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Complementary Protection and Encampment

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ABSTRACT

A camp may be described as a temporary space in which individuals receive humanitarian relief and protection until a durable solution can be found to their situation. The camp environment is often riddled with contradictions—the camp can be a place of refuge while at the same time, a place of overcrowding, exclusion and suffering. This article asks to what extent removal of an individual from state A to state B, where he or she will have to live in a camp, is a breach of state A's human rights law obligations. It argues that even if encampment in state B will expose the individual to terrible conditions, it is unlikely that they will be able to successfully challenge a removal decision before international human rights courts and/or treaty monitoring bodies.

KEYWORDS: camps, encampment, human rights, removal, complementary protection, internal displacement

1. INTRODUCTION

A camp may be described as a temporary space in which individuals receive humanitarian relief and protection until a durable solution can be found to their situation.[1] It is now relatively well-accepted that although camps come in a wide variety of forms, they share certain characteristics such as their temporality, exceptionalism and their aims of containing displaced populations and maintaining 'bare life.'[2] In addition, camps are often overcrowded, with poor sanitary conditions, little or no healthcare services

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1 Sytnik, 'Rights Displaced: The Effects of Long-term Encampment on the Human Rights of Refugees' (2018) *Refugee Law Initiative Working Papers Series* No 4, available at: sas-space.sas.ac.uk/4691/ [last accessed 6 November 2020].

2 Ibid; Knudsen, 'Camp, Ghetto, Zinco, Slum: Lebanon's Transitional Zones of Emplacement' (2016) 7 *Humanity Journal* 443; Schmidt, 'FMO Thematic Guide: Camps versus Settlements', available at: www.alnap.org/help-library/fmo-thematic-guide-camps-versus-settlements [last accessed 6 November 2020]; Ramadan, 'Spatialising the Refugee Camp' (2018) 38 *Transactions of the Institute of British Geographers* 65; Turner, 'What Is a Refugee Camp? Explorations of the Limits and Effects of the Camp' (2015) 29(2) *Journal of Refugee Studies* 139; Diken and Laustsen, *The Culture of Exception: Sociology Facing the Camp* (2005). These characteristics are explained in more detail in section 2.

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and limited supplies of food and water. Yet camps are often referred to as places of 'refuge'[3] and are home to more than 12 million refugees and Internally Displaced Persons (IDPs).[4] The camp environment is thus riddled with contradictions: it is a place of 'refuge' while at the same time, a place of suffering.

The relationship between encampment (i.e. the possibility of living in a camp) and refugee status has been addressed in part with the conclusion that it is unlikely the possibility of encampment will bring an individual within the refugee definition.[5] However, little scholarly attention has been paid to the question of whether an asylum seeker whose claim for refugee protection has failed can rely on complementary protection to challenge removal on the grounds that they may have to live in a camp.[6] In other words, is the removal of an individual from state A to state B, where he or she will have to live in a camp, a breach of state A's human rights law obligations? This question is precisely the focus of this article.

Two examples in particular serve to highlight the timeliness of the topic of removal and encampment. The first is the EU's current policy of assisting Libya to intercept migrants on the Mediterranean. Many of these migrants are detained in camps in Tripoli, in appalling conditions.[7] In addition, the EU has concluded an agreement with Turkey which allows for the removal of refugees from EU states to Turkey where they often end up living in camps.[8] In assessing whether and under what circumstances removal to a situation of encampment can violate international human rights law, this article will assist in determining state responsibility for these policies, and will clarify the relationship between complementary protection and the protection of individuals who end up in camps.

The article argues that generally speaking, a 'real risk' of having to live in a camp if removed will not, in itself, give rise to a violation of international human rights law. In certain circumstances, the cumulative conditions within camps may give rise to

3 Ogg, 'Protection From Refuge: On What Legal Grounds will a Refugee be Saved from Camp Life?' (2016) 28 *International Journal of Refugee Law* 384.

4 Knudsen, supra n 2; McConnachie, 'Camps of Containment: A Genealogy of the Refugee Camp' (2016) 7(3) 7 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 397; Ní Ghráinne, *Internally Displaced Persons in International Refugee Law* (forthcoming, OUP). A refugee is a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it' Convention Relating to the Status of Refugees 1951, 189 UNTS 137 (Refugee Convention). IDPs are 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border. Commission on Human Rights, United Nations Guiding Principles on Internal Displacement (UN doc. E/CN.4/1998/53/Add.21998).

5 Ogg, supra n 3.

6 Removal in this context refers to deportation and/or expulsion.

7 Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya', 21 January 2019, available at: www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya [last accessed 6 November 2020].

8 Euronews, '4 Million Refugees Sheltering in Turkey', 20 March 2018, available at: www.euronews.com/2018/03/20/4-million-refugees-sheltering-in-turkey [last accessed 6 November 2020].

