LUISS

Department of Political Science

Degree Program in International Relations

Major: Diplomacy

Course of Comparative Public Law

The Implementation of the European Convention on Human Rights as a Case Study of Comparative International Law

The enforcement of the principle of non-refoulement

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Academic Year 2023/2024

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LIST OF ABBREVIATIONS AND ACRONYMS

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
NGOs	Non-Governmental Organizations
AFRJCIL	African Journal of International Law
CJIL	Chinese Journal of International Law
AJIL	American Journal of International Law
EJIL	European Journal of International Law
ASIANJIL	Asian Journal of International Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCAT	United Nations Convention Against Torture
CJEU	Court of Justice of the European Union
UNHCR	United Nations High Commissioner for Refugees
UKIP	UK Independence Party
HRA	Human Rights Act

INTRODUCTION

The development of International Law represents the attempt to bring together various communities with different beliefs, cultures, and legal traditions under a common umbrella of rules and standards. Born in the aftermath of the Peace of Westfalia in 1648, this discipline expanded over the years its areas of interest, from the peaceful settling of disputes among states to the most different areas. Cooperation among states gradually transformed into binding obligations, revealing the ambition of a more united world. Human Rights became a central topic of International Law and the protection of the individuals found in the international sphere a powerful sponsor. Treaties were drafted, and consuetudinary norms were assessed, granting these rights a regional or even universal character.

However, in recent years the universal character of International Law has been problematized. While the international obligations upon states strive to create a common language and a common understanding of the norms that states are called to respect, it has been observed how the very conception of such norms can vary among different states, whether regarding their understanding or rather their practical implementation. Strains of literature such as the "Fragmentation Literature" already pointed out how the development of International Law happened in different regimes, such as regional conventions and the UN system.[1] Now, the inquiry has shifted towards the observation of how international norms are differently conceptualized in such regimes and even in states belonging to the same regime. A new strain of literature emerged to conduct such studies, employing the traditional methods of Comparative Law to understand the national characteristics of International Law. Comparative International Law is the discipline that questions the misleading assumption that International Law is a rigid and unified body of laws presenting, as alternative, national versions of international law. These are characterized by differences in the understanding, interpretation, application and approach of the same international norms.[2] The development of the discipline is well contextualized in

[1] Paul B. Stephan, 'Comparative International Law, Foreign Relations Law, and Fragmentation' in Roberts Anthea, and others (eds), *Comparative International Law* (online edn, Oxford Academic 2018)

[2] Anthea Roberts, 'Conceptualizing Comparative International Law' in Roberts Anthea, and others (eds), *Comparative International Law* (online edn, Oxford Academic 2018) 6

Anthea Roberts' 2020 book *Comparative International Law*,[3] which represents the greatest attempt to explain the history and characteristics of this strain of literature. Comparative International Law appears to be a powerful instrument to understand and contextualize the debate around several areas, like the compliance of states towards international obligations and the different degrees of national protection of Human Rights.

The purpose of this work is to contribute to the development of the Comparative International Law literature, adopting this framework to study one of the most powerful human rights protection regimes in the world, the European Convention on Human Rights. The Convention, embedded in the system of the Council of Europe, is broadly known for its pivotal role in expanding the protection of individuals in the continent, protecting a wide range of fundamental rights.

Among these rights, one in particular has gained outstanding relevance in recent years, the right of non-refoulement. Based on Article 3 of the Convention, the prohibition from refoulement has been at the centre of political debate due to the sensitivity of migration issues and the attempt from European governments to fight the migratory wave unleashed by the aftermath of the Arab Spring.[4] In this context, Human Rights became a counterbalance of the restrictive policies of national governments, and the Convention assumed multiple times the role of guarantor of the protection of individuals from unlawful expulsion under International Human Rights Law. While this prohibition interests all of the member parties of the ECHR, questions arose over the respect of the right and the different strategies employed by the actors involved to advance their objectives under the obligations they are called to meet.

This thesis conducts a study of the non-refoulement principle under the framework of the European Convention on Human Rights, in order to answer two main questions: can states actually diverge in the enforcement of the provisions of the Convention? And how such divergence takes place in the case study of the protection from refoulement? What will be assessed is whether or not there is

[3] Anthea Roberts and others (eds), *Comparative International Law* (online edn, Oxford Academic 2018)

[4] Mohammed T. Bani Salameh, 'Migration from the Arab Spring Countries to Europe: Causes and Consequences' in Ahmed Al-Masri and Kevin Curran Editors (eds), *Smart Technologies and Innovation for a Sustainable Future. Proceedings of the 1st American University in the Emirates International Research Conference* (Springer 2017)

room for differences in regards to the national protection of the right, and whether these are the result of defiance towards the Convention or they are rather admitted by the ECHR regime. This inquiry takes place through the study and the comparison of three member states of the Convention characterized by different history, legal culture, and belonging to international organizations: Italy, the UK, and the Russian Federation before it denunciated the Convention. The work is structured in four chapters. The first chapter introduces the concept of Comparative International Law, carrying out a review of the fundamental literature on the topic and building the basis for embarking on the comparison.

The second chapter presents the European Convention on Human Rights, explaining the structure of the Council of Europe, its bodies, the role played by the European Court of Human Rights, and introducing the Margin of Appreciation Doctrine and its implication for the employment of Comparative International Law. In its second section, the chapter defines the protection of the non-refoulement principle as derived from the jurisprudence of the European Court of Human Rights. It explains what are the rules that the member states are called to respect and the characteristics that define its protection in the Convention in comparison with other International Human Rights Law regimes.

The third chapter includes the Comparison at the centre of the work, explaining the selection of the countries of comparison, and looking at the formal and substantial differences and similarities in the enforcement of the non-refoulement principle in their domestic regimes. Particular attention is given to the normative hierarchy of both the Convention and the principle, the repercussions of the national legal cultures in such enforcement, and the strategies adopted at the national level to respect the related international obligations.

The fourth and final chapter discusses the results of the thesis, answering the initial research questions and providing a context for the differences that emerged in the comparison, as well as providing inputs for future research on the topic.

The international protection of human rights, and in particular the provisions for the safeguard of displaced people in situations of extreme vulnerability are a topic of the utmost importance. This work will frame this issue

in an original way, adopting a pragmatic and real-world-oriented approach that takes into account the domestic systems of international actors. Its objective is to demonstrate the opportunities that Comparative International Law can bring to this area of study, assessing successes and shortcomings of international mechanisms of human rights protection.

CHAPTER ONE - A NEW APPROACH TO THE STUDY OF INTERNATIONAL NORMS: COMPARATIVE INTERNATIONAL LAW

1. Defining Comparative International Law

I. A Reflection on International Law

To draw comparisons in the domestic implementation of international norms, this work does not simply rely on the traditional methods of Comparative Public Law. Rather, it attempts to employ a recently emerged strand in the comparative literature, Comparative International Law. Since its establishment is still ongoing, the first chapter of this thesis aims to convey what Comparative International Law is, why it emerged, its relationship with Human Rights International Law, and the implication of its existence for both International Law and Comparative Law.

The very nature of International Law[5] sets it apart from the other branches of law. While domestic laws address a specific, well-defined community, International Law is the discipline that regulates the relationship between separate communities which often hold distinct conceptions of law and justice. International Law is not a global law directed at humankind but rather a framework in which societies can peacefully interact with each other. The classic definition of International Law is the following:

> *International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other.*[6]

This body of law is composed of three different sources of international norms: Customary International Law, which is individuated by state practice and by the belief that a certain norm is binding, treaties, which are drafted between states

[5] The focus of this work is on Public International Law. Whenever the term “International Law” is mentioned, we are actually referring to Public International Law.
[6] Joseph Gabriel Starke, *Introduction to International Law* (10th edn, Butterworths 1989) 3

and are the expression of their consent to be bound, and general rules of International Law.[7]

While the definition provided conveys a convincing understanding of what International Law is, it inevitably simplifies the nature of the discipline, ignoring the great set of discretion that it brings. The voluntary element of International Law, which is evident in the norms before enlisted, undermines the idea that there is an actual fixed set of rules respected and interpreted by every state in the same way. While international courts are employed to resolve disputes regarding compliance with international norms, the absence of an overarching global authority[8] over the law leaves a margin of discretion in both the national interpretation of the international norms and in their enforcement which has not parallels in domestic law. International Law exists because its very own subjects want it to exist and bind them. However, the fundamental lack of coercing power leaves room for a series of contradictions within its application. Comparative International Law aims to address these contradictions, not by undermining the validity of International Law as a discipline, but rather by enquiring how divergent interpretations of international norms shape the effect that such norms produce. Comparative International Law challenges the idea that International Law is by itself a perfectly coherent and united set of rules and, at the same time, it attempts to overcome the limits of a single discipline (i.e. Comparative Law and International Law) in understanding complex juridical and political phenomena.

II. Before Comparative International Law: "Fragmentation Literature" and Foreign Relations Law

Before Comparative International Law, other fields of the literature addressed the lack of coherence and unity within International Law. As noted by a 2006 Report from the International Law Commission[9] the scope and matters of International

[7] Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 50
[8] The issue of the absence of a Global mechanism of enforcement of International Norms is one of the most distinct characteristics of International Law. In the 19th century, this problem has been used to argue if the very term "Law" can be referred to international norms. Even if today International Law is universally accepted as "Law", the enforcement problem remains an unsolved issue. Jan Klabbers, *International Law* (3rd edn, Cambridge University Press 2021) 83
[9] International Law Commission, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law* (Law Com No A/CN.4/L.702 2006) Para 4

Law have been notably expanded over the years. However, this expansion took place in an uncoordinated fashion, within groups of states held together by function or geographical boundaries.[10] This led to a phenomenon called the "Fragmentation" of International Law, leading the discipline to be divided into "fragments of normative and institutional activity."[11] The cause of the creation of different regimes of law can be traced to three main events: the emergence post-1989 of specialized subfields of International Law, the rise of new actors besides states, such as NGOs and multinational enterprises, and the development of new types of norms outside the acknowledged sources.[12] The issue of Fragmentation led to the emergence of a strain of literature that studies the "Discrete and even hermetic bodies of law"[13] created by the different institutions operating at the International Level. The objects of the inquiry are often the concurrent regimes created by the international organizations and their own court in the absence of a clear hierarchy. A case often cited in textbooks and which holds great explanatory power over the issue of fragmentation of International Law is the *Kadi* case. Kadi's assets in Sweden were frozen by the European Commission in compliance with the UN resolution 1267 due to his alleged association with Al Qaeda. Kadi, lamenting the seizure happening without any hearing, brought the case first before the court of first instance and then before the European Court of Justice, which sentenced that his right to a fair hearing and his property rights were in fact violated.[14] The European Court of Justice thus clearly distanced the EU legal system from the UN resolution that froze Kadi's assets, refusing to recognize the hierarchical superiority of the UN charter. This case best established how different international regimes can clash against each other when there is not a clear hierarchy, exposing the current fragmented status of International Law.

The "Fragmentation Literature" is not the only strain of literature that criticizes the alleged universality of International Law. Foreign Relations Law is

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[10] Ibid Para 5
[11] Margaret A. Young, 'Introduction: The Productive Friction between Regimes' in Margaret A. Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 2
[12] Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 (3) MPIL 673
[13] Stephan, (n 1) 63
[14] Case C-402/05 P and C-415/05 P Kadi v Council of the European Union and Commission of the European Communities [2008] ECR I-6351

the discipline that focuses on how states conduct relations with foreign actors on the domestic level.[15] What is discussed by Foreign Relations Law is the implementation at the domestic level of International Law rather than conceptualizing it on the general level. Another case study that can well exemplify the importance of national implementation of International Law is the *Ferrini* case. In 2014 the Italian constitutional court refused to comply with the ICJ decision "Jurisdictional Immunities of States" (Germany v. Italy), deeming access to civil justice as one of the fundamental rights protected by the Italian Constitution, safeguarded even from International Law.[16] Through the lack of an actual implementation of the decision of an international court, the Italian Constitutional Court actively impacted the very effects that International Law should have had produced.

III. The Evolution of Comparative Law: from Private to Public and Recent Developments

Comparative International Law is not just the product of a reflection on the core issues of International Law, but its emergence also stems from the evolution that Comparative Law has undergone over the years. It appears necessary to delineate this process to fully understand the background that led to the development of the comparative analysis of International Law. Comparative endeavours in the field of law trace back to the age of Aristotle,[17] but we cannot properly speak of Comparative Law before one pivotal moment: the Congress on International Comparative Law[18] of Paris held in 1900. During this congress, the modern conception of Comparative Law was born and the first writings on the subject were officially presented.[19] During the Conference of Paris, the dominant idea was to employ the newborn Comparative Law to reach the transnational unification of the law.[20] Nowadays we would consider such an idea utopistic at

[15] Stephan (n 1) 53
[16] Ferrini v Germany, Cass no 5044/04, ILDC 19 (IT 2004), Supreme Court of Cassation, 11 March 2004
[17] Jaakko Husa, *A new introduction to International Law* (Hart Publishing 2015) 18
[18] It must not to be confused with Comparative International Law, there is no relationship whatsoever between the two.
[19] Husa (n 17) 21
[20] Ibid

best, however, traces of such aspiration arguably survived to these very days. For reference, the work of the International Law Commission a century later still aspires to reach a degree of harmonization in the conception of Customary Law through the activity of codification by employing the comparative method.[21] The conference marked the birth of Comparative Law in the European continent, which remained the only place where it was actively studied until the 2nd World War, after which it penetrated the American continent.[22] It is important to notice that during the 20th century, Comparative Law was rather uniquely declined into Comparative Private Law, as a tool employed for clarifying issues of Private International Law.[23] The main explanation for the absence of a strain of Comparative Public Law lies in the now obsolete idea that the private sphere was clearly distinct from the public one, which is too heavily reliant on national substrates like politics and culture to be efficiently compared.[24] The turning point for the expansion of Comparative Law to the public sphere was the fall of the Soviet bloc in 1989 when the fall of the socialist regimes led to the necessity of implementing Western, democratic state structures in the countries of Eastern Europe.[25] A key role was played also by the challenges of European integration, which took place with the construction of a political community and the creation of a regional protection of Human Rights.[26] The beginning of the 21st century saw the emergence and affirmation of Comparative Public Law as the fully independent discipline that we know today. Globalization had a beneficial effect on the development of Comparative Public Law, pushing national actors, courts in particular, to transnational comparisons. In particular Vicki Jackson in her book "*Constitutional Engagement in a Transnational Era*" suggests that both the increasing use of English in national courts and the rise of the Internet expanded significantly the opportunities for comparisons.[27] We have seen that thanks to historical contingencies and technological developments, Comparative Law has

[21] More about the work of the International Law Commission and its relationship with Comparative International Law will be discussed later in this chapter.
[22] Husa (n 17) 21
[23] Ibid 25
[24] Ibid 26
[25] Ibid 27
[26] The European Convention on Human Rights and the European Regime of protection of Human Rights will be addressed in Chapter 2, Ibid 27
[27] Vicki C. Jackson, *Constitutional engagement in a transnational era* (Oxford University Press 2013) 5-6

over the years broadened its range of concern. Its evolution does not seem to stop anytime soon, since the use of Comparative Law is still expanding. Comparative International Law represents the next step in the progress of the discipline, which is expanding its subject of inquiry to international norms as well.

IV. Comparative International Law, Definition and Development

The "Fragmentation Literature" and Foreign Relations Law marked the first steps in the academic criticism of the unity of International Law. They provided the context in which a new field of inquiry could develop complementing the existing research with a new approach. Adopting the research methods of Comparative Law to the study of the application of International Law by different actors, the discipline known as Comparative International Law was born. We use the words of Anthea Roberts, one of its pioneers, to define Comparative International Law as the discipline which:

> *Entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law.*[28]

The underlying concept behind Comparative International Law is that in the application of International Law, states actually diverge from each other, whether in terms of substance or form, resulting in the creation of a national International Law. Thus, this field of study aims to investigate the differences that emerge, as a result, in different systems. This definition is not merely limited to states but includes other types of actors, opening up the possibility of confronting various types of international bodies and organizations and focusing on regional approaches to specific issues of International Law.[29] Comparative International Law established itself as an independent field of research only during the 21st century.[30] This does not mean that comparative methods have not been used to inquire about International Law before, however, the discipline has been

[28] Roberts (n 2) 6
[29] Ibid 5
[30] Mathias Siems, 'Comparative International Law: State of the Art' (2023) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587948> accessed 12 August 2024 2

conceptualized as a distinct field of research only by the second decade of the century.[31] In fact, the first two highly relevant works on the subject were both published by Anthea Roberts and Mamyluk and Mattei[32] in 2011, which is considered the birth year of Comparative International Law as we know it today.

V. Employing Comparative International Law: Different Uses, Units of Analysis and Methodologies

The increasing interest in Comparative International Law is also motivated by practical reasons. Specifically, Anthea Roberts identified 3 main ways to employ this discipline: First, to identify the substantive content of International Law, through the identification of *Opinio Juris* and State Practice. This kind of comparison is employed by international courts and bodies, such as the International Law Commission which is tasked with the objective of codifying International Customary Law. Second, identifying, analysing, and explaining similarities and differences in the application and interpretation of International Law. Third, understanding and explaining different approaches to International Law.[33]

The field is thus relevant for both its explanatory power and its practical utility also in international bodies. Moving to the concrete application of the discipline, questions may arise over the actual units of analysis. While judicial bodies are the main actors in the implementation of International Law,[34] the comparative analysis is not limited to rulings, but it is carried out on several levels. The units that are investigated are of course courts, but also the actions of the executives, legislative bodies, and national administrative bodies.[35]

A further key point in discussing the employment of Comparative International Law is its relationship with functionalism. The functionalist approach might appear as the ideal method to compare implementations of international law domestically, being able to show the different functions the norms have in

[31] Ibid 4
[32] Ibid 8
[33] Roberts (n 2) 7-8
[34] Kevin L. Cope and Hooman Movassagh, 'National Legislatures' in Roberts Anthea, and others (eds), *Comparative International Law* (online edn, Oxford Academic 2018) 271
[35] Roberts (n 2) 10

national legal systems. However, focusing solely on functions can be misleading. The flaw of functionalism is that it intrinsically neglects the importance of details, and thus its employment in the field has been criticized. This does not mean that a functionalist approach cannot be useful in observing and explaining similarities and differences but a correct approach should investigate both formal and functional differences, focusing on functional differences when there are formal similarities.[36]

The main elements of Comparative Law persist in this subdiscipline. This is the case for *the tertium comparationis*, which correspond to the international norm itself, which is compared in the different systems.[37] Speaking of the comparisons, Siems identifies two main types of comparisons that are employed in Comparative International Law, the vertical and the horizontal.[38] The vertical employment of Comparative International Law attributes the same weight to international and national bodies, leading to comparisons between domestic and international institutions. On the other hand, the horizontal variant compares the different understandings of International Law in domestic systems. Both the Vertical and Horizontal comparisons comprehend multiple subcategories which are here briefly reported:[39]

Vertical comparisons:

1. Comparing rules.
2. Comparing other features.
3. Interpretation of international law.
4. Understanding international organizations.
5. Understanding the nature of international law.

