research project on life after return was rejected by the former political government. 14 March 2011 Atle Dyregrov, a Norwegian psychologist, raised his concerns for the lack of knowledge about life after return. He believes that Norway has both a moral and political obligation, to find out what happens to returned asylum seekers. On 17 March 2011, this was also addressed in the Norwegian Parliament by one of the political parties in opposition during the question time. It was argued by the Christian Democrats (KrF) that Norway has a moral obligation to find out what happens to returned asylum seekers, especially those who are forcibly returned to countries like Iran, Iraq and Afghanistan. The question was raised whether the Minister of Justice would initiate, or encourage, research on this

[141] Paasche and Strand, 2012

[142] Paasche and Strand, 2012:219

topic. The Minister of Justice at that time, Grete Faremo, replied in essence that such a research project would not give the answers needed because of a number of practical challenges with such a project, such as difficulties in locating the returnees, the risk of giving the returnee a false hope of receiving protection in Norway, and the risk of receiving biased and false information.[143] It is therefore pertinent to study how the asylum system collects information and whether this also consists of information about life after return.

4.3 The case of Eritrea

Dahl argues that UNE has so far not documented that returnees have suffered persecution as a result of circumstances that were indicated in the application for protection in Norway.[144] This statement is particularly interesting because it gives a somewhat halted picture. What is referred to here is that UNE has not documented the particular case. The next question will therefore be how, and what type of information is documented by the Norwegian asylum system?

Landinfo, the primary source of objective information in asylum cases, is highly perceived as a fact-finding body, and are used as a source by the ECtHR in its assessment of cases. Jorg Lange, the director of Landinfo, said that if there is a discrepancy with other sources of information, they will hold on to their interpretation of the situation until they can access the sources behind the other position. Thereafter they will make an assessment of which sources are reliable and which ones are not. He further argued that in their experience, other fact-finding actors have not always been willing to relieve their sources, and they have therefore not been able to assess whether their information is correct or not.[145] There have been discrepancies in the past, and this was argued to be the reason behind some of them.

[143] Parliament, 2011

[144] Email, Dahl, 26.02.2014

[145] Interview, Lange, 05.03.2014

Furthermore, to study how Landinfo work, information about the reactions a forced asylum seeker may meet in Eritrea will be studied here. Landinfo was asked to come with a response on returned asylum seekers and how they are treated. Two questions were raised; how the government of Eritrea perceives an application for asylum in another country, and if a person hands in an application for asylum in another country, whether the application itself has led to reactions by the Eritrean government or not.

According to the mandate of Landinfo, it does not prepare risk assessments in relation to what might happen to a single applicant or group of asylum seekers after return.[146] Landinfo will provide information about statements made by other experts and institutions, which may disclose assessments of what the outcome of the return of asylum seekers to a specific country may be. This is the case in the response assessed here.[147] Landinfo concludes in its answer that, according to their experience, it is very difficult to get secure and verifiable information about what will happen to returned asylum seekers and how Eritrea has reacted to those asylum seekers who have returned.[148]

Looking at the facts it appears in several reports that Eritreans, who have been forcibly returned, risk extrajudicial arrests and internments, abuse and torture. Eritreans who returned from Malta in 2002, and Libya in 2004, were arrested on arrival in Eritrea and subjected to torture. It is also reported that most of the 1,200 Eritrean asylum seekers that were forcibly returned from Egypt in June 2008, were detained in military camps on return. Thereafter, in December 2008, at least 740 of these were still in a military camp.[149] Thus, experts on Eritrea and organizations like Amnesty International argue that returning an asylum seeker to Eritrea will with a very high probability lead to ill-treatment.[150] However,

---

[146] Landinfo, 2014a

[147] Ibid

[148] Ibid

[149] UDI, 2014

[150] Landinfo, 2014a

Landinfo questions the empirical basis for their statements and has therefore presented a letter to the Norwegian asylum system stating that practice has shown that ill-treatment has happened upon return in the past. Landinfo thereby refrains from making any assumptions of what may happen in the future, other than making a statement that there have been a few years since there has been a return of asylum seekers to Eritrea. Therefore the current practice of the state response is unknown.

Further UNE has made guidelines on how to deal with citizens of Eritrea that do not meet the requirements under the Refugee Convention, and are therefore not recognized as refugees. The asylum seeker is obliged to leave Norway voluntarily within the return deadline. This is because UNE see the general security situation in Eritrea as safe enough to return voluntarily without police escort. According to UNE, voluntary return has occurred to Eritrea from Sudan and Ethiopia without reactions by the government. If the asylum seekers do not leave voluntarily before the deadline, PU will organize a forced return. However, PU cannot follow the returnee the whole way to Eritrea because there are great uncertainties on what reactions the government of Eritrea may give to persons that are forcibly returned. These reactions may constitute persecution under international law, and it is therefore important that the Eritrean government do not find out that the person is forcibly returned. In such a return policy, questions should be raised on whether this practice is proportional according to the risks the returnee may phase.

It may be argued that through Landinfo the Norwegian asylum system access information about the situation returnees may face. However, Eritrea has a special history of portraying asylum seekers as enemies of the country, as was the reason for why Landinfo was asked to make a note on this issue, and therefore the Norwegian government rarely returns persons to Eritrea by force.[151] Lange said that they experience challenges in finding information on how specific groups are treated post-return because of difficulty in finding empirical and

[151] Statistic from PU show that 4 persons have been forcibly returned to Eritrea from 2011-2013, PU, 2011, PU, 2012b, PU, 2013

updated data.[152] Afghanistan is, in contrast to Eritrea, one of the countries where most persons are returned to by force from Norway. Knowledge about the reaction to return in this country is however not as clear as in the case of Eritrea. Furthermore, the person responsible for collecting information about Afghanistan at Landinfo explains that he is often invited to UNE or other events, to provide a statement about the situation in Afghanistan. Along with him, there is usually a professor or a representative from an organization who holds a different opinion than what he does.[153] It is one opinion against the other, and what the returnee may meet may therefore not be certain by the decision makers in all cases.

4.4 Need for further attention

The principle of non-refoulement is based on the idea of having a legal safeguard made to ensure that no person is sent to ill-treatment. It has been argued that because the sending state has obligations to make sure that the return decision is correct, this will in itself protect the returnee in the post-return phase.[154] However, something is missing in this line of reasoning. To be able to ensure that the return decision was made correctly, there needs to be some kind of legal provision that obliges the state, if not to monitor, than at least to take allegations of ill-treatment seriously. Additionally the government should encourage research on life after return, which in the end, will help them to make better assessments of the needs of asylum seekers coming to Norway in search of protection. As has been shown by the practice of the Norwegian asylum system in this chapter, Landinfo experience challenges in gathering enough reliable information about risks in the post-return phase, and little has been done to compensate this deficiency. It is argued here that this deserves attention by the government, in order to be able to provide a better protection for failed asylum seekers.