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a violation of the prohibition of cruel, inhuman and degrading treatment. However, the threshold applied by courts and treaty monitoring bodies (TMBs) to such cases is generally very high, requiring the individual to show that they face exceptional circumstances or have special distinguishing characteristics that would make their life in a camp worse than others. In prohibiting removal solely in exceptional cases, courts and TMBs seem to be trying to tread a delicate balance between, on the one hand, declaring that states have violated international human rights law, and on the other hand, maintaining the support of states for courts and TMBs.

This article will be formed into six parts. This part introduces the article and sets out its scope and aims. Part 2 will illustrate that although millions of people seek protection in camps, the conditions in camps raise serious human rights concerns. Part 3 will briefly introduce the regime of complementary protection. Much has been written about complementary protection in recent years and thus rather than engage in the literature in detail, this part will identify common themes between different treaties and their respective monitoring bodies to illustrate the scope and breadth of complementary protection. Part 4 will examine the jurisprudence of various treaty regimes that deal with the issue of the encampment. The bulk of the analysis will focus on the jurisprudence of the ECtHR because (i) it has decided a number of non-removal cases related to the encampment; and (ii) the ECtHR's views are frequently cited by other international courts and TMBs,[9] and thus the ECtHR's views will likely have an influence far beyond the Council of Europe. This part will also examine the views of the Human Rights Committee (HRC), which has addressed one non-removal complaint relating to internal displacement. Part 5 will then illustrate how these principles are applied in practice. It will employ a test scenario to illustrate (i) whether restrictions in a 'normal' camp are liable to trigger complementary protection (applying the law currently stands); and (ii) whether applying the law to the facts reveals any additional problems with the law itself.[10] Part 6 will conclude by summing up the main contributions and arguments of the article.

2. CONDITIONS IN CAMPS

Camps vary in many ways. Some can be the size of small villages. Others are the size of cities, such as the Daadab camp in Kenya which shelters 235,269 people.[11] Some

9 Case 12.534, *Mortlock v USA,* Inter-American Commission of Human Rights Report No 63/08 (2008); Case 10,675, *Haitian Centre for Human Rights* et al. *v. USA,* Inter-American Commission on Human Rights, Report No 51/96 (1997).

10 Sudan was chosen as a case study because, together with Iraq and Somalia, the issue of return to an IDP camp arises frequently in relation to Darfur. The issue of Somalia and return is addressed by the analysis of case law in this article, and Iraq is not addressed because there is significantly more information regarding the conditions in Sudanese IDP camps rather than Iraq. See *SSHD v Abdulkadir Ahmed Said* [2016] EWCA Civ 442; *NM and Others (Lone women—Ashraf) Somalia CG* [2005] UKIAT 00076; *HH & others (Mogadishu: armed conflict: risk) Somalia CG* [2008] UKAIT 22; *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 00445; *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 442; *Hamid, Gaafar, Mohammed v SSHD* [2005] EWCA Civ 1219; *HGMO (Relocation to Khartoum) Sudan CG* [2006] UKAIT 00062; *Adam Bala Omar v. SSHD* [2009] NICA 21; *AA (Article 15(c) Iraq CG* [2015] UKUT 544.

11 UNHCR, 'Dadaab Refugee Complex' available at: www.unhcr.org/ke/dadaab-refugee-complex [last accessed 6 November 2020].

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camps are fenced and guarded whereas others allow relatively free movement. Some have existed for generations and some are newly created.[12] Despite these variable factors, scholars across various disciplines agree that most camps have certain shared characteristics that raise serious human rights concerns.

First, camps are places of exclusion,[13] characterised by a 'tacit and unsatisfactory policy of containment.'[14] With varying extents of institutional, geographical and legal formality, camps separate their residents from the surrounding area.[15] For example, camps are often placed in remote areas and rarely visible on official maps,[16] and punishments are often imposed on individuals who leave the camp without official permission.[17] Living in a camp defines one's position and one's life,[18] and camps are subject to social exclusion as the inhabitants are often treated as not being a part of the host culture and society.[19] There is, therefore, a general consensus amongst scholars and stakeholders—although not necessarily amongst states—that camps entail an unlawful restriction on freedom of movement and choice of residence.[20]

A further defining characteristic of camps is their temporality.[21] Camps are usually created as a response to an emergency and are often understood as having a restricted, although sometimes indeterminate, duration.[22] Unlike 'normal' settlements like villages, cities and towns, a camp is never intended to be a permanent home.[23] In practice, however, many camps become quasi-permanent, lasting for years and sometimes decades.[24] The camp exists as a 'zone of indistinction' between permanence and transience; 'a temporary suspension of the rule of law . . . is now given a permanent spatial arrangement.'[25] The camp is thus 'a time space of dislocation: a space of displacement and exile, and a time of interruption, waiting, stasis.'[26] Individuals may find themselves in a double paradoxical situation—they cannot settle where they are because they are supposedly 'on the move,' but they cannot remain 'on the move' as they are not going anywhere, either now or in the near future. The result is that they experience living in a time bubble where time stands still inside the camp while normal time continues