Horizontal comparisons:

6. Comparing laws on the same topic.
7. Comparing laws on different topics.
8. Comparing other features.
9. Comparing countries as regards the same international rules.

[36] Ibid 13-14
[37] Ibid 15
[38] Siems (n 30) 16
[39] Ibid

10. Comparing different traditions of international law.

Both a horizontal and a vertical dimension will be included in this work. However, this thesis focuses mainly on the ninth subcategory, comparing countries as regards the same international rules. The vertical dimension will be included in regard to the understanding of the enforcing procedure by the member states of the Council of Europe.

2. Comparative International Human Rights Law

I. International Human Rights Law

The purpose of this work is to enrich the literature on Comparative International Law by comparing the implementation of the non-refoulement principle within the framework of the European Convention on Human Rights. The choice of the topic is motivated by both the great number of real-world cases and the preexisting literature which provides a strong basis for the research. However, before proceeding such literature must be complemented by a digression on the relationship between Comparative International Law and the international protection regime of Human Rights. Following the definition of the International Committee of the Red Cross, we can define International Human Rights Law as:

> *A set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain rights that must be respected and protected by their States.*[40]

Dissecting this definition, four main elements which characterize this subfield can be identified:

1. Consensus-Based [International].
2. Allegedly Universal [Human Rights].
3. Affected by Courts and legal advocates [Law].

[40] International Committee of the Red Cross, 'What is the difference between IHL and human rights law?' (International Committee of the Red Cross, 22 January 2015) < https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law> Accessed 19 August 2024

4. To help address domestic concerns or escape domestic constraints.

The universal character of Human Rights is a topic of particular relevance for this work. The notion that human rights are universal has been heavily discussed by the doctrine. Some scholars oppose this position on the basis of a strong or weak view of cultural relativism. For strong cultural relativists, rights are determined by the culture, which is the main source of the moral right, while the universality of human nature serves just as a check on the excess of relativism.[41] In contrast, a weak form of cultural relativism, which has been supported by Donnely, suggests that while culture is important in determining Human Rights, the divergencies in their application should be limited to the form and interpretation of the rights rather than to the types of rights themselves.[42] To determine whether Human Rights are universal or not is not the focus of this thesis, but as a premise for the analysis in the next chapters, this work accepts the notion that the differences implied by the weak cultural relativism exist, permitting the use of Comparative Law to detect and explain them. In his analysis of the national implementation of Human Rights protection norms, even McCrudden tends to reach similar conclusions. Identifying functionalism as the interpretative key, he affirms that it is because Human Rights play different roles in different societies that the national interpretations of Human Rights protection norms differ,[43] which is well reflected in the fourth element of the definition previously provided.

II. Comparative International Human Rights Law

Like the main discipline, Comparative International Human Rights Law looks for similarities and differences in the understanding, application, interpretation, and approach of International Human Rights norms, providing possible explanations for these differences. Despite presenting all the characteristics of Comparative International Law, this subfield possesses some aspects that set it apart from the rest of the literature. Generally speaking, three elements must exist to speak

[41] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Hum Rts Q 401
[42] Ibid 419
[43] Christopher McCrudden, ‘Comparative International law and Human Rights’ in Roberts Anthea, and others (eds), Comparative International Law (online edn, Oxford Academic 2018) 440

about Comparative Human Rights Law: An element of International Human Rights Law, a domestic use of this International Human Rights Law, and a comparison between two or more of these domestic uses of International Human Rights Law.[44]

It is in such comparison that it can be found a key characteristic of the subgenre. While general Comparative International Law includes a huge variety of comparisons, both horizontal and vertical, the same does not necessarily apply to Comparative International Human Rights Law. In approaching the field, McCrudden in fact openly clashes against the general definition provided by Anthea Roberts, adopting a more restrictive approach due to the very nature of Human Rights Law. Three types of comparison are in fact excluded by McCrudden: horizontal comparisons of international and regional human rights bodies, horizontal comparisons of national human rights bodies, and vertical comparisons of international human rights bodies with regional human rights bodies and with national human rights bodies.[45]

A few considerations led to the exclusions of this kind of comparison by McCrudden. Concerning horizontal comparisons, the comparisons of differences between different international bodies are excluded because belonging to the "Fragmentation Literature". Meanwhile, vertical comparisons between an international body and a domestic court are excluded by the narrower definition of McCrudden which encompasses the three elements of Comparative International Human Rights Law, thus the fact that at least two domestic actors have to be included. This opens up for a comparison between multiple domestic actors and one international actor. Finally, horizontal comparisons of human rights bodies are not included because they arguably fall more closely to the realm of Comparative Constitutional Law rather than in that of Comparative International Law.[46] In contrast, the interpretation of meta-principles by different domestic and international courts such as the concept of human dignity are in fact included.[47]

[44] Ibid 448
[45] Ibid 449
[46] Ibid 449-451
[47] Ibid 451

This brief excursus on the subfield of Comparative International Law appears particularly useful for our future analysis of the protection of the non-refoulement principle within the European Convention on Human Rights. By narrowing the units of analysis and better defining what field of Comparative International Law is concerned, focus can be restricted avoiding superfluous digressions.

3. A Threat to International Law?

I. Criticisms of Comparative International Law

After describing the substance of Comparative International Law, it is now time to address its implications for International Law as a whole. While the development of a new field of study enriches the literature, the enthusiasm for this field of study is not universally shared. The employment of the comparative method to address the existence of divergencies in the implementation of international norms has been defined as unnecessary and unrealistic by part of the scholarship, even for the identification of customary law and general principles.[48] The concept of multiculturalism that lies at the core of this field implies that law is approached differently depending on the culture within which it is embedded.[49] On a cosmopolitan account, such assumptions undermine the concept of a real International Law, allowing for its dilution. The following section ought to address these concerns, presenting Comparative International Law as a useful tool for and not against International Law, especially for its employment in the definition of state practice.

II. The International Law Commission and Comparative International Law

[48] Alain Pellet, 'Article 38' in Andreas Zimmermann, and others (eds), The statute of the International Court of Justice: A Commentary (online edn, Oxford Academic 2019) 769-772
[49] Mathias Forteau, 'Comparative International Law Within, Not Against, International Law' in Roberts Anthea, and others (eds), Comparative International Law (online edn, Oxford Academic 2018) 162

The International Law Commission occupies a special position in the development of International Law. Being a United Nations body, the Commission has the task of:

> *Initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.*[50]

The activity of codification was first employed in the postwar international order to avoid tensions between Western states, which have been the cradle for the classic conception of International Law, and the new states formed during the decolonization process, helping in reaching a consensus over international rules.[51] The Commission, which codifies and fosters the development of International Law since 1947, has become one of the first witnesses of the benefits and drawbacks of the employment of the comparative method in the field.[52] The Commission has not been immune to criticisms, especially due to its tendency to favour general values, undermining the issues of regionalism, defended by other international (regional) bodies such as the African Commission of International Law, which has advocated for the recognition of an African International Law.[53] Another critical point of the Commission is the lack of representation in the appointment of rapporteurs, which come predominantly from the West. Despite these two critiques, the Commission can still be deemed a great example of the successful employment of Comparative International Law. The methods of the body are in fact coherent with the principles of Comparative International Law, first of all, the comparative assessment of decisions of national courts to identify and interpret International Law.[54]

When different conceptions of international norms are found, the Commission acts in different ways. If the state practice is not sufficiently general, the Commission may simply reject any codification, codifying referring to the practice of the majority or expressing a preference sustaining the progressive development of the law. However, the most interesting thing happens when the

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[50] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 13(1)
[51] Forteau (n 49) 166
[52] Ibid 164
[53] Ibid 167
[54] Ibid 168

discrepancies are less marked. In this case, the tools used are more accommodating, actually preserving the existing differences through the use of linguistic tools, the draft of general rules, or adopting a permissive rather than mandatory language.[55]

The very existence of the International Law Commission answers the two doubts regarding the usefulness of Comparative International Law. Striving to harmonize the law, the Commission acknowledges the existence of divergencies in the implementation and understanding of international norms. By employing the comparative method to assess such differences, the body effectively demonstrates that recognizing a degree of uncertainty is useful and healthy for the holding of the Law.

4. Reflections on the Academic Impact of Comparative International Law

I. The Invisible College and the Rise of Regional International Law Journals

The rise of Comparative International Law has implications that extend beyond the simple understanding of International Law and that interest the activity of scholars worldwide, bringing a regional perspective on the scholarship. The idea of a regional sphere within the field clashes with one of the core concepts in favour of a united understanding of International Law: The Invisible College. As written by Oscar Schachter:

> *That professional community, though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise. As in the case of other disciplines, its members are engaged in a continuous process of communication and collaboration.*[56]

[55] Ibid 173
[56] Oscar Schachter, 'Invisible College of International Lawyers ' (1977-1978) 72 Nw U L Rev 217

The idea behind this concept is that the links, the channels of communication, and the debate that happens worldwide between international lawyers are what hold together the discipline of International Law. Due to the presence of the Invisible College, despite the pressures of politics, the field remains steady and indivisible. However, Comparative International Law challenges this assumption, sustaining that a regional dimension clearly exists, even in the literature. Pier Hugues Verdier finds proof of this division in the emergence of regional international law journals.[57] In his article "*Comparative International Law and the Rise of Regional Journals*," Hugues analyses 5 different journals, the American Journal of International Law (AJIL), the European Journal of International Law (EJIL), the African Journal of International & Comparative Law (AFRJICL), the Chinese Journal of International Law (CJIL), and the Asian Journal of International Law (ASIANJIL), identifying their purposes and main characteristics.[58] While AJIL and EJIL being the main Western journals have mainly an "outbound" role, projecting the core Western values and concepts abroad,[59] AFRJICL has an "inward-looking" role, creating space for regional distinctive views. Meanwhile, CJIL and ASIANJIL have a more balanced role, pursuing the objective of integrating global views into the regional debate. Generally speaking, Hugues finds that non-Western regional journals have as a priority the aim to challenge the core-periphery dialogue, opposing a regional conception of International Law to the Western establishment.

II. The Cases of Crimea and the South China Sea

It has been observed the emergence of a regional approach to International Law in the scholarship worldwide. The dissolution of the idea of Schachter's Invisible College has profound implications on the perception of international disputes among international lawyers, potentially leading to divergent positions towards the same cases. To understand how academic regionalism has an impact on the

[57] Pierre-Hugues Verdier, 'Comparative International Law and the Rise of Regional Journals' (2024) 49 Yale J Int'l L 154
[58] Ibid 154
[59] We are referring to the traditional roles played by the Journals, despite their recent switch to a more inclusive approach towards the rest of the world.

academic debate, two cases are presented: the invasion of Crimea and the dispute over the South China Sea.

Following the tensions that started with the Euromaidan protests in 2014, Russia annexed the Crimea peninsula. The annexation sprung a heated debate between Russia and the West, which heavily exposed a division in the perception of the issue and of the notion of self-determination both on political and scholastic levels. The legality and legitimacy of the military operations were defended by Russian international lawyers through articles written in Russian and published in Russia,[60] while argued against by Western lawyers with articles published in the West and written in English.[61] The interaction between the two parties was small and the linguistic barrier was a powerful cause of separation, preventing the development of a proper debate. The different language and the divergence in the understanding of the very facts that led to the annexation reinforced the respective echo chambers, effectively working against the interaction of the two groups.

The South China Sea controversy was on the other hand handled differently, even though it still led to a marked divergence between two regional scholarships. In 2013 the Philippines started an arbitration before the UNCLOS over the sovereignty of natural objects in the South China Sea, where islands and rocks are present. China protested, deeming that the tribunal had no jurisdiction to adjudicate such controversy, but instead of arguing before the tribunals, it decided to desert the arbitration, leading to a sentence in favour of the Philippines. The Chinese scholars, united under the Chinese Society of International Law, supported the government's position,[62] but disagreed over the decision to not participate in the arbitration. Western scholars, on the other hand, were divided on the matter of the case but were unanimous in asserting that China was in fact bound by the decision and that non-compliance would be a challenge to the existing international order.[63] In this case, a dialogue between the two bodies of scholarship took place. While dissenting opinions were harder to find in Chinese

[60] Anthea Roberts, 'Crimea and South China Sea' in Roberts Anthea, and others (eds), Comparative International Law (online edn, Oxford Academic 2018) 117
[61] Ibid 118
[62] Ibid 122
[63] Ibid 125

publications, Chinese authors actively engaged with Western academia defending China's position. However, it must be noted that there was in fact an asymmetry, due to China's censorship over national and foreign dissenting opinions and due to the difficulty for Western international lawyers to publish in Chinese.

These two cases were presented to convey the idea that Schachter's invisible college is not the united and coherent transnational body that it is supposed to be. Language, censorship, media, government control, and geopolitics in fact separate the scholarship into different national and regional groups that often support different understandings of international law. With the rise of Comparative International Law, comparative lawyers must take into account such factors to understand the challenges to a united and coherent International Law.

5. Conclusions

This chapter introduced the concept of Comparative International Law as a way to study the implementation of international norms, tracing its history, the reasons for its emergence, its impact on the scholarship, and defended its relevance and practical utility. With now a deeper knowledge of this field, we move to the next sections, in which it will be conducted a practical study of the different implementations of the European Convention on Human Rights in the national declinations of the non-refoulement principle. The following chapter will look at the understanding, interpretation, application, and approach of the Convention, questioning if there are divergencies in such contexts and what are the possible explanations for them. The objective is to provide a contribution to the affirmation of this strain of literature by embarking on the interdisciplinary analysis of such regimes.

CHAPTER TWO - COMPARATIVE INTERNATIONAL LAW IN CONTEXT: THE CASE OF THE PROHIBITION OF REFOULEMENT UNDER THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. The System of the Convention and its Enforcement

I. Introduction

Chapter 1 described the first element of the thesis, the concept of Comparative International Law and its utility in providing a bridge between international norms and domestic law. This second chapter concludes the theoretical framework of the work, addressing the system of the European Convention on Human Rights and explaining its contents, mechanisms, bodies, and relevant doctrine as a test bench for the employment of Comparative International Law in practice. The final section of the chapter presents the non-refoulement principle derived from the provisions of the European Convention on Human Rights (ECHR) as the case study of this thesis. In selecting a case study to test the methods of Comparative International Law, such a norm appears particularly fitting for a series of reasons. The ECHR and the case law of the European Court of Human Rights (ECtHR) have a well-established application, their regional character prevents the risk of dispersion that would hinder the study of the application of established international norms, there are no insurmountable language barriers in accessing sources related to the countries under consideration, there exists a substantial body of case law on the topic, and, last but not least, the development of the principle of non-refoulement at the European level has gained significant prominence due to recent political developments which will be addressed later.

II. The Council of Europe: History, Purpose, Bodies and Members

Created in 1949, the Council of Europe is an international organization active on the European continent tasked with the development and protection of fundamental rights.[64] Its principles, which are included in Article 3 of its statute,

[64] Shaw (n 7) 248

encompass pluralist democracy, respect for human rights, and the rule of law.[65] The reason behind the establishment of this organization was to avoid repeating the horrors of the 2nd World War, linking together the European states in a framework based upon respect for the individual's rights and the rejection of authoritarian regimes.[66] When the statute of the Council entered into force, the Council was composed of 10 member states, all part of Western and Northern Europe. In 2 years, they were joined by 4 more states among which Germany, and later enlargements brought the total number of Member States to 23 in 1989. However, it was with the fall of the Soviet bloc that the biggest enlargement took place. With the Helsinki Agreement of 1975, the countries in the USSR sphere of influence started to express concerns over human rights protection, and when the Berlin Wall fell and the Soviet Union dissolved, the countries of new democratization decided to adhere to the Council. Thanks to the ’90s enlargement, the Council has reached the number of 47 member states.[67] Every state in the European continent is currently a member of the Council of Europe, with 3 exceptions: The Holy See,[68] which is a permanent observer, Belarus,[69] which failed to meet the rule of law requirements for its admission, and Russia, which has withdrawn its membership after being sanctioned for the 2022 aggression of Ukraine,[70] bringing the current number of member states to 46.

