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Exploring the Margin of Appreciation Doctrine of the European Court of Human Rights in the Context of the Absolute Prohibition of Refoulement: A Doctrinal Analysis

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1. Introduction

On 12 February 2025, the European Court of Human Rights (in the following: the Court) held three Grand Chamber hearings: *R.A. and Others v. Poland*[1], *H.M.M. and Others v. Latvia*[2] and *C.O.C.G. and Others v. Lithuania*[3]. All three cases concern the events at the border between the European Union and Belarus in summer 2021. Thousands of people were forcefully kept in this border zone and violently pushed by border guards of Belarus and respectively Poland, Latvia and Lithuania towards and away from European territory.[4] This act of hindering protection seekers from crossing state borders by intercepting them on land or sea and forcefully returning them to a neighbouring country, without conducting individual assessments about their need to protection is referred to as 'pushbacks'.[5]

Such pushback practices raise serious concerns regarding possible violations of states' obligations under international human rights law, such as the prohibition of collective expulsion and, most notably, the principle of *non-refoulement*. The latter proscribes states from removing a person to a country where they would be at risk of being subjected to torture or to inhuman or degrading treatment or punishment.[6] This principle is enshrined in absolute terms[7] in Article 3 of the European Convention of Human Rights (in the following: ECHR),[8] and will be the focus of this thesis.

While the Grand Chamber cases differ in facts and alleged violations, all three cases involve allegations of pushback at the hands of the authorities of the responding states. In response to this claim, all three governments devoted a significant part of their pleadings to the claim that Europe has entered into a new era of a changed security environment and is experiencing 'hybrid attacks' by Belarus and Russia. According to the state representatives, the migrants subject to their pushbacks were 'instrumentalised' by Belarus.

All three state parties claimed that this new context of a 'hybrid war' must be taken into account by the Court when assessing the alleged violations of the principle of *non-refoulement*. The Latvian government argued that what they were experiencing is not a conventional migration crisis but a deliberate attempt of Belarus to attack fundamental democratic freedoms.[9] The state representative of Lithuania claimed that Belarus is 'using the Convention as a weapon against our

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[1] *R.A. and Others v. Poland* (pending) App no 42120/21 (European Court of Human Rights).
[2] *H.M.M. and Others v. Latvia* (pending) App no 42165/21 (European Court of Human Rights).
[3] *C.O.C.G. and Others v. Lithuania* (pending) App no 17764/22 (European Court of Human Rights).
[4] Aurel Sari, 'Hybrid CoE Paper 17: Instrumentalized migration and the Belarus crisis: Strategies of legal coercion' (April 2023) 11, 13 <https://www.hybridcoe.fi/wp-content/uploads/2023/04/20230425-Hybrid-CoE-Paper-17-Instrumentalized-migration-and-Belarus-WEB.pdf> accessed 10 May 2025; Katarzyna Czarnota and others, 'Humanitarian crisis at the Polish-Belarusian border' (10 December 2021) 12-13 <https://konsorcjum.org.pl/wp-content/uploads/2023/10/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf> accessed 10 May 2025.
[5] Flor Didden, 'Pushed, beaten, left to die: European Pushback Report 2024' (February 2025) 2–3 <https://11.be/sites/default/files/2025-02/Pushbacks%20Report%202024.pdf> accessed 30 April 2025.
[6] *Soering v. the United Kingdom* (1989) App no 14038/88 [88–91] (European Court of Human Rights); see for a critical analysis: Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 196–197, 202-206.
[7] *Soering v. the United Kingdom* (n 6) [88].
[8] 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', Article 3 of the European Convention on Human Rights 3 September 1953, ECHR (Council of Europe).
[9] Grand Chamber hearing on 12 February 2025 of *H.M.M. and Others v. Latvia* (n 2).

democracy'.[10] He therefore urged the Court that for the 'situation at stake we must develop another standard' and that 'the Convention's tools to respond to [the] instrumentalisation of migration [must be] in balance with fundamental human rights' not only of migrants 'but also the rights of the people of my state, the security and well-being of the people of the Contracting parties'.[11] He concluded by stating that 'at these difficult times [with] the geopolitical situation and war in Europe, my government and people expect protection by this Court'.[12]

In response, during the oral hearing of *R.A. and Others v. Poland*, Judge Bårdsen, articulated his concern that the Convention 'is construed in a way that does not open for a [...] balancing between the rights protected in Article 3 [...], on the one side, and on the other side, public interests, even if they should be very weighty.'[13] He continued, noting that the governments of Poland, Latvia and Lithuania had 'nevertheless submitted that there is [...] room for such a balancing exercise, [and] [...] that the member states enjoy a margin of appreciation in this respect, notably in light of their need to protect the integrity of their borders'.[14] He asked all three state parties how this 'apparent paradox or inherent tension' could be explained in valid legal terms, and whether it would 'be worthwhile for the Court to explore even further the well-established distinction between negative and positive obligations' under Article 3 ECHR.[15]

The absolute nature of Article 3 ECHR in general,[16] as well as the absolute nature of states' obligations under *non-refoulement* in particular[17] and what this characterisation as 'absolute' entails for the Court's assessment of Convention states' actions, has been the subject of extensive academic debate. Some authors suggest that the absolute nature of Article 3 ECHR allows for balancing with state interests also with respect to *non-refoulement*. For example, Hemme Battjes argues that 'the application of the prohibition of refoulement always involves some form of balancing, and that reference to the "absolute nature" [only] serves to emphasize the interests of the individual opposing expulsion.'[18] Others, such as Stijn Smet, while acknowledging that the Court 'relies on considerations of proportionality and balancing' when adjudicating certain types of Article 3 ECHR cases,[19] argue that for Article 3 ECHR to be truly

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[10] Grand Chamber hearing on 12 February 2025 of *C.O.C.G. and Others v. Lithuania* (n 3).
[11] ibid.
[12] ibid.
[13] Grand Chamber hearing on 12 February 2025 of *R.A. and Others v. Poland* (n 1).
[14] ibid.
[15] ibid.
[16] Michael K Addo and Nicholas Grief, 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9(3) European Journal of International Law 510; Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23(4) Netherlands Quarterly of Human Rights 674; Natasa Mavronicola, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723; Stijn Smet, 'The 'absolute' prohibition of torture and inhuman or degrading treatment in Article 3 ECHR: Truly a question of scope only?' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).
[17] with a focus *non-refoulement*, see: Natasa Mavronicola and Francesco Messineo, 'Relatively Absolute? The Undermining of Article 3 ECHR in Ahmad v UK' (2013) 76(3) The Modern Law Review 589; Hemme Battjes, 'In Search of a Fair Balance: The Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed' (2009) 22(3) Leiden Journal of International Law 583.
[18] Battjes (n 17), 586.
[19] Smet (n 16) 293.

absolute, its application must be 'purely a matter of scope' and explicitly exclude any proportionality considerations or direct balancing of interests.[20]

However, literature discussing the absolute nature of *non-refoulement* fails to adequately address the implications of this absoluteness for the Court's application of the margin of appreciation doctrine as a means of accommodating state interests. In an article from 2008, Martijn den Heijer assumes that states enjoy a 'wide margin of appreciation [...] in issues of expulsion and extradition'.[21] He bases this conclusion on the Court's reiteration in expulsion cases that 'Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens.'[22] Although he acknowledges that 'the right of States to control the entry of aliens is not unfettered but subject to the Court's scrutiny',[23] he does not explain how his conclusion that states enjoy a wide margin of appreciation aligns with the absolute nature of Article 3 ECHR, nor how it informs the Court's scope of review with regard to states' negative and positive obligations under *non-refoulement*.

In 2001, Yutaka Arai-Takahashi discussed the application of the margin of appreciation doctrine in cases of immigration control, concluding that absolute rights, particularly Article 3 ECHR, leave only little room for the margin of appreciation.[24] He argued that, '[s]overeign factors cannot be decisive especially when pressing humanitarian elements intervene in cases of expulsion and deportation, where applicants would risk life or health or face the risk of being exposed to conditions amounting to inhuman treatment.'[25] Arai-Takahashi also briefly reflects on positive obligations under Article 3 ECHR in general,[26] but does not specifically consider states' obligations under *non-refoulement*.

Thus, while some analysis exists on the applicability of the margin of appreciation doctrine in the context of immigration control, the state of the literature reveals a gap in examining its applicability to the negative and positive obligations of states under the absolute prohibition of *refoulement*. Furthermore, as the Court provided an extensive outline of the contracting states' negative and positive procedural obligation under *non-refoulement* in the 2019 case of *Ilias and Ahmed v. Hungary*[27], an updated assessment of the matter is all the more relevant.

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[20] ibid 275.

[21] Maarten den Heijer, 'Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights' (2008) 10(3) European Journal of Migration and Law 277, 287.

[22] *Chahal v. the United Kingdom* (1996) 22414/93 [73] (European Court of Human Rights); see also *Savran v. Denmark* (2021) App no 57467/15 [124] (European Court of Human Rights) regarding the expulsion of seriously ill aliens ; and *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (1985) App nos 9214/80; 9473/81; 9474/81 Series A No 24 [67] (European Court of Human Rights) with regard to Article 8 ECHR.

[23] Heijer (n 21), 287.

[24] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001) 210.

[25] ibid.

[26] ibid 210, 219-220.

[27] *Ilias and Ahmed v. Hungary* (2019) App no 47287/15 (European Court of Human Rights).

1.1. Research Question and Structure

This thesis therefore seeks to provide an answer to the question:

> Does the absolute prohibition of *refoulement* under Article 3 of the European Convention on Human Rights grant states a margin of appreciation?

This question will be answered by addressing the following sub-questions:

- How does the Court's interpretation of Article 3 ECHR lead to it being classified as absolute? What are the consequences of this classification?
- How did the Court derive the principle of *non-refoulement* from this absolute prohibition of ill-treatment?
- What are the negative and positive obligations of states the Court established with regard to expulsion cases under Article 3 ECHR?
- How does the margin of appreciation doctrine serve to accommodate state interests?
- How does the margin of appreciation affect the Court's scope of review?
- In which contexts is the margin of appreciation doctrine applied?
- How does the Court determine its scope of review with regard to states' negative and positive obligations under absolute rights?
- Does the Court grant states a margin of appreciation with regard to the absolute prohibition of *refoulement* in cases involving a return to the country of origin or a removal to a third country in pushback scenarios?

This thesis is structured to address the aforementioned sub-questions. It begins by first taking a close look at the absolute nature of Article 3 ECHR and considering how its absolute character informs the obligations of the contracting states under the principle of *non-refoulement* (Chapter 2). This chapter will examine the negative and positive obligations of states in detail. Secondly, the thesis will introduce the margin of appreciation doctrine, which is used in the Court's case law as a key tool to take states' interests into account (Chapter 3). The core of the thesis will then apply the margin of appreciation doctrine to the obligations of states under the prohibition of *refoulement* (Chapter 4). The aim of this chapter will be to answer the research question of whether the absolute nature of *non-refoulement* allows for a margin of appreciation for states. This will be established by determining the Court's scope of review in cases involving a return to the country of origin or a removal to a third country in pushback scenarios. The thesis will conclude by summarising the findings of the previous chapters and providing a concrete answer to the research question (Chapter 5).

This thesis will come to the conclusion that the negative obligation of states under the absolute prohibition of *refoulement* leaves no room for a margin of appreciation to be granted to states. Regarding the positive procedural obligation, the Court will conduct its own risk assessment in cases of both return to the country of origin and removal to a third country. Therefore, the positive procedural obligation does not allow for a margin of appreciation with regard to the substantive assessment of the risk. However, states do enjoy a margin of appreciation with regard to their considerations of the specific modalities of the assessment and the resources invested.