[152] Interview, Lange, 05.03.2014

[153] Interview, Nerbye 03.04.2014

[154] Interview, Nerby 03.04.2014, Steen, 2013

In the next chapter attention will be given to different types of assurances the Norwegian government has put in place to make sure that the returnee is not deprived of his right not to be tortured.

5 After the return: different forms of assurances

The Norwegian asylum system has taken some measures to make sure that no person is returned to ill-treatment. This chapter will analyze four such mechanisms; special representatives working with immigration cases, a closer control by UNE before persons are returned to a special area, programs for monitoring the post-return phase and diplomatic assurances made between two countries. Lastly this chapter analyzes an example regarding the transfer of prisoners between two states, to see what the asylum system may learn from the Norwegian Armed Forces, here represented by the Norwegian contribution to the ISAF forces.

5.1 Four mechanisms for better protection

5.1.1 Special representatives

UDI have people working as special representatives, called attaché, at different embassies and consulates with responsibility to work to clarify the identity of persons, and to facilitate return. In the job description it is clarified that the person shall manage and respond to requests for verification of the identity of individuals applying for asylum in Norway. Additionally, the special representative will cooperate with UDI on return of asylum seekers by force, and those that return through IOM's voluntary return programs. Embedded in the work is also a responsibility to follow the general human rights situation closely and report on its own initiative and on instruction by the Norwegian asylum system. Making reports on the circumstances in the host country and areas of importance to the immigration authorities may also be conducted. The special representative belongs to the Ministry of Foreign Affairs administratively, but will relate to UDI as the overriding authority on the topic of immigration and have close contact with PU's special representative's working in the same geographical area.[155] This is a potential resource, not only to supplement the information work done by Landinfo, but also to be present on the ground and assist if requested to check up on a returnee post-return.

[155] Ministry of Foreign Affairs, 2014

5.1.2 Closer control before return

The second mechanism used by the Norwegian asylum system is not as comprehensive, but may still help to improve the protection of the returnee. On the 8 February 2013, UNE repealed the suspension of the duty to return to Mogadishu and to South Somalia and therefore sent a letter to PU, addressed here.

In 2010, the grand board of UNE made a decision involving the return to Mogadishu, which resulted in a ban on returns to Mogadishu. The grand board concluded that the general security situation in Mogadishu is so severe that citizens in general risk ill-treatment. A return was therefore not possible. After this decision, the grand board came with two new decisions in 2012, where the grand board saw the security situation as less severe with the implication that not all asylum seekers should be protected against return to Mogadishu. In other words it argued that cases regarding return to Mogadishu could be assessed on individual bases. As a consequence of these decisions, UNE revoked the suspension of the duty to return to Mogadishu in 2013.[156] In a letter, PU is therefore requested to contact UNE before every forced return is conducted to these areas. This does not depend on whether there exists an application to set aside a decision or not; this has to be done in all the cases for the first six months. Additionally, PU is requested to start returning those who got their final decision from the grand board.[157] Administratively PU takes its orders from the National Police Directorate, which again reports to the Ministry of Justice and Public Security. However, UDI and UNE make decisions in individual cases and will therefore provide guidance for how PU works.[158]

Norway has received criticism, from amongst others, Amnesty International and NOAS for returning persons to South and Central Somalia, since the situation is not perceived as safe

[156] UNE, 2013

[157] UNE, 2013, Immigration Act § 78

[158] PU, 2012a

enough by other actors.[159] It might be asked whether this will improve the legal safeguards for the returnee. In practice this may well be more of a 'warning' sign than anything else. This is argued because the person will still be returned, and there is no monitoring of what will meet the person in the post-return phase, especially because it is not perceived as safe for the Norwegian PU officers to follow the returnee all the way to Somalia.[160] Further, by asking PU to start with those who had their decision heard by the grand board, consisting of three board chairs and four board members, there is also a recognition that this is a more legally secure decision than the other decisions taken by one board chair and two board members, which is the minimum requirement in § 78 of the Immigration Act. This is important because it has to do with the legal safeguards embedded in the decisions made to return a person and thereby the protection of failed asylum seekers.

5.1.3 Monitoring program in Sri Lanka

In the 1990s the UNHCR came with recommendations on whether countries should or should not return persons to Sri Lanka. It was a turbulent time in Sri Lanka and asylum seekers where approaching the Nordic countries.[161] The Norwegian approach was quite clear at this time, as it was believed that some Tamils could be returned, and from 1996 most of the Tamil asylum seekers were returned.[162] At the same time certain groups in the civil society in Norway put a lot of pressure on the government not to return Tamils to Sri Lanka. Their claim was that the Norwegian government returned Tamils to torture and death, however, no evidence was presented in this debate. A modest monitoring program was therefore established by the Norwegian government, to provide evidence that no one was returned to ill-treatment in Sri Lanka.[163]

---

[159] US Department of States, 2014, NOAS, 2014

[160] Staveland, 2006

[161] Interview, Nerby, 03.04.2012

[162] Romstad, 2000

[163] Interview, Nerby, 03.04.2012

The Nordic countries[164] had an attaché at the Norwegian embassy in Colombo, Sri Lanka from 1998 until about 2001, to run the program. The Norwegian embassy in Colombo was notified whenever there was a return. The embassy would then contact the Ministry of Foreign affairs in Sri Lanka which notified the immigration authorities. Of course, there was no mention of the fact that the person had applied for asylum in Norway and was rejected, but as was stated by the Nordic attaché, they understood the circumstances of these cases. When the flight arrived, a person from the embassy would meet the returnee at the airport to observe how the immigration authorities would treat the returnee. Most often, the returnees would go straight through the immigration control, but in a few cases the police were notified and the person was detained at the airport. They were held there between a few hours, and a few days, for security reasons, usually to make sure that they were not affiliated with the Liberation Tigers of Tamil Eelam. Thereafter, the agreement was that everyone had to come to the embassy for an interview, and a financial incentive was provided to ensure that everyone came. The Nordic attaché explained that everyone came to the embassy, between one day and a few weeks after arrival. He would then ask questions like how PU had behaved on the flight; what had happened at the airport if detained; and what had happened during the time after the arrival.