To correctly understand the ecosystem of the Convention, it can be useful to present a brief overview of the main bodies that act within the Council of Europe. The head of the organization is the Secretary-General, who is elected by the Parliamentary Assembly and is in charge of the work program and budget of

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[65] Statute of the Council of Europe (1949) ETS 1, Art 3
[66] CVCE, 'The Origins of the Council of Europe' (CVCE.EU by UNI.LU, 7 July 2016) <http://www.cvce.eu/obj/the_origins_of_the_council_of_europe-en-aa7eeb5ff6c0-4ac5-a1ec-4cc9beb0d739.html> accessed 5 September 2024
[67] Olivier De Schutter, *International Human Rights Law. Cases, Material, Commentary* (3rd edn, Cambridge Universitary Press 2019) 24
[68] Council of Europe, ‘Holy See // Observer State’ (Council of Europe) <https://www.coe.int/en/web/portal/holy-see> Accessed 2 September 2024
[69] Despite Belarus not being a member of the Council of Europe, the organization has engaged with the civil society of the country in several initiatives. In charge of the relationship with Belarus, it has been instituted a Contact Group on Belarus. Council of Europe ‘Contact Group on Belarus’ (Council of Europe) <https://www.coe.int/en/web/portal/contact-group-on-belarus> Accessed 2 September 2024
[70] Council of Europe, ‘The Russian Federation is excluded from the Council of Europe’ (Council of Europe, 16 March 2022) <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe> Accessed 2 September 2024

the Council.[71] The Committee of Ministers is the decision-making body of the Council, responsible for the enforcement of the Convention by supervising the compliance of the States with the decisions of the Court[72]. It is composed of the Ministers of Foreign Affairs or the Diplomatic Representatives of the member states. The Parliamentary Assembly comprises delegations from national parliaments and counts 306 seats. It elects the Secretary-General, the Human Rights Commissioner, and the Judges of the European Court of Human Rights. It is a forum for debate and for monitoring elections and its committees examine current issues.[73] The Commissioner for Human Rights addresses and brings attention to Human Rights violations and assists the states in implementing the human rights standards set by the Council of Europe.[74] Finally, the European Court of Human Rights is the judicial body of the Organization, in charge of reviewing the compliance of the States with the Convention.[75]

The organization's main purpose lies in the protection of human rights, democracy, and the rule of law on the Continent. To be admitted, the state applicant must respect first and foremost the principles of the rule of law, as stated in Article 3 of the Statute:

> *Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.*[76]

Since 1994, another fundamental requirement is the ratification of the main treaty of the organization, the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights.[77]

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[71]Council of Europe, 'Structure' (Council of Europe) < https://www.coe.int/en/web/about-us/structure> Accessed 2 September 2024
[72] Ibid
[73] Ibid
[74] Ibid
[75] The composition and functioning of the European Court of Human Rights will be later outlined more in depth in a dedicated section.
[76] Statute of the Council of Europe (1949) ETS 1, Art 3
[77] Parliamentary Assembly, *Resolution 1031 (1994) Honouring of commitments entered into by member states when joining the Council of Europe* (14 April 1994) Doc 7037

III. The European Convention on Human Rights

Signed in 1950, the European Convention on Human Rights entered into force in September 1953, as the most important treaty signed in the framework of the Council of Europe and the very *Raison d'être* of the establishment of the Organization.[78] The Convention is divided into two main sections. The first section, "Rights and Freedoms" comprises the articles from 2 to 18 and includes all the rights protected by the convention. It is preceded by Article 1 which states:

> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*[79]

Effectively attributing to the initial part of the treaty the necessity to be respected at the national level. Section 2 "European Court of Human Rights" comprises articles from 19 to 51 and regulates the system of the European Court of Human Rights. A third section, "Miscellaneous Provisions" includes articles from 52 to 59 and deals with topics of different nature such as the territorial applicability of the Convention, reservations, and the mechanism of denunciation. The Convention encompasses a wide variety of Human Rights of a political character. Among the rights protected by the Convention, particularly relevant to this work are the right to life,[80] the prohibition of torture and inhumane or degrading treatment,[81] the prohibition of slavery,[82] the right to liberty and security of person,[83] and the right to respect for private and family life.[84]

Over the years the Convention has been amended with the introduction of additional Protocols, which have effectively expanded the list of rights protected by the Convention. Among these, there are the Prohibition of imprisonment for

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[78] Shaw (n 7) 250
[79] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 1
[80] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 2
[81] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 3
[82] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 4
[83] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 5
[84] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 8

civil debt and protection inter alia the rights of free movement and choice of residence within a citizen's own country (Protocol 4), the abolition of the death penalty (Protocol 6), the right of non-expulsion of an alien inter alia exception in pursuance of a decision reached in accordance with the law, that a person convicted of a criminal offense shall have the right to have that conviction or sentence reviewed by a higher tribunal and that no one may be tried or punished again in criminal proceedings for an offense for which he has already been finally acquitted or convicted (Protocol 7), the extension of the abolition of the death penalty to all circumstances, including for crimes committed in time of war (Protocol 13).[85]

The mechanisms that address the enforcement of the Convention have mutated significantly over the years with the introduction of additional protocols. Originally, the framework of the Convention included a body called "The European Commission"[86] which was tasked with controlling the admissibility of the applications of the victims of the violations or the other member states and then directing them to the Committee of Ministers or the European Court of Human Rights.[87] With the introduction of Protocol 9 in 1994 individuals were allowed to refer their case directly to the Court when the application was against a state which is party to the Convention.[88] In 1998 Protocol 11 completely changed the supervisory system. The Commission was dismantled and a single Court was established, in charge of the tasks of the eliminated body. Both the jurisdiction of the Court and its competence for receiving individual applications became officially compulsory for the Member States. The Committee of Ministers remained in charge of supervising the compliance with the Court decisions, but it was deprived of its quasi-judicial function.[89] Over the years the number of cases grew significantly, leading to an overload of cases that burdened the Court. In order to address this issue in 2004 Protocol 14 was adopted. The protocol succeeded in increasing the efficiency of the ECtHR, optimizing the filtering of the cases, creating new judicial formations for the simplest cases, and introducing

[85] Shaw (n 7) 251
[86] The European Commission of the Council of Europe must not be confused with the European Commission of the European Union, they are separate and completely unrelated bodies.
[87] De Schutter (n 67) 990
[88] Ibid 992
[89] Ibid

the admissibility criterion of "Significant Disadvantage."[90] After the Conference of Brighton of 2013, Protocol 15 introduced two more key concepts in the ecosystem of the Convention:[91] the principle of subsidiarity and the margin of appreciation doctrine[92] and reduced the time limit to present a case before the ECtHR from 6 to 4 months. Finally, in 2018 protocol 18 allowed the highest courts and tribunals of a member state to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols.[93]

IV. Enforcing the Convention: The European Court of Human Rights

Having discussed both the structure of the organization and the contents of the European Convention on Human Rights, it is now time to address the system of enforcement of the Convention, introducing the judicial body of the Council of Europe: The European Court of Human Rights.

Introducing the Court, it is first necessary to outline its structure. The Court presents the same number of judges as the number of the Member States of the Council of Europe, currently 46. Every judge is elected by the Parliamentary Assembly from a list of 3 candidates presented by each member state, for a non-renewable term of 9 years and they serve in complete independence. The actual composition of the ECtHR varies depending on the typology of the case presented. The Court has 4 different judicial formations[94]: The Single Judge, which deals with inadmissible cases and if the application is not struck down can refer it to a chamber or a Committee, The Committee, composed of 3 judges who decide upon repetitive unoriginal cases, it can declare an application inadmissible or decide on its merits in case it belongs to a well-established ECtHR case law,

[90] The criteria of the "Significant disadvantage" imposes that the claimant must have suffered from the consequences of the misapplication of the Convention, otherwise the claim will be considered inadmissible. Council of Europe, 'Amendments to the Convention' (Council of Europe) <https://www.coe.int/en/web/human-rights-convention/amendments-to-the-convention> Accessed 3 September 2024

[91] The principles were officially recognized in Protocol 15, but they were already part of the Jurisprudence of the Court.

[92] The Margin of Appreciation doctrine will be addressed in the next section of the Chapter.

[93] Council of Europe (n 90)

[94] Shaw (n 7) 253-254

the Chamber, composed by 7 members that can decide on merits and admissibility of an application. While its decisions are final, its judgments are so only if the Grand Chamber is not seized. The jurisdiction can be relinquished to the Grand Chamber if the case raises serious questions about the interpretation of the Convention or if it might lead to a contradiction with the established jurisprudence. The Grand Chamber is formed by 17 judges, cases can be referred to it by requests of one of the parties and approval of 5 judges or when the Chamber is relinquished. The Committee of Ministers supervises the execution of Grand Chamber judgments.

The Convention provides two ways to access the ECtHR, by individual application and by inter-state application. Article 33 states that each member state can open a case against another member state. To this date, only 7 cases of interstate application have been registered.[95] Article 34 allows for individual petitions, but the application to the Court must satisfy a series of requirements. The fundamental principle that governs the reception of application is, as anticipated, the principle of subsidiarity. Such principle was not raised during the draft of the Convention, but it has been formulated by the Convention bodies and thus it is to be considered implied. Its legal foundations derive from the reading of Article 1, which binds the high-contracting parties to defend the freedoms protected in the Convention, Article 13, which guarantees the right to effective remedies, and Article 35, which outlines the admissibility criteria.[96] Such criteria impose that for an application to be considered admissible, all domestic remedies must be exhausted, the application must be filled at a maximum of four months after the date of the final decision and the claimant must have suffered a significant disadvantage.[97] The subsidiary character of the ECtHR has been introduced in the corpus of the Convention through the adoption of Protocol 15, including the principle in the convention from a formal standpoint.

[95] The extremely low number of Interstate Applications can be easily explained by the political implications that this kind of act implies. To avoid diplomatic crisis States usually refrain from directly challenge another state in Court. Ibid 255

[96] Elzbieta Morawska, 'The Principles of Subsidiarity and Effectiveness: Two Pillars of an Effective Remedy for Excessive Length of Proceedings within the Meaning of Article 13 ECHR' (2019) 39 Polish YB Int'l L 159 163

[97] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 35

The assessment of a violation of the Convention by the ECtHR is not the final step in the journey of an application, but it rather marks the start of a new course of action aimed at enforcing the human rights provisions. There are three things that fall under the obligation to abide by the Court judgments: The payment of just satisfaction, which is decided by the ECtHR in the operative section of the judgment, the adoption of individual measures to ensure the *restitutio ad integrum*, and the adoption of general measures to avoid repeating the case.[98] It is up to the state to execute the judgments, under the surveillance of the Committee of Ministers and the department for the execution of judgments, which assess if the measures taken by the national authorities are sufficient or not.[99]

2. The Margin of Appreciation Doctrine: Reading the ECHR through the Lenses of Comparative International Law

I. Introducing the Margin of Appreciation Doctrine

Having already outlined the system of the Convention, it is now introduced the "margin of appreciation doctrine", an interpretative tool in the hands of the European Court of Human Rights. This doctrine shaped the application of the Convention, being particularly impactful both on the assessments of the ECtHR and on the measures taken on a national level. Inspired by the French Conseil d'État's "marge d'appréciation",[100] the Margin of Appreciation was not foreseen in the Convention, but it was rather directly established by the Strasbourg organs, being employed for the first time in the 1976 case Handyside v. UK.[101] However, this was not the first time the term was used within the system of the Convention. This happened in 1961 in a Commission Report in the case Lawless v. Ireland. The report discussed the existence of an emergency situation in the country that

[98] Élisabeth L. Abdelgawad, 'The Enforcement of ECtHR Judgements' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Online edn, Oxford Academic 2017) 326
[99] Ibid 326
[100] Council of Europe, 'The Margin of Appreciation', (Council of Europe, 2013) <https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> Accessed on 2 September 2024
[101] Michael R. Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48(3) ICLQ 639

could justify the suspension[102] of the application of some articles of the Convention.[103] The text suggested that in addressing the situation, the national government should benefit from a margin of discretion, in this case, due to the necessity *"to protect (its citizens) against any threat to the life of the nation."*[104] Handyside v. UK then became the seminal case regarding the affirmation of the doctrine in the jurisprudence of the Court. The case involved the publication of a Danish book whose target was young readers which included open references to sexual conduct and use of drugs.[105] The police seized the copies of the book in possession of its publisher, Mr Handyside, who claimed that such censorship was violating Article 10 of the Convention, protecting the freedom of expression. The Court ultimately ruled that there was no violation of the Convention, justifying such a decision through the employment of the margin of appreciation doctrine. The ruling affirmed the principle of subsidiarity of the mechanism of the Convention to the national authorities, which may need to put restrictions on the rights protected by the ECHR.[106] Lying its foundations in the principle of subsidiarity, the margin of appreciation doctrine can be interpreted as an activity of self-restraint[107] of the Court, in the attempt to avoid replacing the national authorities on matters of their competence. The doctrine is mostly employed when there is a necessity to balance a right protected by the Convention with legitimate reasons to restrict the applications.[108] Initially, such legitimate reasons entirely belonged to the realm of national security, as seen in the Commission Report in Lawless v. Ireland, but the doctrine over the years underwent an evolution that expanded its use to principles such as morality and management of national resources.[109] It can be affirmed that in the margin of appreciation, the

[102] The derogation to the Convention is regulated by Article 15 ECHR under special conditions "In time of war or other public emergency threatening the life of the nation of any High Contracting Party". Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art 15
[103] Hutchinson (n 101) 639
[104] Lawless v Ireland (App no 332/57) (Commission Report, 19 December 1959) para 85.
[105] Maša Marochini, 'The Interpretation of the European Convention on Human Rights' (2014) 51(1) Zbornik radova Pravnog fakulteta u Splitu 63
[106] Hutchinson (n 101) 640
[107] Marochini (n 105) 69
[108] Hutchinson (n 101) 640
[109] Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 NYU J Int'l L & Po 846

member states found a safeguard for partially retaining their sovereignty over matters regulated by the Convention.

Depending on the rights protected by the convention involved in the case, the states can either benefit from a wide or narrow margin of appreciation. The wide margin of appreciation is conceded in cases that mainly involve national security, public emergency, protection of morals, legislative implementation of social and economic policies, where there is no consensus among member states on a particular issue, and striking a balance between competing rights of the Convention. The narrow margin is instead applied when identity or existence is at stake, the justification for a restriction is the protection of the authority of the judiciary, racial or ethnic discrimination is implicated, or an intimate aspect of life is at stake. Articles 2 and 3 of the Convention are generally recognized by the Court as "absolute rights", generating obligations towards states which cannot be balanced against other rights.[110] However, it is important to underline that the lack of consensus among member states may influence the Court's opinion that the matter is best left to individual states as seen in Pretty v. UK. Such a case involved a 43-year-old British woman who due to her degenerative medical condition expressed the desire to commit suicide. Due to her illness, she needed assistance to end her life, and her family wrote a letter to the Director of Public Prosecutors, demanding her Husband not be prosecuted if he assisted her in her death. The request was denied and the ECtHR ruled that while the application was admissible, the matter should be regulated by the Member State itself.[111]

II. Criticisms of the Doctrine

National governments generally favour the margin of appreciation doctrine, but such enthusiasm is not universally shared. In fact, the doctrine has not been immune from criticism on several levels. The first issue with the doctrine is the level of uncertainty that characterizes it. The width of the margin of discretion can

[110] Open Society Justice Initiative, 'ECHR Reform: Margin of Appreciation' (April 2012) < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf> accessed> accessed 24 November 2024

[111] Emily Wada, 'A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide' (2005) 27 Loy. L.A. Int'l & Comp. L. Rev. 274-288

be particularly hard to determine, leading to unpredictable outcomes. As an example, in Dudgeon v. UK, the classic limitations of Article 8 ECHR including the respect of morality clashed against the core rights protected by the Convention, leading the Court to strike a balance between the relative weights.[112] Another problem of the doctrine is the level of arbitrariness that the margin of appreciation doctrine grants. As argued by Lord Lester in regard to the Otto-Preminger Institute v. Austria case, the Court applying a wide margin of appreciation may use the doctrine to abdicate to its own responsibility of protecting the Convention in sensible cases.[113] A final critique of the doctrine comes from Eyal Benvenisti, who argues that it may harm the national minorities that, in the absence of political influence see in judicial procedures their main protections against the majority.[114] Benvenisti argues that the margin of appreciation doctrine can be a means to safeguard and promote democracy in the communities, but when majorities monopolize the democratic game, minorities are harmed by such an instrument. Thus, International Human Rights Law instruments born to provide protection for such minorities lose their original purpose in the name of safeguarding state sovereignty.[115]

This latter argument has been particularly relevant since the Lautsi II judgment. The Lautsi case involved the presence of the crucifix in Italian classrooms. The Lautsi family applied to the ECtHR, which, in its Chamber formation delivered the Lautsi I Judgement, effectively deeming the exposure of the crucifix in School a violation of the Convention. Such a stance was heavily criticized and led the Italian State to ask for a referral to the Grand Chamber. The second Judgement subverted the decision, establishing that the member states enjoyed the margin of appreciation on the matter.[116] Such a case appears to be in contrast with another previous judgment of the ECtHR, in the case Dahlab v. Switzerland. In this, an elementary teacher was prohibited by the national authorities to wear during her shift the Hijab. When the matter ended up in the hands of the ECtHR, the Court upheld the interpretation of the National Tribunal,

[112] Hutchinson (n 101) 641
[113] Hutchinson (n 101) 641
[114] Benvenisti (n 109) 848
[115] Benvenisti (n 109) 849-850
[116] Giulio Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case' (2013) 13 Hum Rts L Rev 288-292

affirming that during her work, a teacher is representing the institutions, and such institutions shall protect the neutrality of the State regarding the right of freedom of religion. The Hijab, being a powerful external symbol, could affect the minds of young influenceable kids, potentially undermining the very Article 9 of the Convention that Dahlab claimed was denied to her.[117] As a result, the application of the margin of appreciation doctrine in the Lautsi case effectively led the Court to accept the presence of a powerful external symbol in Italian classrooms, an outcome contrary to that of the Dahlab case. Given that the Lautsi II decision was heavily influenced by the protests of European governments and public opinion, it can be argued that the margin of appreciation doctrine has been employed to grant majorities more favourable treatment than minorities. While this work neither endorses nor opposes such criticism, it is crucial to critically examine an instrument that appears far from flawless.

III. The Implications of the Margin of Appreciation Doctrine for the Implementation of the Convention

Born as an interpretative instrument in the hands of the ECtHR, the margin of appreciation doctrine has deeply affected how the Convention is perceived and implemented among state parties. It is arguable that the width of discretion permitted by the doctrine opened the possibility of a more flexible application of the ECHR, allowing different states to provide different types of protection for the same rights interested by the Convention. In its critique of the margin of appreciation doctrine, Michael Hutchinson sustains the vision for which the doctrine is not just used as an excuse for incoherent judgments of the ECtHR, but it is what makes them possible in the first place.[118] The margin of uncertainty in relation to the provisions of the Convention is directly related to the very concept of the margin of appreciation. The doctrine has been theoretically thought of in two different ways. The first conception of the margin sustains that the Convention provides a minimum standard that has to be respected by the states regarding the human rights protected. When a state fails to respect this minimum

[117] Mauro Gatti, 'Laicità e simboli religiosi' in Pietro Manzini and Andrea Lollini (eds.), *Diritti fondamentali in Europa, un casebook* (Il Mulino 2015) 104-107
[118] Hutchinson (n 101) 641

floor, a violation occurs.[119] Shai Dothan attributes a positive acceptance to this floor, sustaining that through this method, the Convention can push the development of human rights without holding back states that adopt regimes more advanced than the minimum.[120] Hutchinson proposes an alternative approach, seeing the margin of appreciation as an "area of compliance" that "expands and contracts depending on the various width-defining factors."[121] This in fact interests even the minimum requirements, which in this interpretation are not a static floor but move with the expansion or contraction of the range. This leads to the individuation of a "central norm" around which the margin moves depending on the contingencies. But such a centre cannot be well defined, otherwise, the margin of discretion would be near non-existent. The central norm must be expressed in general terms, undefined enough to allow discretion.[122] The direct implication of these observations is particularly relevant to our work. As Comparative International Law "Entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law*,"*[123] the Margin of Appreciation Doctrine provides a justification for the existence of such differences in the application of the provisions of a written treaty. With the very ECtHR that recognizes the possibility for divergent applications of the Convention depending on different contingencies and national sensibilities, the employment of Comparative International Law appears to be a perfect instrument to enquire about the practical outcomes of the Convention.

3. The Asylum Regime as Regulated by the Convention

I. Introducing the Issue of Refugee Protection as a Case Study

[119] Shai Dothan, 'Comparative Views on the Right to Vote in International Law. The Case of Prisoners' Disenfranchisement' in Roberts Anthea, and others (eds), *Comparative International Law* (online edn, Oxford Academic 2018) 392
[120] Ibid 392
[121] Hutchinson (n 101) 644
[122] Hutchinson (n 101) 645
[123] Roberts (n 2) 6

After having outlined the main aspects of the Convention and the mechanisms that govern the ECtHR, it is now time to introduce the case study of this work, which can enable us to understand how, in practice, states effectively conceptualize international norms differently in their domestic legal orders. The case study chosen is the system of refugee protection as regulated by the European Convention on Human Rights, focusing specifically on the principle of non-refoulement. This section aims to outline the developments of such a system and, after addressing the main issues and the landmark decisions of the Court, to find the "general rule" within the range conceded by the margin of appreciation doctrine, in order to assess if and how this range has varied in the selected member states in the following Chapter.