1.2. Methodology

This Master's thesis applies a classical doctrinal research method.[28] The doctrinal method is a two-part process, involving 'first locating the sources of the law and then interpreting and analysing the text'.[29] This thesis therefore seeks first to 'determine[...] a statement of the law'[30] by examining the Court's case-law on Article 3 ECHR, as well as on the margin of appreciation doctrine. As there is a large body of case law on Article 3 ECHR, the thesis will focus mainly on Grand Chamber cases, with a particular emphasis on expulsion and pushback cases. Only where necessary will Chamber cases be analysed. This thesis does not aim to provide a comprehensive analysis of the Court's case-law on Article 3 ECHR. Instead, it will examine specific cases cited in the consulted academic literature that provide answers to the research question and help to construct the legal argument. Particular focus will be given to the 2019 judgment in the case of *Ilias and Ahmed v. Hungary*[31], as it provides a detailed account of the positive procedural obligation of states under the principle of *non-refoulement*. In addition to examining the relevant case-law, this thesis will also assess the academic literature on the subject of the absolute nature of Article 3 ECHR, as well as the negative and positive obligations under the principle of *non-refoulement* and the margin of appreciation doctrine under the Convention.

In line with the doctrinal method, the thesis will, after having determined the state of the law, in a second step, analyse the court's case law using 'inductive reasoning'.[32] Inductive reasoning is defined as the 'process of arguing from specific cases to a more general rule'.[33] This thesis will also make use of '[a]nalogy [which] proceeds on the basis of a number of points of resemblance of attributes or relations between cases'.[34] In order to do so the thesis will also draw on the presented academic literature.

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[28] Terry Hutchinson, 'Doctrinal Research: Researching the jury' in Dawn Watkins and Mandy Burton (eds), *Research methods in law* (Second edition. Routledge Taylor & Francis Group 2018) 13-15, 18; See also Gareth T Davies, 'Taming Law: The Risks of Making Doctrinal Analysis the Servant of Empirical Research' [2021] SSRN Journal, 3–4 accessed 10 May 2025.
[29] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2014) 17(1) Deakin Law Review 83, 110.
[30] ibid.
[31] *Ilias and Ahmed v. Hungary* (n 27).
[32] Hutchinson and Duncan (n 29), 111.
[33] ibid.
[34] ibid quoting John H Farrar, Legal Reasoning (Thomson Reuters, 2010) 91.

2. The Absolute Prohibition of *Refoulement*

In order to answer the question of whether the absolute prohibition of *refoulement* under Article 3 ECHR allows the Court to grant states a margin of appreciation, it is crucial first to explain how the Court's interpretation of Article 3 ECHR led to its classification as absolute, and what the consequences of this classification are. Secondly, this chapter will explain how the Court derived the principle of *non-refoulement* from this absolute prohibition of ill-treatment. Finally, the chapter will outline the negative and positive obligation of states with regard to expulsion cases under Article 3 ECHR, as established by the Court.

2.1. The Absolute Nature

In its jurisprudence on Article 3 ECHR the Court has repeatedly held that '[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct'[35] (in the following: prohibition of ill-treatment).

The Court derives this absolute nature by applying a literal and contextual interpretation of Article 3 ECHR, emphasising that the text of the provision 'makes no provision for exceptions'.[36] In this regard Article 3 ECHR is '[u]nlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4',[37] which contain an explicit limitation clause.[38] The Court thus applies Article 3 ECHR as an unqualified right in 'one step only', characterising the act complained of as torture or inhuman or degrading treatment or punishment.[39] In contrast to qualified rights, which are applied by the Court in two steps: first, characterisation of the act in question as interference with the claimed Convention right, and second, assessment whether this interference can be justified under the Convention.[40] Any infringement of Article 3 ECHR is therefore conclusively unlawful.[41] Furthermore, the Court highlights that 'under Article 15 para. 2 (art. 15-2), there can be no derogation [from Article 3] even in the event of a public emergency threatening the life of the nation'.[42] Article 15 ECHR provides for derogations from obligations under the Convention in exceptional and limited circumstances and lists Article 3 ECHR as a non-derogable right under Article 15(2) ECHR.

This leads the Court to conclude that 'absolute' means the absence of any possibility of justifying interferences.[43] Furthermore, in *Soering v. the United Kingdom*, the Court stated that this absolute nature '*shows* that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe'.[44] This phrasing has been reiterated in subsequent case law, with the addition that the prohibition of ill-treatment is 'also a value of civilisation closely bound up with respect for human dignity, part of the very essence of the Convention'.[45]

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[35] *Ireland v. the United Kingdom* (1978) App no 5310/71 [163] (European Court of Human Rights).
[36] ibid.
[37] ibid.
[38] Battjes (n 17), 587.
[39] ibid.
[40] ibid.
[41] Mavronicola (n 16), 737.
[42] *Ireland v. the United Kingdom* (n 35) [163].
[43] Battjes (n 17), 588.
[44] *Soering v. the United Kingdom* (n 6) [88], emphasis added.
[45] *Ilias and Ahmed v. Hungary* (n 27) [124].

2.2. The Prohibition of *Refoulement*

The 'absolute' character of Article 3 ECHR thus serves to express the fundamental nature of the underlying value of the prohibition of ill-treatment, which in turn 'informs us about the scope of the provision'.[46] Drawing on this fundamental importance, the Court in *Soering v. the United Kingdom* concluded that

> [i]t would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture [...]. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).[47]

In this 1989 case, the Court established for the first time[48] that the fundamental value underlying the prohibition of ill-treatment extends the scope of that provision to include cases of extradition.[49] In *Cruz Varas and Others v. Sweden*, the Court found this to apply also 'to expulsion decisions and a fortiori to cases of actual expulsion.'[50] Thus, the prohibition of expulsion resulting in ill-treatment – the principle of *non-refoulement* – is to be understood as an inherent aspect of the Convention's fundamental values.[51]

Relying on the aforementioned textual, contextual, and fundamental value arguments, the Court reaffirmed in *Chahal*[52] and *Saadi*[53] that '[t]he prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases.'[54]

2.2.1. States' Negative Obligation: Not to Remove

The following two sub-chapters will outline the obligations of the contracting states under the principle of *non-refoulement*, as established by the Court. Setting out the negative and positive obligations of states under *non-refoulement* in detail will be crucial for later assessing whether the Court grants states a margin of appreciation with regard to these obligations.

The Court most commonly applies the following definition of the prohibition of *refoulement*:[55]

> [E]xpulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment

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[46] Battjes (n 17), 593.
[47] *Soering v. the United Kingdom* (n 6) [88].
[48] Mavronicola and Messineo (n 17), 595.
[49] Battjes (n 17), 593; with reference to the explicit wording of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 26 June 1987, CAT (United Nations).
[50] *Cruz Varas and Others v. Sweden* (1991) App no 15576/89 Series A No 201 [70] (European Court of Human Rights).
[51] Battjes (n 17), 593.
[52] *Chahal v. the United Kingdom* (n 22) [80].
[53] *Saadi v. Italy* (2008) App no 37201/06 Reports of Judgments and Decisions 2008 [127, 138] (European Court of Human Rights).
[54] *Chahal v. the United Kingdom* (n 22) [80].
[55] Battjes (n 17), 600.

> contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country.[56]

While some argue that the principle of *non-refoulement* can be understood as a positive obligation,[57] – 'an obligation to prevent ill-treatment, in cases where the state is willing to expel an alien',[58] – the negative wording[59] ('not to deport the person') suggests that it is essentially a negative obligation.[60] This reasoning follows the principle that 'positive obligations are defined [...] as obligations to act and negative obligations as obligations not to act'.[61] The Court seems to emphasise the negative element[62] – to refrain from the action of expelling – stating in *Soering v. the United Kingdom* that '[i]n so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State *by reason of its having taken action* which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'[63] As Battjes rightly points out, '[l]iability for taking action is liability for a negative obligation.'[64]

2.2.2. States' Positive Obligation: Individual Assessment

In addition to the negative obligation, not to remove, the Court in *Soering v. the United Kingdom* held that the 'establishment of such responsibility inevitably involves an assessment of conditions' in the receiving country against the standards of Article 3 ECHR.[65] Only if the extraditing state conducts a 'rigorous' assessment 'of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3'[66] will it be enabled to fulfil its absolute negative obligation under Article 3 ECHR. During the oral hearing of the pending case *H.M.M. and Others v. Latvia*[67], on 12 February 2025 in Strasbourg, the applicants' representative, Naomi Hart, highlighted this close relationship between the negative and positive obligations derived from Article 3 ECHR, describing them as 'intimately intertwined'.[68] If the removing state fails to carry out a proper risk assessment, this failure could result in a person being removed to a country where he or she would face serious harm. This, in turn, would violate the negative obligation of the state not to remove individuals to a state where they face a real risk proscribed by Article 3 ECHR. The fulfilment of the absolute negative obligation thus depends on the strict fulfilment of the positive obligation,[69] rendering the latter absolute in nature too. This was explicitly recognised by the Court in *Ilias and Ahmed v. Hungary*, where it was stated that the 'procedural obligation, [stems] from the absolute nature of the prohibition of ill-treatment under Article 3' ECHR.[70]

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[56] *Saadi v. Italy* (n 53) [125].
[57] For a more detailed discussion see Battjes (n 17), 600–606; and Heijer (n 21), 290–291.
[58] Battjes (n 17), 606.
[59] ibid 600.
[60] Heijer (n 21), 290.
[61] ibid.
[62] Battjes (n 17), 600–601.
[63] *Soering v. the United Kingdom* (n 6) [91], emphasis added.
[64] Battjes (n 17), 601.
[65] *Soering v. the United Kingdom* (n 6) [91].
[66] *Ilias and Ahmed v. Hungary* (n 27) [127].
[67] *H.M.M. and Others v. Latvia* (n 2).
[68] Alison J Beuscher and others, 'The Claim of Hybrid Attacks: Balancing State Sovereignty and Migrants' Rights at the European Court of Human Rights' (21 February 2025) <https://verfassungsblog.de/hybrid-attacks/> accessed 12 May 2025.
[69] ibid.
[70] *Ilias and Ahmed v. Hungary* (n 27) [162].

The Court thus established a positive 'procedural obligation' for states to conduct an individual assessment depending on all the circumstances of the case.[71] In *Ilias and Ahmed v. Hungary*, the Court set out in detail what this procedural obligation under the absolute prohibition of *refoulement* entails for the contracting states.[72] It acknowledged that 'the content of the expelling State's duties under the Convention, may differ.'[73] The Court distinguishes between cases in which the state authorities choose to remove the protection seeker to his or her 'country of origin or a third country and, in the latter situation, on whether the expelling State has dealt with the merits of the asylum application or not.'[74]

In the case of a return to the country of origin, the expelling authorities bear the duty to 'examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin'.[75] In cases where the authorities choose to remove a protection seeker to a third country, the Court has stated that

> this leaves the responsibility of the Contracting State intact with regard to its duty not to deport them if substantial grounds have been shown for believing that such action would expose them, directly (i.e., in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to, in particular, Article 3.[76]

Consequently, the removing state must first assess, prior to removal, 'whether or not the individual will have access to an adequate asylum procedure in the receiving third country',[77] protecting him or her against *refoulement*.[78] That is because the removing state acts on the basis that the receiving third country will examine the asylum request on its merits.[79] Second, it must assess whether there is a risk of the individual being subjected to treatment contrary to Article 3 ECHR concerning conditions of detention or living conditions for asylum seekers in the receiving third country.[80]

2.2.2.1. Removal to a Third Country with Assessment of the Merits

In the event of a pushback, the country of removal will most likely be a third country for the people affected. In *Ilias and Ahmed v. Hungary*, the Court set out in detail what assessment the state's positive procedural obligation requires in cases of removal to a third country. In response to the Hungarian government's argument that the procedural obligation does not arise, where the individuals concerned allegedly are not 'genuine asylum seekers',[81] the Court emphasised that the contracting states are free to assess the merits of their claims.[82] If the authorities find that the asylum seekers'

> claims are unfounded, or even more so, [...] have no arguable claim about any relevant risk necessitating protection, Contracting States are free, subject to their international obligations, to

[71] ibid [127, 145].
[72] ibid [128–141].
[73] ibid [128].
[74] ibid [142].
[75] ibid [131].
[76] ibid [129].
[77] ibid [131].
[78] ibid [134].
[79] ibid [131].
[80] ibid; *M.S.S. v. Belgium and Greece* (2011) App no 30696/09 [367–368] (European Court of Human Rights).
[81] *Ilias and Ahmed v. Hungary* (n 27) [135], referring to paras 108-111, 118 and 120.
[82] ibid [136].