From 1998 until 2001, about 200 persons were followed up, and no one reported that they had experienced ill-treatment.[165] According to the Nordic attaché, there were a few local NGOs which protested and alleged that two returnees had been subjected to ill-treatment; however, they could not confirm this story with physical marks on their bodies or other evidence. Additionally, two Norwegian lawyers travelled to Sri Lanka to make their own fact-finding mission. This mission resulted in a note concluding quite different from the experience of the Nordic attaché; that it was not safe to return Tamils to Colombo.[166]

---

[164] This includes only Denmark and Norway according to the note by Romstad, 2000, however the person spoke of himself as the Nordic attaché

[165] Interview, Nerby, 03.04.2012

[166] Romstad, 2000

The program described here is exceptional in the Norwegian context. Little information exists about similar programs suggesting that there are none, or at least very few. The question is therefore what the rationale behind the program was, and why the state suddenly started to monitor the post-return phase. According to the Nordic attaché, the whole idea behind the program was to refute accusations of return to ill-treatment. The Norwegian position that it was safe to return Tamils to Colombo was not affected. However, it seems that the pressure from civil society actors was too much to handle without hard facts to support their arguments. It is worth noting that at that time, the asylum system was under direct political control, which may also have had an effect on the origin of the program.[167]

Further, the interviews conducted in the embassy revolved around social, humanitarian and psychological difficulties the returnees were facing. There was hardly any talk about security issues or risk of ill-treatment according to the Nordic attaché. He further argued that the whole program presented a paradox because the asylum system is based on making the right decision, rather than creating legal safeguards post-return to make sure that the decision is correct. The program itself was therefore more of a showcase, because the return decision was correct in all the cases followed up on by the embassy, meaning that no one had been subjected to torture or ill-treatment post-return.[168] This is also important to know because it can prove that the Norwegian state do not return persons to torture. The fact that a lawyer was of a different opinion is not the crucial point here, rather it is important to see that monitoring the post-return phase in this case could provide some facts which the asylum system could learn from. Whether a monitoring system is an effective way to ensure protection post-return is debated, and will briefly be touched upon in the next section, dealing with diplomatic assurances.

---

[167] Interview, Nerby, 03.04.2012

[168] Ibid

5.1.4 Diplomatic assurances

A fourth measure used to ensure that the return will be in line with the legal and moral obligations a state have, is diplomatic assurances. For the return to take place, there need to be a close cooperation between the sending and the receiving country. Diplomatic assurances are made through bilateral agreements, called readmission agreements, and are most commonly used for regulating migration.[169] Readmission agreements are not a prerequisite for returning a person, but it can be necessary to facilitate the return to some countries. The agreement committed the parties to mutually accept their own citizens, and the framework for the practical circumstances surrounding the return, for example, work to identify the returnee and provide travel documents.[170] Forced Return can be problematic in cases where the country of origin refuses to accept the returnee. When this happens, the host country is obliged to take the returnee back. This is usually the case when the identity and nationality of the returnee have not been properly established. The EU has signed readmission agreements to be able to avoid these situations. However, some of these readmission agreements have been criticized for not including sufficient provisions to protect the human rights of the returnees.[171]

Norway has signed readmission agreements with 29 countries where 20 of these are outside the Schengen area.[172] The Standard Draft Agreement between the EU and third countries will often provide the basis for negotiations of bilateral agreements since Norway cooperate closely with EU on migration control. Norway has only one agreement which includes UNHCR. This is the tripartite agreement with Afghanistan, where IOM is responsible for

---

[169] CoE, 2013:7

[170] UDI, 2013

[171] CoE, 2013:10

[172] UDI 2013, Full list over the countries can be found here:[http://www.regjeringen.no/nb/dep/jd/tema/innvandring/utvisning_og_bortvisning_fra_norge/tilbaketakelsesavtaler.html?id=575001] Last accessed 15 May 2014

the reintegration program in connection with the agreement.[173] However another example will be highlighted here, precisely because there has been debate about this agreement, both within Norway, and with the Office of the United Nations High Commissioner for Human Rights.

A letter was sent by the Special Rapporteur on Human Rights of Migrants to the Ministry of Justice and Public Security, asking questions about the readmission agreement signed with Ethiopia in 2012. Question number four is particularly interesting, where the Special Rapporteur asks: "How will your Excellency's Government ensure that the authorities in Ethiopia comply with the absolute prohibition of torture vis-à-vis the returnee?"[174] The Ministry replied that at the stage where return is prepared for by Norwegian authorities, the protection claim of the returnee has been thoroughly processed by UDI and UNE. Persons at risk of persecution, death penalty, torture or other inhuman or degrading treatment or punishment, are granted asylum. Further, the letter states that under no circumstances may such persons be returned to the country of origin. Information about the country of origin was highlighted as a vital tool to ensure that the decision is made correctly.[175] However it might still be asked questions on whether this information is good enough when it comes to reaction upon return, referring to discussions on knowledge about life after return in this thesis. Although, the arguments made by the Ministry are important because it seems that the readmission agreement are not meant to ensure legal safeguards for persons in need of protection in the line of reasoning presented in the letter. Though, in other circumstances it seems that these agreements have been used to make legal safeguards.

[173] Ministry of Justice and Public Security, 2012

[174] Ibid

[175] Ibid

5.1.4.1 The legal appearance of readmission agreements

In 2008, the ECtHR laid out major principles to guide the assessment of diplomatic assurances against ill-treatment on a case-by-case basis.[176] The Court further stated that even where the receiving state provides assurances satisfying the sending state, the ECtHR has the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the individual to be transferred would be protected against the risk of treatment prohibited by the ECHR.[177] Accordingly, the weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.[178] In effect, this means that readmission agreements may have a role to play in ensuring legal safeguards depending on the circumstances in each case.

Manfred Novak, the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman and degrading treatment or punishment, came with a note to the General Assembly of UN in 2005. He argued that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment in general. Further Novak stated that such assurances are usually sought from states where the practice of torture is systematic, and the post-return monitoring mechanisms have proven to be no guarantee against torture.[179] One example of a post-return monitoring mechanism can be found in the case of Othman v. UK from the ECtHR. Omar Othman, the applicant, alleged that he would be in real risk of ill-treatment contrary to Article 3 of the ECHR if he were deported to Jordan. The readmission agreement, between UK and Jordan in this case made provisions for any person returned under it to contact, and have prompt and regular visits from a representative of an independent body nominated jointly by the UK and Jordanian government. Adaleh Center for Human Rights Studies signed a monitoring agreement with the UK in

[176] ECtHR, 2008, Saadi v. Italy (2008) para 148

[177] Ibid: para 148

[178] Ibid: para 148

[179] GA, 2005:13

2006.[180] There was no guarantee that access to the applicant would always be granted to Adaleh Center, but it was argued that any refusal would be brought to light quite quickly. In the early period of detention, Adaleh Center was expected to visit the applicant three times a week, to ensure the safety of the returnee.[181] Third party comments were received by NGOs in this case, and in their view, the Adaleh Center had not carried out any inspections, nor had the Center expressed any concern of ill-treatment in Jordanian detention facilities privately or publicly.[182] However, despite the criticism to the monitoring mechanism in this case, the Court concluded that the applicant's return to Jordan would not expose him to a real risk of ill-treatment.[183] It is important to note that despite its limitations, the Court held that the Adaleh Center would be capable of verifying that the assurances were respected.[184]

Though, going back to Novak's note, he argued that diplomatic assurances are not legally binding; they therefore carry no legal effect nor accountability if breached, and the person whom the assurance aim to protect has no access to remedy if the assurances are violated.[185] However, the ECtHR seems to rule differently in the case of Othman v. UK, where it in this particular case, argues that the existence of the readmission agreement will make possible a return which otherwise could have violated the principle of non-refoulement.