Immigration is a heated topic worldwide. Historically, the relationships of citizens with aliens have always been particularly sensitive, and the European continent makes no exception. In the aftermath of the Arab Spring in the last decade, the immigration flows have dramatically increased, and with them the necessity for the national authorities to face them. On a political level, far-right parties hostile to the flows have gained significant relevance in national parliaments, resulting in stricter measures aimed at reducing illegal immigration. On the other hand, human rights Instruments have increased their relevance in balancing political power to protect asylum seekers. The issue of refugees is complicated by the difficulty of including them in a common definition. One of the first descriptions of what a refugee is can be found in what is historically the most important treaty on a global scale on the topic, the 1951 UN Convention on Refugees. Article 1 of this Convention states that a refugee is someone who:

> *Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themself] of the protection of that country; or who, not having a nationality and being outside the country of [their] former habitual residence, is unable or, owing to such fear, is unwilling to return to it.*[124]

[124] Convention Relating to the Status of Refugees 1951, Art 1

The limitations of such a definition of refugee, alongside the flaws in the UN Convention to effectively be enforced, led to the creation of other mechanisms for the protection of refugees, and, in the case of the ECHR to the expansion of the domains interested by the Convention itself.

II. The ECHR and the Protection of Refugees: Historical Developments

There are different international regimes protecting the right to asylum, such as the UN convention relating to the rights of refugees, the EU law, and UNCAT.[125] However, such instruments often fail to include a wide range of situations within their domain, becoming useless in a wide variety of cases. This is not the case for the European Convention on Human Rights, which is currently one of the main instruments of protection for the rights of refugees in Europe,[126] so much so that it is currently thought to be replacing the 1951 UN Refugee Convention in its functions.[127] This might appear odd for one specific reason: the Convention itself does not include any reference to the right to asylum. However, the interpretation of some articles of the treaty led to the emergence of a well-established jurisprudence that extended the explicit rights of the Convention. The basis of refugee protection is in fact funded in Article 3 of the ECHR, which prohibits torture and any inhumane or degrading treatment.[128] The application of the Convention to the protection of refugees was first introduced in the landmark case *Soering v. UK*.[129] Such a case was not directly about the protection of refugees, but it was rather interesting the extradition of a German citizen detained in England who was facing extradition to the United States due to a charge of murder. Since Soering was facing the death penalty in the US, this was recognized as a breach of Article 3 of the ECHR. The ECtHR sentenced that the extradition would have led to such a breach, inadvertently creating a precedent

[125] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights, Human Rights Files No. 9* (Council of Europe Publishing 2010)
[126] Jelena Ristik, 'The Right to Asylum and the Principle of Non-Refoulement Under the European Convention on Human Rights' (2017) 13(28*) European Scientific Journal* 109
[127] Mole and Meredith (n 125) 10-11
[128] Ristik (n 126) 112
[129] Ristik (n 126) 112

for the cases of extradition.[130] This was later expanded to issues of expulsion in Crus Varas v. Sweden, in case the subject of the decision risks facing inhumane or degrading treatments in the country to which he or she is returned.[131]

Despite its prominence in the establishment of such right, it must be noted that Article 3 is not the only provision that interests the right to Asylum. This can also result from invoking: Article 2, Right to life; Article 4, Prohibition of slavery, servitude, and compulsory labour; Article 5, Right to liberty and security of the person; Article 6, Right to a fair trial; Article 7, Prohibition on retroactive criminal punishment; Article 8, Right to respect for family and private life; Article 9, Right to freedom of thought, conscience, and religion; Article 10, Freedom of expression; Article 11, Freedom of assembly and association; Article 14, Prohibition of discrimination in the enjoyment of Convention rights; Article 4 of Protocol No. 4, Collective expulsion of aliens; Article 1 of Protocol No. 7, Procedural safeguards relating to expulsion of aliens; Article 3 of Protocol No. 7, Exclusion of own nationals; Article 4 of Protocol No. 7, Prohibition on double jeopardy; Article 1 of Protocol No. 12, General prohibition on discrimination.[132] The common denominator over the invocation of such articles by the European Court of Human Rights is the establishment in the jurisprudence of the Court of a single principle that protects Asylum seekers by the Convention: the principle of non-refoulement.

III. The Principle of Non-Refoulement in the Convention System

The principle of non-refoulement is a principle of International Human Rights Law which was recognized by the 1951 UN Convention on Refugees. Article 33(1) states that:

> *No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be*

[130] *Soering v United Kingdom* (1989) 11 EHRR 439
[131] Ristik (n 126) 114
[132] Mole and Meredith (n 125) 23

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[133]

Such provisions guarantee that refugees do not suffer again from the persecutions that made them displaced in the first place, and they represent a limitation of the sovereign right of states to turn back aliens to the frontiers of their countries of origin.[134] The principle of non-refoulement indicated by the UN Convention does not however perfectly overlap to the non-refoulement as protected by the European Convention on Human Rights. The ECHR protection in fact encompasses a wider number of refugees, not limiting itself to the rather restrictive definition of the 1951 UN Convention and thus playing a fundamental complementary role.[135]

A point that must be stressed is that the mere fact that the conditions in the country of origin are less favourable than the ones in the host country is not enough to justify the application of the non-refoulement. This means that if the human rights protection regime of the country of origin is not at the same level as the country that is trying to expel the alien if such shortcomings do not interest a fundamental right, the alien can still be expelled.[136] The prohibition of inhuman or degrading treatment in Article 3 is absolute, due to the serious and irreparable risks that it entails. This is not the case for other articles such as Article 8 protecting the right to private life or Article 9 which contains the right to freedom of religion.[137] However, the removal can still be resisted in case of a flagrant breach of a qualified convention right (articles 5,6,8-14), especially when the denial of a fair trial can lead to a risk of execution.[138] However, what constitutes a flagrant breach has not been clearly explained by the Court jurisprudence[139] and, as a result, while the boundaries of the principle of non-refoulement are not clearly delineated,[140] the Court has stated that such principle does not extend to

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[133] Convention Relating to the Status of Refugees 1951, Art 33
[134] Seline Trevisanut, 'The principle of non-refoulement and the de-territorialization of border control at sea' (2014) 27(3) *Leiden Journal of International Law* 664-665
[135] Katharina Röhl, *Fleeing Violence and Poverty: Non-Refoulement Obligations under the European Convention on Human Rights*, Working Paper No. 111 (UNHCR 2005) 2
[136] Ibid 8
[137] Mole and Meredith (n 125) 88
[138] Mole and Meredith (n 125) 88
[139] *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, Joint Partly Dissenting Opinion of Judges Sir Nicolas Bratza, Bonello, and Hedigan, §14
[140] Such concept will be further expanded in the next section of the Chapter, interesting the application of the Margin of Appreciation doctrine to the principle of non-refoulement.

the Convention as a whole.[141] In determining the extent of the non-refoulement under Article 3, a tool employed by the ECtHR is the "Real Risk Criterion." The Court has assessed that:

> *The test is whether it has been shown that there are substantial grounds for believing that the person concerned if extradited, would face a real risk of being subjected to torture or inhuman or degrading treatment in the requesting country.*[142]

However, just the possibility of ill-treatment is not sufficient to invoke Article 3 of ECHR. The real risk criterion needs to be assessed at the time of the final proceeding of the Court and it is at that moment that the possibility of the ill-treatment can be invoked. If the conditions of the country of return worsen during that time, the member state of the convention cannot be deemed responsible.[143]

A sensitive issue regarding the right of non-refoulement as protected by the Convention is its relationship with the death penalty. Article 2 of the Convention, which recognizes the right to life, has hardly been invoked to justify the denial of expulsion on the basis that the applicant risks facing the death penalty. This is because the article itself does not outlaw capital punishment, and when the issue arises it has been preferred to invoke Article 3, as seen in Soering v. UK. The abolition of the death penalty has been instead addressed by the additional Protocols 6 and 13 of the Convention. Following the jurisprudence of the Court, Article 1 of Protocol 6 can be invoked in the case the expulsion of an alien puts it at risk of the death penalty. This was shown in Al-Shaari v. Italy, but under the condition that the applicant adduces *prima facie* evidence to support such risk.[144] Meanwhile, Article 1 of Protocol 13 has a much narrower margin of application but can be hypothetically invoked following the concurring opinion of Judge Barreto in the case Bader v. Sweden.[145]

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[141] Röhl (n 135) 9
[142] *Abdurrahim Incedursun v The Netherlands* App no 33124/96 (ECtHR, 22 June 1999).
[143] Röhl (n 135) 18
[144] Ibid 90
[145] Röhl (n 135) 91

IV. The Principle of Non-Refoulment and the Margin of Appreciation Doctrine, defining the "General Rule" (If Any)

The second section of this chapter discussed how the margin of appreciation allowed by the Convention contracts and expands over a central rule, defined in broad, general terms. It is now presented the attempt to include the right of non-refoulement within such a definition, attempting to define the general rule created by the jurisprudence of the Court.

It has been observed how the non-refoulement draws its legitimacy from the Extraterritorial application of the ECHR when there is a manifest responsibility of a member state in the expulsion of the alien. It has been shown that the non-refoulement principle to be effective needs some conditions to be satisfied: The expulsion of the alien can lead to a violation of a fundamental right of the Convention, such fundamental right is in most cases a violation of Article 3 of the Convention, but it can interest other articles and additional protocols, the expulsion can lead to a flagrant breach of the Convention, the real risk criterion must be satisfied, lesser protection of human rights in the country of restitution is not enough to justify the invocation of the non-refoulement principle.

Following these principles, Member States have to respect the non-refoulement principle, otherwise, the expulsion of aliens may be ruled unlawful by the ECtHR when the domestic remedies are exhausted and the national courts did not rule the unlawfulness in the first place. However, such general principles might allow for a margin of discretion in the application of the norm. The questions now are: do the member states implement such international norm in different ways? How can these differences be explained? Is there a circumvention of their international obligation, or open defiance of the jurisprudence of the Court? Which national measures are in place for guaranteeing the right of non-refoulement? The next chapter will address these issues, making a comparative analysis of the national measures employed by adopting the framework of Comparative International Law.

4. Conclusions

This chapter concluded the theoretical framework of this work with a description of the system of the European Convention on Human Rights and of the principle of non-refoulement as protected by the Convention for a Comparative International Law perspective. Indeed, the focus on the margin of appreciation doctrine bridged the topic of the thesis with the approach of Comparative International Law, showing why the comparative method can be useful for the analysis of the national implementations of the Convention. What was assessed is that a margin of discretion is left to the states interpreting the articles, the protocols, and the principles derived by the jurisprudence of the European Court of Human Rights. It is now time to move to such interpretations, seeing in detail what similarities and differences can be found in the national measures enacting the principle of non-refoulement.

CHAPTER THREE - USING COMPARATIVE INTERNATIONAL LAW AS ANALYTICAL FRAMEWORK: THE DOMESTIC ENFORCEMENT OF THE NON-REFOULEMENT PRINCIPLE AS DEFINED BY THE ECHR

1. Introduction of the Chapter

I. Purpose of the Chapter

This chapter aims to apply the methods of Comparative International Law to studying the non-refoulement principle as established by the jurisprudence of the ECtHR within different domestic European legal systems. The purpose of this work is to assess whether or not there are differences in the ways such countries understand, interpret, apply, and approach this international norm, both from a formal and a substantive point of view. To achieve this, the application of the Convention and the principle within their legal frameworks will be observed, pivotal judgments that can provide us with an understanding of the principle in the respective courts will be examined, and strategies and decisions at the political level to observe, circumvent or bargain with this international obligation will be analysed.

II. Type of Comparison and Criteria for Case Selection

There are currently 46 States that are part of the European Convention on Human Rights, they were 47 before the denunciation of the Convention by the Russian Federation. The high number of parties to the treaty and the complexity of the subject does not allow a comparison that entails all of them, and since the purpose of this work is to complete a qualitative comparison, it is necessary to carry out a case selection. The chosen approach refers to the method that Ran Hirschl defined as the “Most Different Cases Logic.”[146] Hirschl describes such case selection as the selection of cases that are different in the variables that are not central to the study but

[146] Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53(1) AJCL 126

Match in the terms that are, emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable.[147]

This approach to case selection is used to prove that despite differences in variables, the study's subject remains consistent, thus demonstrating the effects of the independent variable. However, instead of trying to prove the consistency of the effects of a variable, the goal is to disprove the assumption that despite differences in domestic legal systems, the enforcement of the non-refoulement principle remains the same in every country. For this reason, the countries that have been selected are different in terms of legal culture, history, and position within the international system.

In exploring which criteria can determine stark differences in the implementation of the articles of the Convention, reliance was placed on the classification made in 2017 by Patricia Popelier, Sarah Lambrecht, and Koen Lemmens in their volume *Criticism of the European Court of Human Rights*.[148] Recognizing the debate that surrounded the role of the Court, this work analyses 15 member states of the Council of Europe, examining their attitude towards the positions of the ECtHR, their criticism of the Council system, and the counter-dynamics they employed at the political and judicial level vis à vis the Convention.[149] The units of analysis are classified into 4 different groups on the basis of their attitude towards the ECtHR. The four families identified by the authors are: Countries with sparse criticism, moderate criticism, strong criticism, and hostile criticism. The more hostile the criticism towards the Court, the higher the risk of defiance towards its judgments. Countries with a lower level of Compliance are more inclined to present deviant conceptions of how to follow international obligations, thus eluding the narrow rigidity of the margin of appreciation when applied to Article 3 of the ECHR.

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[147] Ibid 139

[148] Patricia Popelier, Sarah Lambrecht, and Koen Lemmens, *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016)

[149] P Popelier, S Lambrecht, and K Lemmens, 'Introduction: Purpose and Structure, Categorisation of States and Hypotheses' in P Popelier, S Lambrecht, and K Lemmens (eds) *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016) 1

As anticipated, in selecting a small group of countries, that belong to different groups in the classification previously described, it has been considered the need to include countries with differing legal systems and international positions. The three selected countries are: Italy (sparse criticism), the United Kingdom (strong criticism), and the Russian Federation (hostile criticism). The absence of a country belonging to the moderate criticism group is explained by two practical reasons. Since a most dissimilar case logic will be adopted to observe the differences in the enforcement of the non-refoulement principle in the different countries, including such a group would result in redundancy, not providing any further contribution to the argument of the thesis. Secondly, the limited list of countries analysed by Popelier et Al. in their book does not offer a selection of cases in this group wide enough for selecting a case that presents uniqueness relevant to the purpose of the research. Among the countries of sparse criticism, Italy was chosen because of its Civil Law tradition, its membership in the European Union, the rigidity of its constitution, and its belonging to the Western international system, characteristics that separate it from the other selected countries. The United Kingdom was then included as a Western Common Law country that is no longer a member of the European Union and for having an unwritten constitution. Finally, the hostile criticism group is represented by the Russian Federation, a country that, while a member of the Council of Europe before the denunciation of the Convention following the invasion of Ukraine, was consistently hostile toward the ECtHR and frequently defiant of the rules of the ECHR as it will be presented later in this chapter. The choice of including Russia in this analysis is further motivated by the Russian approach to International Law which has been observed as systematically different from the Western approach by several authors. This argument was introduced in the first Chapter, when we presented the position of the Russian scholars in justifying the annexation of Crimea following a conception of International Law which contrasted with the position of Western scholars.[150] The Russian attitude towards International Law and its incompatibility with the Western conception of it has been explored by several other authors. The Russian International Lawyer Malksoo in his book

[150] Roberts (n 60) 117

Russian Approaches to International Law[151] studies the contemporary Russian approach to International Law, reaching the conclusion that since World War II, there has been no congruence between the West and Russia in the interpretation, application, and contents of International Law.[152] Meanwhile, Citty Wittke tried to expand on this topic, defending the thesis for which there exists a whole different language of International Law in the post-soviet space, strictly linked with the political priorities that are translated in legal arguments.[153] Such works, which evidence the existence of a Russian approach to International Law, led us to believe that the Russian case can provide a great contrast to the practice of the other two European Western countries.

III. Margin of Appreciation or Defiance? What to expect from the Application of Article 3 of the ECHR

In the previous chapter it was established how while not limited by the application of Article 3 of the ECHR, it is through its implementation that the non-refoulement principle has been upheld in the vast majority of cases. At the same time, the margin of appreciation doctrine, which has been used as a supportive argument for the employment of Comparative International Law to the ECHR and has been implemented within the Convention through its 15th Protocol,[154] appears to not be applicable to the non-refoulement principle due to the absolute nature of Article 3 of the Convention. The ECHR in *Chalal*[155] has clarified the impossibility of balancing the interests of individuals or society to the prohibition of Ill-treatment, even in cases involving terrorist activities.[156] It will be later presented more in-depth the *Saadi*[157] case, which confirmed the standing of the Court and directly

[151] Lauri Mälksoo, *Russian Approaches to International Law* (Oxford, 2015; online edn, Oxford Academic, 21 May 2015)
[152] Citty Wittke, 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?' (2020) 72 *Europe-Asia Studies* 180, 185
[153] Citty Wittke, 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?' (2020) 72 *Europe-Asia Studies*
[154] Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013, entered into force 1 August 2021) ETS No 213, art 1.
[155] *Chahal v United Kingdom* (1996) 23 EHRR 413
[156] Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed ' (2009) 22 LJIL 584
[157] *Saadi v Italy* [2008] EHRR 136

interested the Italian approach to the expulsions of aliens. However, this does not mean that differences in the understanding, interpretation, application, and approach to the principle cannot take place. While the Margin does not admit derogation on the minimum standards of protection guaranteed to the right, certain states might provide a higher degree of protection than the minimum floor, incorporating in their legal framework measures that extend the protection from non-refoulement beyond the standards set by the Convention. Secondly, even in cases in which the member states are found breaching the ECHR, they can exhibit proof of a different conception of the obligations that they must respect. In this case, the focus should extend beyond the deviations admitted by the ECtHR to include defiance as evidence of a differing conception of the international norm. Additionally, formal differences and the creative alternative solutions employed by states are equally significant when comparing the national implementation of the selected norm.

Having identified the countries of analysis and the main aspects of interest in the upcoming comparison, it is time to move to the individual analysis of understanding, interpretation, application, and approach of the non-refoulement principle as identified by the ECtHR in the three domestic systems.

2. The Non-Refoulement Principle in Italy

I. The Implementation of the ECHR and the Principle of Non-Refoulement in the Italian Legal System

In the following section, we present the integration of the ECHR and the non-refoulement principle within the Italian legal systems, focusing in particular on its normative hierarchy.