> dismiss their claims on the merits and return them to their country of origin or a third country which accepts them.[83]

The positive procedural obligation can therefore be fulfilled by the contracting states through an assessment of whether the asylum claim is well-founded by determining whether there is a risk for the person concerned in their country of origin. In this regard, the Court notes that '[t]he form of such examination on the merits will naturally depend on the seriousness of the claims made and the evidence presented.'[84] If the assessment of the merits leads the state to dismiss the individual's claim, the state is 'free, subject to their international obligations, to [...] return them to their country of origin or a third country which accepts them.'[85]

2.2.2.2. Removal to a Third Country without Assessment of the Merits

However, the state may decide not to conduct such an assessment of the merits and still return an individual to a third country. Pushback practices at state borders are characterised by the absence of any individual assessment of asylum claims[86], meaning that the potential risks individuals face in their country of origin are not examined. In this regard, the Court recalls in *Ilias and Ahmed v. Hungary* that when a state decides to return a person seeking protection to a third country without examining the merits of their asylum claim,

> it cannot be known whether the persons to be expelled risk treatment contrary to Article 3 in their country of origin or are simply economic migrants. It is only by means of a legal procedure resulting in a legal decision that a finding on this issue can be made and relied upon.[87]

If the state decides not to provide for a procedure for assessing asylum claims before removal and thus does not issue a legal decision on the merits of such, the Court highlights that

> removal to a third country must be preceded by thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention.[88]

The procedural obligation under the prohibition of *refoulement* thus necessitates a form of individual assessment in any case. In this regard, the state has two options: Firstly, it can 'opt for dismissing unfounded asylum requests after examination on the merits, where no relevant risks in the country of origin are established.'[89] Alternatively, it can 'opt for removal to a third safe country without examination of the asylum claims on the merits, to examine thoroughly whether that country's asylum system could deal adequately with those claims.'[90]

2.2.2.3. Nature and Content of the Individual Assessment

It is not enough for the state to make a 'post-factum finding that the asylum seeker did not run a risk in his or her country of origin' to fulfil the procedural obligation.[91] The Court emphasises that

[83] ibid.
[84] ibid.
[85] ibid.
[86] Didden (n 5) 2.
[87] *Ilias and Ahmed v. Hungary* (n 27) [137].
[88] ibid.
[89] ibid [138].
[90] ibid.
[91] ibid [137].

> [i]f it were otherwise, asylum-seekers facing deadly danger in their country of origin could be lawfully and summarily removed to "unsafe" third countries. Such an approach would in practice render meaningless the prohibition of ill-treatment in cases of expulsion of asylum seekers.[92]

A 'post-factum' assessment could thus potentially engage the state's responsibility under the negative obligation of Article 3 ECHR not to remove a person to a country where he or she would face the risk of indirect *refoulement*. This finding stresses the obligation of national authorities to assess the individual situation of the protection seeker before removal.

The Court further demands that the state's examination of the relevant conditions in the third country concerned must be conducted thoroughly.[93] While it is for the protection seeker to substantiate the

> individual circumstances that the national authorities cannot be aware of, those authorities must carry out of their own motion an up-to-date assessment, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice.[94]

The Court in this regard underlines that the removing state

> cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice [...].[95]

The assessment must primarily be based on the facts known to the national authorities at the time of expulsion.[96] However, the authorities have a duty to seek all relevant information that is generally available.[97] General deficiencies that are well documented in authoritative reports, such as those from the United Nations High Commissioner for Refugees, the Council of Europe, and European Union bodies, are in principle considered to be known.[98]

This chapter has therefore demonstrated that the Court derives the principle of *non-refoulement*, along with its negative and positive procedural obligations, from the absolute nature of Article 3 ECHR. It has also been established that this absolute nature precludes any justification for infringement, leading to the conclusion that the prohibition of *refoulement* does not, in principle, permit balancing with state interests. However, as previously mentioned, another means of accommodating state interests is the scope of review, which is determined by the Court through the margin of appreciation granted to states.

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[92] ibid.
[93] ibid [139].
[94] ibid [141].
[95] ibid.
[96] ibid.
[97] ibid.
[98] ibid.

3. Margin of Appreciation in the Court's Jurisprudence

The following chapter introduces the margin of appreciation as a doctrinal figure applied in the Court's jurisprudence, which grants the contracting states a degree of discretion when implementing the Convention's rights (Chapter 3.1). To answer the research question of whether the prohibition of *refoulement* under Article 3 ECHR grants states a margin of appreciation, it is crucial to understand how the Court conceptualises the doctrine, and under which conditions it may apply to *non-refoulement*. To this end, this chapter describes the effects of the margin of appreciation on the Court's scope of review (Chapter 3.2). Finally, the chapter will examine the context in which the doctrine is applied, focusing particularly on its implications for two-stage rights and positive obligations (Chapter 3.3).

3.1. Doctrinal Figure to Accommodate State Interests

This section will first introduce the margin of appreciation doctrine, exploring its function within the Court's jurisprudence in order to understand why the contracting states are interested in being granted a margin of appreciation, as outlined in the introduction of this thesis.

Macdonald describes the doctrine of the margin of appreciation as illustrating 'the general approach of the European Court of Human Rights to the delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention.'[99] Adopted in 1950, the Convention established a minimum standard of human rights for the contracting states of the Council of Europe.[100] Although these states all shared traditions of democracy and fundamental rights, they also brought with them a diversity of cultural and legal traditions.[101] Furthermore, some scholars have noted a continued rise in deference to the sovereignty of each contracting state, emphasising that the Court's 'legitimacy is fragile'[102] and that its 'undertaking [...] depends on the good faith and continuing cooperation of the contracting states.'[103] The margin of appreciation doctrine was established to address this tension by introducing 'an element of relativity into the uniform interpretation of the Convention, resulting in differences in scope and emphasis depending on the circumstances of the case.'[104]

This approach is based on the premise that the protection of the rights enshrined in the Convention should primarily be the responsibility of the states, with the Court only stepping in when they fail to do so.[105] In the *Handyside v. UK* case, the Court emphasised its subsidiary role,[106] stating that 'it is in no way the Court's task to take the place of the competent national courts'.[107] National authorities are best placed to choose the measures they consider appropriate for matters governed by the Convention.[108] As adequate protection of fundamental rights can take

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[99] Ronald S J Macdonald, 'The Margin of Appreciation' in Ronald S J Macdonald, Franz Matscher and Herbert Petzold (eds), *The European System for The Protection of Human Rights* (Martinus Nijhoff Publishers 1993) 83.
[100] Arai-Takahashi (n 24) 3.
[101] ibid.
[102] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17(1) European Law Journal 80, 104.
[103] Arai-Takahashi (n 24) 3.
[104] Macdonald (n 99) 83.
[105] Gerards (n 102), 104; *Handyside v. the United Kingdom* (1976) App no 5493/72 Series A No 24 [48] (European Court of Human Rights).
[106] Gerards (n 102), 104.
[107] *Handyside v. the United Kingdom* (n 105) 48, 50.
[108] Gerards (n 102), 85.

many forms, 'it is certainly not always reasonable to proclaim that the ECtHR's approach is the only correct one.'[109] Janneke Gerards emphasises the importance of guaranteeing fundamental rights in a manner that reflects 'national traditions and perceptions and [...] allows for cultural variation.'[110] To this end, the Court uses the margin of appreciation to indicate the degree of discretion allowed to contracting states when implementing 'the Convention's standards, taking into account their own particular national circumstances and conditions.'[111]

Although the application of the doctrine was sometimes criticised as vague and difficult to predict,[112] the 2012 Brighton Declaration,[113] which resulted in the adoption of Protocol 15,[114] 'encourage[d] the Court to give great prominence to and apply consistently the [principle of subsidiarity and the margin of appreciation] [...] in its judgments'[115]. To this end, Protocol 15 added a new recital to the preamble of the Convention, which affirms

> that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention[.][116]

The margin of appreciation doctrine was thus elevated to a 'foundational principle of the Convention',[117] ensuring that the contracting states' are primarily responsible for safeguarding the Convention rights. This doctrinal figure serves to accommodate the interests and particular circumstances of states, thereby underlining the Court's subsidiary role in securing Convention rights. This explains why the contracting states are so eager to be granted a margin of appreciation by the Court when it assesses alleged violations of Convention rights.

3.2. Two Sides of the Same Coin: Margin of Appreciation and Scope of Review

Having explored the function of the margin of appreciation doctrine, this section will now examine its development within the Court's case law. It will also clarify the relationship between the margin of appreciation granted by the Court and the scope of its review when assessing alleged violations of Convention rights, in order to lay the groundwork for applying the doctrine to the prohibition of *refoulement* under Article 3 ECHR later on.

While the legal basis of the margin of appreciation doctrine can be traced back to the administrative law systems of every civil law jurisdiction, the first use of this doctrine at international level occurred in the jurisprudence of the Strasbourg organs.[118] Since its first express use in the case *Ireland v. UK* in 1978, the Court increasingly developed the margin of appreciation

[109] ibid 104.
[110] ibid.
[111] Arai-Takahashi (n 24) 2.
[112] Francis G Jacobs and others, *The European Convention on Human Rights* (8th edition, Oxford University Press 2021) 366.
[113] Council of Europe, 'Brighton Declaration: High Level Conference on the Future of the European Court of Human Rights' (20 April 2012).
[114] Protocol No. 15 to the European Convention on Human Rights 1 August 2021, Protocol No. 15 (Council of Europe).
[115] Council of Europe, 'Brighton Declaration' (n 113) 12a.
[116] Protocol No. 15 to the European Convention on Human Rights (n 114), Article 1.
[117] Jacobs and others (n 112) 367.
[118] Arai-Takahashi (n 24) 3.

doctrine in its scope and application.[119] In this first inter-state case brought before the Court,[120] it had to assess whether extrajudicial powers exercised by Northern Ireland were in conformity with the derogation clause of Article 15 ECHR.[121] The Court in this regard acknowledged its limited powers of review.[122] It hold that

> [b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.[123]

The Court granted the responding state a margin of appreciation, recognising that national authorities are often better placed to decide what actions are possible and necessary in response to a situation due to their proximity to the events in question. The Court has applied this rationale, in particular, in the context of immigration law and policies, including admission to and expulsion from territory.[124] In this area, it is

> not only the equipment of the national legislative and administrative authorities that is reason for the court to allow the states a wide margin of appreciation, but also the fact that it is for the states to regulate and control the entry and residence of aliens or to make operational choices in terms of priorities and resources.[125]

The Court thus acknowledges the sovereign interests of the contracting states and the proximity of their national authorities by granting them a margin of appreciation in certain cases. However, in the case *Ireland v. UK*, the Court emphasised that this power of national authorities is not unlimited, and that the Strasbourg organs, according to Article 19 ECHR, are responsible for ensuring that the engagements undertaken by the contracting states in the Convention and its Protocols are observed.[126] The Court therefore concluded that the 'domestic margin of appreciation is [...] accompanied by a European supervision.'[127] Ronald St. John Macdonald describes the margin of appreciation as 'the other side of the scope of review coin'.[128]

The margin of appreciation granted to the state directs the intensity of judicial scrutiny applied by the Court when assessing the conformity of a challenged decision with the standards set out in the Convention.[129] Given that the width of the margin of appreciation varies depending on factors such as the applicable right, the applicant's claim and the state's justification,[130] it inevitably follows that there is a 'spectrum of appropriate intensity' of judicial scrutiny dependent on the

[119] For a detailed account of the doctrine's development, see: ibid 5–8.
[120] ibid 5.
[121] *Ireland v. the United Kingdom* (n 35) [202].
[122] ibid [207].
[123] ibid.
[124] Gerards (n 102), 110; Arai-Takahashi (n 24) 210.
[125] Gerards (n 102), 110–111.
[126] *Ireland v. the United Kingdom* (n 35) [207].
[127] ibid.
[128] Macdonald (n 99) 85.
[129] ibid 84.
[130] Jacobs and others (n 112) 367.

context.[131] This ranges from total deference, which amounts to unreviewability at one extreme, to the most stringent standard of justification at the other.[132]

Gerards calls this the 'sliding scale model of intensity of review' ranging from a wide margin to a narrow one.[133] In the case of a wide margin granted to the national authorities,