However, the case of Othman v. UK shows that the Special Immigration Appeals Commission in UK has made a test to see whether diplomatic assurances are sufficient on its own. The Special Immigration Appeals Commission did for example find assurances to be insufficient in respect of Libya in 2007, given the nature of the Gaddafi regime ruling at that

---

[180] ECtHR, Othman v. UK (2012) para 24

[181] Ibid: para 31

[182] Ibid: para 181

[183] Ibid: para 205

[184] Ibid: para 204

[185] GA, 2005 para 51

time.[186] The ECtHR has also made a test to assess, first the quality of the assurances given and second, whether in light of the receiving state's practices they can be relied upon.[187] Even though such tests are made, the readmission agreement cannot be a substitute for a lack of hard law protection. Novak concludes in his note that states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.[188] A readmission agreement can be helpful to sort out practicalities with the return, but it should not be used as a legal safeguard for the rights of the returnee in the post-return phase.

5.2 Best practice

In any policy area, it is useful to share and learn from other areas where there has been success. One such example can be found in the agreements made due to the Norwegian participation in International Security Assistance Force (ISAF) operation in Afghanistan. The issue at hand is that any Afghan citizen apprehended by Norwegian ISAF personnel were handed over to the Afghan authorities in accordance with a Memorandum of Understanding (MoU), obliging the Afghan Government to comply with relevant international standards in the treatment of any persons transferred.[189]

5.2.1 The transfer of prisoners

Amnesty International Norway argued in 2007, that there is a great risk that prisoners handed over by ISAF forces are subjected to torture and other inhuman treatment in Afghan custody. Amnesty International published a report the same year, demanding that all countries contributing to ISAF forces stops handing over prisoners to Afghan authorities. ISAF forces generally delivered prisoners to the National Directorate for Security. A Cana-

[186] ECtHR, Othman v. UK (2012) para 74

[187] Ibid: para 189

[188] GA, 2005 para 51

[189] CAT Committee, 2008:1, Buick, 2007

dian journalist documented that prisoners handed over by Canadian ISAF forces was severely ill-treated in prisons run by the National Directorate for Security. Moreover Amnesty in Norway reacted to the reluctance from the Norwegian government to give Amnesty information about the Afghan prisoners. Further, in April 2007 Norwegian diplomats in Kabul raised their concern over the limited access Afghan authorities provides to the follow up mechanisms, and that they feared that prisoners were subjected to torture.[190] The Minister of Defense in 2007 admitted that Norwegian authorities were concerned about the Afghan National Directorate for Security's obligations and commitments. She also admitted that resources were inadequate for the body that Norway trusted to ensure the monitoring of the treatment of prisoners, the Afghan Human Rights Commission.[191]

In its conclusions and recommendations to Norway, considering its fifth periodic report in 2008, the CAT Committee commented on this issue. The Committee confirmed that article 3 of the CAT and its obligation of non-refoulement applies to a state party's military forces, wherever situated, where they exercise effective control over an individual. The CAT Committee further argued that the state should continue to closely monitor the compliance by the Afghan authorities with their relevant obligations in relation to the continued detention of any persons handed over by Norwegian military personnel.[192]

In October 2010 the International Commission of Jurists (ICJ) – Norway, sent an email to the Ministry of Foreign Affairs raising their concerns on whether the principle of non-refoulement was respected by the Norwegian ISAF forces. Additionally, they asked if there were any mechanisms available for the future that could prevent such uncertainty on whether the principle was violated or not.[193] Secretary of State Roger Ingebrigtsen came with a public statement 31 October 2010 as a response to ICJ – Norway and other actors

[190] Buick, 2007

[191] Ibid

[192] CAT Committee, 2008:3

[193] ICJ, 2010

that had reacted to the situation with Afghan prisoners. His main argument was that Norwegian forces rarely took prisoners. Although, if it happened, they would actively follow up on their situation to ensure the legal protection of the detainees. Norwegian forces operated primarily with Afghan security forces. Arrests in these operations undertaken by the Afghan National Army and Police, as opposed to individuals arrested by Norwegian forces, were considered as detained by Afghan authorities. Ingebrigtsen further confirmed that Norwegian forces had arrested and handed over 29 persons to Afghan authorities, were only three of them were detained. These were followed up actively by established procedures to safeguard their legal rights. Their names and place of imprisonment were reported to the International Committee of Red Cross in Kabul and the Afghan Independent Human Rights Commission. Additionally, the detainees were visited at least once a year by a doctor and a lawyer from the Norwegian forces, as well as the Norwegian military police. Lastly he argued that the monitoring responsibility and the opportunity Norway had to supervise prisoners arrested by Norwegian forces should not be confused with the criminal jurisdiction over those individuals. The Afghan authorities are responsible for maintaining law and order in their own country.[194]

However, after United Nations Assistance Mission in Afghanistan (UNAMA) published a report in 2011 on the treatment of conflict related detainees in Afghan custody, the Norwegian government changed their policies. The report's conclusion stated that torture is practiced systematically in a number of facilities run by the National Directorate for Security throughout Afghanistan.[195] The Minister of Defense at the time, Grete Faremo, argued that although the report did not identify systematic torture in those areas where Norwegian forces operated, she decided that the Norwegian forces would stop all transfers of detainees to Afghan authorities. She further argued that the transfer of prisoners would not resume until there had been a thorough assessment of the situation, and assurance had been made

[194] Ministry of Defence, 2010

[195] UNAMA, 2011:2

that prisoners handed over by Norwegian forces are not exposed to a real risk of torture after the transfer.[196]

Although, the Norwegian ISAF forces started to transfer prisoners to Afghan authorities in 2012, after a one year stop. Norwegian newspapers wrote that this happened due to the situation of especially two prisoners. These two were handed over by the Norwegian ISAF forces before they stopped transferring prisoners. A lawyer and one of the doctors from the Norwegian forces were able to visit them after the Afghan authorities could tell where they were in 2012, after being missing from the Norwegian radar. It was then verified that they had not been subjected to torture. Thereafter, Espen Barth Eide, the Minister of Defense, abolished the prohibition to transfer prisoners to Afghan authorities.[197] This example is referred to as best practice due to several factors, which will be looked at now.