In the Italian system, international treaties are implemented according to the dualist tradition and no treaty can produce effects within the domestic legal system without the implementing legislation.[158] In the first instance, the ECHR

[158] Giuseppe Cataldi, 'Italy' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011; online edn, Oxford Academic, 19 January 2012) 338

was hierarchically considered as of ordinary power,[159] since it had been executed through the law 848/1955, which was an ordinary law.[160] A second phase in the history of the Convention in the Italian system saw the emergence of judicial experiments at the interpretative level in order to make it prevail over contradictory ordinary laws enacted after.[161] In the judgment n°10 1993,[162] the Italian Constitutional Court stated for the first time that the Convention cannot be contradicted or abrogated by ordinary norms since derived from a source of atypical competence.[163] While later judgments did not reiterate such an argument, the judgment represented an attempt to elevate the provisions of the Convention over ordinary legislation. A shifting point in the hierarchical collocation of the Convention was the 2001 constitutional reform[164] that introduced Article 117, which states:

> *"Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations."*[165]

The provision was subject to intense debate among Italian scholars. Some of them argued that the provision was only referring to sub-national legal orders and was not aimed at regulating the respective hierarchies, while others argued that the norms that implemented international obligations could now serve as an interposed standard of review and their violation by a national statutory norm could have led to its unconstitutionality.[166] In this debate, the hierarchy of the ECHR was determined by two pivotal judgments that finally put at rest the long-standing uncertainty about the collocation of the Convention. In the "twin

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[159] Angelica Dalla Vedova, 'Effetti giuridici delle decisioni della Corte Europea dei Diritti dell'Uomo nel diritto italiano, con particolare riguardo alla richiesta di Revisione Europea' (Master Thesis, LUISS Guido Carli 2020)
[160] Legge 4 agosto 1955, n. 848, Ratifica ed esecuzione della Convenzione per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, Gazzetta Ufficiale No. 221, 24 September 1955
[161] Dalla Vedova (n 159) 80
[162] Corte Costituzionale, Sentenza n. 10/1993, 12 Gennaio 1993
[163] Dalla Vedova (n 159) 83
[164] Legge Costituzionale 18 ottobre 2001, n. 3, "*Modifiche al titolo V della parte seconda della Costituzione*", Gazzetta Ufficiale n. 248, 24 ottobre 2001.
[165] Constitution of the Italian Republic (adopted 22 December 1947, entered into force 1 January 1948) Art. 117
[166] Francesca Biondi Dal Monte and Filippo Fontanelli, 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System' (2008) 9 *German Law Journal* 897

judgments" 348 and 349 of 2007,[167] the Italian Constitutional Court was concerned respectively with the issue of compensation for expropriation of private property which was not equivalent to its market value and compensation for occupation of private property. In its judgments, the Court ruled the unconstitutionality of Art. 5-bis par. 1 and 2 (348) and par. 7-bis (349) of the Law Decree No. 333 of July 11, 1992,[168] on the basis of Article 117 par. 1 of the Italian Constitution, since they were in contrast with the ECHR's first protocol Article 1 because they did not provide significant compensation in case of unlawful expropriation for public purposes.[169] In its judgment, the Court affirmed that the Convention had super-primary value, standing between ordinary norms and the Constitution, and that the ECHR can stand as "Interposed Norms" for the review of the constitutionality of primary legislation.[170]

Having clarified the legal status of the Convention within the system, we now see the inclusion of the non-refoulement principle in itself. The implementation of international norms within the Italian legal system happens in two ways, through the special procedure and through the ordinary procedure. In the special procedure, an internal norm directly recalls an international norm. In this case, it is not necessary to reformulate the international norm, which becomes directly applicable. On the other hand, the ordinary procedure consists of an internal norm that reformulates the international norm.[171] Interestingly, the non-refoulement principle in Italy has been implemented both ways. Starting with the special procedure, both Articles 10 and Article 117 of the Italian Constitution give force to the international obligations of which Italy is part.[172] While we have already talked about the implementation of the ECHR within the Italian system, we should also mention that Italy is part of the UN Convention on the Rights of Refugees of 1951, which includes the prohibition of refoulement and has been adopted through Law

[167] Corte Costituzionale, Sentenze n. 348/2007 e 349/2007, 24 Ottobre 2007
[168] Decreto-Legge 11 luglio 1992, n. 333, *Misure urgenti per il risanamento della finanza pubblica*, Gazzetta Ufficiale n. 162, 11 luglio 1992.
[169] Biondi and Fontanelli (n 166) 891
[170] Merten Brauer, *Principled Resistance to ECtHR Judgements-A New Paradigm?* (Max Planck Institute 2019) 140
[171] Chiara Favilli, 'L'attuazione del principio di non respingimento nell'ordinamento italiano', in Lorenza Calcagno, Fabrizio Di Marzio (Eds), *Il diritto dell'immigrazione* (Poligrafico e zecca dello Stato italiano, 2022) 112
[172] Article 10 of the Italian Constitution is known as a "Permanent Transfert", implementing directly Customary laws within the Italian legal system. The non-refoulement principle has been often conceptualized as a Consuetudinary norm, and it is thus included. Ibid

722 1954.[173] Moving to the ordinary procedure, Article 2 of the 268/1998 Single Text on immigration, which is the piece of legislation that incorporates all the Italian norms related to migration issues, states:

> *A foreigner, however present in the territory shall be accorded fundamental human rights, provided for in the norms of domestic and international law and generally recognized principles of international law.*[174]

The non-refoulement principle as protected by Article 3 of the ECHR, but also by other pieces of legislation that protect it such as the UN Convention on the Rights of Refugees, are included in the provisions of such article. However, the Single Text on immigration[175] does not stop there and includes the principle of non-refoulement through the means of ordinary adaptation in Article 19, which openly states:

> *1. Under no circumstances may expulsion or refoulement be ordered to a state where the foreigner may be subject to persecution on the grounds of race, sex, sexual orientation, gender identity, language, nationality, religion, political opinion, personal or social conditions, or may risk being returned to another state in which he or she is not protected from persecution.*[176]
>
> *1.1 Refoulement or expulsion or extradition of a person to a State shall not be permissible if there are reasonable grounds to believe that he or she is in danger of being subjected to torture or inhuman or degrading treatment, or if the obligations set forth in Article 5, paragraph 6, are met. The existence of systematic and gross violations of human rights in that State shall also be taken into account in the assessment of such grounds.*[177]

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[173] Legge 24 luglio 1954, n. 722, *Ratifica ed esecuzione della Convenzione relativa allo statuto dei rifugiati*, firmata a Ginevra il 28 luglio 1951, Gazzetta Ufficiale n. 196, 27 agosto 1954.
[174] Decreto Legislativo 25 luglio 1998, n. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, Gazzetta Ufficiale n. 191, 18 agosto 1998, Art. 2
[175] Decreto Legislativo 25 luglio 1998, n. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, Gazzetta Ufficiale n. 191, 18 agosto 1998.
[176] Decreto Legislativo 25 luglio 1998, n. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, Gazzetta Ufficiale n. 191, 18 agosto 1998, Art. 19
[177] Ibid

Article 19 reformulates the principle of non-refoulement in an extensive way. Rather than limiting itself to prohibit direct refoulement, it also includes the prohibition of indirect refoulement, not allowing the extradition in the case there is the concrete risk that the alien would be expelled from the country of restitution to another country in which he could be subject to persecution, effectively extending directly in-text the protection of the international norm here incorporated.[178] The jurisprudence of the ECtHR supports the prohibition of indirect refoulement under articles 3 and 4 of the ECHR,[179] but the explicit inclusion of this prohibition in the Italian Law represents nonetheless a step forward in advancing the nature of non-refoulement directly under primary legislation.

The Italian norms related to the principle of non-refoulement are complemented by the European Union Law. Italy, being part of the European Union, is bound by a supranational framework that distinguishes it from the other countries included in the research.

The first instrument adopted to harmonize the European approach to asylum is the Qualification Directive, which addressed the non-refoulement principle at the EU level. Aiming at protecting individuals from the risk of refoulement, this directive introduced the instrument of subsidiary protection for those who do not qualify for the status of refugee, but if returned to their home country would face the risk of serious harm.[180] “Serious harm” has been identified in Article 15 of the same directive, as the death penalty, torture, or inhumane and degrading treatment and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.[181]

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[178] Favilli (n 171) 114
[179] Council of Europe/European Court of Human Rights, *Key Notions on Asylum and the ECHR* (2016) <http://hudoc.echr.coe.int> Accessed 6 January 2025
[180] Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17(3) *International Journal of Refugee Law* 461.
[181] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9, art 15

The Qualification Directive was later complemented by another piece of EU legislation, the Asylum Procedures Directive[182] which harmonized the guarantees given to applicants during procedures concerning international protection, including subsidiary protection. The directive includes a provision that is particularly relevant to this work. Article 9, "Right to remain in the Member State pending the examination of the application" states that

> *"Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit."*[183]

Italy conforms to the directive, and following the framework drawn in the 2020 Law-Decree Lamorgese,[184] an irregular immigrant at risk of expulsion can request a residence permit for humanitarian reasons, based on Articles 3 and 8 of the ECHR, directly to the local precint, which takes a decision under a territorial commission. In accordance with the principle of non-refoulement, once the request is submitted, the deportation process is automatically suspended.[185] As it will be later presented, this procedure respects the ECHR standards, in contrast with the Russian approach to temporary protection, detecting substantive differences in the implementation of the non-refoulement in the two domestic legal frameworks.

Finally, the third piece of EU legislation that had important consequences on the matter of transfers of asylum seekers is the Dublin III regulation.[186] The Dublin system was born in 1990 when EU member states

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[182] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60
[183] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art 9
[184] Decreto-Legge 21 ottobre 2020, n. 130*, Disposizioni urgenti in materia di immigrazione, protezione internazionale e complementare*, Gazzetta Ufficiale n. 261, 21 ottobre 2020.
[185] Marta Gionco and Michele LeVoy (eds), *Barriers to Return: Protection in International, EU and National Frameworks* (PICUM 2022) <https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf> Accessed 6 January 2025 24
[186] Council Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31

looked to standardize their competing asylum policies, and the system aimed to determine which state is responsible for the assessment of each asylum claim, identifying it in the state that authorized the entry of the asylum seeker.[187] Due to the pressure put on the states at the external borders of the EU, the system was revised first in the Dublin II Regulation, which failed to provide the needed support to those EU countries, and later in 2014 in the Dublin III Regulation.[188] At the current state, the Dublin regulation identifies the responsible state following these criteria: First, if the applicant has family members who have refugee status or an asylum application undergoing in a state party, the application has to be processed there. If this is not the case, the state that is responsible is the one in which the asylum seeker has a visa or a residence permit. If those criteria are not applicable, the application must be processed where the asylum seeker first entered the EU.[189] The asylum can be requested only once within the whole EU, and the asylum seeker can be transferred to the country responsible for the processing of the application.[190] This regulation has interesting repercussions on the non-refoulement principle, opening to possible violation of the principle and Article 3 of the ECHR. Within the Dublin system, all EU member states are considered in presumption “Safe Third Countries,” as defined by Article 38 of the 2013 Regulation on common procedures for granting and withdrawing international protection,[191] and thus a transfer in them, in theory, should not be considered a violation of the non-refoulement principle.[192] This assumption is justified by their equal commitments to International Law and the protection of human rights.[193] However, this solution faced its limits in 2011 with the ECtHR judgment *M.S.S. v. Greece and Belgium*.[194] In this case, an Afghan applicant

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[187] Rachel Garrett and Nicole Barrett, 'Dublin III in Practice: Synthesizing a Framework for European Non-Refoulement Cases at the Human Rights Committee' (2021) *Journal of Human Rights Practice* 252
[188] Ibid
[189] Ibid 252
[190] Ibid
[191] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/60
[192] Silvia Morgades-Gil, 'The "Internal" Dimension of the Safe Country Concept: The Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts' (2020) 22(1) *European Journal of Migration and Law* 83
[193] Ibid 84
[194] *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2.

sought asylum in Belgium, but in identifying Greece as the state responsible for the processing of its application, he was transferred. There, he was met with conditions that the ECtHR assessed as breaching Article 3 of the ECHR, assessing the responsibility to both Greece, for not having met the standards set by Article 3 and by Belgium, for having violated the principle of non-refoulement.[195] The ECtHR judgment undermined the concept of the presumption of safety, which was upheld later by another Court, the Court of Justice of the European Union (CJEU) the same year in the case *N.S. and M.E. and others*,[196] in which the Court, in analysing similar cases referred by Ireland and UK courts, stated that a state is required to not transfer an individual to another country only if there are systemic flaws in the asylum condition.[197] However, the ECtHR maintained its critical approach in the later judgement *Tarakhel*[198] of 2014. This case concerned the transfer under the Dublin system of a family with six minor children from Switzerland (which is not part of the EU but entered the Dublin system) to Italy. In the judgment, the Court reaffirmed that the transferring State has to carry out a thorough and individualized examination[199] of the individual and suspend the transfer if it finds the risk of ill-treatment. It also affirmed that in cases of particular vulnerability, guarantees must be required from the transfer to the receiver State. These two judgments had a profound impact on the Dublin system, which became more reliant on the Sovereignty Clause that allows a State to not transfer an applicant since the national authorities feared breaching the non-refoulement principle. As pointed out in the CJEU judgment in the 2019 *Jawo*[200] case, which interested the transfer of asylum seekers from Germany to Italy, the internal courts of the states that are part of the Dublin system must assess if there are present in the receiver state deficiencies that can be systemic or generalised, or which may affect certain groups of people. In conclusion, the Dublin System which aimed to create a safe framework of transfers within European Countries that shared common levels of protection

[195] Morgades-Gil (n 192) 96
[196] Case C-41/10 *N.S. and M.E. v Secretary of State for the Home Department* (2011) ECR I-13905
[197] Morgades-Gil (n 192) 97
[198] *Tarakhel v Switzerland* [2014] EHRR 292
[199] Ibid
[200] Case C-163/17 *Abubacarr Jawo v Bundesrepublik Deutschland* (2019) ECLI:EU:C:2019:218

of human rights proved itself to be flawed, as the regulation opened the possibility of breaching the ECHR prohibition of refoulement.

II. The Application of the Non-Refoulement Principle, Case Law, and Strategies Employed

Beyond the legal implementation of the principle, for assessing the role of the non-refoulement in the Italian system there is the need to investigate its concrete application and how it is approached by the domestic institutions. Different strategies are employed to mitigate the effects of the Convention on migratory issues, often in the attempt to circumvent international responsibilities while not breaching the Convention, but sometimes openly defying them. A core aspect of the Italian approach to migration is the employment of diplomatic assurances and, more broadly speaking, the process of externalization. Following the definition provided by the United Nations High Commissioner for Refugees (UNHCR), "Diplomatic Assurances" is a term:

> *"To refer to guarantees on the part of the receiving State that it will treat the person in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law"*[201]

The role of diplomatic assurances is to enable the extraditions of individuals while avoiding breaches of international obligations by shifting the responsibility to third countries after receiving formal assurances on the protection from ill-treatment of the expelled alien, making the removal lawful.[202] The employment by Italy of diplomatic assurances has been at the basis of a particularly relevant case in the ECtHR jurisprudence, *Saadi v. Italy.*[203] Nassim Saadi was a Tunisian national who migrated to Italy with a residence permit. Saadi was arrested in 2002 being accused of association with terrorist organizations, and had been released by the Italian authorities in 2006. During this time, a military court in Tunisia had

[201] United Nations High Commissioner for Refugees (UNHCR), 'UNHCR master glossary of terms' <https://www.unhcr.org/glossary> Accessed 17 January 2025
[202] Lena Skoglund, 'Diplomatic Assurances Against Torture: An Effective Strategy' (2008) 77 Nordic Journal of International Law 320
[203] *Saadi v Italy* [2008] EHRR 136

convicted Saadi *in absentia* for the accuse of operating abroad with terrorists and of incitement to terrorism, sentencing him to 20 years of prison. In 2006 Saadi was detained in a deportation centre in Italy, but he applied for asylum, claiming that if deported to Tunisia, he would have been subject to torture and religious persecution. His application was deemed inadmissible due to issues of national security, but its deportation was stayed by both the national court and the ECtHR. Italy argued in front of the Court that Tunisia has provided explicit assurances against the possibility of a violation of Article 3 of the ECtHR and that Tunisia itself was part of several covenants protecting the refugees, among which the UN Covenant of 1951. The UK intervened in the case supporting the Italian argument, stating that the employment of Diplomatic Assurances was enough to satisfy the positive obligations under the ECHR. The ECtHR in its judgment made two fundamental points: first, the nature of the offense allegedly committed by the applicant was in no case relevant to the case since Article 3 is an absolute right and does not admit derogation. Second, the Court recognized that there are cases in which the diplomatic assurances can be enough to satisfy the positive obligations under the Convention, but in this case, they could not suffice to demonstrate that the ill-treatment would not take place.[204] As a result, the employment of diplomatic assurances while not in absolute violation of the ECHR, can still be deemed insufficient to respect the Convention.