12 McConnachie, supra n 4.
13 McConnachie, supra n 4.
14 Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism* (2000) at 140; McConnachie, supra n 4.
15 McConnachie, supra n 4; Sytnik, supra n 1; Schmidt, supra n 2.
16 Turner, supra n 2; Diken and Laustsen, supra n 2.
17 Sytnik, supra n 1.
18 Sytnik, supra n 1.
19 Sytnik, supra n 1.
20 Janmyr, 'Spaces of Legal Ambiguity: Refugee Camps and Humanitarian Power' (2016) 7(3) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 413; McConnachie, supra n 4; Sytnik, supra n 1.
21 Grbac, 'Civitas, Polis, and Urbs: Reimagining the Refugee Camp as the City' (2013) Refugee Studies Centre Working Paper Series No 96, www.refworld.org/pdfid/55c9f3504.pdf [last accessed 6 November 2020]; Sytnik, supra n 1; Turner 'Suspended Spaces: Contesting Sovereignties in a Refugee Camp' in Hansen and Stepputat (eds) *Sovereign Bodies: Citizens, Migrants and States in the Post-Colonial World* (2015) at 312.
22 Turner, supra n 2.
23 McConnachie, supra n 4.
24 Turner, supra n 2.
25 Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998), 96; Ramadan, supra n 2.
26 Ramadan, supra n 2, 72; Sanbar, 'Out of Place, Out of Time' (2011) 16 *Mediterranean Historical Review* 87.

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outside the camp. This limbo is often indeterminate,[27] and imagining a future, planning one's life trajectory, and acting in the present become difficult.[28] Hage explains that a situation with the 'quasi-complete absence of possibilities of a worthy life' may lead to 'a generalised form of premature social ageing, even of social death.'[29]

Relatedly, camps are widely described as places of exception.[30] They are not only legally under the jurisdiction of the state in which the camp is based but also exempted from it because camps are often governed by separate legal instruments.[31] Camps can have a temporary suspension of moral order where norms, hierarchies and status are constantly being renegotiated.[32] As a result, camps are often characterised by insecurity and violence.[33] However, encamped residents are unable to claim their human rights for a number of reasons. The jurisdictional isolation of the camp leaves its residents outside of the legal system; and their recourse to justice is severely limited because of lack of information about their rights, lack of resources and difficulties in accessing legal representation. In addition, camps are primarily administered by humanitarian organizations that are often unable to protect against human rights violations.[34] Moreover, the perception of IDPs and refugees as temporary, and thus warranting a temporary, humanitarian response may lead to their relatively poorer treatment.[35]

Some have described the purpose of camps as maintaining 'bare life.'[36] In other words, the aim of camps is to simply keep the displaced alive from one day to the next. As a result, the camp structure does not envision accommodation for an extended stay and the standard of living in camps is often incredibly low.[37] Overcrowding is a major problem in many camps, with some camps accommodating up to 300,000 individuals.[38] There is often a shortage of food, water, shelter and/or inadequate access to basic services, such as education and sanitation.[39] Confinement in a camp severely limits an individual's ability to obtain employment, open a business, cultivate land or

27 Turner, supra n 2.

28 Turner, supra n 2; Turner, supra n 21, 312.

29 Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society* (2003), 78; Turner, supra n 2. Social death is used by Borgstrom to describe the ways in which someone is treated as if they were dead or non-existent. Králová has identified three characteristics often found in definitions of social death, each of which suggests that the concept represents compromised well-being. These are: a loss of social identity; a loss of social connectedness; and losses associated with disintegration of the body. Rather than necessarily being a clearly defined event, Norwood considers social death as a series of losses. For example: loss of identity; loss of ability to take part in daily activities; and loss of social relationships. Cumulatively, these losses can result in an individual becoming disconnected from social life. See Borgstrom, 'Social Death' (2017) 110(1) *International Journal of Medicine* 5; Králová, 'What is Social Death?' (2015) 10(3) *Contemporary Social Science* 235; Norwood, *The Maintenance of Life: Preventing Social Death through Euthanasia Talk and End-of-Life Care: Lessons from the Netherlands* (2009).

30 Ramadan, supra n 2; Grbac, supra n 21; Diken and Laustsen, supra n 2; Agamben, supra n 25; Turner, supra n 21, 312.

31 Turner, supra n 2.

32 Turner, supra n 21, 312.

33 Loescher and Milner, 'Protracted Refugee Situations and State and Regional Insecurity' (2004) 4 *Conflict, Security, and Development* 3; Grbac, supra n 21; Sytnik, supra n 1; Turner, supra n 21, 312.