5.2.2 Lessons that could be learned

When the Norwegian government learned that they could not monitor properly and that they were not accountable for their actions as required under international law – the Norwegian government stopped transferring prisoners to Afghan authorities. They did this despite the existence of a MoU ensuring the rights of the prisoners and the access to information about them. This is an important factor, especially since the Norwegian government is focusing on making readmission agreements to enable PU to increase the number of forced returns every year. It seems that making readmission agreements is a part of the intensified effort to return more persons from Norway. However, it is important that these agreements are not taken as an instrument safeguarding the rights of the returnees. The example of transferring prisoners shows the possible weakness of such an agreement. Even though there were monitoring mechanisms in place, the monitoring body did not have the resources needed to follow up the prisoners, and the Norwegian diplomats did not receive the access that was agreed on in the MoU. Diplomatic assurances in the shape of a MoU in

[196] Staveland and Gimse, 2011

[197] Adressa, 2012

this case, may be a useful tool for setting out the practicalities of a transfer, but even here it may fail.

The concern about ill-treatment of the prisoners was first raised in 2007; however it would take four years until the practice would stop. The question is therefore why the state stopped the transfer in 2011. Was the pressure from the civil society too high for the state to handle? High pressure from powerful organizations such as Amnesty and UN affiliated organizations was probably one of the reasons. Another reason could be that in 2011 research results were presented, giving a concrete number of how often torture was found in prisons in Afghanistan. UNAMA had conducted interviews with 379 prisoners in 47 prisons in Afghanistan. 46% of those interviewed reported that they had been tortured during interrogation.[198] Arguably, more research should be initiated on the post-return phase for forcibly returned asylum seekers. Not knowing can mean that rights are violated. However it can also mean that rights are protected. Surely it is argued here that the information which can tell whether a right is violated or not, should be desirable. In the case of the transfer of prisoners, knowledge about the situation stopped the transfer because the statistics created an uncertainty on whether the duties of the state where upheld. On the other hand, knowledge about the situation of two prisoners also created the opportunity for the state to start transferring prisoners again, one year later. The lesson that could be learned from this is that gaining more knowledge about a situation will help to safeguard the legal protection by the state, and make sure that the mechanisms in place are good enough to ensure the protection of failed asylum seekers.

After looking at these factors, one ought to ask if anything had changed from 2011 until 2012. Was the prisoners transferred to a different prison? Had the ill-treatment in Afghan prisons stopped because of international pressure? Probably, not much had changed about the situation in Afghan prisons. Although, the Norwegian government did confirm that the

[198] UNAMA, 2011

two prisoners, handed over by Norwegian ISAF forces, had not been ill-treated during the time they had been missing from the Norwegian monitoring mechanisms. This was the knowledge, and the change that was needed for the Norwegian government to make the decision to start transferring prisoners again.

6 Conclusion

This thesis explored the responsibilities of the Norwegian government towards failed asylum seekers who are forcefully returned. Whether these responsibilities ensure the protection of the failed asylum seeker or not, was found neither in the positive nor the negative, due to a lack of information about the effects of the return. It has, however, become apparent that the government can do more to protect failed asylum seekers.

There do nonetheless exist several challenges when it comes to the protection of failed asylum seekers. It is argued here that the threshold for an article 3 case in the ECtHR has been set too high. Additionally, further attention should be given to the practice of applying a higher threshold for non-refoulement cases as compared to domestic cases under article 3 of the ECHR. The Norwegian asylum system can however decide to set a lower threshold than what has been set by the ECtHR.

It has furthermore been argued that there exists an extraterritorial obligation to investigate allegations of ill-treatment in the post-return phase. Several dilemmas and challenges present itself in this phase, lack of knowledge being one of them, another being the lack of priority displayed by the political government in Norway. Additionally it seems that the mechanisms put in place function more as a 'warning' sign, than actual protection of the returnee in the post-return phase. Yet, it is crucial to also highlight the proficiency of the Norwegian asylum system, even though there is potential for improvement when it comes to the protection of failed asylum seekers.

There are many concerns which have not been addressed in this thesis. It has been argued that the state should increase its focus on failed asylum seekers and its effort to protect them. Future research projects should take on this task and suggest ways to do this in an effective and efficient manner.

The hope behind this study is that the failed asylum seeker will be in sight and in mind of the Norwegian government in the future.

7 References

Treaties and Statutes

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by the UN General Assembly, New York 10 December 1984.
Cartagena Declaration	Cartagena Declaration on Refugees. Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, 22 November 1984.
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted by the Council of Europe, Rome, 4 November 1950.
EEA	Law on implementing the main part of the agreement on the European Economic Area (EEA) in Norwegian law, January 1994 (Authors translation) Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven).
HRA	Act relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act), June 2009.
IA	Act of 15 May 2008 on the entry of foreign nationals into the kingdom of Norway and their stay in the realm (Immigration Act), January 2010.
ICJ Statute	Statute of the International Court of Justice. Adopted 26 June 1945.

ICCPR	International Covenant on Civil and Political Rights. Adopted by the UN General Assembly, 16 December 1966.
LOV-2014-04-04-10	Changes in the Immigration Act (Lov om endringer i utlendingsloven (behandling av omgjøringsanmodninger)). 4 April 2014.
Norwegian Constitution	The Norwegian Constitution (Kongeriket Norges Grunnlov) Adopted at Eidsvold, 17 May 1814.
OP-CAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT). Adopted by the General Assembly of the United Nations 18 December 2002
PAA	Act relating to the procedure in cases concerning the public administration (Public Administration Act) January 1970 (Norway).
RD	Directive 2008/115/EC of the European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive). Adopted December 2008.
UDHR	Universal Declaration on Human Rights. Adopted by the UN General Assembly, Paris, 10 December 1948.
VCLT	Vienna Convention on the Law of Treaties. Adopted by the United Nations Conference on the Law of Treaties, Vienna 23 May 1969.

QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Adopted April 2004.
Refugee Convention	The Convention relating to the Status of Refugees, Adopted by the UN Conference of Plenipotentiaries, Geneva 28 July 1951 Amended by Protocol adopted January 1967.

Judgments/ Decisions

European Court of Human Rights (ECtHR)

A.A. and others v. Sweden, Application No. 14499/09. Strasbourg 28 June 2012.

Al-Skeini and others v. The United Kingdom, Application No. 55721/07. Strasbourg 07 July 2011.

Assenov and others v. Bulgaria, Application No. 24760/94 Strasbourg, 28 October 1998.

Aswat v. The United Kingdom, Application No. 17299/12. Strasbourg, 16 April 2013.

Banković and others v. Belgium and others, Application No. 52207/99. Strasbourg, 12 December 2001.

Chahal v. The United Kingdom, Application No. 22414/93. Strasbourg, 15 November 1996.

D.N.M. v. Sweden, Application No. 28379/11. Strasbourg, 27 June 2013.