More generally speaking, Italy has often resorted to practices of externalization. Following the definition provided by the UNHCR, practices of externalization consist in:

> *Actions beyond the border which, directly or indirectly, prevent asylum seekers from reaching a specific destination or from claiming protection.*[205]

While such a definition includes a wide range of policies, three main types of externalization activities can be identified: The transfer of asylum seekers to “Safe Third Countries” once they arrive on the territory, the outsourcing of border control before the migrants arrive on the territory, the processing of asylum seekers

[204] Daniel Moeckli, 'Saadi Italy: The Rules of the Game Have Not Changed' (2008) 8(3) *Human Rights Law Review* 534

[205] Andreina de Leo, ‘Managing Migration the Italian Way. The “Innovative” Italy-Albania Deal under Scrutiny’ (Verfassungsblog, 29 October 2024) <https://verfassungsblog.de/managing-migration-the-italian-way/> Accessed 6 January 2025

outside the borders for status determination.[206] Among them, the outsourcing of border control has been consistently employed by Italy through agreements with third countries, creating a practice that has often conflicted with the provisions of non-refoulement. In this regard, a perfect case study of the tension between the provisions of the Convention and the reality of the practice is the agreements with Libya. The first comprehensive migration deal between Italy and Libya was the 2008 Comprehensive Strategic Partnership. Such documents included externalization and readmission agreements, multilevel cooperation, and development programs.[207] After the Arab Spring dismantled this framework, in 2011 the Monti Government concluded another agreement with the Libyan National Transition Council, which was formulated in a memorandum of understanding[208] which kept the main structures of the 2008 agreement. Both agreements were characterized by the inclusion of pushback measures that were sanctioned by the ECtHR as a violation of the Convention in the case *Hirsi Jamaa and Others v. Italy,*[209] and as a result, the agreement were reformulated without their inclusions. Under Letta and Renzi's governments (2013-2016), Italy ceased the externalization policies, mainly due to the sensibility of public opinion after multiple shipwrecks that resulted in the deaths of migrants.[210] However, after the failure to address migration issues at the European level through a reform of the Dublin III regulation, in 2017 the Gentiloni government resumed the externalization policies, reaching a new memorandum of understanding with Libya for the duration of 3 years with automatic renewal. Such a memorandum, modelled after the 2008 and 2012 agreements but including also Italian patrol boats for Libya's coast guard is still in place, having been renovated first by the Conte administration, and later by the Draghi administration.[211] The Meloni administration later reaffirmed the Italian externalization efforts, brokering an EU-Tunisia deal that interested repatriations, externalization, and the interception of

[206] Ibid
[207] Gabriel Echeverría, Gabriele Abbondanza and Claudia Finotelli, 'The Externalisation Gamble: Italy and Spain at the Forefront of Maritime Irregular Migration Governance' (2024) 13 *Social Sciences* 517 6
[208] Ibid
[209] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012)
[210] Echeverría, Abbondanza, Finotelli (n 207) 6
[211] Gabriele Abbondanza, *The Foreign Policy of Irregular Migration Governance* (Routledge 2025) 34-35

migrant boats on the coast of Tunisia, as well as an EU-Egypt deal with similar goals.[212]

A new form of externalization is represented by the controversial agreement signed by Italy and Albania in 2023. The agreement would allow Italy to both process asylum applications through an accelerated border procedure, which is subordinated to the applicant coming from a safe third country, and to carry out returns in Albania for migrants rescued in non-European waters. In order to do so, two centres were opened in October 2024, one to register applicants and identify the vulnerable ones that have to be returned to Italy, the second to process the applications. In total according to the protocol, the centres would be able to keep up to 3000 individuals.[213] The processing of applications would not be shifted to the Albanian authorities, but the whole process will take place within the Italian jurisdiction,[214] thus not externalizing its responsibility for international protection and border management to Albania.[215] The agreement raised serious concerns about the accountability and the responsibility for ensuring no asylum seeker is returned to an unsafe country. While the Italian authorities will carry out the transfers, it also grants the Albanian authorities the power for the return procedures in the case individuals leave the centres, thus losing their asylum application.[216] In October 2024, the Civil Court of Rome refused to validate the detention in the Albanian centres of 12 asylum seekers from Bangladesh and Egypt. The decision of the Court did not question directly the agreement itself, but it focused on a recent judgment of the CJEU,[217] which ruled that the member states cannot assess third countries as “safe” in limited areas of their territory, as Bangladesh and Egypt were considered by the Italian authorities. The Italian judges ruled that the border procedure was not applicable and the appeal of the

[212] Ibid 36
[213] De Leo (n 205)
[214] Rrezart Bushati and Emanuela Furraman, ‘Potential Effects and Concerns of the Agreement Between Italy and Albania on Managing Migratory Flows’ (2024) 10(3) *Journal of Liberty and International Affairs* 28-39
[215] Andreina De Leo and Eleonora Celoria, ‘The Italy–Albania Protocol: A New Model of Border-Shifting within the EU and Its Compatibility with Union Law’ (2025) *Maastricht Journal of European and Comparative Law* 9
[216] Iris Broerse, *The Italy-Albania Agreement: Externalising Asylum Procedures in Violation of Human Rights* (VU Migration Law Series No 26, 2024) 20
[217] Case C-406/22 CV v Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky (4 October 2024) ECLI:EU:C:2024:841

asylum seekers should take place in Italy.[218] On November 11, the Civil Court of Rome once again suspended the processing of the application of seven asylum seekers, activating the preliminary reference procedure to the CJEU to assess compliance with the EU law.[219]

While the future of the Italy-Albania agreement appears to be uncertain, it must be stressed the fact that it presents similarities to the Rwanda Scheme created in the UK and already sanctioned by the ECtHR which will be addressed later in this chapter. The creation of two similar models of externalization might lead in the future to the emergence of an established practice in the conception of non-refoulement, which might obtain popularity since states like Austria and Denmark have expressively welcomed the agreement in the hope of the creation of a precedent within the European Union.[220]

3. The Non-Refoulement Principle in the UK

I. The Implementation of the ECHR and the Principle of Non-Refoulement in the UK Legal System

The UK legal system, and consequently the implementation of the ECHR in its framework present differences with respect to the Italian system. The UK presents a dualist tradition in the incorporation of international norms. The European Convention on Human Rights has been included in the UK system through the Human Rights Act (HRA) of 1998,[221] which aligned the domestic law to the Convention with a reformulation of all the binding norms. The Human Rights Act incorporates the articles of the ECHR from 2 to 12 since Articles 1 and 13 are already fulfilled by its creation. Article 3 of the Human Rights Act states that:

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[218] De Leo (n 205)
[219] Giulia Mentasti, 'Detention of Asylum Seekers in Albania: Another Preliminary Reference to the Court of Justice on ‘Safe Countries’ from the Court of Rome' (Tribunal of Rome, XVIII Civil Section, Order 11 November 2024) *Sistema Penale* (2024) Issue 11
[220] Bushati and Furraman (n 214) 36
[221] Human Rights Act 1998

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[222]

Repeating word for word the content of the original text.

An important difference with the Italian system lies in the constitutional hierarchy and in the legal protection of the Act. In order to understand the legal standing of the Act, it is necessary to speak first about the UK system. Following the classification made by Mark Tushnet, the UK has a weak form of judicial review, as opposed to countries like the US with a strong form of judicial review. The strong form of judicial review is a system in which the judicial interpretations of the Constitution are final and cannot be revised by legislative majorities, while in the weak-form of judicial review, the courts can assess the legislation under constitutional norms but do not have the final word on whether statutes comply with those norms.[223] This choice reflects a fundamental principle of the UK system: the idea of Parliamentary Sovereignty. Dicey explains the central role of the parliament in these terms:

Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. A law may, for our present purposes, be defined as 'any rule which will be enforced by the Courts.' The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described; any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated; there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.[224]

[222] Human Rights Act 1998, Art. 3
[223] Aileen Kavanagh, 'What's So Weak About "Weak-Form Review"? The Case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1011
[224] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 37–38

In his explanation of Parliamentary Sovereignty, Dicey thus rejects the possibility that common law, morality, international law, royal prerogatives, and the previous status might bind the powers of the parliament.[225] Having introduced these two key features of the UK system, the next step is to clarify the position of the HRA. When the Act was enacted, the government of the UK decided not to entrench the rights and freedoms protected into a broader constitutional framework, but it nevertheless granted to the HRA a margin of protection. Under the Human Rights Act, the judges have the power to strike down secondary legislation but not primary legislation incompatible with the Act.[226] It has to be noted that the Act was intended to provide a new basis for the judicial interpretation of all the legislation.[227] However, while the parliament remains sovereign, a new procedure was introduced. The courts are in fact empowered to issue certificates of incompatibility related to primary legislation that conflicts with the Act.[228] The declaration of incompatibility operates as a formal invitation to the relevant minister and parliament to amend the incompatible legislation.[229] Once the declaration is issued, the government can act in three ways. It can decide to do nothing, it can ask the parliament to repel the offending provision by an act of parliament, and finally, it can amend and replace the provision by executive order, which must be approved by the parliament.[230] The principle of Parliamentary Sovereignty and its interaction with the UK's international obligations will have profound repercussions in the Rwanda Scheme crisis that will be addressed later in the chapter.

The immigration system in the UK is defined by the Immigration Act, updated in 2016[231] and later in 2020[232] following the exit of the country from the

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[225] Mark D Walters, 'The Law of Parliamentary Sovereignty' in MD Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge University Press 2020) 162–225
[226] Jonathan L Black-Branch, 'Parliamentary Supremacy or Political Expediency: The Constitutional Position of the Human Rights Act under British Law' (2002) 23(1) *Statute Law Review* 64
[227] Ibid, 65
[228] Ibid 66-67
[229] David Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19(2) *Legal Studies* 188
[230] Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper, and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015)
[231] Immigration Act 2016
[232] Immigration Act 2020

European Union. The acts contain the provisions related to immigration to the country and have been complemented by the immigration rules, supported by the Home Office Guidance, which is a piece of policy statements set by the Home Secretary that provides practical guidelines to the management of immigration within the country.[233]

They include provisions to avoid the risk of refoulement and explicitly mention the need to respect the Real Risk Criterion for assessing the lawfulness of the deportation. The guidance includes a reference to the Supreme Court decision in *AM v. Secretary of State of Home Department*.[234] An asylum applicant was facing a return to Afghanistan while suffering heavy psychological conditions. The Court ruled that Article 3 of the ECHR could have been considered violated if the health of the individual is put at risk from deportation for the lack of sufficient medical treatments in the country of arrival.[235] The Real Risk Criterion is assessed starting from the claims of the individual, which holds the burden of the proof to demonstrate that there are substantial risks of being subjected to inhuman, ill-treatments in violation of Article 3.[236] Where a protection claim is raised involving articles 2 or 3 of the ECHR, it must be considered by a case owner who has had appropriate training.[237]

Finally, a discussed piece of legislation that directly impacted the non-refoulement application within the Country is the 2023 Illegal Migration Act,[238] which deemed “Inadmissible” the claim of asylum for anyone who crossed the borders of the country by illegal means. The Illegal Migration Act should be read in the context of the strong opposition of the Country to immigration. It has been noted that migration has been a central topic in the debate around Brexit, which aimed at disentangling the UK from what was perceived as an increasingly unmanageable EU migration regime.[239] Following the Act, illegal migrants would

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[233] Immigration Rules (HC 395), as amended
[234] AM v Secretary of State for the Home Department [2020] UKSC 17 (29 April 2020)
[235] Ibid
[236] UK Government, ‘Guidance. Conducive deportation’ (GOV.UK, 27 December 2024) <https://www.gov.uk/government/publications/deporting-non-eea-foreign-nationals/conducive-deportation-accessible> Accessed 6 January 2024
[237] Ibid
[238] Illegal Migration Act 2023
[239] Alessio D’Angelo, ‘Migration Policy and Welfare Chauvinism in the United Kingdom: European Divergence or Trend-Setting?’ in Claudio Finotelli and Irene Ponzo (eds), *Migration Control Logics and Strategies in Europe Claudia Finotelli Irene Ponzo Editors A North-South Comparison* (Springer Cham 2023) 230

be detained until deported to a safe third country. The Act has not found real success due to the absence of bilateral agreements with safe third countries, and together with the Rwanda Scheme, it has been set aside since the Labourist win in the last UK parliamentary elections.[240] The Illegal Migration Act was arguably an attempt to reduce migration through processes of externalization while namely respecting the right of non-refoulement through the employment of safe third-country assurances. However, the respect for the prohibition of refoulement and the safeguards of the ECHR has been severely doubted, especially in the context of the Rwanda scheme as will be presented in the following section.

II. The Application of the Non-Refoulement Principle, Case Law, and Strategies Employed

The section concerning the legal framework in matters of immigration and non-refoulement in the UK already introduced the reliance of the Country on the notion of safe third country in order to deal with immigration without openly breaching international norms. This tendency, which was already visible during the Saadi case in which the UK supported the Italian position on diplomatic assurances, has been addressed manifestly through a heavily divisive and criticized foreign policy, the UK-Rwanda deal of 2022. The history of the agreement presents the perfect opportunity to understand the standing of the non-refoulement principle in the country and to address the role of Parliamentary Sovereignty in respect of international obligations.

In April 2022 the UK and Rwanda signed a memorandum of understanding, establishing a Migration and Economic Development Partnership, which enhanced the cooperation between the two countries and enabled the transfer of asylum seekers from the UK to Rwanda, making the claims to be processed there.[241] The agreement sparked concerns over the possible violation of the rights of asylum seekers, and the ECtHR intervened immediately, ordering interim

[240] Sarah Francis, Naomi Bartram, 'What is the Illegal Migration Act?' (International Rescue Committee, 26 June 2023) <https://www.rescue.org/uk/article/what-illegal-migration-bill-and-what-does-it-mean-refugees> Accessed 6 January 2025

[241] Catherine Briddick, Cathryn Costello, 'Supreme Judgecraft. Non-Refoulement and the end of the UK-Rwanda 'deal'?' (Verfassungsblog, 20 November 2023) <https://verfassungsblog.de/supreme-judgecraft/> Accessed 6 January 2025

measures[242] that stopped the transfers of the first flight towards Rwanda, in June 2022.[243] The lawfulness of the agreement, which was political in nature and thus not an act of parliament was later challenged by asylum seekers. While the High Court ruled on the lawfulness of the act, the Court of Appeal[244] and later the UK Supreme Court[245] ruled on the unlawfulness of the agreement. The judgement was taken by unanimity and the reasoning of the Court was supported by the international obligations that the UK is called to respect under International Law, thus the principle of non-refoulement. The UK Supreme Court cited the ECtHR jurisprudence in the cases *Soering* (1989), *MSS* (2011), and *Ilias v Hungary* (2019), and also recognized the principle of non-refoulement as a principle of customary character:

> *A core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law.*[246]

The court also cited Domestic jurisdiction through the Human Rights Act and other statutory acts:

> *Asylum seekers are thus protected against refoulement not only by the Human Rights Act but also by provisions in the [three other statutes], under which Parliament has given effect to the Refugee Convention as well as the ECHR.*[247]

The sentence gave considerable weight to the UNCHR intervention in the case. The UNHCR provided proof that Rwanda could not be indicated as a safe third

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[242] European Court of Human Rights, 'Interim Measures' (European Court of Human Rights) <https://www.echr.coe.int/documents/d/echr/fs_interim_measures_eng> Accessed 5 January 2024

[243] Peter W Walsh, 'The UK's former policy to send asylum seekers to Rwanda' (The Migratory Observatory at the university of Oxford, 25 July 2024) <https://migrationobservatory.ox.ac.uk/resources/commentaries/qa-the-uks-policy-to-send-asylum-seekers-to-rwanda/#:~:text=The%20Supreme%20Court%20ruled%20that,accurate%20and%20fair%20asylum%20decisions> Accessed 6 January 2024

[244] *AAA (Syria) & Ors, R (on the application of) v The Secretary of State for the Home Department* (Rev1) [2023] EWCA Civ 745 (29 June 2023)

[245] *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department* (Appellant/Cross Respondent) [2023] UKSC 0093 (24 July 2023)

[246] Ibid

[247] Ibid

country for multiple reasons. The Rwanda Asylum System was presented as inadequate due to the lack of independence of lawyers and judges from the government and the absence of appeals, the rejection rates for specific national groups (Afghanis, Syrians, and Yemenis) were near zero despite such rates in the UK were significantly different, thus suggesting a bias in the Rwandan authorities, the consistent and ascertained violation of the very principle of non-refoulement by Rwanda and the manifest failure in respecting the obligations included in a similar agreement with Israel.[248]

The judgment represented the resilience of the UK system from the attempts of the executive to supersede the international obligations of the country. In this sense, the principle of non-refoulement was protected by the UK Supreme Court in full accordance with the ECtHR jurisprudence despite a different conception proposed by the governmental actors. However, the Sunak government did not give up on the Rwanda Scheme and forced its hand on the Supreme Court by passing in April 2024 the Safety of Rwanda Bill. Manipulating the Parliamentary Sovereignty principle, the UK government declared with the Bill Rwanda a safe third country.[249] This bill, which would have conflicted with the provisions of the ECHR, was later set aside not by judicial review, which in the UK cannot strike down primary legislation as explained in the previous section, but rather by the overwhelming defeat of the Tories in the parliamentary elections of 2024. Keith Stramer, leader of the Labourists and new prime minister stopped the whole Rwanda Scheme once in government, as well as the Illegal Migration Act.[250] The Rwanda scheme crisis tells us three important lessons about the non-refoulement principle in the UK. First of all, the UK has been in the last years extremely keen on externalization policies and it focused its efforts on the establishment of agreements with allegedly safe third countries. Second, Parliamentary Sovereignty allows a parliamentary majority to openly clash with the Council of Europe ecosystem since processes of strong judicial review are not in place. Third, with the win of the Labourists in the parliamentary elections of 2024, the new UK government appears to have completely rejected both the Rwanda

[248] Walsh (n 243)
[249] Safety of Rwanda (Asylum and Immigration) Act 2024 (c. 8)
[250] Sam Francis, ‘Starmer confirms Rwanda deportation plan 'dead'' (BBC, 6 July 2024) <https://www.bbc.com/news/articles/cz9dn8erg3zo> Accessed 6 January 2024

scheme and the Illegal Migration Act, thus stopping for the moment the consequence of breaching the non-refoulement principle as protected by the ECHR. On a final note, while the Rwanda scheme will not take effect, it belonged to a new practice of externalization that includes the Italy-Albania deal. However, some differences between the two schemes set them apart. In the Italian case, the Italian authorities maintain the task of evaluating the individual requests for asylum, while in the UK case, such duty is up to the authorities of Rwanda. Moreover, the Albania scheme concerns only migrants rescued in non-EU waters, a provision that is not found in the Rwanda deal in relation to UK territorial waters.[251]

4. The Non-Refoulement Principle in the Russian Federation

I. The Implementation of the ECHR and the Principle of Non-Refoulement in the Russian Legal System

The last country of analysis is the Russian Federation. The references that will be made to the Russian application of the provisions of the ECHR are precedent to the 16th of September 2022, the date on which Russia denunciated the Convention following the military invasion of Ukraine. As a result of such denunciation, Russia is not part of the system of the Convention anymore.[252] However, its inclusion in this research appears to be particularly relevant nonetheless. As previously discussed in Chapter 1, Russia's stance on International Law has often clashed with the Western conception of the international system, and presenting its application of the Convention, which in its regional character reflects such Western conceptions of human rights protection, can identify potential differences in the domestic interpretation of the non-refoulement. Moreover, Russia has a long tradition of open defiance of the Convention. As proof of its rebellious attitude, following the Annual Report of the

[251] Bushati and Furramani (n 214) 36

[252] Council of Europe, 'Russia ceases to be party to the European Convention on Human Rights' (Council of Europe, 16 September 2022) Accessed <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>

ECtHR of the year 2022, there were a total of 17013 pending cases[253] in the ECtHR against Russia, and a total of 219 cases were judged presenting at least one violation of the Convention,[254] confirming a record in the long history of the Court.

