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CRITICALLY ILL MIGRANTS, ASYLUM SEEKERS AND THE DOUBLE STANDARD OF APPLICATION OF THE PRINCIPLE OF *NON-REFOULEMENT*

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Abstract

The principle of *non-refoulement* is a well-established principle of international law in the context of refugee protection and in the wider field of protection of human rights. The principle is deemed to be a *ius cogens rule* in the latter branch, as clarified by Sir Lauterpacht and Bethlehem. This qualification results in its absolute and not derogable character, as well as in the prohibition to subject the norm to any limitation. However, the principle is composed by words having a flexible meaning. On the one hand, this flexibility allows the norm to be applied to a broad range of situations; on the other hand, the lack of a well-defined meaning of the principles involves the risk for the absolute character of the norm to be undermined. The concrete enforcement of the principle plays a crucial role in the assessment of the impact that the flexibility of its words has on the absolute character of the rule. The European Court of Human Rights (ECtHR) is among the international judicial mechanisms which have contributed in a significant way to the promotion and to the clarification of the scope of the norm. Over the last few years, the application of the so called "protection *par ricochet*" has increasingly concerned cases involving expulsion orders targeting asylum seekers and critically ill migrants due to the several number of application complaining the violation of the art. 3 of the European Convention of Human Rights (ECHR). The paper will briefly address the evolution of the Court's case-law concerning the application of the principle of *non-refoulement* to the category of critically ill migrants in case of expulsion orders, highlighting the recent considerable change of ECtHR approach.

Purpose – The present article aims at analyzing whether the jurisprudence of the Strasbourg Court concerning expulsion orders targeting critically ill migrants has undermined the absolute character of the principle of *non-refoulement*, regarded as a *jus cogens* norm in the field of the international protection of human rights.

Design/methodology/approach – Analysis the ECtHR most relevant judgments concerning the application of the principle of *non-refoulement* in the field of expulsion orders targeting critically ill migrants. Comparison between this case-law and the approach adopted in *Sufi and Elmi v. the United Kingdom*.

Finding – After several judgments characterized by a restrictive application of the guarantees provided by art. 3 ECHR, the Court has recognized a wider protection to critically ill migrants. This welcomed and long-waited development has contributed to re-establish the absolute character of the prohibition of torture, inhuman and degrading treatment.

Research limitations/implications – The research is limited to the jurisprudence of the ECtHR. The analysis is focused on the judgments dealing with the expulsion orders targeting critically ill migrants and one case regarding asylum seekers. The paper does not examine the issue concerning the legal status of the subject whose expulsion would violate art. 3 ECHR - the analysis does not concern the national legal grounds upon which a foreign is allowed to stay in a specific country.

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Practical implications – The complete understanding of the new approach developed by the ECtHR could help Council of Europe member States in reviewing their migration policy concerning expulsion orders targeting critically ill migrants. Moreover, advocates and legal counsel could rely on the recent case law of the ECtHR in drafting judicial claims aimed at avoiding illegal expulsions of foreigners to their countries of origin.

Originality/Value – The main point of the paper is to underline that the low level of protection acknowledged by the ECtHR to critically ill migrants in the field of expulsion orders is unjustified under the absolute character of the principle of *non-refoulement*. The originality of the work is the innovative approach – namely, the comparison between the different standards of protection recognized to critically ill migrants and asylum seekers.

Keywords: principle of *non-refoulement*, *jus cogens*, international protection of human rights, ECHR, Strasbourg Court, asylum seekers, critically ill migrants,

Research type: research paper

Introduction

One of the most perceivable transformation in European society stems from migratory movements. During the recent years, the balance between States' sovereignty on migration policy and the protection of migrants' rights has given rise to serious concerns. One of the branch of law which establishes migrants' rights is International human rights law (IHRL). Among the guarantees recognized to migrants, the principle of *non-refoulement* plays a crucial role. Originally established in the field of refugee protection, the principle has broadened its content and scope and it is now considered as a *ius cogens* norm in the wider field of the protection of human rights[1]. In the field of IHRL, the principle of *non-refoulement* stems from the prohibition of torture and inhuman, cruel and degrading treatment and punishment and, according to qualified scholars as Sir. Lauterpacht and Bethlehem, the content and scope of the principle as a rule of IHRL may be summarized as follow:

> *"No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception"*[2].