> the court usually only superficially and rather generally examines the choices made by the national authorities to see whether the result is (clearly) unreasonable or disproportionate, or places an excessive burden on the applicant. [...] if it finds that the case has been carefully assessed and decided by the national authorities, it will mostly not find a violation.[134]

In contrast to such a rather procedural test, where a narrow margin is allowed to national authorities, the Court generally examines the facts of the case closely, determines the interests at stake, and decides whether the balance between conflicting interests has been struck in accordance with the relevant Convention rights.[135]

When determining the scope of the margin of appreciation, the Court often considers whether or not there is a general consensus or common ground among the contracting states.[136] If there is little or no consensus, the Court will generally grant a wide margin of appreciation.[137] However, it considers more extensive supervision to be reasonable if it finds that 'the domestic law and practice of the states revealed a fairly substantial measure of common ground' in the decisive area.[138] In order to determine whether or not there exists a common ground, the Court will often refer to comparative law materials and international legal instruments, such as European conventions, as well as soft law, from which the presence or absence of a common ground can be clearly established.[139] However, the threshold for the Court to assume a European consensus is difficult to determine.[140]

This section explored the close relationship between the Court's scope of review and the margin of appreciation. While the Court grants the contracting states a margin of appreciation, recognising that national authorities are often better placed to decide what actions are possible and necessary in response to a situation, this power is limited by the Court's supervision, as the Court is responsible for ensuring that the Convention rights are observed by the contracting states. The margin of appreciation determines the intensity of the Court's judicial scrutiny when assessing an alleged violation of a Convention right. Understanding this close relationship between the margin of appreciation and the Court's scope of review will inform the subsequent analysis of whether states' obligations under the principle of *non-refoulement* allow for a margin of appreciation. This is because it revealed that the Court's observations on its scope of review in its case law can be used to draw conclusions about the respective margin of appreciation.

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[131] Macdonald (n 99) 84.
[132] ibid.
[133] Gerards (n 102), 105.
[134] ibid 105–106, with reference to examples in case law.
[135] ibid 106.
[136] ibid 108.
[137] ibid.
[138] ibid.
[139] ibid 109.
[140] In *Christine Goodwin v. the United Kingdom* (2002) App no 28957/95 Reports of Judgments and Decisions 2002-VI [85] (European Court of Human Rights) the Court ruled that complete unanimity is not necessary, and that 'clear and uncontested evidence of a continuing international trend'; Gerards (n 102), 109 states that other cases seem to indicate, 'that much more than a trend is needed'.

3.3. Context of Application

The following section of this thesis will set out in which cases the Court has granted contracting states a margin of appreciation and to what degree. It will introduce the doctrine's application to Convention articles containing explicit limitation clauses, as well as to positive obligations. The focus here will be on positive obligations under absolute rights, and how their classification as obligations of effort or result influences the Court's scope of review. This will inform the subsequent analysis of whether the absolute prohibition of *refoulement* under Article 3 ECHR, in particular states' negative and positive procedural obligations, allows the Court to grant states a margin of appreciation and, if so, to what extent.

The Court has never set out a universal formula for identifying which articles are suitable for the application of the margin of appreciation doctrine.[141] However, it has provided reasons for its application in particular contexts, such as granting some discretion in the interpretation of Convention norms, cases involving difficult issues of economic and social policy or technology, or in the context of justifying an act of discrimination.[142] Put simply, the margin of appreciation doctrine was applied in cases where the Court deemed that 'the national judge [was] in a better position than the international judge to make a decision.'[143]

Consequently, the Court has applied the doctrine more extensively in a general context, 'emphasising that national authorities have a margin of appreciation in evaluating whether a fair balance is struck between the right of an individual and the interest of society as a whole.'[144] The Court has justified extending the doctrine to all derogable Convention rights by considering the 'general exercise of "balancing" [...] [as] "inherent" in the adjudication of the Convention'[145].

However, this balancing inherent in the Convention follows a sliding scale,[146] stating that the 'margin allowed will be relatively narrow or significantly restricted where the right at stake is crucial to the individual's effective enjoyment of [...] key rights and where a particularly important facet of an individual's existence or identity is at stake.'[147] Therefore, with regard to absolute rights, the margin of appreciation granted by the Court is narrow.[148]

3.3.1. Explicit Limitation Clauses

Arai-Takahashi classifies the Court's use of the margin of appreciation doctrine in three categories: 'cases involving particular freedoms and rights [including Articles 5 and 6, 8-11 of the Convention and Article 1 of Protocol No 1[149]]; non-discrimination under Article 14; and derogation in a state of emergency under Article 15.'[150] The Court most often refers to the margin of appreciation when assessing whether an infringement of the personal freedom rights guaranteed under Articles 8-11 ECHR can be justified according to the almost identical limitation clauses

[141] Macdonald (n 99) 122.
[142] ibid.
[143] ibid.
[144] Arai-Takahashi (n 24) 8.
[145] ibid.
[146] Jacobs and others (n 112) 367.
[147] Kristina Trykhlib, 'The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights' [2020] EU and Comparative Law Issues and Challenges Series 128, 140.
[148] ibid 141.
[149] Protocol No. 1 to the European Convention on Human Rights 18 May 1954, Protocol No. 1 (Council of Europe).
[150] Arai-Takahashi (n 24) 8.

found in paragraph two of these articles.[151] They require the Court to conduct a three-part inquiry:[152] any interference must be 'in accordance with the law', pursued for one of the exhaustive legitimate interests listed, and 'necessary in a democratic society'.[153] The determination of the latter is at the heart of the Court's assessment of the merits[154] and asks whether the interfering measure is proportionate in securing the legitimate aim or 'whether [it] goes beyond what is necessary in a democratic society to achieve the legitimate aim pursued'.[155] The Court tends to grant national authorities a margin of appreciation in this regard.[156]

Thus, the proportionality test must be technically separated from the margin of appreciation doctrine. The former asks whether 'the interference with the rights protected is no greater than is necessary to address [the] pressing social need' that caused the state measure in question.[157] This test 'requires the Strasbourg Court to balance the severity of the restriction placed on the individual against the importance of the public interest.'[158] The margin of appreciation, however, determines the scope of review applied by the Court when assessing whether the interfering state measure meets the proportionality test. The Court in the *Silver*[159] case in this regard hold that 'the contracting States enjoy a certain but not unlimited margin of appreciation in the matter of the imposition of restrictions, but it is for the Court to give the final ruling on whether they are compatible with the Convention'.[160]

Gerards notes that, in some immigration cases concerning Article 8 ECHR, 'the factors determining the margin of appreciation seem to be merged with the factors used to examine the proportionality of a certain measure'.[161] This suggests that the relationship between the margin of appreciation doctrine and proportionality is a close one. Arai-Takahashi even claims that

> [i]t is possible to consider the application of the proportionality principle as the other side of the margin of appreciation. The more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities.[162]

With regard to Convention rights that do not contain an express limitation clause, Arai-Takahashi argues that what he terms 'inherent limitations' can possibly be applied to them.[163] However, he asserts that, in this context, it is crucial for the Court to 'effectively employ the principle of proportionality to constrain the national power of appreciation.'[164] Battjes also argues that 'the absence of a limitation clause is a formal feature that does not, or does not necessarily, warrant

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[151] ibid 9.
[152] Jacobs and others (n 112) 349.
[153] This is provided for in almost identical terms in Articles 8(2), 9(2), 10(2) and 11(2) of the European Convention on Human Rights (n 8).
[154] Arai-Takahashi (n 24) 11; Jacobs and others (n 112) 373.
[155] Jacobs and others (n 112) 349.
[156] Arai-Takahashi (n 24) 11.
[157] Jacobs and others (n 112) 366.
[158] ibid.
[159] *Silver and Others v. the United Kingdom* (1983) App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 Series A No 61 (European Court of Human Rights).
[160] ibid [97].
[161] See footnote 209 in Gerards (n 102), 110–111, referring to *Konstantinov v. the Netherlands* (2007) App no 16351/03 (European Court of Human Rights).
[162] Arai-Takahashi (n 24) 14.
[163] ibid 13.
[164] ibid 14.

the conclusion that states are precluded from limiting the right concerned.'[165] Nevertheless, this reasoning cannot be applied to absolute rights. Battjes refers to the Court's judgment in *Al-Adsani v. the United Kingdom* regarding Article 6 ECHR (right to a fair trial), which does not contain an explicit limitation clause. The Court notes that

> [t]he right of access to a court is not [...] absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court.[166]

While acknowledging the possibility of limiting rights without explicit limitation clauses in cases where they are not absolute, the Court implicitly notes that an absolute right which evidently does not contain an explicit limitation clause cannot be subjected to limitation by *argumentum e contrario*.

3.3.2. Positive Obligations

Macdonald adds a fourth category to Arai-Takahashi's list, namely the Court's application of the margin of appreciation doctrine 'to impose positive obligations on States under the Convention.'[167] In cases concerning an alleged violation due to the state's failure to act in accordance with its positive obligations, the Court does not follow the three-part inquiry, but instead assesses whether the State has struck a fair balance between its own public interest and that of the individual.[168]

3.3.2.1. Positive Obligations under Article 8 ECHR and other Personal Freedom Rights

Regarding Article 8 ECHR, the right to private and family life, Macdonald highlights the *Marckx v. Belgium*[169] case, which affirmed that the Convention may impose a positive obligation on contracting states to ensure their citizens enjoy the rights it guarantees.[170] Subsequent case law has further developed the positive obligations of contracting states, granting them 'a margin of appreciation, [and] permitting them to choose the means by which they fulfil their obligations.'[171] In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*[172] the Court expanded the doctrine of the margin of appreciation, allowing states not only to decide on the means, but also to determine whether the right itself existed.[173] The Court holds that 'this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.'[174]

The Court's general judicial self-restraint when assessing claims involving positive obligations can be explained by two reasons.[175] Firstly, it is not possible for the Court to uniformly determine the

[165] Battjes (n 17), 588.
[166] *Al-Adsani v. the United Kingdom* (2001) App no 35763/97 Reports of Judgments and Decisions 2001-XI [53] (European Court of Human Rights).
[167] Macdonald (n 99) 83.
[168] Jacobs and others (n 112) 349.
[169] *Marckx v. Belgium* (1979) App no 6833/74 Series A No 31 (European Court of Human Rights).
[170] Macdonald (n 99) 103; *Marckx v. Belgium* (n 169) [31].
[171] Macdonald (n 99) 103.
[172] *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (n 22).
[173] Macdonald (n 99) 103–104.
[174] ibid 104; *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (n 22) [67].
[175] Arai-Takahashi (n 24) 218.

extent to which positive steps can be expected of a state.[176] The scope of positive obligations depends heavily on the political choices of the contracting states when allocating their limited resources.[177] Different national authorities making different policy choices lead to diverse practices, which makes it impossible for the Court to supervise them using a uniform standard.[178] Secondly, factors such as the severity of the effect a government's omission has on individuals' rights and personal circumstances determine the extent to which positive steps can be expected of a state.[179] These factors are difficult for the Court to assess, justifying the deferential approach of contracting states when exercising positive obligations.[180] Arai-Takahashi concludes that '[t]he Strasbourg organs do not wish to be seen as second-guessing the respectable decision reached by democratic representatives, who must weigh different priorities, requirements and concepts of distribute justice.'[181]

This approach suggests that the Court's decision-making regarding positive obligations under qualified rights should be submissive to that of national authorities, leaving it within their margin of appreciation to strike a 'fair balance' between the interests of the state and the rights of the individual. According to Arai-Takahashi, this approach would result in the Court limiting its supervision to establish whether national authorities have made 'such efforts [...] as can reasonably be demanded under the special circumstances of each case.'[182] He claims that it is crucial for the proportionality assessment to remain within the scope of review of the Court and not to delegate it to the national authorities.[183]

3.3.2.2. Positive Obligations under Absolute Rights: An Obligation of Result or Effort?

The Court takes a different approach with regard to the positive obligations of contracting states under Articles 2 and 3 ECHR. The absolute nature of these articles requires that any restriction on these rights must be subject to the Court's 'most rigorous review'.[184] Regarding the negative obligations of the contracting states under these absolute rights, this leads the Court to grant no margin of appreciation.[185]

With regard to positive obligations under absolute rights, Arai-Takahashi detects a 'symbiotic relationship' between the enhanced need for intense scrutiny of infringements of these absolute rights and the extended scope of positive obligations for contracting states.[186] He argues that

> [i]n spite of the degree of uncertainty and unpredictability surrounding the circumstances and extent of the scope of positive obligations, the supervisory bodies have refused to recognise either explicitly or implicitly any margin of appreciation in the contexts of Articles 2 and 3. This consistent stance, which is the correct approach in the present writer's view, means that the Convention organs are willing to determine of their own motion the requisite degree of positive obligation

[176] ibid.
[177] ibid.
[178] ibid.
[179] ibid.
[180] ibid.
[181] ibid.
[182] ibid 219; citing *Olsson v. Sweden (No. 2)* (1992) App no 13441/87 Series A No 250 [90] (European Court of Human Rights).
[183] Arai-Takahashi (n 24) 219, 222.
[184] ibid 219.
[185] Fiona de Londras and Kanstantsin Dzehtsiarou, *Great Debates on the European Convention on Human Rights* (Great Debates in Law Series, first edition, Bloomsbury Publishing Plc 2018) 95, 109.
[186] Arai-Takahashi (n 24) 219.

