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## **FINAL REPORT**

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# Non-Refoulement

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Background Paper for the technical workshop on Human Rights and International Cooperation in Counter-Terrorism, Liechtenstein, 15-17 November 2006  
OSCE Office for Democratic Institutions and Human Rights and UN Office of the High Commissioner for Human Rights

**T**HE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS, states that ‘[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.<sup>1</sup> The norm declared in article 19(2) of the European Charter is often described as the principle of non-*refoulement*. Although the European Constitution of which it is a part has not yet been adopted, the Charter is important as an authoritative contemporary statement of basic human rights norms. Article 19(2) of the *Charter* is an effort at codification of the case law of the European Court of Human Rights.<sup>2</sup>

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**Note: Opinions expressed in this paper are not necessarily those of the OSCE-ODIHR or the OHCHR.**

<sup>1</sup> *Charter of Fundamental Rights*, [2000] OJ C364, art. 19(2). A similar formulation appears in paragraph 13 of the preamble of the Council of Europe Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 13 June 2002, 2002/584/JHA. On the Charter, see: François Julien-Laferrrière, ‘Article II-79 – Protection en cas d’éloignement, d’expulsion et d’extradition’, in Laurence Burgorgue-Larsen, Anne Levade & Fabrice Picod, *Traité établissant une Constitution pour l’Europe, Commentaire article par article*, Vol. II, Brussels: Bruylant, 2005, pp. 269-279.; Henri Lebayle, ‘Article 19’, in *EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union*, June 2006.

<sup>2</sup> ‘Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, 11 October 2000, Explanations, p. 21.

many terrorist suspects.<sup>11</sup> In addition, article 33(2) itself declares that the principle of non-*refoulement* may not be claimed by a refugee about whom ‘there are reasonable grounds for regarding as a danger to the security of the country in which he is’. It is argued, however, that these exceptions do not apply in cases where the individual will be exposed to torture. Because of the absolute prohibition of torture under international law,<sup>12</sup> the exceptions that appear to authorise *refoulement* do not apply in such a case. For most countries, a debate about whether there is an implied limitation on *refoulement* contained within the Refugee Convention will be largely academic, however, because in any event the State will be subject to other treaty obligations, notably article 3 of the *Convention Against Torture*, where non-*refoulement* is set out explicitly, and the anti-torture provisions of the general human rights treaties, where it is implied. Although this is known as ‘complementary protection’, the human rights regime governing non-*refoulement* has largely taken over that of the Refugee Convention, which is gradually becoming virtually superfluous.<sup>13</sup>

### **Non-*refoulement* as a general norm of international human rights law**

The principle of non-*refoulement* has been enlarged by modern international human rights law, applying to broader categories of individuals, and not only refugees or asylum-seekers.<sup>14</sup> It may also apply to a larger range of threats to the individual in question and,

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<sup>11</sup> ‘Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel inhuman or degrading treatment or punishment’, UN Doc. A/57/173, para. 28.

<sup>12</sup> See, e.g., Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 July 1990, para. 12(3): ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or another public emergency, may be invoked as a justification of torture’.

<sup>13</sup> See, e.g., Brian Gorlick, ‘The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees’, (1999) 11 *International Journal of Refugee Law* 479; David Weissbrodt & Amy Bergquist, ‘Extraordinary Rendition: A Human Rights Analysis’, (2006) 19 *Harvard Human Rights Journal* 123; Hélène Lambert, ‘Protection Against *Refoulement* From Europe: Human Rights Law Comes to the Rescue’, (1999) 48 *International and Comparative Law Quarterly* 515.

<sup>14</sup> As was acknowledged by the European Court of Human Rights in *Chahal v. United Kingdom*, 15 November 1996, Reports 1996-V, para. 80.

Prohibition of expulsion or return ("*refoulement*")

(1) No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>5</sup>

The *Declaration on Territorial Asylum* adopted in a unanimous resolution of the United Nations General Assembly, in 1967, is to similar effect.<sup>6</sup> Within the international law governing the protection of refugees and asylum seekers, there are several other formulations of the principle, such as the 1966 *Asian-African Refugee Principles*,<sup>7</sup> the *Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa*<sup>8</sup> and the *Cartagena Declaration*.<sup>9</sup>

The Refugee Convention only applies to those whose refugee status has been recognized. Moreover, it explicitly excludes persons about whom there are 'serious reasons for considering' that they have committed international crimes or 'acts contrary to the purposes and principles of the United Nations'.<sup>10</sup> These 'exclusion clauses' certainly cover

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<sup>5</sup> *Convention Relating to the Status of Refugees*, (1954) 189 UNTS 137.

<sup>6</sup> GA Res. 2132 (XXII), art. 3.

<sup>7</sup> 'Report of the Eighth Session of the African-Asian Legal Consultative Committee held in Bangkok from 8 to 17 August 1965', p. 335, art. III(3).

<sup>8</sup> (1969) 1001 UNTS 3, art. II(3).

<sup>9</sup> 'Colloquium on the International protection of Refugees in Central America, Mexico and Panama, Conclusions', 1984, Section III, para. 5.

<sup>10</sup> *Convention Relating to the Status of Refugees*, (1954) 189 UNTS 137, art. I(F)(c).