This definition highlights the two main features of the principle of *non-refoulement* as a rule of IHRL. Firstly, the hard core of the principle is an obligation of result – namely, avoiding the exposure of the subject to the risk of inhuman, cruel and degrading treatment or punishment. The second main feature is the absolute character of the principle, which result in the prohibition of limitation or exception. This IHRL obligation represents a strong boundary to the States' discretion concerning the management of migratory flows. One of the international mechanisms in charge of monitoring and guaranteeing the respect of this principle by national authorities is the European Court of Human Rights (ECtHR). Through an

[1] For a detailed analysis of the *ius cogens* nature of the principle of *non-refoulement* in the field of IHRL, see e.g. Lauterpacht, E., & Bethlehem, D. (2003). *The scope and content of the principle of non-refoulement. Refugee protection in international law: UNHCR's global consultations on international protection*, 87-177.

[2] Ibid. p. 163

evolutionary and systematic interpretation of the ECHR, the Strasbourg Court has clarified the obligations arising from art.3 ECHR[1] and has developed its own approach concerning the application of the principle of *non-refoulement*, also known as "protection *par ricochet*". On one hand, the case-law of the Court has contributed to the clarification and development of the principle at stake. On the other hand, concerns have raised for the restrictive application of art. 3 to expulsion orders targeting critically ill migrants.

This paper will analyze the impact of the jurisprudence of the Strasbourg Court on the absolute character of the principle of *non-refoulement*. After a brief overview of the Court's case law related to the development of the protection *par ricochet* (Chapter I), the paper will examine the traditional approach that the ECtHR has developed with regard to expulsion orders targeting critically ill migrants (Chapter III). Subsequently, the article will address the approach adopted in *Sufi and Elmi v. the United Kingdom*, a case concerning expulsion orders targeting two asylum seekers (Chapter IV). This judgment will be used as a term of comparison to underline the restrictive application of art.3 regarding the removals of critically ill migrants. Lastly, the paper will cover the considerable change of approach employed by the Court in the recent case *Paposhvili v. Beligium* (Chapter V). The last section will outline brief conclusions.

The principle of *non-refoulement* and the case-law of the Strasbourg Court

Initially developed in refugee law[2], the principle of *non-refoulement* has lately been recognized as a *ius cogens* norm in the field of IHRL[3]. The broadening and strengthening of the content and scope of the principle stem from two factors. The first is its explicit recognition in several international instruments at both universal and regional level. The second is the role played by monitoring and enforcement bodies[4]. Among the international Courts, the Strasbourg Court is worthy the attention due to

[1] Art. 3 ECHR - Prohibition of torture "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[2] See e.g.: League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, art. 3; UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, art. 33.

[3] See Lauterpacht, E., & Bethlehem, D. cit. *supra*

[4]. See e.g. UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 7 as interpreted in CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, para. 9; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, art. 3; European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, art. 19; Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45, art. 2; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, art. 22, para. 8; Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 5; Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, art. 5; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), art. 5.

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its evolutionary and systematic interpretation of the ECHR resulting in the development of the so called "protection *par ricochet*"[1].

According to the well-established case law of the ECtHR, the decision of a Contracting party to expel, extradite or remove a person may give rise to an issue under art. 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving Country. As clarified by Milanovich, the responsibility of the Contracting State relies on the decision of the sending State "to actually proceed with the extradition, while being aware of the risk that the individual will be subjected to inhuman treatment. The violation, in other words, consists of the state knowingly exposing an individual to harm at the hands of third parties"[2]. Thus, the focus of what could be defined as a "harm-based" approach is on the consequences of the enforcement of the removal in accordance with the obligation of result which is the hard core of the principle of *non-refoulement*. The establishment of such responsibility inevitably involves a scrutiny of the conditions in the receiving Country in order to assess the exitance of the above-mentioned real risk. The burden of the execution of this evaluation relies primarily upon the Contracting State, which should carry out this appraisal before the expulsion, extradition or removal of the person. If the assessment results in the existence of the above-mentioned real risk, then the State is under the negative duty to avoid the expulsion, extradition or removal[3]. As for the concept of "real risk", besides the evaluation of the general situation of the receiving Country, the State must take into account also the personal circumstances of the subject[4].