> necessary to accomplish the effective protection of the rights secured in Articles 2 and 3. They are ready to criticise the Member State's inaction and omission on the basis of their own standards.[187]

Arai-Takahashi thus argues that Articles 2 and 3 ECHR leave no room for a margin of appreciation – neither regarding the negative obligation of states, nor their positive obligations. However, it should be noted that this conclusion is based on case law from the Court before 2001. As Fiona de Londras and Kanstantsin Dzehtsiarou point out in their 2018 contribution, the Court's subsequent case law 'has suggested that states do have some margin of appreciation' with regard to their positive obligations under absolute rights.[188] In *Öneryıldız v. Turkey* the Court noted with regard to the state's positive obligation under Article 2 ECHR to take preventive operational measures to protect the right to live of those within its jurisdiction, that

> an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources [...]; this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres such as the one in issue in the instant case [...].[189]

In this 2004 case, the Court acknowledges that, depending on the surrounding circumstances of the case, states may enjoy a margin of appreciation with regard to positive obligations under absolute rights. This reasoning has been followed in subsequent case law on Articles 2 and 3 ECHR, for example in *Cevrioğlu v. Turkey*, where the Court reiterated 'that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation.'[190]

The Court thus seems to see room for a margin of appreciation with regard to positive obligations under absolute rights. However, it appears unclear how the Court determines the extent of the margin of appreciation granted to states under the 'sliding scale model of intensity of review'. Applying this doctrinal figure to positive obligations under absolute rights creates a tension, between, on the one hand, the Court's reluctance to define the measures that a state must take under a positive obligation in strict terms – acknowledging that the state is best placed to allocate its resources – and, on the other hand, the fundamental importance of absolute rights, and the Court's responsibility to subject any restrictions to its most rigorous review. This thesis argues that the Court addresses this tension through its categorisation of positive obligations as 'obligations of effort' or 'obligations of result'.[191] This distinction can be found in the Court's jurisprudence on

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[187] ibid 220.
[188] Londras and Dzehtsiarou (n 185) 95.
[189] *Öneryıldız v. Turkey* (2004) App no 48939/99 Reports of Judgments and Decisions 2004-XII [107] (European Court of Human Rights).
[190] *Cevrioğlu v. Turkey* (2016) App no 69546/12 [55] (European Court of Human Rights); see also *Budayeva and Others v. Russia* (2008) App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 Reports of Judgments and Decisions 2008 (extracts) [134] (European Court of Human Rights); *Kolyadenko and Others v. Russia* (2012) App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 [160] (European Court of Human Rights); see with regard to the positive obligation under Article 3 ECHR to provide a possibility for review of a whole life sentence *Vinter and Others v. the United Kingdom* (2013) App nos 66069/09, 130/10 and 3896/10 Reports of Judgments and Decisions 2013 (extracts) [120, 104-105] (European Court of Human Rights).
[191] Heijer (n 21), 291.

positive obligations[192] and has been adopted in academic writing.[193] Classifying a positive obligation as either an obligation of effort or an obligation of result informs its scope, referring to 'how demanding and stringent [the obligation] can be (how many measures, or how far reaching these measures should be)'.[194] The scope of the obligation arguably informs the scope of review of the Court and, consequently, the margin of appreciation granted to the state.

The following section will provide a more detailed explanation of how to classify a positive obligation as either an obligation of effort or an obligation of result. This will be illustrated using the examples of the positive obligation to investigate under Articles 2 and 3 ECHR, and the positive obligation to provide acceptable detention conditions under Article 3 ECHR. In doing so, it will be explored how this classification influences the Court's scope of review and, consequently, the state's margin of appreciation.

Obligation of Effort

The Court characterises the positive procedural obligation to investigate into serious allegations of ill-treatment under Article 3 ECHR as an obligation of effort.[195] The Court explores this notion in *Mikheyev v. Russia* noting that

> the lack of conclusions of any given investigation does not, by itself, mean that it was ineffective: an obligation to investigate "is not an obligation of result, but of means" [...]. Not every investigation should necessarily be successful or come to a conclusion [...]; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible [...].[196]

The Court acknowledges that, in order to fulfil its procedural obligation to investigate allegations of past ill-treatment within its jurisdiction, the state cannot be expected to reach a definitive conclusion. Rather the state's duty is to take 'reasonable steps' to investigate,[197] meaning that 'the Court reviews the capacity of the investigation to lead to the establishment of relevant facts and secure relevant evidence.'[198] The Court grants the state a margin of appreciation as to the efforts, meaning the concrete investigation measures chosen and the evidence needed.[199] Its review is limited to assessing the effectiveness of the investigation, which fails to meet the requirements of the positive obligations under Articles 2 or 3 ECHR only if 'the possible defects in the relevant proceedings and the decision-making process [...] amount to significant flaws'.[200]

Thus, the classification as an obligation of effort aligns with the Court granting states a wide margin of appreciation, as in the case of states' positive obligations under derogable rights. The

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[192] 'The procedural obligation is a requirement of means and not of result', see *S.M. v. Croatia* (2020) App no 60561/14 [315] (European Court of Human Rights), in the context of Article 4 ECHR; see *Šilih v. Slovenia* (2009) App no 71463/01 [193] (European Court of Human Rights); and *Cevrioğlu v. Turkey* (n 190) [53], in the context of Article 2 ECHR.
[193] Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (Oxford University Press 2023) 168.
[194] ibid 18.
[195] *Mikheyev v. Russia* (2006) App no 77617/01 [107] (European Court of Human Rights); see with reference to more case law Stoyanova (n 193) 168.
[196] *Mikheyev v. Russia* (n 195) [107].
[197] *S.M. v. Croatia* (n 192) [316].
[198] Stoyanova (n 193) 168; *S.M. v. Croatia* (n 192) [313].
[199] Stoyanova (n 193) 168.
[200] *S.M. v. Croatia* (n 192) 320, 318.

Court will not review whether the contracting state has achieved a specific result or taken specific steps, but will leave the state to decide on the necessary steps to be taken.

Obligation of Result

In its case law on the positive obligation of contracting states to provide acceptable detention conditions under Article 3 ECHR, the Court defines these obligations as 'primarily [...] obligations of *result*, in which limited economic resources cannot justify the provision of conditions below the requirements of Article 3.'[201] In the case *Kalashnikov v. Russia*[202] the government argued that the applicant's conditions of detention could not be regarded as torture or inhuman or degrading treatment, because

> [o]vercrowding was a problem in pre-trial detention facilities in general. The authorities had had no intention of causing physical suffering to the applicant or of harming his health. The administration of the detention facility took all available measures to provide medical treatment for those persons suffering from any disease and to prevent the contagion of other inmates. [...] It was acknowledged that, for economic reasons, conditions of detention in Russia were very unsatisfactory and fell below the requirements set for penitentiary establishments in other member States of the Council of Europe. However, the Government were doing their best to improve conditions of detention in Russia.[203]

In response to the Russian government's attempt to justify its shortcomings, the Court recalled that 'Article 3 of the Convention enshrines one of the most fundamental values of democratic society' and that its prohibition is absolute 'irrespective of the circumstances and the victim's behaviour'.[204] The Court emphasised that for a contracting state to fulfil its positive obligation with regard to detention conditions it was not enough to take 'all available measures' and to do its 'best to improve the conditions'. As Article 3 ECHR provides for a minimum threshold the state must ensure that a person is detained in conditions which are compatible with that provision.[205]

In this regard, the Court did not limit its review to assessing whether the State had taken 'reasonable steps' within its capacity, but rather extended it to determine whether the State's actions met the absolute threshold set out in Article 3 ECHR. By classifying the state's positive obligation to provide acceptable detention conditions as an obligation of result, the Court significantly extended its scope of review, thereby limiting the states margin of appreciation.

It can be concluded that the Court does not restrict itself when it comes to granting states a margin of appreciation with regard to positive obligations under absolute rights. However, the scope of its review is significantly influenced by the classification of the positive obligation as either an obligation of effort or an obligation of result. In the case of the former, the Court will limit its scope of review to determining whether the state took reasonable steps, only finding a violation of the absolute Convention right if significant flaws are found in the national proceedings and decision-making process. In the case of an obligation of result, the Court has a stricter idea of what is expected of the state. Consequently, it will conduct a more thorough review, analysing whether the state's actions result in the fulfilment of the requirements explicitly set out by the

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[201] Heijer (n 21), 291.
[202] *Kalashnikov v. Russia* (2002) App no 47095/99 Reports of Judgments and Decisions 2002-VI (European Court of Human Rights).
[203] ibid [93–94].
[204] ibid [95].
[205] Heijer (n 21), 291.

Court in its interpretation of the absolute Convention right. Thus, the room for granting states' a margin of appreciation in this regard is considerably limited.

In summary, Section 3.3.2.2. established that the Court takes a different approach with regard to the positive obligations of contracting states under absolute rights as opposed to positive obligations under qualified rights. While the Court extended its application of the margin of appreciation doctrine to all derogable Convention rights, its application to absolute rights is more narrow. The absolute nature of these articles requires that any restriction on these rights must be subject to the Court's 'most rigorous review'. Regarding the negative obligations of the contracting states under these absolute rights, this leads the Court to grant no margin of appreciation. While the section 3.3.2.2 has revealed a dispute on whether or not the Court grants states a margin of appreciation with regard to their positive obligations under absolute rights, recent case law suggests that states indeed have some margin of appreciation in this regard. To determine the extent of the margin of appreciation granted to states in cases involving positive obligations under absolute rights, this thesis argued that classifying the obligation as one of effort or result is decisive. The Court tends to grant states a wider margin of appreciation in the case of an obligation of effort, while the margin of appreciation will be more limited in the case of an obligation of result. The next chapter will examine how this analysis applies to the margin of appreciation in the context of the principle of *non-refoulement* under Article 3 ECHR.

4. A Margin of Appreciation under Article 3 ECHR?

Having explored the absolute prohibition of *refoulement* and its accompanying negative and positive procedural obligation for contracting states in Chapter 2, and the margin of appreciation doctrine under the Court's jurisprudence in the preceding Chapter 3, this Chapter 4 seeks to answer the question of whether the absolute principle of *non-refoulement* allows for a margin of appreciation for states. In order to do so, this chapter will work out in detail the scope of review applied by the Court in the case of a return to the individual's country of origin (Chapter 4.1.) and in the case of a return to a third country (Chapter 4.2.).

4.1. Return to Country of Origin

This first section will explore the scope of review applied by the Court in cases involving the return of protection seekers to their country of origin. First, it will focus on the Court's review of the state's compliance with its negative obligation not to remove a person to a risk of ill-treatment. Then, it will look at the Court's review of the state's fulfilment of the positive procedural obligation.