Harkins and Edwards v. The United Kingdom, Application nos. 9146/07 and 32650/07. Strasbourg, 17 January 2012.

Hirsi Jamaa and others v. Italy, Application No. 27765/09. Strasbourg, 23 February 2012.

Ireland v. The United Kingdom, Application No. 5310/71 . Strasbourg, 18 January 1978.

Issa and other v. Turkey, Application No. 31821/96. Strasbourg, 16 November 2004.

Kontrovà v. Slovakia, Application No. 7510/04. Strasbourg, 31 May 2007.

L.C.D. v. The United Kingdom, Application No. 23413/94. Strasbourg, 9 June 1998.

Loizidou v. Turkey, Application No. 15318/89. Strasbourg, 23 March 1995.

N v. Finland, Application No. 38885/02. Strasbourg, 26 July 2005.

Othman (Abu Qatada) v. The United Kingdom, Application No. 8139/09. Strasbourg, 17 January 2012.

Saadi v. Italy, Application No. 37201/06. Strasbourg, 28 February 2008.

Soering v. The United Kingdom, Application No. 14038/88. Strasbourg, 07 July 1989.

Sufi and Elmi v. The United Kingdom. Application Nos. 8319/07 and 11449/07. Strasbourg, 28 June 2011.

Vilvarajah and others v. The United Kingdom, Application No. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87. Strasbourg 30 October 1991.

International Court of Justice (ICJ)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, the Hague 19 December 2005.

Legal consequences of the construction of a Wall in the occupied Palestinian territory, Advisory Opinion, the Hague 9 July 2004.

International Criminal Tribunal on the former Yugoslavia (ICTY)

Prosecutor v. Dusko Tadic a/k/a "Dule" Decision in the Defense motion for interloctory appeal on jurisdiction. 2 October 1995.

Committee against Torture (CAT Committee)

Ahmed Hussein Mustafa Kamil Agiza v. Sweden, CAT/C/34/D/233/2003, 24 May 2005.

The United Kingdom: Asylum and Immigration Tribunal/ Immigration Appellate Authority

AM and AM v. Secretary of State for the Home Department, CG [2008] UKAIT 00091, 27 January 2009.

Court of Justice of the European Union (CJEU)

Meki Elgafaju and Noor Elgafaji v. Staatssecretaris van Justitie. Case C-465/07, 17 February 2012.

UN Documents

Committee against Torture. *Considerations of reports submitted by states parties under Article 19 of the Convention, Conclusions and recommendations of the Committee, Norway* (CAT/C/NOR/CO/5). 5 February 2008.

Committee against Torture. General Comment No. 2, *Implementation of Article 2 by State Parties* (CAT/C/GC/2). 24 January 2008.

General Assembly, Office of the United Nations High Commissioner for Refugees: *Resolution adopted by the General Assembly* (A/RES/52/103). 9 February 1998.

General Assembly (GA). *Torture and other cruel inhuman or degrading treatment or punishment. Note by the Secretary-General. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.* Manfred Novak (A/60/316). 30 August 2005.

Human Rights Committee(HRC). General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. 26 May 2004.

UN Assistance Mission in Afghanistan (UNAMA). *Treatment of conflict-related detainees in Afghan custody.* UN Office of the High Commissioner for Human Rights. October 2011

UN High Commissioner for Refugees (UNHCR), Executive Committee. *Conclusion No.6 (XXVIII) Non-refoulement* (1977).

UN High Commissioner for Refugees (UNHCR), Executive Committee. *Conclusion No. 15 (XXX) Refugees without an asylum country* (1979).

UN High Commissioner for Refugees (UNHCR). *Background Paper on Preserving the institution of asylum and refugee protection in the context of counterterrorism*: *The Problem of Terrorist Mobility*. October 2007.

EU Documents

Council of Europe (CoE), *Monitoring the Return of irregular migrants and failed asylum seekers by land, sea and air*, (Doc. 13351 Report). 7 November 2013.

European Council on Refugees and Exils (ECRE), The return of asylum seekers whose applications have been rejected in Europe, June 2005

European Union Agency for Fundamental Rights (FRA). *Fundamental Rights of Migrants in an irregular situation in the European Union*. November 2011.

European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). *Code of Conduct for joint return operations coordinated by FRONTEX*. October 2013.

International and Norwegian organization's documents

Mellomkirkelig råd for Den Norske Kirke (MKR) and Norges Kristne Råd (NKR). *Notat til fra Mellomkirkelig råd for Den Norske Kirke (MKR) og Norges Kristne Råd (NKR) om afghanske konvertitter og troverdighetsvurdering av religiøs overbevisning.* 13 June 2008.

Norsk Organisasjon for Asylsøkere (NOAS), *Monitorering av tvangsretur av asylsøkere, NOAS' anbefalinger for en tilsynsordning som oppfyller returdirektivets krav*. February 2013.

Norsk Organisasjon for Asylsøkere (NOAS), *A Fact-Finding Report by NOAS, Persecution and Protection in Somalia*. April 2014.

Norsk Organisasjon for Asylsøkere (NOAS). *Forventer at regjeringen holder Afghanerløftene*. 19 February 2007. Available at [http://www.noas.no/forventer-at-regjeringen-holder-afghaner-loftene/] Last accessed 30 April 2014

Norsk Organisasjon for Asylsøkere (NOAS). *Merkverdig FN- regnskap.* 2 September 2010. Available at: [http://www.noas.no/merkverdig-fn-regnskap/] Last accessed 30 April 2014

United States (US) Department of States. *Norway 2013 Human Rights Report*. (February 2014) Bureau of Democracy, Human Rights and Labor

Governmental Documents

Ïnnst. 124 L (2013-2014) *Om endringer i utlendingsloven* (behandling av omgjøringsanmodninger).

Ministry of Justice and Public Security. *Regelverk for individuell stønad til reise til og reintegrering I hjemlandet ved assistert frivillig retur – Statsbudsjettet for 2013, kapittel 490, post 72* (2013-11-01-JD) Available at: [http://www.udiregelverk.no/no/rettskilder/departementets-rundskriv-og-instrukser/2013/] Last accessed 30 April 2014

Ministry of Justice and Public Security. *Rundskriv G-15/2011: Retningslinjer for arbeidet med assistert frivillig retur.* (G-15/2011) 15 June 2012.

Ministry of Justice and Public Security. *Re: Memorandum of Understanding between Norway and Ethiopia*. 25 December 2012. Available at: [http://peoplepeace.org/web/pdf/pdf_64/norway%20responds%20to%20un%20on%20readmission%20deal%20with%20ethiopia.pdf] Last accessed 30 April 2014

Ministry of Justice and Public Security. *Tilbaketakelsesavtaler.* Last updated March 2014. Available at: [http://www.regjeringen.no/nb/dep/jd/tema/innvandring/utvisning_og_bortvisning_fra_norge/tilbaketakelsesavtaler.html?id=575001] Last accessed 13 May 2014.