34 Sytnik, supra n 1.

35 Sytnik, supra n 1.

36 Turner, supra n 21 at 312.

37 Sytnik, supra n 1.

38 Turner, supra n 2; McConnachie, supra n 4; Sytnik, supra n 1; Schmidt, supra n 2.

39 Sytnik, supra n 1.

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access protection and services.[40] Most individuals in camps are therefore very poor, often living on small amounts of support payments with no cash allowance.[41] This lack of opportunities and consequent poverty make camp residents particularly vulnerable to exploitation in an informal economy.[42] There is also significant evidence that living in a camp is detrimental to human health.[43] Moreover, the enforced proximity produced by the camp fosters internal tensions, exacerbates intercommunity pressure and control and deprives individuals of privacy.[44] As a result, there is often a radicalization of ethnic identity and breakdown of community.[45]

More generally, placing the residents of camps within the humanitarian paradigm is problematic. They are perceived as passive victims and as such are reduced to recipients of aid within a camp.[46] Being stripped down to a biological minimum for prolonged periods can subsume individuals 'within a discourse of animality' and leads to their dehumanization.[47] Confinement to camps also ignores the resources and capacities that residents possess and increases dependency on aid.[48]

As a result of these conditions, crime and violence (and in particular sexual and gender-based violence)[49] often flourish in camp environments. As set out above, such harms often go unpunished.[50] This suspension of law and morality also makes camp residents vulnerable to abuses of authority by staff of international humanitarian agencies.[51]

It is, therefore, clear that life in a camp can, in human terms, be terrible. However, it is unclear whether an individual can rely on these terrible conditions to contest removal to a situation of the encampment, particularly when—notionally at least—camps are places of refuge for millions of people.[52] The next section (section 3) will set out the restrictions on states in removing an individual from their territory; and section 4 will focus on specific cases that dealt with situations of encampment and removal.

40 Sytnik, supra n 1; Janmyr, supra n 20; Diken and Laustsen, supra n 2.

41 McConnachie, supra n 4; Diken and Laustsen, supra n 2.

42 Krause-Vilmar, 'Struggling to Make a Living in Ethiopia: Surviving in the Informal Economy' (2010) Women's Refuge Commission, available at: www.womensrefugeecommission.org/blog/1002-struggling-to-make-a-living-in-ethiopia-surviving-in-the-informal-economy [last accessed 6 November 2020].

43 Black, 'Putting Refugees in Camps' (1998) 10 *Forced Migration Review* 4; Sigona, *'Campzenship: Reimagining the Camp as a Social and Political Space'* (2015) 19, Citizenship Studies 1, Verdirame and Harrell-Bond, *Rights in Exile: Janus-faced Humanitarianism* (2005).

44 Sigona, supra n 43; Sytnik, supra n 1; Schmidt, supra n 2.

45 Verdirame and Harrell-Bond, supra n 43.

46 Turner, supra n 2.

47 Sytnik, supra n 1; Nyers, *Rethinking Refugees: Beyond States of Emergency* (2006).

48 Smith, 'Warehousing Refugees: A Denial of Rights, a Waste of Humanity' (2004) *World Refugee Survey*, available at: refugees.org/wp-content/uploads/2015/12/Warehousing-Refugees-Campaign-Materials.pdf [last accessed 6 November 2020].

49 Turnet, supra n 312.

50 Sytnik, supra n 1.

51 McConnachie, supra n 4.

52 Ogg describes camps as 'places of "refuge" in the notional sense only . . . while they are used or designated as places of refuge, in practice, they often do not provide meaningful protection.' Ogg, supra n 3, 393.

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3. OVERVIEW OF COMPLEMENTARY PROTECTION

The risk of living in a camp in their country of nationality or habitual residence will not ipso facto bring an individual within the refugee definition.[53] Therefore, anyone who claims refugee status on the grounds that they face living in a camp will likely be unsuccessful and face removal. However, as this article will assess, complementary protection may be a useful avenue by which to contest such removal.

Complementary protection refers to international instruments—mainly human rights treaties—which apply notwithstanding failure to satisfy the refugee definition.[54] The protection offered 'complements' the Refugee Convention as it extends the categories of persons entitled to international protection. For example, complementary protection may prevent the removal of an individual who is in need of international protection despite the fact that they do not qualify as a refugee. In addition, states are the primary interpreters of the Refugee Convention. Unlike the European Convention on Human Rights, the Refugee Convention has no binding international mechanism where individuals have standing and thus complementary protection may be the only option available to those who believe that the Refugee Convention has been misapplied or misinterpreted.[55] Most international courts and monitoring bodies are not competent to apply the Refugee Convention. However, they may examine the issue of non-removal under the particular instrument that they are mandated to supervise, and conclude that removal would be a violation of that respective instrument.