4.1.1. Negative Obligation Not to Remove

The removal of a protection seeking person may engage the state's responsibility under the negative obligation not to deport or extradite someone 'where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3.'[206] In *Saadi v. Italy* the Court stated that '[i]n this type of case the Court is therefore called upon to assess the situation in the receiving country in the light of the requirements of Article 3.'[207]

In the situation of a return to the country of origin this means assessing whether such a risk exists in the receiving country of origin. To determine the risk 'the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu'.[208] To this end the Court 'may examine evidence that has come to light after extradition as this may be relevant as to the appreciation of the risk to the applicant.'[209] The cited case law of the Court highlights that the Court carries out its own risk assessment, not granting the respondent state a margin of appreciation.

When assessing the risk of ill-treatment in the country of origin, the Court will determine whether the ill-treatment 'attains a minimum level of severity'.[210] In this regard, the Court holds that its 'examination of the existence of a real risk must necessarily be a rigorous one'.[211] While, in *Soering v. the United Kingdom*, the Court emphasised that 'the Convention is a living instrument which … must be interpreted in the light of present-day conditions', a European consensus appears to exist on the notion of torture, inhuman or degrading treatment or punishment.[212] The Court therefore defines the severity threshold and determines whether the situation in the country of removal meets this threshold on its own account. It does not grant the state a margin of appreciation in

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[206] *Saadi v. Italy* (n 53) [125].
[207] ibid [126].
[208] *Cruz Varas and Others v. Sweden* (n 50) [75].
[209] Jacobs and others (n 112) 194.
[210] *Ireland v. the United Kingdom* (n 35) [162].
[211] *Saadi v. Italy* (n 53) [128]; *Chahal v. the United Kingdom* (n 22) [96].
[212] Trykhlib (n 147), 147.

this regard. However, this does not preclude the Court from taking into account the specific circumstances of the case.[213]

It can be concluded that, when assessing a potential violation of the negative obligation not to remove a person to a country where he or she would be at risk of ill-treatment prohibited by Article 3 ECHR, the Court will apply an extensive scope of review, exercising rigorous scrutiny while taking the circumstances of the case into consideration. The Court will not leave any margin of appreciation to the state. This can be explained by the absolute nature of the negative obligation, which allows for no justification, and by the existing consensus between the contracting states on the notion of ill-treatment. Thus, the negative obligation under *non-refoulement* leaves no room for the margin of appreciation doctrine as a tool to accompany state interests and recognise national peculiarities. The next section will set out the Court's scope of review with regard to the positive obligation under *non-refoulement* in the context of a return to the country of origin.

4.1.2. Positive Obligation to Assess

Under the positive procedural obligation contracting states are obliged to conduct an assessment of conditions in the country of removal against the standards of Article 3 ECHR.[214] As outlined above in Chapter 2.2.2, the content of the expelling state's duties under this procedural obligation 'differs depending on whether the receiving country is the asylum seeker's country of origin or a third country and, in the latter situation, on whether the expelling state has dealt with the merits of the asylum application or not.'[215] As a consequence, the Court notes in *Ilias and Ahmed v. Hungary* that 'the Court's task is in principle different in all of the above-mentioned categories of cases, subject to the complaints raised by the applicant involved.'[216]

As outlined in Chapter 2.2.2, when deciding to return a person to his or her country of origin, the state has the procedural obligation to assess the person's asylum claim on the merits.[217] The national authorities must thus assess the individual risk of ill-treatment the person faces in the country of origin.[218]

In the case of an expulsion following a rejected asylum application, Jacobs, White and Ovey note that the Court 'underlined the need for subsidiarity when examining an asylum decision of a domestic court, as the domestic authorities are best placed to consider issues such as credibility.'[219] The Court will focus its assessment on the question of whether 'effective guarantees are in place to prevent "arbitrary refoulement" contrary to Article 3.'[220] However, the Court's task in this regard is not limited to examine whether the domestic decision on the merits was reasonable taken meeting the requirement of a rigorous assessment set out by the Court's jurisprudence. In *A.I. v. Switzerland*, the Court emphasised that it will carry out a 'full and *ex nunc* assessment' if information that has come to light after the national authorities' final decision has

[213] '[T]he Court is of the view that it would certainly be artificial to examine the facts of the case without considering the general context in which those facts arose', in *Khlaifia and Others v. Italy* (2016) App no 16483/12 Reports of Judgments and Decisions 2016 [185] (European Court of Human Rights).
[214] *Soering v. the United Kingdom* (n 6) [91].
[215] *Ilias and Ahmed v. Hungary* (n 27) [142].
[216] ibid.
[217] ibid [143].
[218] ibid.
[219] Jacobs and others (n 112) 196.
[220] ibid.

to be taken into account.[221] This implies that the Court is taking its supervisory role under Article 19 ECHR seriously by extending the scope of its review to include a comprehensive assessment of the risks in the country of removal that takes into account evidence that has emerged since the domestic decision was made.

The Court's scope of review with regard to the positive obligation in the case of removal to the country of origin is therefore aligned with its scope of review regarding the negative obligation. The Court will conduct a full review of the facts of the case and find that the state has violated its positive obligation to thoroughly assess the merits of the asylum application if its review establishes a risk of ill-treatment that the state knew or could have known about. This leads to the conclusion that the Court will not grant states a margin of appreciation with regard to the substantive assessment of the risk.

4.2. Removal to Third Country without Assessment of the Merits

This section will focus on the Court's scope of review with regard to contracting state's positive procedural obligation in a pushback scenario. In the case of pushback practices, the neighbouring country of removal will most likely be a third country, rather than the country of origin, for the protection seeker. Furthermore, the removing state will not have conducted an asylum procedure based on the merits of the applicant's claim.

In *Ilias and Ahmed v. Hungary*, the Court elaborated on the scope of its review with regard to states' positive procedural obligation in cases of removal to a third country. The Court clarified that it will not examine the applicants' risk of ill-treatment in their country of origin, as '[s]uch analysis would be unrelated to the question whether the respondent State discharged its procedural obligations under Article 3'.[222] It noted that, in this regard, 'it is not for the Court to act as a court of first instance and deal with aspects of the asylum claims' merits in a situation where the defendant State has opted – legitimately so – for not dealing with those'.[223]

Instead, the Court emphasised that it will focus its examination on the applicants' complaints brought before it.[224] In the case of pushbacks, this relates to the alleged exposure to a real risk of treatment contrary to Article 3 ECHR due to the state's removal to a third country. As outlined in detail in Chapter 2.2.2, the state's procedural obligation in this case consists of a twofold assessment. First, it must determine whether the person to be removed will have access to an adequate asylum procedure in the receiving third country (protection from 'indirect' *refoulement*).[225] Second, it must establish whether the detention or living conditions pose a risk of ill-treatment contrary to Article 3 ECHR (protection from 'direct' *refoulement*).[226]

With regard to its scope of review, the Court in *Ilias and Ahmed v. Hungary* noted that

> [t]he Court's approach in examining these questions must be guided by the principle, stemming from Article 1 of the Convention, according to which the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. It is not

[221] *A.I. v. Switzerland* (2017) App no 23378/15 [49] (European Court of Human Rights), unofficial translation of the French judgment.
[222] *Ilias and Ahmed v. Hungary* (n 27) [145].
[223] ibid [147].
[224] ibid [148].
[225] ibid [131].
[226] ibid.

> the Court's task to substitute its own assessment of the facts for that of the domestic courts. The Court must be satisfied, however, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources [...].[227]

The Court emphasises its subsidiary role, highlighting that the contracting states are primarily responsible for enforcing the rights set out in the Convention, including the principle of *non-refoulement*. For this reason, the Court focuses its review on determining whether 'the assessment made by the authorities of the Contracting State is *adequate* and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources'.[228] A few paragraphs later, the Court makes use of the same terms, stressing that 'the absolute nature of the prohibition of ill-treatment enshrined in Article 3 of the Convention mandates an *adequate* examination [by the national authorities] of the risks in the third country concerned.'[229] The following part of the thesis will analyse how the requirement for an 'adequate' risk assessment by national authorities informs the Court's scope of review.

4.2.1. Individual Assessment as an Obligation of Result

It has been established that, under the procedural obligation, the Court requires states to 'adequately' assess the risk of direct or indirect *refoulement* upon removal. In order to determine the scope of this obligation this thesis puts forward the argument that the positive procedural obligation should be classified as an obligation of result, as opposed to an obligation of effort. As outlined in Chapter 3.3.2.2, this classification informs the scope of the Court's review and thus the margin of appreciation granted to the state.

The classification of the positive obligation is based on two arguments: First, the procedural obligation to carry out an individual assessment must be distinguished from the obligation to investigate under Article 3 ECHR, which only amounts to an obligation of effort. Second, the Court's reasoning in the case *Kalashnikov v. Russia* with regard to the contracting states' obligation to provide acceptable detention conditions as an obligation of result can be applied to the procedural obligation under *non-refoulement*.

4.2.1.1. Distinction from the Obligation to Investigate

As outlined in Chapter 3.3.2.2, the procedural obligation to investigate allegations of past ill-treatment under Article 3 ECHR requires the state to take 'reasonable steps' to conduct an investigation.[230] This means that 'the Court reviews the capacity of the investigation to lead to the establishment of relevant facts and secure relevant evidence.'[231] Rather than conducting its own assessment of the facts of the case, the Court will grant the state a wide margin of appreciation in this regard, only finding a violation of the absolute Convention right if significant flaws are found in the national proceedings and decision-making process.

[227] ibid [150].
[228] ibid, emphasis added.
[229] ibid [155], emphasis added.
[230] *S.M. v. Croatia* (n 192) [316].
[231] Stoyanova (n 193) 168; *S.M. v. Croatia* (n 192) [313].

In his 2008 article, den Heijer applied the rationale of the classification of the obligation to investigate to the positive procedural obligation under *non-refoulement*. According to him, the latter had to be classified as an obligation of effort.[232] He argued that

> [a] State will normally not have inspection teams in all corners of a foreign country, as a result of which it will frequently have to rely on information provided by other governments or non-governmental organizations. The procedural duty to investigate – both into the likelihood of manifestation of the treatment as well as into the nature of the treatment – is thus subject to considerable obstacles and one cannot expect expelling States to spend endless resources on the assessment of future eventualities. Hence, this procedural duty is likely to be regarded as an obligation of effort and not of result [...].[233]

Den Heijer's conclusion that the procedural obligation under *non-refoulement* should be classified as an obligation of effort was therefore based primarily on the assumption that state authorities would have limited resources available to them and would have to rely on external information when conducting the risk-assessment.

In his 2009 article, Battjes also argued that the obligation to perform a risk assessment is limited. He based this argument on the Court's reasoning regarding the state's obligation to prevent ill-treatment within its jurisdiction under Article 2 ECHR. Here, the Court noted that

> [b]earing in mind [...] the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[234]

Battjes deduced from this that 'there is a limit to the means states must invest in [the] risk assessment, [...] because of competing priorities as regards the states' limited resources.'[235]

However, in light of the Court's recent case law, particularly its detailed account of the procedural obligation under *non-refoulement* set out in its 2018 judgment in the case of *Ilias and Ahmed v. Hungary*, this argument is no longer convincing. The principle of *non-refoulement* prohibits the state from removing an individual to a country where he or she risks facing ill-treatment. This absolute negative obligation cannot be circumvented by considerations of limited resources triggered by special circumstances, e.g. a hybrid attack by a neighbouring country leading to an increased number of people seeking protection at the state's borders. This was reiterated by the Court in *Ilias and Ahmed v. Hungary*. While acknowledging the difficulties faced by contracting states when the number of persons seeking protection at their borders increases, it noted that

> [t]he Court is mindful of the challenge faced by the Hungarian authorities during the relevant period in 2015, when a very large number of foreigners were seeking international protection or passage to western Europe at Hungary's borders. However, the absolute nature of the prohibition of ill-treatment enshrined in Article 3 of the Convention mandates an adequate examination of the risks in the third country concerned.[236]

The Court's review will therefore always be a rigorous one, scrutinising whether the national authorities conducted an assessment that enabled them to decide in favour of or against removal.

[232] Heijer (n 21), 292.
[233] ibid.
[234] *Paul and Audrey Edwards v. the United Kingdom* (2002) App no 46477/99 Reports of Judgments and Decisions 2002-II [55] (European Court of Human Rights).
[235] Battjes (n 17), 604.
[236] *Ilias and Ahmed v. Hungary* (n 27) [151].