Having justified the inclusion of the Russian Federation in this work, the discussion now shifts to the implementation of the Convention within the Russian legal system. The ECHR was implemented in the Russian Constitution through its Articles 15 and 17. Article 15 Par. 4 clarifies the monist nature of the Russian legal system stating that:

> *Universally recognized principles and norms of international law as well as international agreements of the Russian Federation should be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules, which differ from those stipulated by law, then the rules of the international agreement shall be applied.*[255]

Meanwhile, Article 17 enunciates the commitment of the Russian Federation to the protection of human rights, including in its first paragraph the following provision:

> *In the Russian Federation human and civil rights and freedoms shall be recognized and guaranteed according to the universally recognized principles and norms of international law and this Constitution.*[256]

The presence in the Constitution of these two provisions gains particular weight knowing that in 1992 the Country joined the UN Convention on the Status of Refugees and in 1998 it joined the European Convention on Human Rights. The provisions align the Russian institutions with the rights enshrined by the two Conventions, including Article 3 ECHR and the principle of non-refoulement. It must be noted that the ECHR provisions are hierarchically subordinate to the Russian Constitution, and as seen in the case *Anchugov and Gladkov v. Russia*, a judgment of the ECtHR can be deemed “Conflicting” with the Russian

[253] European Court of Human Rights Annual Report 2021 (Council of Europe, 2022) 180
[254] Ibid 187
[255] Constitution of the Russian Federation (adopted 12 December 1993, entered into force 25 December 1993), Art 15
[256] Constitution of the Russian Federation (adopted 12 December 1993, entered into force 25 December 1993), Art 17

Constitution and thus discarded.[257] While this is not the case in the application of Article 3, it clearly shows the conflicting position and the clash between the ECHR system and the Russian legal framework.

In the Russian Federation, issues of migration are regulated on a federal level. Building upon the rights guaranteed by the Constitution, three federal sources regulate migration and asylum, all of them were adopted in 1993 with the Russian Constitution. These are:

Article 63 of the Constitution, which regulates political asylum and contains the following paragraph:

1. *The Russian Federation shall grant political asylum to foreign citizens and stateless persons in accordance with the universally recognized norms of international law.*

2. *In the Russian Federation persons who are persecuted for their political convictions or for actions (or inaction) not recognized as a crime in the Russian Federation may not be extradited to other states. The extradition of persons accused of a crime, as well as the surrender of convicts to serve sentence in other states, shall be carried out on the basis of federal law or an international treaty of the Russian Federation.*[258]

The Law on Forced Migration, which has been created to address the issue of citizens of the FSU who moved to Russia mainly for economic reasons after the collapse of the USSR.[259]

The Federal Law on Refugee, which deals with individuals from the “Far Abroad”, thus any individual who arrives from outside the FSU.[260] This Law, amended in 1997, is a critical piece of legislation regarding both substantial and

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[257] Alvise Accordati, ‘I "controlimiti" secondo la Corte Costituzionale Russa’, (Diritto Consenso, 3 Maggio 2021) <https://www.dirittoconsenso.it/2021/05/03/controlimiti-secondo-corte-costituzionale-russa/> Accessed 6 January 2024

[258] Constitution of the Russian Federation (adopted 12 December 1993, entered into force 25 December 1993), Art. 63

[259] Maria Sole Continiello Rineri, ‘The Russian Law on Refugees through the lens of the European Court of Human Rights’ in Giovanni Carlo Bruno, Fulvio Maria Palombino, Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals* (CNR Edizioni 2019) 158

[260] Ibid

procedural rights of refugees,[261] and it is what really disciplines their status. The Federal Law distinguishes two different types of protection, refugee status and temporary asylum status. The first type of protection is in line with the 1951 UN Covenant on the Right of Asylum and states that:

> *Not a citizen of the Russian Federation who, because of a well-founded fear of becoming a victim of persecution by reason of race, religion, citizenship, national or social identity or political convention is to be found outside the country of his nationality and is unable or unwilling to avail himself of the protection of this country due to such a fear, or having lost his or her nationality and staying beyond the country of his or her former place of residence as a result of similar developments, cannot return to it and does not wish to do so because of such fear.*[262]

Such protection is granted for 3 years and it is renewable. Differently, Art. 12 of the Federal Law on Refugees disciplines the “temporary protection”. Such protection is granted to those who do not meet the requirements for possessing the status of refugees, but cannot be extradited for humanitarian reasons,[263] it lasts 1 year and can be extended yearly. This double regime of protection has repercussions on the application of the principle of non-refoulement in the country. While Russian law explicitly prohibits the refoulement of those who apply for the status of refugees, the applicant for temporary asylum does not receive the same degree of protection. Only those who have already received the status of temporary protection are safeguarded by the non-refoulement.[264]

However, the piece of legislation that is the most critical for the application of non-refoulement within the country is Article 5 of the Russian Law on Refugees. This Article disciplines the reasons for which an application can be refused by Russian officials. The article includes the existence of criminal proceedings for any crime committed on Russian soil, including minor administrative offenses. An application is also refused if the immigrant arrives from a safe third country.[265] As

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[261] Ibid 159
[262] Law of the Russian Federation on Refugees (1993, as amended 2004) Art 1 Federal Law of the Russian Federation No. 4528-I "On Refugees" (19 February 1993, as amended up to 13 June 2023), Art. 1
[263] Ibid, Art 12
[264] Continiello Rineri (n 259) 160
[265] Ibid

it will be soon presented, such provisions led to consistent violations of Article 3 of the ECHR following the ECtHR jurisprudence and the reports of international observers, providing the legal basis for a national strategy of refoulement.

II. The Application of the Non-Refoulement Principle, Case Law, and Strategies Employed

As anticipated, the application of the non-refoulement principle in Russia finds concerning fallacies specifically with the instrument of temporary asylum. The application for this status has dramatically increased since the first Ukrainian conflict, and it is estimated that during the years 2012-2014 it reached a peak of 98% of temporary asylum requests coming from Ukraine.[266] Other critical areas from which applicants for temporary asylum come are Afghanistan, Syria, and Central Asian Countries. Stressing the origin of migrants is fundamental to understanding the core of the issue, since following reports from international observers, the Russian authorities concede different treatments to the applicants based on their origin, resembling the approach of Rwanda discussed during the excursus on the Rwanda Scheme. It has been assessed that while Ukrainians have traditionally been accepted and assimilated, other groups, Syrians and Uzbekistanis in particular, encounter greater difficulties that result in significantly higher numbers of extradition procedures and denials of protection.[267] The instrument used to justify such denials is the Code of Administrative Offences (CAO), which includes the failure to secure a valid residence registration (*Propiska*), working without a work permit, or violating an immigration rule.[268] The measure of administrative deportation is considered a discretionary measure in regional courts, but since 2013 in Moscow, Moscow Oblast, St Petersburg, and Leningrad Oblast it became mandatory in these cases. Such cases are on a practical level managed following a case-file logic by judges, who often process

[266] Ibid 161
[267] Ibid 162
[268] Ibid

the case without proper flexibility and understanding of the applicants' background.[269]

The failure to respect the prohibition of refoulement has been consistently condemned by the ECtHR, which through its jurisprudence has assessed how the Russian approach to this principle results in manifest defiance of the Convention. Between 2008 and 2019 more than 100 judgements have been pronounced by the Court of Strasbourg which condemned Russia for unlawful deportation of asylum seekers.[270] In most of these cases, it was assessed the breach of Article 3 of the Convention and the failure of Russia to prevent torture or ill-treatment due to extradition.[271] The consistency of the violation of the Convention has also been enlightened by the failures, assessed by the courts, of implementing effective remedies by the Russian authorities due to the absence of automatic suspensive effect[272] and independent and rigorous scrutiny.[273] The breaches of the Convention led to the adoption of numerous Interim Measures which are:

> *Urgent orders issued by the European Court of Human Rights (ECtHR) in 'exceptional circumstances', where there is an 'imminent risk of irreparable harm.*[274]

Interim measures are obligatory in their nature, but Russia has repeatedly breached them in extradition cases through the employment of illegal means, meaning abduction, illegal transfers, kidnappings, and extraordinary renditions, mainly concerning individuals from Uzbekistan, Tajikistan, and Turkmenistan.[275] As clarified by the ECtHR in the cases *Savriddin Dzhurayev, Ermakov, Kasymakhunov, and Mamazhonov,* Russian authorities were deemed

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[269] Agnieszka Kubal, 'In Search of Justice: Migrants' Experiences of Appeal in the Moscow City Court' in M Kurkchiyan and A Kubal (eds), *A Sociology of Justice in Russia* (Cambridge University Press 2018) 93
[270] Ibid 166
[271] Ibid
[272] European Court of Human Rights, *Allanazarova v. Russia*, Application No. 46721/15, Judgment of 14 February 2017
[273] European Court of Human Rights, *I.U. v. Russia*. Application No. 48917/15, Judgment of 10 January 2017.
[274] UK in a Changing World, 'What is an interim measure (or Rule 39 order) of the European Court of Human Rights?' (UK in a Changing World 4 April 2024) <https://ukandeu.ac.uk/the-facts/what-is-an-interim-measure-or-rule-39-order-of-the-european-court-of-human-rights/> Accessed 6 January 2025
[275] Continiello Rineri (n 259) 171

responsible for breaching Article 3 of the Convention for their manifest failure to protect the applicants.[276] As a result of the denunciation of the Convention by Russia, there are no expectations regarding the Russian follow-up to most of the critiques of the Court, which has been, even during the Russian membership to the ECHR, lacklustre.

5. Summary of the Findings of the Chapter

I. Presenting the Elements of Comparison

Both formal and substantive implementation of the non-refoulement principle as protected by the ECHR have been illustrated in the different case studies. It is now time to present the findings, evidencing the formal and substantive elements of similarity and difference among them, by comparing the different legal systems.

II. Presenting the Formal Similarities and Differences in the Three Legal Systems

The three countries presented three distinct models of implementation of the principle within their legal frameworks.

The first aspect of comparison is the implementation of the Convention in the domestic settings. In the Italian and Russian systems, there is no reformulation of every single article of the Convention, but rather the inclusion within their systems of the Convention with a reference to the treaty. This is different for the UK, where the whole document has been included in the domestic legal framework through the adoption of the Human Rights Act in order to make the international obligations of the ECHR effectively binding also in the domestic jurisdiction. However, in this latter case, it does not appear that such reformulation has led to a misinterpretation of the Convention since the text is identical to the original provisions.

[276] Ibid

It is rather in the inclusion of the non-refoulement principle within the domestic settings that the first differences between the three countries are noticed. Italy, in particular, includes in Article 19 of the single text on immigration an extensive interpretation of the right of non-refoulement, including the prohibition of indirect refoulement. While the indirect refoulement can lead to a violation of the Convention following the jurisprudence of the ECtHR,[277] this codification confirms the commitment of Italian authorities to prevent indirect refoulement under their primary legislation. Meanwhile, the inclusion of a written prohibition of indirect refoulement is absent in Russia and the UK, despite it being included within the reasons of the UK Supreme Court to deem the Rwanda Scheme unlawful.

The hierarchy of the Convention is another area in which the three systems differ. In Italy and Russia, the Convention has infra-constitutional value, being superior to primary legislation. In the UK, on the other side, the implementation of the Convention through the Human Rights Act in 1998 did not grant the Convention proper constitutional power, even though special procedures have been put in place to allow the legislative power to amend the irreconcilable acts and the executive to enact effective remedies. However, it has been witnessed the limits of these procedures during the Rwanda Scheme crisis, which demonstrated how political power can theoretically supersede the prohibitions of the Convention with implications even for the non-refoulement principle which, following the ECtHR, is “absolute”.

III. Comparisons on the Application of the Principle

On a substantive account, the three countries differ in the strategies adopted by the executive and administrative bodies to deal with the non-refoulement obligation and, most importantly, they differ in the degree of respect for the Convention and the Court system.

Similarities have been ascertained in the processes of externalization. Italy and the UK both consistently looked for agreements with safe third countries, also relying on the instruments of diplomatic assurances. The Albania and Rwanda

[277] Council of Europe/European Court of Human Rights (n 179)

deal, besides their differences regarding the migrants concerned by the procedures and the authority in charge of the evaluation of the applications, present strong similarities in their approach to externalization, possibly signalizing the emergence of a new way of managing migrants' applications outside the borders of the State.

Differences emerge in the procedure of risk assessment of the applicants as well. While the local committees in Italy and the Home Office in the UK appear to properly examine the applicants' requests, in Russia the case-file logic approach caused by the overwhelming numbers of asylum requests leads the authorities to often mishandle cases, jeopardizing the correct process of risk assessment. As a result, it appears the effective protection of asylum seekers is endangered in such cases.

The suspension of deportation is another point of difference within the national jurisdictions. As it has been evidenced, the Russian status of "temporary protection" protects in itself the applicant from deportation, but does not guarantee the same right to those who apply for it and who are still waiting for a decision, in clear contrast with the practice in both Italy and the UK.

Regarding the degree of defiance of the Court, the Italian legal system appears compliant with the system of the Convention in regard to the protection of the principle of non-refoulement. This claim is supported by the rearrangement of the memorandum of understanding with Libya once the ECtHR deemed the pushback measures unlawful and contrary to Article 3 of the Convention. The Dublin system raised concerns over the possibility of refoulement between EU countries, but the Member States answered to this issue by increasing the employment of the sovereignty clause to halt the problematic transfers. Meanwhile, the UK government has openly clashed with the Court, ignoring the preoccupations that emerged first by the interim measures enacted to halt the refoulement of refugees, and later by passing the Safety of Rwanda bill, menacing to breach the rights protected by the Convention as established by its very own Supreme Court. Finally, Russia had a long history of ascertained breaches of the Convention, the non-refoulement principle appears to be applied selectively and non-consistently and the measures required by the ECHR have not been implemented properly to address the situation.

The Application of the right of non-refoulement also appears to vary significantly between the countries. While the UK and Italy do not present apparently discriminatory rates in the extradition and refoulement of applicants, there is proof of racial discrimination connected to this obligation within the Russian system. The international norm thus serves a specific function, while in the two Western states, it protects in principle people in distress, in Russia such protection is accorded only to selected groups of people, while others appear to be excluded from such guarantees. The different rates of refoulement for people from central Asia, Afghanis and Syrians suggest that the possibility of assimilation of the applicant effectively affects the probability of receiving protection from refoulement.

6. Conclusions

The points here summarised point out that there are differences in the understanding, interpretation, application, and approach of the prohibition of refoulement in the three countries. These differences concern written provisions, which directly lead to variation in the domestic application of the principle, and in the concrete applications of the principle themselves. These findings assume particular relevance since Article 3 of the ECHR possesses the status of “absolute right” and its derogation is theoretically prohibited as has been pointed out in the *Saadi* case. The last chapter admitted the possibility of national discretion in the application of the provisions of the Convention through the margin of appreciation doctrine. Such doctrine cannot be properly used to justify the differences among the three jurisdictions, nonetheless, the existence of such differences proves once more the mutable nature of International Law. The fact that some of the differences in the application of the non-refoulement in Russia derive from an assessed defiance towards the Convention and the Court does not invalidate the reality of a different application of the principles of the Convention within the Russian territory. In the final chapter of this work, which will discuss the findings of this thesis, such defiance will be addressed by trying to contextualize it, not limiting its explanation to the *Raison d’état* but looking at how the cultural environment and legal traditions lead states in different directions in approaching international norms.

CHAPTER FOUR – DISCUSSION OF THE RESULTS

1. Contextualizing the Results of the Research

I. Introduction of the Chapter

This last chapter discusses the results of the thesis, providing context for the findings and answering the research question. The first section deals with the critical aspects of the work, contextualising the differences in the implementation in the analysed countries of the non-refoulement principle and addressing their approach to the jurisprudence of the ECtHR. Particular emphasis will be given to the Russian case, identifying as an explanation of its non-compliance its relationship with the Convention system and its general attitude towards International Law. The second section summarises the findings, understanding which hypotheses have been confirmed and which have been disproven. Attention will be given to the role of the Margin of Appreciation Doctrine and its relevance for the discipline of Comparative International Law.

II. More Institutions, more Protection? The Italian Case between the EU Law and the ECHR

Among the three countries included in this research, Italy appeared to have the best relationship with the European Court of Human Rights, as well evidenced by its inclusion in the countries with "Sparse Criticism" by Popelier, Lambrecht and Lemmens. While in Russia and the UK, political parties and government officials have often criticised the interference of the Court in domestic matters doubting the legitimacy of this intrusion, the Convention system in the Italian political debate is practically absent. As Giuseppe Martino observed, the discourse around the Convention is confined to the judiciary and the academic world, while politicians and media refrain from engaging in debates over the Convention, presumably because of a general lack of knowledge of the topic.[278] On multiple

[278] Giuseppe Martinico, 'Italy: Between Constitutional Openness and Resistance' in Patricia Popelier, Sarah Lambrecht, and Koen Lemmens (eds), *Criticism of the European Court of*

occasions public statements released by political exponents and commentators have confused the ECHR as part of the EU institutions, failing to correctly inform the general public. As a result, the strong criticism of the Convention in the UK or the debate surrounding the European Union in Italy does not find equivalent coverage in the ECHR Italian discourse. This of course comes with exceptions, notably when judgements of the ECtHR affected issues of high cultural sensibility. It was the case of the *Lautsi* judgement,[279] which obtained exceptional relevance and met strong opposition from the political world, not limited by conservative parties, and civil society.[280] However, even in such cases, the Italian membership to the ECHR has not really been put into discussion.

Besides the general lack of political criticism, another relevant point to contextualize the differences that emerged between Italy and the other two countries in the implementation of the Convention in the matter of non-refoulement is the Italian membership to the European Union, which adds an additional layer to the defence of the right in the country. In the first chapter, the "Fragmentation Literature" was introduced as the strain of literature that deals with the fragmentation of International Law into multiple regimes that constantly interact with each other. This is well reflected in the triangular relationship between national protection, ECHR protection and EU protection of human rights, which are intertwined in their nature and their interaction has been able to produce positive effects for individuals in search of protection. As argued by Maja Meinard, while it is not excluded that conflicts can arise between the different international regimes, more often this plurality is beneficial to those whose rights are protected, thanks to the possibility to choose where to make their claims (i.e. Forum Shopping),[281] allowing the victims of Human Rights violation to pursue the maximization of their protection.[282] Moreover, the European Courts do not exist in sealed compartments but interact with each other, engaging in a discussion that aims to resolve potential conflicts and foster integration.[283] This dialogue has

Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level (Intersentia 2016) 177
[279] See Chapter 2 section 2.2
[280] Martinico (n 278) 178
[281] Maja Menard, 'Protection of Human Rights – Relations between Legal Orders: National, EU, ECHR' [2023] 79(Special issue) *Zbornik Znanstvenih Razprav* 132
[282] Ibid 143
[283] Menard (n 281) 138

been evidenced in this research in relation to the developments of the Dublin system, when the ECtHR judgement *M.S.S. v. Greece and Belgium* began a juridical discussion that led, in the end, the parties of the system to change their approach to the transfer of asylum seekers and put in doubt the presumption of safety of migrants transferred within the European Union.[284] The Albania deal will be another interesting case of overlapping of jurisdiction, and the preliminary reference to the European Court of Justice is likely to affect in one way or the other the protection of the right in Italy.