The ECtHR traditional approach concerning expulsion orders targeting critically ill migrants

The case law of the Court traditionally required a high threshold to declare that an expulsion order targeting a critically ill migrant is in violation of the principle of *non-refoulement*. More in detail, since *D. v. the United Kingdom*[5], the Strasbourg Court applied the principle according to which

> *"the decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under*

[1] This article will use the expression "principle of *non-refoulement*" and "protection *par ricochet*" as synonyms.

[2] Milanovic, M. (2011). Extraterritorial application of human rights treaties: law, principles, and policy. Oxford University Press, p.9.

[3] See e.g. ECtHR: *Chahal v. The United Kingdom*, Application no. 22414/93, 15 November 1996 [GC], §74; *Soering v. The United Kingdom,* Application no. 14038/88, 07 July 1989, §87-88; *Mamatkulov e Askarov v. Turkey*, Applications no. 46827/99, 46951/99, 4 February 2005 [GC], §67; *Salah Sheekh v. The Netherlands Application* no. 1948/04, 11 January 2007 [Chamber], §137 e 147; *Saadi v. Italy*, cit. *supra* §126.

[4] See e.g. *Iskandarov v. Russia*, Application no. 17185/05, 27 September 2010 [Chamber], §127.

[5] ECtHR, *D. v. the United Kingdom*, Application no. 30240/96, 2 May 1997

Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling"[1].

The first case addressing the issue has been the above-mentioned *D. v. the United Kingdom*, concerning the removal of an AIDS patient to his country of origin. The Court determined that the implementation of the decision would have amounted to inhuman treatment by the respondent State, hence in violation of Article 3. The already terminal state reached by the illness represented the exceptional circumstance and the compelling humanitarian ground that justified the Court's assessment - specifically, D. appeared to be close to death[2].

In its subsequent judgments, the Court constantly denied that the removal of critically ill migrants to their countries of origin would have constituted a violation of art. 3 ECHR. The assessments stemmed from the lack of exceptional circumstances and the compelling humanitarian grounds. Notably, the judges never provided a definition of these two requirements. Prime sample of this approach is the case of *N. v. the United Kingdom*, concerning a Ugandan woman affected by HIV. After having recalled the principle affirmed in *D. v. the United Kingdom*[3], the Court declared that the removal would have not constituted a breach of art. 3 ECHR. More in detail, two aspects were not considered as decisive by the judges to declare the violation of the prohibition under inquiry. The first aspect concerned the rapid deterioration of the applicant's condition and her death within a few years due to the deprivation of the medication that she was receiving in U.K.[4]. The second element concerned the lack of medical resources available in Uganda, resulting in the halving of the access to medical treatment for those in need[5]. With regard to the possibility that the suffering caused by a naturally occurring illness may be covered by art. 3, the Court clarified its approach in several judgments. Notably, the Court opened to the possibility of declaring the violation of the prohibition under inquiry in situation where the distress is, or risks being, exacerbated by treatment flowing from measures for which the Contracting state can be held responsible. Expulsion was explicitly mentioned in the list of those measures[6]. However, the Court specified that this approach applies solely in situations where the conduct that causes the deterioration of the applicant's conditions is attributable to the receiving State. As for *N. v. the United Kingdom*, the judges stated that the alleged future harm would have flowed from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. Since none of those two factors could be attributed to the receiving State, the expulsion had been deemed in compliance with the prohibition enshrined in art. 3 ECHR[7]. The ECtHR has adopted this restrictive approach to all the subsequent cases

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[1] See e.g. ECtHR: *D. v. the United Kingdom*, cit. *supra*, § 54; *N. v. the United Kingdom*, Application no. 26565/05, 27 May 2008 [GC] §42

[2] *D. v. the United Kingdom*, cit. *supra*, from § 51 to § 54. See also *N. v. the United Kingdom*, cit. *supra*, § 42

[3] *N. v. the United Kingdom*, cit. *supra*, § 42

[4] Ibid.