If the Court concludes that the state knew, or should have known, of a risk of ill-treatment, it will rule that the procedural obligation has been violated due to an insufficient individual assessment. This is because, if the Court finds that the state could have been aware of the risk of ill-treatment, the state's assessment will inevitably fail to meet the requirement of being 'adequate'. In *Ilias and Ahmed v. Hungary*, the Court set out that, in this regard, it will review whether the state authorities took into account all relevant information about the third country that was generally available at the time of removal, and whether the individuals 'were given sufficient opportunity to demonstrate that [the country of removal] was not a safe third country in their particular case.'[237]

The Court's considerations also highlight its view that consulting general information about the country of removal, such as authoritative reports of international and non-governmental organisations, is a self-evident part of the individual assessment. This rebuts den Heijer's assertion that the state's inability to deploy 'inspection teams' in every country of return limits the procedural obligation to an obligation of effort. On the contrary, in *Ilias and Ahmed v. Hungary*, the Court found that Hungary had failed to fulfil its procedural obligation under Article 3 ECHR, in particular because it did 'not appear that the authorities [had taken] sufficient account of consistent general information' about the risk of indirect *refoulement* in Serbia, the country of removal.[238] Therefore, it is not sufficient for a contracting state to refer to 'widely available information about certain alleged risks' in the third country in its removal decision.[239] The Court will not be satisfied with mere references to authoritative sources. Instead, it will make its own assessment of the adequacy of the consulted reports and of whether the authorities have addressed 'in substance [and] in sufficient detail the concrete risks pinpointed' in them.[240] If the references to reports are found to be inadequate, or if the state has drawn the wrong conclusion from them, the Court will point this out, as it did in *Ilias and Ahmed v. Hungary*, where it noted that 'there was other reliable information which did not seem to have been taken into consideration by the Hungarian authorities.'[241]

By explicitly outlining the detailed requirements of the individual assessment under *non-refoulement* in the case of *Ilias and Ahmed v. Hungary*, the Court emphasised the broader scope of its review, as opposed to the obligation to investigate under Article 3 ECHR. While the Court grants states a margin of appreciation with regard to the latter, as regards the concrete investigation measures chosen and the evidence needed (see Chapter 3.3.2.2), this room for manoeuvre is limited in the case of removing states. Not only do they have to consult all available information about the third country and give the person concerned the opportunity to demonstrate their risk, they will also be held accountable for drawing the wrong conclusion from the materials consulted.

Therefore, the state's duty to conduct an individual assessment under the procedural obligation cannot fall short of these explicit requirements, even in cases of limited national resources. Consequently, the Court seems to leave no room for a margin of appreciation to be granted to the removing state with regard to the risk assessment, as opposed to the obligation to investigate.

[237] ibid [147].
[238] ibid [158, 163].
[239] ibid [156].
[240] ibid [160].
[241] ibid [159].

4.2.1.2. Parallels with the Obligation to Provide Acceptable Detention Conditions

If the procedural obligation to conduct an individual assessment would be considered to be merely an obligation of effort, it would be conceivable for a state, for example, to reduce the necessary assessment to a general review of the situation in the neighbouring country – the country of removal in the case of a pushback – rather than assessing the circumstances of the individual person. The national authorities could argue that they are 'doing their best to improve' the situation, but that the number of people crossing their borders exceeds their administrative capacity to conduct individual assessments, and that the state lacks the financial resources to increase its staff numbers and improve facilities.

Similar to the efforts of the Russian government regarding the detention conditions in the case *Kalashnikov v. Russia*[242], which failed to meet the minimum standards required under Article 3 ECHR and resulted in 'inhuman or degrading treatment', the efforts described in the example above would fail to give due effect to the negative obligation not to remove individuals at risk of ill-treatment in the country of return. As stated in Chapter 2.2.2, the negative and positive obligation are 'intimately intertwined'. To avoid violating the former when pushing back to a third country, the Court has set out in *Ilias and Ahmed v. Hungary* that the state carrying out the removal must first assess whether the individual would be at risk of direct *refoulement* in that country. This could involve facing ill-treatment at the hands of border guards or in detention facilities, for example. Secondly, the state must assess the risk of indirect *refoulement*, i.e. whether the country of return provides adequate asylum procedures to ensure that the person concerned would not be sent back to their country of origin if they would face ill-treatment there.

It would not be sufficient for the Court to merely review whether the relevant state made an effort to assess the individual's situation upon removal. Instead, the Court must scrutinise whether the contracting state fulfilled its positive obligation, with the *result* that its assessment aligns with the aforementioned standards set out by the Court in *Ilias and Ahmed v. Hungary*. The Court must review whether the state made a well-founded decision that the individual would not be at risk of direct or indirect *refoulement*, as prohibited by Article 3 ECHR. Only in this way can the Court ensure that Article 3 ECHR is guaranteed to be not 'theoretical or illusory but [...] practical and effective'.[243]

Accordingly, the Court will only not find a violation of the state's positive obligation if it finds that, besides conducting a thorough assessment, the state did not know nor could have known of the risk. If the state has any doubts regarding the risk of ill-treatment, for example because its authorities lack the resources to conduct thorough individual assessments, it must refrain from removing that person in order to avoid violating its negative obligation under *non-refoulement*.

This differentiates the procedural obligation under *non-refoulement* from the obligation to investigate outlined above. The latter seeks to inquire past ill-treatment inflicted by state agents.[244] While this criminal investigation also aims to prevent future harm, its primary purpose is to introduce punitive measures.[245] However, the procedural obligation to assess the circumstances of an individual being removed to a third country is explicitly aimed at preventing

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[242] *Kalashnikov v. Russia* (n 202).
[243] *Airey v. Ireland* (1979) App no 6289/73 Series A No 32 [24] (European Court of Human Rights).
[244] *Labita v. Italy* (2000) App no 26772/95 Reports of Judgments and Decisions 2000-IV [131] (European Court of Human Rights).
[245] ibid.

possible ill-treatment upon their removal. Executing the decision to remove based on this assessment will lead to irreversible consequences. The finality of such a removal means that any flaws in the assessment are inexcusable, as the negative obligation under *non-refoulement* prohibits removal to a risk of ill-treatment in absolute terms. These considerations arguably allow more stringent requirements to be placed on the state responsible for removal. If the state wishes to remove the person, the assessment upon removal must therefore meet the threshold of an obligation of result. The best effort of the state to assess the risk will not suffice. This is because the 'performance of the negative obligation depends on strict performance of the positive obligation.'[246] As the applicants' representative rightly stated in the oral hearing of *H.M.M. and Others v. Latvia* '[b]y diluting the positive obligation, the negative obligation is also diluted and becomes theoretical and illusory.'[247] Other than in the case of the obligation to investigate, the Court therefore does not limit its review to assessing whether possible defects in the relevant proceedings and decision-making process amount to 'significant flaws'.

The positive procedural obligation under the principle of *non-refoulement* must therefore be understood as an obligation of result. The state must be able to make a well-founded decision that the person in question will not face any risk of direct or indirect *refoulement*, as prohibited by Article 3 ECHR. If the state has any doubts regarding the risk of ill-treatment it must refrain from removing that person in order not to violate its negative obligation. This finding emphasises that the negative and positive obligations under the principle of *non-refoulement* are 'intimately intertwined'.[248] Accordingly, the Court's scope of review will be extensive, leaving states with only a narrow margin of appreciation.

4.2.2. Content of the Court's Scope of Review and the State's Margin of Appreciation

Having concluded that the procedural obligation under *non-refoulement* amounts to an obligation of result, with the consequence of a rather extensive scope of review of the Court, as opposed to other positive procedural obligations under Article 3 ECHR, such as the obligation to investigate, the question remains as to what substance falls outside the Court's extensive scope of review and thus remains within the narrow margin of appreciation possibly granted to the states.

To answer this question, it must first be asked, whether, in the case of a removal to a third country, the Court's extensive scope of review includes that it conducts its own risk assessment with regard to the individual circumstances of the case, as has been established in the case of a return to the country of origin. In its judgment in *Ilias and Ahmed v. Hungary*, when citing the general relevant principles in expulsion cases, the Court stated that

> [t]he assessment of whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 [...] inevitably involves an examination by the competent national authorities and *later by the Court* of the conditions in the receiving country against the standards of Article 3 [...].[249]

The Court thus explicitly leaves open the possibility of conducting its own assessment of the conditions in the receiving country, whether that be the country of origin or a third country. However, as noted above, in the same judgment the Court reiterated its subsidiarity to the national decision-making process, stating that it is 'not the Court's task to substitute its own assessment

[246] *H.M.M. and Others v. Latvia* (n 2).
[247] Grand Chamber hearing on 12 February 2025 of ibid.
[248] Beuscher and others (n 68).
[249] *Ilias and Ahmed v. Hungary* (n 27) [127], emphasis added.

of the facts for that of the domestic courts'.[250] It emphasises that it 'must be satisfied, [...], that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources'.[251] The foregoing analysis has shown, however, that in order to assess the adequacy of the state's examination, the Court is inevitably required to make its own analysis of the existing authoritative reports about the situation in the third country. For this reason, in *Ilias and Ahmed v. Hungary*, the Court provided a detailed account of 'other reliable information which did not seem to have been taken into consideration by the Hungarian authorities.'[252] The Court noted 'a significant risk of refoulement' in Serbia, the country of removal, and listed the reasons and sources that led to this conclusion.[253] Only by conducting its own assessment of the available information about the risks in the third country could the Court conclude that the Hungarian authorities had only made 'passing references' to the relevant reports, 'without addressing in substance or in sufficient detail the concrete risks pinpointed there and, in particular, the risk of arbitrary removal in the two applicants' specific situation'.[254]

These observations emphasise that the Court does conduct its own assessment of the circumstances in the third country. However, this is not to substitute its own assessment of the facts of the case for the national decision, but rather to judge the adequacy of the state's decision-making process based on its own findings. This analysis suggests that the Court leaves no margin of appreciation for the national authorities to reach their own conclusion. Instead, the Court seems to imply that, when consulting all the relevant materials, the responding state must have been able to come to the same conclusion as the Court with regard to the existence of a risk. If the state did not come to the same conclusion as the Court, the national decision-making process will be considered insufficient. This is independent of the effort and resources invested by the state.

This conclusion aligns with the Court's procedure of taking into account all available information when conducting its own risk assessment. In this regard, the Court reiterated in *Cruz Varas and Others v.* Sweden that

> [s]ince the nature of the Contracting States' responsibility under Article 3 (art. 3) [...] lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears.[255]

Although this explanation arose in the context of the negative obligation under *non-refoulement* rather than the positive procedural obligation, the same rationale can be applied to the Court's assessment of the latter. By not restricting its examination to the sources available to the state, the Court demonstrates its willingness to conduct its own risk assessment. However, while the Court may consult reports and information about circumstances that only came to light after the

[250] ibid [150].
[251] ibid.
[252] ibid [159].
[253] ibid.
[254] ibid [160].
[255] *Cruz Varas and Others v. Sweden* (n 50) [76].

applicant's removal, it will only use these to conclude whether the decision of the removing state that there was no risk at the time of removal was correct. If the Court concludes that there were no indications of a risk of direct or indirect *refoulement* at the time of removal, the state cannot be held accountable for its assessment or the removal. This is because the responsibility of the contracting state lies in the act of knowingly or negligently exposing an individual to the risk of ill-treatment.

It can be concluded that, when examining the state's fulfilment of the positive procedural obligation under *non-refoulement*, the Court conducts its own risk assessment. This involves not only prescribing what sources to consult, but also examining whether the national authorities have drawn the right conclusions from the reports consulted. Given the Court's extensive scope of review, the only aspect left to the margin of appreciation of the state is the concrete performance of the assessment. The specific modalities of the assessment, such as the time and location allocated and the personnel conducting the assessment, cannot be made subject to a strict review by the Court. The Court cannot apply a common standard of assessment with regard to these considerations in all cases. While it will review whether the state has fulfilled its obligation of result, as outlined above, the state is free to decide how to achieve this result, provided it reaches the same conclusion as the Court.