In conclusion, the absence of political discourse around the Convention provides a context for the lack of strong criticism which is instead present in the UK and in Russia, and the membership of Italy to the EU guarantees multiple layers of protection for the rights protected in the Convention and, in particular, the principle of non-refoulement. The Italian case does not appear particularly "problematic", in contrast with the UK and Russia which present an attitude towards the Convention that requires an analysis on a deeper level.

III. Political Criticism, Exceptionalism and Legal Culture: The UK Rebellious Approach

In the last chapter, it has been observed how Parliamentary Sovereignty influenced the application of the ECHR within the UK legal system, empowering the political power to influence and to some extent resist the decisions of the European Court of Human Rights. This distinct characteristic of the UK legal tradition led to the Rwanda Scheme crisis, which risked compromising irremediably the relationship between the UK and the system of the Convention with respect to the non-refoulement principle. This legal and political clash did not come out of the blue but it has rather characterized the history of the UK-ECHR relationships.

In providing a context to this intricate relationship, our starting point is the creation of the 1998 Human Rights Act, which made the Convention directly enforceable within the UK legal system. The UK has been part of the Convention since 1951, and while a petition could have been presented to the ECtHR since

[284] See Chapter 3 section 2.1

1961, until the creation of the HRA the Convention could not produce any effect within the UK, resulting in a disconnection between the decisions of the ECtHR and their effects in the domestic setting.[285] The establishment of the link that the HRA provided led in the following years to an increasing criticism of the Court, mainly rooted in the fear of devolution of sovereignty and in the increasing power of the ECtHR. The "Living Instrument Doctrine" has been in particular severely criticized in the UK. The doctrine allows the ECtHR to expand its jurisprudence following an incremental development which takes into account the present conditions of today,[286] leading to concerns about the influence of non-national authorities.[287] Chairing the Committee of Ministers of the Council of Europe in 2012, the UK sought to reaffirm the primary value of the principle of sovereignty within the application of the Convention. The outcome of this effort can be seen in the Brighton Declaration, which stated the fundamental role of the margin of appreciation doctrine and the pivotal role of states in enforcing the Convention.[288]

While the attempt to reaffirm national sovereignty in the application of the Convention was notable, the criticism of the ECtHR did not stop there but made its way into the political debate. Differently from Italy, the Convention became a very sensitive topic in public opinion, dividing the political spectrum. Since 2006, the Conservative Party, later joined in its claims by the UK Independence Party (UKIP), adopted in its political program the repeal of the Human Rights Act and the introduction of a Bill of Rights to replace it. This proposal was later overshadowed by the Brexit agenda, delaying the presentation of the Bill of Rights Bill only in June 2022 once the exit from the European Union was definitely out of the agenda.[289] With the introduction of this Bill, the Conservatives aimed at completely replacing the HRA, de facto rejecting the interference of the ECHR in the UK system. Following the provisions of the Bill, the judgements, decisions and interim measures of the ECtHR would not affect the rights of parliament to legislate since they would not be part of domestic law, and the interpretative duty

[285] Roger Masterman, 'The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?' in P Popelier, S Lambrecht, and K Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016) 450
[286] Tyrer v United Kingdom (1978) Series A no 26, 2 EHRR 1 [31].
[287] Masterman (n 285) 457
[288] Ibid 458
[289] Merris Amos, 'Democratic State, Autocratic Method: The Reform of Human Rights Law in the United Kingdom' (2024) 73(1) ICLQ 2

of the UK courts to comply with the Convention would not be present anymore.[290] The bill would also have prohibited the progressive development of Human Rights Law, in clear contrast with the existing living instrument doctrine of the ECtHR. The adoption of the bill was ultimately unsuccessful since the government decided to withdraw the document because it reached the conclusion that it would not have reached the objectives that its political sponsor delineated when it introduced the bill.[291] The attempt to substitute the HRA with a domestic and separate protection of Human Rights clearly illustrated an aversion within the UK political spectrum towards the constraints that are imposed by the Convention, which later resulted in the creation of the Illegal Migration Act and in the Rwanda Scheme, with their negative implications for the right of non-refoulement and their tension with the ECHR.

It is undoubtful that the Conservative attack on the system of the Convention has been part of an electoral strategy aimed at raising consensus. However, our explanation of the UK distrust should not be limited to reasons of mere political calculus. The desire to uphold the UK Parliamentary Sovereignty over a shared devolution of control to an external Court lies its roots deeper, in the form of a British exceptionalism. Frederick Cowell in his work "*Understanding the causes and consequences of British exceptionalism towards the European Court of Human Rights*"[292] argues that British Exceptionalism can be understood as the reactionary belief, concerning the protection of human rights, that the UK system is intrinsically superior and does not need the intervention of external sources. The arguments that support the exceptionalist nature of the UK system rely on the historical creation of the Magna Carta, identifying its restricting power on the executive as the progenitor of human rights protection, and on the democratic institutions of the UK, which possess a degree of democratic legitimacy that the system of the Convention lacks.[293]

In conclusion, legal tradition, history and political developments have played a major role in the complicated relationship between the UK and the

[290] Ibid 10-11
[291] Ibid 25
[292] Frederick Cowell, 'Understanding the Causes and Consequences of British Exceptionalism Towards the European Court of Human Rights' (2019) 23 *International Journal of Human Rights* 1183
[293] Ibid 1186-1188

European Court of Human Rights. As a result, the differences individuated in the implementation of the non-refoulement protection as defined by the ECHR and the dispute over the Rwanda Scheme are contextualized in a broader national approach to the Court, which sees domestic actors actively fighting against the interference of the Court in domestic political decisions.

IV. Sovereignty First: Contextualizing the Russian Defiance towards ECtHR Provisions

A critical point of the findings of the last chapter lies in the attitude of Russia towards the provisions of the Court, and its reticence to implement the needed changes to abide by the non-refoulement principle as interpreted by the ECtHR. This stance has not been only adopted in relation to Article 3 of the ECHR and the asylum regime in general, but it rather characterized the whole Russian approach to the Convention, when it was a member of it, and more extensively, to International Law.

To correctly frame the Russian contrasts with the ECtHR, it is necessary to first consider the historical context in which the accession to the Convention took place. The ratification of the Convention happened in the aftermath of the fall of the Soviet Union. Russia, emerging from the ashes of a superpower, was in search of a new identity, attempting to integrate itself into the new post-Cold War European ecosystem. In their work in the book "*Criticism of the ECtHR*"[294] Matta and Mazmanyan suggest that the Russian integration within the Council of Europe was driven by considerations of geopolitical identity and status, rather than by political considerations, and by the research of a new identity that led Russia, for the first time, to accept an unprecedented degree of external supervision.[295] While the Court played a significant role in the development of human rights protection in Russia, the country had difficulties reconciling the necessity to respect the role of a rule-taker with the ambition to be a rule-maker

[294] Popelier, Lambrecht, and Lemmens (n 148)
[295] Aaron Matta and Armen Mazmanyan, 'Russia: In Quest for a European Identity' in Patricia Popelier, Sarah Lambrecht, and Koen Lemmens (Eds.), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level* (Intersentia 2017) 483

in the post-Cold War world.[296] Retracing the development of the relationship between Russia and the system of the Convention, severe tensions have constellated the dialogue between the two. The first conflicts have arisen during the first and the second Chechenia wars. The first war effectively delayed the entrance of the Russian Federation in the Convention, while the second war clearly demonstrated the Russian reticence of implementing the judgements of the ECtHR. The impossibility of pursuing applications domestically led to the victims of violation of human rights during the conflict to apply towards the ECtHR, which led to more than 200 judgements that held Russia responsible for violations of the Convention in the region. While monetary compensation to the victims has been awarded, the perpetrators have not been held accountable for their actions.[297] Refusals to implement the provisions of the Convention have been at the centre of other crises. This is the case of the abolition of the death penalty under Protocol 6 of the Convention, which despite its ratification has not seen the abolition of the death penalty itself, but rather a moratorium on executions, making Russia the only country in the Council of Europe with a codified death penalty at the time of its exit from the Convention.[298] On the political level, the ECtHR was not a central topic. The case law of the Court was hardly discussed, with the exception of instances in which it was accused of politicizing its judgements, following a rhetoric of discrimination towards Russia, which led to the delay in the ratification of Protocol 14 of the Convention.[299] Particular relevance was concerning the issue of sovereignty that characterizes the Russian approach to International Courts. A pivotal moment in the worsening of the relationship between Russia and the ECtHR was the *Markin*[300] case of 2012. Markin, who was serving in the Russian military force, was denied parental leaving for his newborn son due to his gender on the basis of the Russian Federal Law and filed an application to the Russian constitutional court challenging the constitutionality of the provision. The case ended up at the Grand Chamber of the ECtHR which confirmed the violation of the provisions of the Convention. Later, the Russian Constitutional Court stated that it would decide the possibility of

[296] Ibid 485
[297] Ibid 487
[298] Ibid 488
[299] Ibid 497
[300] Markin v Russia (2012) 56 EHRR 8

employing constitutional means in implementing an ECtHR judgement for cases that are consistent with the Russian Constitution.[301] The *Markin* case was the object of strong criticism in Russia, where it was perceived as an external interference to the Russian traditional values, and President Medvedev himself intervened in the debate claiming that the Russian authorities would never authorize foreign courts to harm Russian sovereignty and change Russian legislation.[302] In the aftermath of Markin, in 2015 the Russian Constitutional Court issued a judgement following the request of Duma deputies on the constitutionality of provisions included in the ratification law of the ECHR. In this judgement, the Court admitted the possibility of constitutional review of enforceability when an ECtHR judgement contradicts the Constitution.[303] This led to the amendment in the same year of the federal law "On International Treaties of the Russian Federation"[304] which granted the Constitutional Court the power to rule the impossibility of implementing a judgement of the ECtHR in the case this might lead to conflict with the Constitution. This historical digression helps us to contextualize the perpetration of the violations of the non-refoulement principle individuated in the last chapter. The issue of the absence of systemic changes is thus not only related to the analysed principle but rather an indication of a constant pattern in the relationship between Russia and the ECtHR. This tension was exacerbated after the Ukraine conflict leading Russia to be forced to quit the Convention, but has its deep roots in a concept of sovereignty that is difficult to reconcile with the authority of an International external Court, as clearly expressed by the Russian Constitutional Court and by the political authorities of the Country. The very conception of International Law, as presented by the West, is not shared in Russia. As noted by Marina Aksenova and Iryna Marchuk in their work "*Reinventing or rediscovering international law? The Russian Constitutional Court's uneasy dialogue with the European Court of Human Rights*"[305] the

[301] Galina A Nelaeva, Elena A Khabarova, and Natalia V Sidorova, 'Russia's Relations with the European Court of Human Rights in the Aftermath of the Markin Decision: Debating the "Backlash"' (2020) 21 *Human Rights Review* 100
[302] Matta and Mazmanyan (n 295) 97
[303] Nelaeva, Khabarova and Sidorova (n 301) 101
[304] Federal Law No 5-FKZ *'On Amendments to the Federal Law "On International Treaties of the Russian Federation*"' [2015] (RU); Federal Law No 101-FZ 'On International Treaties of the Russian Federation' [1995] (RU).
[305] Marina Aksenova and Iryna Marchuk, 'Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights' (2018) 16(4) *International Journal of Constitutional Law*

interpretation of the Russian Constitutional Court can be framed in the context of a challenge between opposite "*International Law Power Blocks*"[306] and thus as a challenge to the Western narrative of International Law, proposing an alternative conception based on the principles of national sovereignty and self-determination.

In conclusion, the lacklustre implementation of the non-refoulement principle in Russia and the lack of compliance with the provisions of the Court can be ascribed to a broader general trend of the Russian Federation, which demonstrates a high degree of reluctance to accept the interference of the ECtHR and the tendency to prioritize a conception of international law that puts national sovereignty above the respect of international obligations.

2. Framing the Results of the Research: Answering the Research Question(s)

I. Answering the Research Question according to the Results

This dissertation has started with the definition of Comparative International Law, as the discipline which aims to study the similarities and differences in how International Law is understood, interpreted applied and approached by different international actors. The purpose of this work was to question whether or not it is possible to detect such differences in the application of the European Convention on Human Rights, a written treaty integrated with an international court, selecting as a case study the principle of non-refoulement protected by the jurisprudence of the Court under the articles of the Convention. After having researched the implementation of the Convention in the national legal frameworks, the relationship between the countries and the ECtHR, the strategies employed to bargain with the principle, and how the three legal cultures influence the level and the type of compliance with the provisions of the Convention and the decisions of the Court, it can be assessed that, in fact, such differences exist in the three selected countries.

[306] Ibid 1343

In regards to the implementation and approach to the Convention, formal differences have been detected in the integration of the Convention within the systems, with the UK standing out for its dualist system reinforced with the principle of Parliamentary Sovereignty that allows political power to impose itself on its international obligations and the Russian Federation which has been reluctant to comply with the required updates to its legal system, in respect of a conception of International Law which sees sovereignty and non-interference as supreme values. The work has also illustrated how the very hierarchy of the Convention depends on the legal system that implements it, and it can be clarified over time, as it has been the case for Italy after the 2007 twin judgments and the aftermath of the *Marvin* case for Russia. The presence of supranational structures provides another layer of protection in the case of non-refoulement, effectively expanding the legal constraints of states, resulting in a higher degree of effective protection, as shown in the Italian case regarding the role that is being played by the Court of Justice of the EU in the Albania scheme. Substantive differences in the implementation of the Convention have been detected in the analysis of the practices of states to protect the right of non-refoulement, with the Russian case-logic approach to the protection of refoulement that discloses a lesser level of respect to the Real Risk criterion than the one present in Italy and the UK. Meanwhile, practices of externalization have been compared, showing how these are still evolving in new forms such as the agreements with Rwanda and Albania that might lead to the emergence of a new practice in migration control and in the conception of non-refoulement. The understanding and interpretation of the provision also seemed to vary across the states. The obligation of protection under the processing of a temporary asylum request has been regarded as mandatory in the UK and Italy, while in Russia, during its membership to the ECHR such right was not granted.

In conclusion, the initial hypothesis appears to have been proven correct, and the differences previously summarized are responsible for the existence of three distinct systems of protection of non-refoulement, identical in their premises (i.e. The provision developed by the ECtHR jurisprudence) but dissimilar in their national declinations.

II. The Role of the Margin of Appreciation Doctrine

Despite the positive outcome of the research, not all hypotheses have been proven correct. In the second chapter of the thesis, the margin of appreciation doctrine was introduced as the tool employed by the European Court of Human Rights and later included in the Convention itself to allow a degree of discretion to member states in implementing the provisions of the ECHR. By its very description, the doctrine seems the perfect instrument to frame the differences in the national approaches to the Convention. Bearing that in mind, it has been suggested the idea that the margin of appreciation could have been the key to explaining differences also in the implementation of the non-refoulement principle. However, this assumption has been proven false. The absolute character of Article 3 of the Convention prevents the member states from balancing this right with other interests of the individuals or the society. This has been illustrated in the *Chalal* and *Saadi* cases, which cemented the impossibility of adopting discretion in the enforcement of the right even in cases concerning national security and terrorism. As a result, all repatriations that happen when the individual is at risk of torture or inhuman or degrading treatment are considered breaches of the Convention, regardless of the contingencies. It must be noted that such rigidity has not prevented states from continuing to adopt a narrower level of protection, like in the Russian case, or to voice their dissent and take action disregarding the guidelines of the ECtHR, like in the Rwanda Scheme crisis. Nevertheless, the Margin of Appreciation doctrine appears to be a great starting point for further comparative research, as due to its employment, those who seek to enquire about the practical declinations of the ECHR would benefit from the development of Comparative International Law.

III. Limits of the Research and Recommendations for Future Studies

On a final note, some limitations of the research should be addressed. The first limitation concerns the scope of this work. The field of study was limited to the non-refoulement principle as derived by the ECHR, thus framing its analysis on the European Continent and in its definition by Strasbourg. Within the member

states of the Council of Europe, only three countries have been considered and the results, while sufficient for answering the research question, cannot detect all the different national approaches to the principle. In this regard, studies that encompass a wider range of countries or that compare the non-refoulement in different areas of the world could provide a better picture to assess the different levels and ways of protection. Meanwhile, this case study could not employ the doctrine of the margin of appreciation, which could be a powerful tool in the study of other rights of the Convention, probably detecting even more differences in the national declinations of the provisions. Finally, while it has been observed how the integration of the Convention has evolved in the Italian case, a similar approach could be applied to other countries, employing a diachronic method to observe how the evolution of the relationship between national authorities and courts and the Convention system has developed, and if and how the degree of human rights protection has varied across the years accordingly.

CONCLUSIONS

This work aimed to address the complexity that characterizes the enforcement of International Law. This research showed that despite the existence of international courts, and despite the high level of institutionalization of international treaties, the domestic regimes maintain a pivotal role in determining how international provisions are translated in reality. As a result, the study of international norms cannot overlook the national dimensions, and the comparative method represents a powerful tool to understand issues of enforcement and application of such norms. To advance the promotion of human rights, and to understand where and why international mechanisms of protection fall short, legal tradition, culture and national politics are a fundamental starting point.

The analysis of the three case studies offered a comprehensive perspective on the connection between domestic factors and the implementation of International Law. Constitutional principles, such as Parliamentary Sovereignty, can challenge the full adherence to international obligations. History and tradition can also influence the implementation of structural changes required by international courts, as demonstrated by the Italian response to the *Hirsi Jamaa* judgment[307] in contrast to Russia's repeated instances of resistance. Public opinion, political priorities, and geopolitics shape governmental actions, sometimes driving them to restrict[308] or expand[309] the protections arising from international commitments. Finally, the element of time plays a crucial role in the interpretation and application of International Law, which may vary depending on constitutional reforms or evolving legal interpretations, as exemplified by Italy's enforcement of the European Convention on Human Rights following the 2007 "twin judgments."[310] Whether states can enjoy a margin of appreciation or not, it remains evident that domestic factors continue to exercise a significant influence on the national implementation of the Convention.

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[307] *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012)
[308] This happened in the UK as a result of the Government's tough stance on migration. D'Angelo (n 239)
[309] The shipwrecks of multiple migrants' boats caused a severe shock in the Italian public opinion, leading the Letta and Renzi governments to halt Italy's externalization policies between 2013 and 2016. Echeverría, Abbondanza, Finotelli (n 207) 6
[310] Brauer (n 170)

In light of this, the extension of Comparative International Law to International Human Rights Law does not justify human rights violations, but it rather helps us to read them in a broader context, and to address them accordingly.[311] In times in which global instability leads entire populations displaced and in conditions of vulnerability, the role of provisions like the non-refoulement principle appears to be more important than ever. While the aspiration of reaching global common standards of protection remains, these issues should not be approached with naivety, but rather with a pragmatic and real-world-oriented approach. In this regard, the development of Comparative International Law opens new opportunities to frame the national resistance to human rights obligations and it represents a powerful tool for the development of mechanisms that, aware of national sensibilities, aim to expand such protections further.

[311] Forteau (n 49)

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