NOU 2010:12. *Ny klageordning for utlendingssaker.* Ministry of Justice and Police. 29 November 2010.

Ot.prop.nr. 75 (2006-2007) *Om lov om utlendinger adgang til riket og deres opphold her (utlendingsloven).* Ministry of Labour and Social Affairs. 29 June 2007.

Parliament. Dokument nr. 15:1075 (2010-2011) *Skriftlig spørsmål fra Geir Jørgen Bekkevold (KfF) til justisministeren.* 23 March 2011. Avaliable at: [https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=49785] Last accessed 30 April 2014

Prop. 180 L (2012-2013) *Om endringer i utlendingsloven* (behandling av omgjøringsanmodninger).

Prop. 3 L (2010-2011) *Om endringer i utlendingsloven* (gjennomføring av returdirektivet).

Press release and news

Ministry of Foreign Affairs. *Om overlevering av fanger i Afghanistan*. 12 November 2007. Available at: [http://www.regjeringenno/nb/dokumentarkiv/stoltenberg-ii/ud/Nyheter-og-pressemeldinger/nyheter/2007/fangeoverlevering.html?id=489245] Last accessed 27 March 2014.

Ministry of Justice and Public Security. *Returnerer flere personer uten lovlig opphold*. Press release Nr.: 109 – 2013. 8 November 2013. Available at: [http://www.regjeringen.no/nb/dep/jd/pressesenter/pressemeldinger/20131/returnerer-flere-personer-uten-lovlig-op.html?id=745298] Last accessed 13 February 2014

Ministry of Justice and Public Security. *Re: Memorandum of Understanding between Norway and Ethiopia*. 25 May 2012. Available at: [http://www.peoplepeace.org/web/pdf/pdf_64/norway%20responds%20to%20un%20on%20readmission%20deal%20with%20ethiopia.pdf] Last accessed 12 May 2014

Ministry of Defence ,Ingebrigtsen, Roger. *Norske styrker følger opp fanger*. 31 October 2010. Available at: [http://www.regjeringen.no/nb/dokumentarkiv/stoltenberg-ii/fd/Nyheter-og-pressemeldinger/Nyheter/2010/norske-styrker-folger-opp-fanger.html?id=622322] Last accessed 27 March 2014

Norwegian Asylum System

Landinfo. *Respons. Eritrea: Reaksjoner mot hjemvendte asylsøkere*. 31 January 2014a Available at: [http://www.landinfo.no/asset/2792/1/2792_1.pdf] Last accessed 30 April 2014

Landinfo. *English.* 29 April 2014b. Available at: [http://www.landinfo.no/id/162.0] Last accessed 13 February 2014.

Utlendingsnemnda (UNE). *UNE åpner for retur av asylsøkere til Mogadishu.* 8 February 2013. Available at: [http://www.une.no/no/Aktuelt/Redegjorelser/UNE-apner-for-retur-av-asylsokere-til-Mogadishu/] Last accessed 30 April 2013

Utlendingsnemnda (UNE). Påstander uten dekning. 19 April 2011. Available at: [http://www.une.no/Aktuelt/Redegjorelser/Pastander-uten-dekning/] Last accessed 4 May 2014

Utlendingsdirektoratet (UDI). *Asylpraksis – Eritrea.* (PN 2012-010) 18 February 2014.

Utlendingsdirektoratet (UDI) . *Vårkonferansen 2013:Retur.* Background note for the Spring conference arranged by UDI. 22 April 2013.

Politiets Utlendingsenhet (PU). *Samarbeidspartnere.* 20 July 2012a. Available at: [https://www.politi.no/politiets_utlendingsenhet/om_politiets_utlendingsenhet/samarbeidspartnere/] Last accessed 30 April 2014

Statistics

Politiets Utlendingsenhet (PU) *Månedsstatistikk desember 2011: Uttransportering fra Norge.*2011 Available at: [https://www.politi.no/vedlegg/lokale_vedlegg/politiets_utlendingsenhet/Vedlegg_1570.pdf] Last accessed 30 April 2014

Politiets Utlendingsenhet (PU) *Månedsstatistikk desember 2012: Uttransportering fra Norge.* 2012b. Available at: [https://www.politi.no/vedlegg/lokale_vedlegg/politiets_utlendingsenhet/Vedlegg_1974.pdf]

Politiets Utlendingsenhet (PU) *Månedsstatistikk desember 2013: Uttransportering fra Norge.* 2013. Available at: [https://www.politi.no/vedlegg/lokale_vedlegg/politiets_utlendingsenhet/Vedlegg_2385.pdf] Last accessed 30 April 2014

Personal correspondence (transcript by author)

Email correspondence

E-mail from cda@une.no to author (26 February 2014)

E-mail from tormod.bakke@peoplepeace.org to author (14.01.2013)

E-mail from tormod.bakke@peoplepeace.org to author (20.01.2014)

Email from bslydal@amnesty.no to author (10.02.2014)

Interviews

Interview with Ståle Sørmo, Director at Trandum, Jan Olav Frantsvold, Legal director for PU and Tormod Bakke, leader, Peoplepeace (Trandum, 24 January 2014)

Interview with Unni-Mette Vrådal, Senior advicer, Ministry of Justice and Public Security (Oslo, 20 January 2014)

Interview with Tormod Bakke, Leader, Peoplepeace (Oslo, 16 January 2014)

Interview with Jörg Lange, Director, Landinfo (Oslo, 5 March 2014)

Interview with Andrè Møkkelgjerd, Legal advisor, NOAS (Oslo, date)

Interview with Sven Thore Kloster, Advisor, Mellom Kirkelig Råd (Oslo)

Interview with Geir-Aage Nerdby, former Nordic attachè at the Norwegian Embassy of Colombo, currently country advisor for Asia, Landinfo, (Oslo, 3 April 2014)

Secondary literature

Baldaccini, Anneliese. *The EU Directive on Return: Principles and Protests.* In: Refugee Survey Quarterly, Vol. 28, No. 4. 2010.

Beitz, Charles. *The Idea of Human Rights*. New York: Oxford University Press. 2009.

Buick, Kristin Rødland. *Stans fangeoverføringene*. 12 September 2007. Available at [http://www.amnesty.no/aktuelt/flere-nyheter/arkiv-nyheter/stans-fangeoverf%C3%B8ringene], Last accessed 27 March 2014.