This way, states can take into account the specific circumstances surrounding the assessment and the removal. For example, in situations involving increased border crossings, national authorities could decide to postpone returns and conduct assessments in other parts of the country. In particular, when a state claims that its national security is at risk, the Court generally grants it a wide margin of appreciation.[256] However, in accordance with the above-determined obligation of result, contracting states cannot be given 'an unlimited licence but [have] to satisfy the Court that adequate and effective safeguards [are] in place.'[257]

To conclude Chapter 4, when determining whether the state has fulfilled its procedural obligation to assess the individual circumstances of the case before removal, the Court will conduct its own risk assessment, as it does when evaluating states' fulfilment of their negative obligation. This risk assessment will be conducted in both cases: return to the country of origin and removal to a third country. The Court will use its own risk assessment to determine whether the national decision-making process can be deemed 'adequate'. It will only find so if the national assessment reaches the same conclusion as the Court. Consequently, the Court does not grant the states a margin of appreciation with regard to the substantive assessment of the risk. However, the Court will not review the state's considerations regarding the specific circumstances of the assessment and the resources invested, including time, location, and personnel. In this regard, the Court grants the state a margin of appreciation, allowing it to adapt the procedure for carrying out assessments to its national realities, while still stipulating stringent quality standards for each individual assessment.

[256] Jacobs and others (n 112) 371.
[257] ibid.

5. Conclusion

The responding state governments in the Grand Chamber hearings in *R.A. and Others v. Poland*,[258] *H.M.M. and Others v. Latvia*[259] and *C.O.C.G. and Others v. Lithuania*[260] all insisted that the prohibition of *refoulement* under Article 3 ECHR must allow for a margin of appreciation to accommodate states' interests and needs when facing new challenges to their national security such as 'hybrid attacks' and 'instrumentalised migration'. Since the margin of appreciation was established by the Court as a tool to enable it 'to deal with the different situations and needs which could not have been envisaged at the time of the drafting of the Convention but which in its work daily confront it',[261] its application to newly arising challenges to states obligations under the principle of *non-refoulement* seems not out of context.

Therefore, this thesis looked at the question whether the absolute prohibition of *refoulement* under Article 3 ECHR grants states a margin of appreciation.

To answer this question it was crucial to, first, unfold how the Court's interpretation of Article 3 ECHR leads to it being classified as absolute and what the consequences of this classification are. Chapter 2 has shown that by applying a literal and contextual interpretation the Court in its jurisprudence came to the conclusion that 'absolute' means the absence of any possibility of justifying interferences. The Court also links this to the idea that Article 3 ECHR enshrines 'one of the most fundamental values of democratic societies'. Furthermore, Chapter 2 has demonstrated that the Court derives the prohibition of *refoulement*, along with its negative and positive procedural obligation, from the absolute nature of Article 3 ECHR.

The negative obligation under *non-refoulement* prohibits contracting states to remove a person, where substantial grounds have been shown for believing that the person concerned, if removed, faces a real risk of being subjected to ill-treatment contrary to Article 3 ECHR. In order for a state to fulfil this negative obligation, the Court established the positive procedural obligation for states to conduct an individual risk assessment before removal depending on all the circumstances of the case. This thesis examined the procedural obligation set out in the *Ilias and Ahmed v. Hungary* judgment in detail, demonstrating that it differs depending on the country of return. In the case of a return to the country of origin, the national authorities bear the duty to examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin. In cases where the authorities choose to remove a protection seeker to a third country, the contracting state must assess, whether the removal would expose the person, directly (i.e., in that third country) or indirectly (for example, in the country of origin or another country), to treatment contrary to Article 3 ECHR. By providing a detailed description of the contracting states' obligations under the principle of *non-refoulement*, Chapter 2 paved the way for a differentiated approach to answering the question of whether the absolute prohibition of *refoulement*, in the form of both its negative and positive obligation, allows the Court to grant states a margin of appreciation.

To this end, Chapter 3 introduced the margin of appreciation doctrine applied by the Court in its case law, establishing it as a foundational principle of the Convention. The doctrine emphasises the primary responsibility of the contracting states for safeguarding the Convention rights, thereby

[258] *R.A. and Others v. Poland* (n 1).
[259] *H.M.M. and Others v. Latvia* (n 2).
[260] *C.O.C.G. and Others v. Lithuania* (n 3).
[261] Macdonald (n 99) 122.

underlining the Court's subsidiary role in this regard. The chapter demonstrated that this doctrinal figure serves to accommodate the interests and particular circumstances of the contracting states, granting them a degree of discretion when implementing the Convention's rights. These considerations provided an explanation for why the contracting states are so eager to be granted a margin of appreciation by the Court when it assesses alleged violations of Convention rights, as outlined in the introduction to this thesis.

Chapter 3.2 then explored the close relationship between the Court's scope of review and the margin of appreciation. While the Court grants the contracting states a margin of appreciation, recognising that national authorities are often better placed to decide what actions are possible and necessary in response to a situation, this power is limited by the Court's supervisory role, as established by Article 19 ECHR. The margin of appreciation determines the intensity of the Court's judicial scrutiny when assessing an alleged violation of a Convention right. It is also referred to as 'the other side of the scope of review coin'.[262] Understanding this close relationship between the margin of appreciation and the Court's scope of review informed the subsequent analysis of whether states' obligations under the principle of *non-refoulement* allow for a margin of appreciation. This is because it revealed that the Court's observations on the scope of its review in its case law could be used to draw conclusions about the respective margin of appreciation.

The following Chapter 3.3 of this thesis set out in which cases the Court has granted contracting states a margin of appreciation and to what degree. It introduced the doctrine's application to Convention articles containing explicit limitation clauses, as well as to positive obligations. The focus here has been on positive obligations under absolute rights, and how their classification as obligations of effort or result influences the Court's scope of review. This informed the subsequent analysis of whether the absolute prohibition of *refoulement* under Article 3 ECHR, in particular states' negative and positive procedural obligations, allows the Court to grant states a margin of appreciation and, if so, to what extent.

The detailed analysis of the Court's application of the doctrine revealed the Court's differential approach depending on the type of right to be examined. Section 3.3.1 showed that the Court most often refers to the margin of appreciation when assessing the justification of an infringement of qualified rights. In this context, the application of the doctrine is guided by the three-part inquiry required by the explicit limitation clauses. Section 3.3.2.1 further revealed that another important area of application of the doctrine concerns states' positive obligations under qualified Convention rights. When assessing whether a state has struck a fair balance between its own public interest and that of the individual, the Court leaves the state with a wide margin of appreciation. This permits states to choose how to fulfil their positive obligations, taking due regard of their needs and resources.

However, Section 3.3.2.2 developed that the Court takes a different approach with regard to the positive obligations of contracting states under absolute rights. While the Court extended its application of the margin of appreciation doctrine to all derogable Convention rights, its application to absolute rights is more narrow. The absolute nature of these articles requires that any restriction on these rights must be subject to the Court's 'most rigorous review'. Regarding the negative obligations of the contracting states under these absolute rights, this leads the Court to grant no margin of appreciation. While the section has revealed conflicting views in the literature on whether or not the Court grants states a margin of appreciation with regard to their positive

[262] ibid 85.

obligations under absolute rights, recent case law suggests that states may indeed be granted some margin of appreciation in this regard. To determine the extent of the margin of appreciation granted to states in cases involving positive obligations under absolute rights, this thesis argued that classifying the obligation as one of effort or result is decisive. The Court tends to grant states a wider margin of appreciation in the case of an obligation of effort, while the margin of appreciation will be more limited in the case of an obligation of result. Chapter 4 then examined how this analysis applies to the margin of appreciation in the context of the principle of *non-refoulement* under Article 3 ECHR.

Having explored the absolute prohibition of *refoulement* and its accompanying negative and positive procedural obligation for contracting states in Chapter 2, and the margin of appreciation doctrine under the Court's jurisprudence in the preceding Chapter 3, Chapter 4 applied these findings made in order to answer the question of whether the absolute principle of *non-refoulement* allows states a margin of appreciation. To this end, Chapter 4 worked out in detail the scope of review applied by the Court in the case of a return to the individual's country of origin (Chapter 4.1) and in the case of a return to a third country (Chapter 4.2).

The assessment of the scope of review of the Court in the case of a removal to the country of origin first looked at the contracting state's negative obligation under the principle of *non-refoulement* to then second, analyse the Court's scope of review with regard to states positive obligation. With regard to the former, Section 4.1.1 concluded that, when assessing a potential violation of the negative obligation not to remove a person to a country where he or she would be at risk of ill-treatment prohibited by Article 3 ECHR, the Court will apply an extensive scope of review, exercising rigorous scrutiny while taking the circumstances of the case into consideration. The Court will not leave any margin of appreciation to the state. This can be explained by the absolute nature of the negative obligation, which allows for no justification, and by the existing consensus between the contracting states on the notion of ill-treatment. Thus, the negative obligation under *non-refoulement* leaves no room for the margin of appreciation doctrine as a tool to accompany state interests and recognise national peculiarities.

Section 4.1.2 then examined the positive procedural obligation of states in the case of removal to the country of origin. It concluded that the Court's scope of review in this regard is aligned with its scope of review regarding the negative obligation. The Court will conduct a full review of the facts of the case and find that the state has violated its positive obligation to thoroughly assess the merits of the asylum application if its review establishes a risk of ill-treatment that the state knew or could have known about. This leads to the conclusion that the Court will not grant states a margin of appreciation with regard to the substantive assessment of the risk.

The second part of Chapter 4 focused on the Court's scope of review with regard to the positive procedural obligation of the contracting state in a pushback scenario. For the purposes of this thesis, this scenario implied that the country of removal is a third country, and that the removing state has not assessed the merits of the applicant's claim. Section 4.2.1 established that, under the procedural obligation, the Court requires states to 'adequately' assess the risk of direct or indirect *refoulement* upon removal. In order to determine the scope of this obligation, which informs the Court's scope of review, this thesis put forward the argument that the positive procedural obligation should be classified as an obligation of result, as opposed to an obligation of effort. This classification is based on two arguments: First, the procedural obligation to carry out an individual assessment must be distinguished from the obligation to investigate under

Article 3 ECHR, which only amounts to an obligation of effort. Second, the Court's reasoning in the case *Kalashnikov v. Russia* with regard to the contracting states' obligation to provide acceptable detention conditions as an obligation of result can be applied to the procedural obligation under *non-refoulement*.

Under the obligation of result, the state must be able to make a well-founded decision that the person in question will not face any risk of direct or indirect *refoulement*, as prohibited by Article 3 ECHR. If the state has any doubts regarding the risk of ill-treatment it must refrain from removing that person in order not to violate its negative obligation. This finding emphasises that the negative and positive obligations under the principle of *non-refoulement* are 'intimately intertwined'.[263] Accordingly, the Court's scope of review will be extensive, leaving states with only a narrow margin of appreciation.

The last section of this thesis then answered the question as to what substance falls outside the Court's extensive scope of review and thus remains within the narrow margin of appreciation possibly granted to the states. It concluded that, when determining whether the state has fulfilled its procedural obligation to assess the individual circumstances of the case before removal, the Court will conduct its own risk assessment, as it does when evaluating states' fulfilment of their negative obligation. This risk assessment will be conducted in both cases: return to the country of origin and removal to a third country. The Court will use its own risk assessment to determine whether the national decision-making process can be deemed 'adequate'. It will only find so if the national assessment reaches the same conclusion as the Court. Consequently, the Court does not grant the states a margin of appreciation with regard to the substantive assessment of the risk. However, the Court will not review the state's considerations regarding the specific modalities of the assessment and the resources invested, including time, location, and personnel. In this regard, the Court grants the state a margin of appreciation, allowing it to adapt the procedure for carrying out assessments to its national realities, while still stipulating stringent quality standards for each individual assessment.

This thesis concludes that the negative obligation of states under the absolute prohibition of *refoulement* leaves no room for a margin of appreciation to be granted to states. Regarding the positive procedural obligation, the Court will conduct its own risk assessment in cases of both return to the country of origin and removal to a third country. Therefore, the positive procedural obligation does not allow for a margin of appreciation with regard to the substantive assessment of the risk. However, states do enjoy a margin of appreciation with regard to their considerations of the specific modalities of the assessment and the resources invested.

[263] Beuscher and others (n 68).

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