There is a significant amount of literature on complementary protection.[56] For the purposes of this article, it suffices to briefly identify common themes between different

53 The 1951 Refugee Convention provides that in order to qualify as a refugee, an individual has to show, *inter alia*, that there is (i) a well-founded fear of persecution in their country of nationality on a Convention ground (race, religion, nationality, political opinion or member of a particular social group) and; (ii) that there is no available protection from persecution. To satisfy criterion (i), an individual could argue that the human rights violations inherent in encampment reach the threshold of persecution. However, the threshold for establishing persecution is high and even if this threshold is met, the individual might have difficulty establishing the connection between persecution and a Convention ground. Alternatively, an asylum-seeker may argue that a camp does not qualify as available protection as per criterion (ii) because the conditions inherent in encampment are so dire that an individual cannot be expected to seek protection there. However, the jurisprudence on this issue is inconsistent—some cases have held that relocation to a camp is entirely reasonable, whereas other cases have found that spending a large portion of time in a camp would be 'unreasonable' or 'unduly harsh.' See Ní Ghráinne, 'The Internal Protection Alternative Inquiry and Human Rights Considerations—Irrelevant or Indispensable?' (2015) 27 *International Journal of Refugee Law* 29; Ogg, supra n 3.

54 McAdam, *Complementary Protection in International Refugee* Law (2007).

55 Although the International Court of Justice (ICJ) has jurisdiction to resolve disputes on the interpretation and application of the 1951 Refugee Convention, it has so far not adopted any relevant judgment or advisory opinion, and there is no prospect that such questions will be addressed by the ICJ as individuals do not have standing before it. See Article 38, 1951 Refugee Convention; *Regina v. Secretary of State for the Home Department, exparte Adan*, [2001] 1 All E.R. 593, 616 (per Hobhouse, L.J.).

56 For example, Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) 2 *New Zealand Law Review* 257; Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007); McAdam, supra n 54; Pobjoy, 'A Child Rights Framework for Assessing the Status of Refugee Children' in Juss and Harvey, *Contemporary Issues in Refugee Law* (2013) at 91; Scott, 'Natural Disasters, Climate Change and Non-Refoulement: What Scope for Resisting Expulsion under Articles 3 and 8 of the European Convention on Human Rights?' (2014) 26 *International Journal of Refugee Law* 404; Kolmannskog and Myrstad, (2009) 'Environmental Displacement in European Asylum Law' 11(4) *European Journal of Migration and Law* 313; Kolmannskog, 'Climate Change, Environmental Displacement, and International Law' (2012) 24(8) *Journal of International Development* 1071; Cantor and Barichello, 'The Inter-American Human Rights System: A New Model for Integrating Refugee and Complementary Protection?', (2013) 17 *The*

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treaties and their respective monitoring bodies to illustrate the scope and breadth of complementary protection.

First, the general underlying rationale across all treaty regimes is that if an act of removal results in a violation of a particular treaty, the removing state may be responsible under that treaty. For example, if an individual is sent to a state where he or she is at risk of torture or cruel, inhuman or degrading treatment; the removing state is responsible for the consequences of removal.[57] In considering such cases, the relevant court/monitoring body may evaluate the conditions in the receiving state with reference to the particular treaty at hand. That is not to say that the monitoring body is applying that treaty in an extra-territorial manner (i.e. assessing whether the receiving state is in violation of the relevant treaty), but rather, is engaging in a factual analysis for the purposes of assessing the consequences of the act of removal. Therefore, the obligation of non-removal is not concerned with attributing responsibility for the actions of one state (the receiving state) to another (the removing state). Nor is it a situation that the removing state is responsible for assisting in the violation by removing the individual concerned. This is because it is only in exceptional cases that one state is responsible for the acts of another, and the removal cannot be said to be carried out 'with a view to facilitating the commission of the wrongful act.'[58] In addition, the receiving state may not even be bound by the human rights treaty in question, and thus the removing state cannot be said to be aiding or assisting it in violating that particular treaty. Therefore, the responsibility assessed in these non-removal cases is that of the removing, rather than the receiving state. As the European Court of Human Rights explained in its first case on the non-removal obligation—*Soering v United Kingdom:* 'there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the [ECHR] or otherwise.'[59]

Second, the potential violation of *any* right can give rise to an obligation of non-removal. It is not limited, in theory, to non-derogable rights or rights that have *jus cogens* status. However, courts/TMBs have tended to find such an obligation mainly in conjunction with the prohibition of torture or cruel, inhuman and degrading treatment, and thus the cases examined in this article focus on this right.[60] To a lesser extent, violations have been found in conjunction with the right to life,[61] the right to family

International Journal of Human Rights 689; Durieux, 'Salah Sheekh is a Refugee: New Insights into Primary and Subsidiary Forms of Protection', 49 Refugee Studies Centre Working Paper (2008).