[5] Ibid. §48. N. was removed to Uganda and died there few months later.

[6] ECtHR, *Pretty v. the United Kingdom*, Application no. 2346/02, 29 April 2002 [Chamber] §52

[7] See ECtHR, *Sufi and Elmi v. the United Kingdom*, Applications nos. 8319/07 and 11449/07, 28 June 2011 [Chamber], § 281 recalling and summarizing the *rationale* of *N. v. the United Kingdom*. For a critic point of view, see *N. v. the United Kingdom* cit. *supra*, Joint Dissenting Opinion of Judges Tulkens, Bonello and Spielmann – particularly, para. 8.

concerning expulsion orders targeting critically ill migrants. In the view of the author, the switch from a "harm-based" approach to an "attribution-based" approach – centred on the attribution of the causes of the alleged future harm – finds no justification under the obligation of result that constitutes the hard core of the principle of *non-refoulement*.

The broadening of the scope of art. 3 ECHR in *Sufi and Elmi v the United Kingdom*

Sufi and Elmi v. the United Kingdom clearly shows the higher level of protection recognized to asylum seekers targeted by expulsion orders. In this case, concerning the removal of two asylum seekers to IDP camps in the Afgooye corridor (Somalia) and in Dadaab (Kenya), the Court assessed that the humanitarian conditions of the IDP camps were sufficiently dire to reach art. 3 threshold – mainly due to the extreme overcrowding, from which stemmed an extremely limited access to shelter, water and sanitation facilities. Thus, the removal of the applicants would have amounted of a violation of the principle of *non-refoulement*[1].

The judges recalled both *N. v. the United Kingdom* and the famous *M.S.S. v. Belgium and Greece*[2]. As for the former, the Court reminded its well-established case-law principle according to which the removal must not be implemented in very exceptional cases where the humanitarian grounds against removal are compelling[3]. Then, the judges adopted the approach developed in *M.S.S. v. Belgium and Greece*[4] in order to assess the existence of a real risk of a violation of the principle of *non-refoulement*[5]. Notably, the Court recalled the paragraphs concerning the violation of art. 3 committed by Belgium and Greece due to the applicant's life conditions in Greece. The judges did not take into account the qualification of the applicant as a particular vulnerable subject – which constituted one of the main grounds in support of the violation of art. 3 declared in *M.S.S. v. Belgium and Greece* due to the applicant's living conditions in Greece[6].

Two aspects of this judgment are worthy attention. The first is that the Court declared that the implementation of the removal order would have violated art.3 ECHR due to the extreme material poverty and the harsh living conditions that the applicant would have faced if returned to the country of origin. This approach is in line with the "harm-based" approach of the protection *par ricochet* developed by the Strasbourg Court. The second important aspect is that the violation of the principle of *non-refoulement* stems solely from the prohibition of inhuman and degrading treatment enshrined in art. 3 ECHR, as interpreted by the Court. This feature distinguishes *Sufi and Elmi v. the United Kingdom* from *M.S.S. v. Belgium in Greece*.

The position of the Court in this judgment leads to two considerations. On the one hand, this approach is in line with the extensive interpretation of the ECHR which the Court has developed in the past years. The reference is to the lack of a

[1] *Sufi and Elmi*, cit. *supra* § 291 – 296 – 303
[2] ECtHR, *M.S.S. v Belgium and Greece*, Application no. 30696/09, 21 January 2011 [GC]
[3] *Sufi and Elmi v. the United Kingdom*, cit. *supra* § 278
[4] Ibid. § 279
[5] Ibid. § 283
[6] *M.S.S. v. Belgium and Greece*, cit. *supra*, from § 249 to § 264