Chase, Elaine and Allsopp, Jennifer. *'Future citizens of the world'? The contested futures of independent young migrant in Europe*. RSC Working Paper Series No. 97. Barnett Papers in Sosial Research, Working Paper 13-05. November 2013

Forfang, Frode. *Hvordan få asylsøkere til å reise.* 16 April 2014 Available at: [http://www.nrk.no/ytring/hvordan-fa-asylsokere-til-a-reise_-1.11667725] Last accessed 30 April 2014

Goodwin-Gill, Guy S. and McAdam, Jane. *The Refugee in International Law*, Third Edition. Oxford University Press. 2007.

Gorlock, Brian. Working paper No. 68 on *Common burdens and standards: legal elements in assessing claims to refugee status*, UNHCR, Evaluation and Policy Analysis Unit. October 2002.

Grønmo, Sigmund. *Samfunnsvitenskapelige metoder*. Fagbokforlaget. 2007.

Heir, Ole Johan. *Politiets arbeid med retur. UDI vårkonferansen 22. april*. Presented at the Spring conference arranged by UDI. 22 April 2013.

International Commission of Jurists (ICJ). *Letter to the Ministry of Foreign Affairs. 27 February 2010*. Available at: [http://icj.no/wp-content/uploads/2010/10/BrevUCogFDoverleveringavfanger271010.pdf] Last accessed 27 March 2014

Larsen, Kjetil M. *The Human Rights Treaty Obligations of Peacekeepers*. Cambridge University Press. 2012.

Lauterpacht, Elihu and Bethlehem, Daniel. *The scope and content of the principle of non-refoulement*, UNHCR. 2001.

Lawsen, Rick. Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights. In: Fons Coomand and Menno T. Kamminga (eds.). *Extraterritorial Application of Human Rights Treaties.* Intersentia. 2004

Mandal, Ruma. *Protection Mechanisms outside the 1951 Convention ("Complimentary Protection")* Legal and Protection Policy Research Series, Department of International Protection, UNHCR, Geneva. 2005.

McConville, Mark and Chui, Wing Hong. *Research Methods for Law*, Edinburgh University Press, Edinburgh. 2007.

Milanovic, Marko. *Extraterritorial application of Human Rights Treaties, Law, Principles and Policy*. Oxford University Press. 2011.

Milanovic, Marko. *Foreign Surveillance and Human Rights, Part: Models of Extraterritorial Application.* In: Blog of the European Journal of International Law, EJIL: Talk. November 27 2013. Available at: [http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/] Last accessed 29 April 2014.

Paasche, Erlend and Strand, Arne. *En komperativ analyse av landbaserte retur- og reintegreringsprogrammer: Hva fungerer (ikke) i reintegreringsfasen?* In: Marko Valenta and Berit Berg (eds). Asylsøker, i velferdsstatens venterom. Universitetsforlaget. 2012, pp. 205-224.

Rehman, Javaid. *International Human Rights Law*, Second Edition, Pearson Education Limited. 2010.

Romstad, Trond. *Notat om retur av tamilere til Sri Lanka av advokat Trond Romstad – Juli 2000.* (2000)

Sheinin, Martin. Extraterritorial Application of the International Covenant on Civil and Political Rights. In: Fons Coomand and Menno T. Kamminga (eds.). *Extraterritorial Application of Human Rights Treaties.* Intersentia. 2004

Stein, Barry N. *Durable solutions for Developing Country refugees*. In: International Migration Review 20(74). 1986.

Steen, Rune Berglund. *Svartebok over Norsk Asylpolitikk*. Forlaget Manifest AS. 2013

Steen, Rune Berglund. Åtte krav for en mer rettssikker norsk asylpolitikk. *Dagsavisen* (23 January 2014). Available at: [http://www.dagsavisen.no/nyemeninger/alle_meninger/cat1003/subcat1017/thread294231/#post_294231] Las accessed 30 April 2014

Thorgrimsen, Tone Celine Sundseth. *Utviklingen av norsk returpolitikk overfor avviste asylsøkere: En dokumentstudie av statsbudsjettene 2000-2012*. (Master thesis UiO) 2013.

Valenta, Marko. *Avviste asylsøkere, kamp mot uttransportering og livet utenfor mottakssystemet.* In: Marko Valenta and Berit Berg (eds). Asylsøker, i velferdsstatens venterom. Universitetsforlaget. 2012, pp. 225-244

News articles

Adressa. Norge stopper utleverings-nekt til Afghanistan. *Adressa.* 14 March 2012. Available at: [http://www.adressa.no/nyheter/innenriks/article1790320.ece] Last accessed 30 April 2014

Folkvord, Magnhild. Vik ikkje. *Klassekampen* (21 September 2004) Available at: [http://klassekampen.no/17288/article/item/null/vik-ikkje] Last accessed 30 April 2014

Haugsbø, Frank. Yemane (56) vil saksøke staten etter 22 år i asylmottak. *VG* (19 April 2014) Available at: [http://www.vg.no/nyheter/innenriks/asyl-debatten/yemane-56-vil-saksoeke-staten-etter-22-aar-i-asylmottak/a/10139392/]

Heinesen,Camira Tirillsdottir. Fester lit til dødsdom-papirer. *Ny Tid*. 24 June 2011. Available at: [http://www.nytid.no/nyheter/artikler/20110624/fester-lit-til-dodsdom/] Last accessed 4 May 2014

NRK. Færre asylsøkere til Norge. *NRK* (16 March 2014) Available at: [http://www.nrk.no/norge/faerre-asylsokere-til-norge-1.11608892] Last accessed 30 April 2014

Lysevold, Susanne. Kysset gulvet på flyplassen i gledesrus. *NRK* (27 February 2014) Available at: [http://www.nrk.no/nordland/kysset-gulvet-pa-flyplassen-1.11574016] Last accessed 22 March 2014

Opsahl, Egil. UNEs påstand uten dekning- sim sala bim. *Dagsavisen* (15 May 2011) Available at: [http://www.dagsavisen.no/nyemeninger/alle_meninger/cat1003/subcat1018/thread147127/#post_147127] last accessed 28.November 2013

Staveland, Lars Inge and Gimse, Lars Martin. Norge stopper fangeoverføringen til Afghanske myndigheter. *Aftenposten* (27 October 2011) Available at: [http://www.aftenposten.no/nyheter/uriks/Norge-stopper-fangeoverfring-til-afghanske-myndigheter-6678354.html#.UzUu1Pl5MRo] Last accessed 28 March 2014

Staveland, Lars Inge. Politiet tør ikke eskortere somalierne helt frem. *Dagbladet* (24 August 2006) Available at: [http://www.dagbladet.no/nyheter/2006/08/24/474755.html]

Others

Ministry of Foreign Affairs. *Spesialutsending for utlendingssaker ved ambassaden i Teheran, utlysningsnr. 197/14*. Available at: [http://www.jobbnorge.no/ledige-stillinger/stilling/102186/spesialutsending-for-utlendingssaker-ved-ambassaden-i-teheran-utlysningsnr-197-14] Last accessed 30 April 2014