57 UN Human Rights Committee, General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004 at para 12; *X v. Denmark* (2007/2010), Views, CCPR/C/110/D/2007/2010; *K v. Denmark* (2393/214), Views, CCPR/C/114/D/2393/214; *PT v Denmark* (2272/2013), Views, CCPR/C/113/D/2272/2013; *X v Sweden* (1833/2008), Views, CCPR/C/103/D/1833/2008; Soering v United Kingdom Application No 14038/88, Merits, 7 July 1989; Case 12.534, *Mortlock v USA* (2008), supra n 9;, Inter-American Commission of Human Rights Report No 63/08 (2008); 97/93_14ar *John K. Modise v Botswana* (6 November 2000).

58 Crawford, 'Second Report on State Responsibility' (30 April 1999) UN doc A/CN.4/498/Add. 2, 148.

59 *Soering v United Kingdom* (1989) at para 91, supra n 57.

60 Case 12.534, *Mortlock v USA* (2008), supra n 9; *Soering v United Kingdom* (1989), supra n 57; *Kindler v Canada* (470/1991), Views, CCPR/C/48/D/470/1991 "Mortlock v USA, Inter American Commission of Human Rights Report No 63/08 Case 12.534 (25 July 2008)."

61 *Al Nashiri v Poland* Application No 28761/11, Merits, 24 July 2014; *Rodger Judge v Canada* (829/1998), Views, CCPR/C/78/829/1998.

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and private life,[62] the prohibition of slavery,[63] the prohibition of retrospective criminal measures,[64] right to a fair trial,[65] freedom of thought, belief and religion;[66] the right to peaceful enjoyment of possessions[67] and the prohibition of collective expulsion.[68] Generally speaking, unless an applicant can illustrate that the potential suffering engages one of these rights, it is unlikely that he will be able to successfully contest a removal decision relying on other rights.

Third, similar tests for the non-removal obligation is applied across treaty regimes. The Committee on the Rights of the Child,[69] the HRC,[70] the Inter-American Commission on Human Rights,[71] the Court of Justice of the European Union[72] and the European Court of Human Rights all prohibit removal where there is a 'real risk' of irreparable harm in the receiving state.[73]

Fourth, the removing state has an obligation to carry out a thorough and individualised examination of the situation of the person concerned and suspending enforcement of the removal order if necessary.[74]

Fifth, a threat of indiscriminate violence may give rise to an obligation of non-removal if the degree of indiscriminate violence reaches such a high level that substantial grounds are shown for believing that an individual returned to the relevant country, would, solely on account of his or her presence there, face a real risk of being subject to that threat.[75]

62 *Ayder and Others v Turkey* Application No 23656/94, Merits, 8 January 2004; *Bilgin v Turkey* Application No 23819/94, Merits and Just Satisfaction, 16 November 2000; *Selcuk and Asker v Turkey* Application No 12/1997/796/998–999, Merits and Just Satisfaction, 24 April 1998; *Xenides-Arestis v Turkey* Application No 46347/99, Merits, 22 December 2005; *Demades v Turkey* Application No 16219/90, Merits and Just Satisfaction, 31 October 2003.

63 *Ould Barar v Sweden* Application No 42367/98, Admissibility, 19 January 1999 illustrates that the ECtHR is open to claims under Article 4 but found no risk of treatment contrary to Article 4 in this particular case.

64 *Gabarri Moreno v Spain* Application No 68066/01, Merits and Just Satisfaction, 22 July 2003.

65 Soering v United Kingdom (1989), supra n 57; *Othman (Abu Qatada) v United Kingdom* Application No 8139/09, Merits and Just Satisfaction, 9 May 2012.

66 *F v United Kingdom* Application No 17341/03, Admissibility, 22 June 2004.

67 *Ayder and Others v Turkey* (2004), supra n 62; *Bilgin v Turkey* (2000), supra n 62; *Selcuk and Asker v Turkey* (1998), supra n 62; *Xenides-Arestis v Turkey* (2005), supra n 62; *Demades v Turkey* (2003), supra n 62.

68 *Hirsi Jamaa v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012.

69 Committee on the Rights of the Child, CRC General Comment No 6: Treatment of Unaccompanied and Separated Children outside their Country of Origin, 1 September 2005.

70 *Kindler v Canada* (470/1991), Views, CCPR/C/48/D/470/1991; *AAS v Denmark* (2464/2014), Views, CCPR/C/11/D/2464/2014; *Warda v Denmark* (2360/2014), Views, CCPR/C/114/D/2360/2014; UN Human Rights Committee, General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004; *ASM and RAH v Denmark* (2378/2014) CCPR/C/117/D/2378/2014.