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"water-tight division" separating the sphere of social and economic rights from the field of civil and political rights covered by the Convention, especially in the context of the obligations arising from art. 3 ECHR[1]. As noted by judge Sajo, "the Court's position regarding Article 3 of the Convention and the constitutional position of a Welfare State are getting even closer"[2]. Moreover, the judge underlined that the position of the Court in *M.S.S. v. Belgium and Greece* seems to be linked to the qualification of the applicant as belonging to a vulnerable group[3]. However, in *Sufi and Elmi* this vulnerable-centred approach was abandoned: the principle of *non-refoulment* showed its potential adaptability to each situation that may give rise to a violation of art. 3 ECHR, deemed as an absolute norm which cannot be subjected to limitation, derogations or exceptions. Thus, *Sufi and Elmi* could be considered as a corner stone in broadening and strengthening the scope and content of the principle of *non-refoulement*.

The second consideration concerns the lack of justification for the different and restrictive approach adopted by the Court with regard to expulsion orders targeting critically ill migrants. Indeed, through the comparison between *N. v. the United Kingdom* and *Sufi and Elmi v. the United Kingodm* it is possible to underline the high threshold required by the Court to find a violation of art. 3 ECHR in cases concerning critically ill migrants. In *Sufi and Elmi v. the United Kingdom* the Court adopted the traditional "harm-based" approach, focused on the consequences of the removal. Moreover, the Court qualified extreme material poverty and harsh living conditions as inhuman and degrading treatment. Differently, in *N. v. the United Kingdom* – and in all the subsequent judgments concerning expulsion order targeting critically ill migrants – the Court did not considered the rapidity of the deterioration of the applicant medical conditions due to the lack of sufficient treatment available in the country of origin as an appropriate ground to declare the implementation of the removal contrary to art. 3 ECHR. The only situation in which the Court found that the enforcement of the removal would have violated the principle of *non-refoulement* involved a critically ill migrant close to death[4]. The establishment of such a higher threshold in order to declare the violation of art.3 in cases involving removal orders targeting critically ill migrants is in sharp contrast to the extensive interpretation of the principle of *non-refoulement*, as recently developed by the Court in *Sufi and Elmi*. This double standard of application of the principle of *non-refoulment*, due to its lack of an objective justification, risks to undermine the absolute character of a prohibition enshrined in a *ius cogens* norm.

In conclusion, on one hand *Sufi and Elmi v. the United Kingdom* represented a step forward in broadening the scope and content of the principle of *non-refoulement*; one the other hand, the Court did not take advantage of the developed approach, avoiding its application to cases concerning critically ill migrants.

[1] See e.g. ECtHR, *Budina v. Russia*, Application no. 45603/05, Admissibility Decision, First Section, 18 June 2009. For a

[2] *M.S.S. v. Belgium and Greece*, cit. *supra*, partly concurring and partly dissenting opinion of judge Sajo.

[3] Ibid.

[4] See *D. v. the United Kingdom* cit. *supra*

The overruling: *Paposhvili v. Belgium*

The application of such a high threshold in the context of expulsion orders targeting critically ill migrants has been severely criticised by both high-qualified scholars and the judges of the Court. After several judgments, the Strasbourg Court has changed her approach and has recognized a wider protection to this category of individuals. The welcomed and long-waited evolution is outlined in the case *Paposhvili v. Belgium*[1], in which the Court set aside the restrictive application of art. 3 ECHR and called for a more rigorous assessment of the applicant's individual situation.

Primarily, the Grand Chamber stated that the previous approach – according to which there was a breach of art. 3 solely in cases where the applicant was close to death – had deprived critically ill migrants of the guarantees of the principle under inquiry. As a result, the practical and effective application of the rights enshrined in the Convention had been affected[2]. Secondly, the Court noticed that the test of the "very exceptional circumstances" had not been defined and, hence, decided to clarify the meaning of this criteria. According to the Grand Chamber, in cases involving the removal of a critically ill migrant, the "very exceptional circumstances" which may give rise to a violation of art. 3 ECHR should be understood to refer to situations in which "substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy"[3].