71 *Mortlock v USA* (2008), supra n 9; *Haitian Centre for Human Rights* et al. *v. USA* (1997), supra n 9.

72 Case C-578/26 PPU *CK and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127.

73 *Soering v United Kingdom* (1989), supra n 57.

74 Case C-578/26 PPU *CK and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127; *Mortlock v USA* (2008), supra n9; *Auad v Bulgaria* Application No 46390/10, Merits and Just Satisfaction, 11 January 2012; Costello, 'The Search for the Outer Edges of Non-refoulement in Europe: Exceptionality and Flagrant Breaches' in Burson and Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (2016), 186. "Mortlock v USA, Inter American Commission of Human Rights Report No 63/08 Case 12.534 (25 July 2008)".

75 Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94; *Sufi and Elmi v United Kingdom* Application Nos 8319/07 and 11,449/07, Merits and Just Satisfaction, 28 November 2011; *NA v United Kingdom* Application No 25904/07, Merits and Just Satisfaction, 17 July 2008.

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Finally, the individual's personal circumstances must also be taken into account.[76] For example, an individual who is suffering from a serious illness may have a right of non-removal if removal would lead to a significant and irreversible decline in his or her health.[77] However, even where a person faces a real risk of being exposed to very harsh conditions on return, removal may be permissible if they are not in a special situation of vulnerability and/or in a situation significantly different to others.[78]

In sum, although there exist various complementary protection regimes, their protection is similar in scope. Now that this section has established these common themes, the next section will focus specifically on cases that relate to the subject of this article, namely: (i) cases involving returnees who would have to live in a camp; and (ii) cases where the circumstances an individual will face upon removal is analogous to a camp environment, such as homelessness and/or destitution.

4. COMPLEMENTARY PROTECTION AND ENCAMPMENT

Significant attention is paid to ECtHR jurisprudence in this section since it is the most developed jurisprudence on this topic, and provides the most extensive reasoning about the scope and content of human rights-based non-removal obligations.[79] In addition, it is likely the ECtHR's views will influence other courts and TMBs, because they tend to focus on the same or similar rights in removal cases, and more generally, the ECtHR is often cited by other regional courts and TMBs. Reference will also be made in this section to the lesser-known views of the HRC which examine the issue of removal and encampment. The jurisprudence/views of other courts and TMBs will not be analysed in this section because they have not so readily dealt with cases involving encampment. However, section 5 will draw on the general approach of other bodies in non-removal cases to anticipate how they might analyse a case concerning removal and encampment.

This section will illustrate that no court/TMB to date has explicitly stated that encampment, in itself, is a human rights violation. In fact, some have accepted that removal to a camp environment is compatible with various international instruments. However, as the next section will illustrate, in certain limited circumstances, the cumulative conditions of encampment may give rise to a violation of the prohibition of cruel, inhuman and degrading treatment, thus prohibiting removal of the individual in question.

76 *AAS v Denmark* (2014), supra n 70; *Warda v Denmark* (2014), supra n 70; *MSS v Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 January 2011.

77 Case C-578/26 PPU *CK and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127; *Paposhvili v Belgium* Application No 41738/10, Merits and Just Satisfaction, 13 December 2016; Case 12.534, *Mortlock v USA* (2008), supra n 9; Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* [2014] ECLI:EU:C:2014:2453. "Mortlock v USA, Inter American Commission of Human Rights Report No 63/08 Case 12.534 (25 July 2008)."

78 *AAS v Denmark* (2014), supra n 70; Hudson, 'Migration in the Mediterranean: Exposing the Limits of Vulnerability at the European Court of Human Rights,' (2018) 4 *Maritime Safety and Security Law Journal* 26.

79 McAdam, *Climate Change, Forced Migration and International Law* (2012), 55.

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A. European Convention on Human Rights

The ECtHR does not preclude the Contracting States from removing individuals to a camp environment as such. Nonetheless, a Contracting State has a responsibility to ensure that the applicant will not, as a result of the decision to expel, be exposed to treatment contrary to the ECHR.[80]