Furthermore, the Court refined the solution proposed by judge Lemmens in his dissenting opinion to *Tatar* case[4]. Recalling *Tarakehl*[5], the Grand Chamber stated that if after the examination of the relevant information[6], serious doubts persists concerning the consequences of removal of the person concerned, the returning State "must obtain individual and sufficient assurances from the receiving State, the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3"[7]. Lastly, the judgment clarified that the event which is contrast

[1] ECtHR, *Paposhvili v. Belgium*, Application no. 41738/10, 13 December 2016 [GC] from§ 181 to §193
[2] Ibid. § 181 - 182
[3] Ibid. § 183
[4] ECtHR, *Tatar v. Switzerland*, Application no. 65692/12, 14 April 2015 [Chamber], partly dissenting opinion of judge Lemmens, p. 17, § 4. The case concerned the expulsion from Switzerland to Turkey of a person affected by schizophrenia. Judge Lemmens proposed to consider critically ill migrants as belonging to a vulnerable group, as well as the adoption of the approach developed in *Tarakhel* case. As for the latter, the case concerned a so-called *Dublin transfer* of a family of asylum seekers from Switzerland to Italy. The Court stated that Switzerland would have violated art. 3 ECHR if it had sent the family back to Italy under Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.
[5] ECtHR, *Tarakhel v. Switzerland*, Application no. 29217/12, 4 November 2014 [GC]
[6] As for the rules governing the Court's assessment of the procedure employed by the Contracting State to establish the existence of a real risk resulting from the removal, see *Paposhvili v. Belgium*, cit. *supra*, from § 186 to § 190.
[7] Ibid. § 191

with the art. 3 ECHR is not the lack of medical infrastructures in the receiving State. The responsibility of the Contracting State under the Convention arises from the implementation of the removal decision, considered itself as an act "which would result in an individual being exposed to a risk of treatment prohibited by Article 3"[1]. Notably, the Court did not focus on the naturally occurring illness or on the lack of medical resources of the receiving Country – which cannot be attributed neither to the sending State nor to the receiving one. The Grand Chamber focused on the consequences stemming from the implementation of the removal. This approach reflects the hard core of the principle, which is an obligation of result – namely, the prohibition to expose the person to torture and inhuman, degrading or cruel treatment or punishment.

In conclusion, *Paposhvili* overruled the previous case law of the Strasbourg Court. Even if the circumstances which may give rise to a breach of art. 3 ECHR still correspond to a high threshold[2], the clarification of the grounds under which the removal cannot be implemented represents an undisputed progress both in the protection of critically ill migrants and in the application of the principle of *non-refoulement*[3].

Conclusions

The paper covered the issue related to the flexible nature of the principle of *non-refoulment* in the context of removal orders targeting critically ill migrants. The inquiry took into account art. 3 ECHR, as interpreted by the jurisprudence of the Strasbourg Court – one the international mechanisms which has played a crucial role in the clarification of the scope and content of the prohibition under investigation. The main purpose was assessing whether the concrete application of the protection *par ricochet* has undermined the absolute nature of the principle of *non-refoulement*. After several judgments that risked impairing the absolute character of the prohibition through the recognition of different levels of protection to asylum seekers and critically ill migrants targeted by removal orders, finally the Court adopted an evolutionary approach broadening the guarantees acknowledged to both groups under investigations. Ultimately, as shown above, both *Sufi and Elmi v. the United Kingdom* and *Paposhvili v. Belgium* strengthened and widened the scope and content of the principle of *non-refoulement*. The recent evolution of the jurisprudence of the Strasbourg Court significantly contributed in the re-establishment of the absolute character of the prohibition of torture and inhuman and degrading treatment and punishment, whose *ius cogens* nature finally corresponds to a strict application of a norm representing a cornerstone in the field of the international protection of human rights.

[1] Ibid. § 192
[2] Ibid. § 183
[3] For reasons of space, the article did not deal with the issue related to the higher social costs imposed upon States, potentially stemming from the novel approach developed by the ECtHR.

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