This section focuses predominantly on Article 3 ECHR because all of the removal cases involving removal to a situation of encampment brought before the ECtHR have been decided on the grounds of Article 3 (and relatedly, under Article 13 because of lack of access to an effective remedy for the Article 3 violation). There are a number of reasons that the ECtHR focuses on Article 3. First, although a number of cases have been brought invoking Article 2 (the right to life), in all such cases the ECtHR has considered the matter under Article 2 raising issues 'indissociable from the substance' under Article 3, and have chosen to decide the case under Article 3.[81] Second, while the triggering mechanism for Article 3 is that there exist 'substantial grounds' that there is a 'real risk' of treatment contrary to Article 3,[82] the threshold to engage other relevant articles of the ECHR—such as Article 4 (prohibition of slavery and forced labor),[83] Article 6 (right to a fair trial),[84] Article 7 (prohibition of retrospective criminal measures),[85] Article 8 (respect for private and family life),[86] Article 9 (freedom of thought, belief, and religion),[87] Article 4 of Protocol 4 (prohibition of collective expulsion of aliens)[88] and Article 1 of Protocol 1 (right to peaceful enjoyment of possessions)[89]—in non-removal cases have been much higher. A 'flagrant denial' of these rights must be shown;[90] and in the case of Article 8, that there would be 'sufficiently adverse effects on physical and moral integrity.'[91] Third, the ECtHR tends to focus on Article 3 in non-removal cases because 'it would be difficult to visualise a case in which a sufficiently flagrant violation of [another article] would not also involve treatment in violation of Article 3 of the Convention.'[92] Therefore in practice, 'the ECtHR maintains Article 3's centrality by often treating severe infringements of other Convention rights as "inhuman treatment."'[93] Fourth, there is little likelihood of the facts reaching the relevant severity threshold under other articles, given that they generally permit balancing of

80 *Sufi and Elmi v the United Kingdom* (2011), supra n 75.

81 *D v United Kingdom* Application No 30240/96, Merits and Just Satisfaction, 2 May 1996 at para 59.

82 *D v United Kingdom*, Ibid; *TI v United Kingdom* Application No 43844/98, Admissibility, 7 March 2000.

83 *Ould Barar v Sweden* Application No 42367/98, Admissibility, 19 January 1999 illustrates that the ECtHR is open to claims under Article 4 but found no risk of treatment contrary to Article 4 in this particular case.

84 *Soering v United Kingdom* (1989), supra n 57; *Othman (Abu Qatada) v United Kingdom* Application No 8139/09, Merits and Just Satisfaction, 9 May 2012.

85 *Gabarri Moreno v Spain* Application No 68066/01, Merits and Just Satisfaction, 22 July 2003.

86 *Ayder and Others v Turkey* (2004), supra n 62; *Bilgin v Turkey* (2000) supra n 62; *Selcuk and Asker v Turkey* (1998), supra n 62; *Xenides-Arestis v Turkey* (2005), supra n 62; *Demades v Turkey* (2003), supra n 62.

87 *F v United Kingdom* Application No 17341/03, Admissibility, 22 June 2004.

88 *Hirsi Jamaa v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012.

89 *Ayder and Others v Turkey* (2004), supra n 62; *Bilgin v Turkey* (2000), supra n 62; *Selcuk and Asker v Turkey* (1998), supra n 62; *Xenides-Arestis v Turkey* (2005), supra n 62; *Demades v Turkey* (2003), supra n 62.

90 *Mamatkulov and Askarov v Turkey* Applications No 46827/99 and 46,951/99, Merits and Just Satisfaction, 4 February 2005 at para 90.

91 *Bensaid v United Kingdom* Application No 44599/98, Merits and Just Satisfaction, 6 February 2001 at para 46.

92 *Z and T v United Kingdom* Application No 27034/05, Merits and Just Satisfaction, 28 February 2006 at 7.

93 Costello, supra n 74 at 197.

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the rights of the individual vis-à-vis the state.[94] Thus, even though other articles may provide the basis for a claim, these articles will not be considered in detail in this section.

The source of the potential harm has become a determinative factor in the jurisprudence of the ECtHR in recent years and the ECtHR has introduced a threshold to establish when the feared harm will engage the Article 3 ECHR obligations of the removing state. As helpfully set out by Scott, this threshold increases along a continuum, with a lower (albeit already very high) threshold applied for the direct and intentional infliction of harm, a somewhat higher threshold for acts which are seen as being the predominant cause of a humanitarian crisis, and a still higher 'exceptional' threshold where conditions on return as seen as being entirely naturally occurring.[95] Therefore, an applicant must be able to meet the applicable threshold depending on the cause of displacement. The following paragraphs will set out how the source of the harm might affect decisions involving encampment. Significant attention will be paid to the second category, as this type of factual scenario has produced the most jurisprudence thus far in relation to the encampment.

(i) Direct and intentional infliction of harm by the state or non-state actors

Where the displacement leading to the encampment is a result of direct or intentional infliction of harm by the state the lower (albeit very high) threshold of 'real risk' is applied. This threshold has not yet been applied in any removal cases to situations of the encampment, but it would likely be applied in situations such as ethnic cleansing where individuals are forcibly displaced by the state and end up in camps, or where the state is unwilling or unable to provide protection from forcible displacement by private actors.

(ii) State acts or omissions are the predominant cause of a humanitarian crisis

If the receiving state's actions or omissions are the probable cause of the displacement leading to the encampment, for example, by failing to protect from foreseeable disasters,[96] or by being a party to the conflict that has resulted in displacement; a claim may be based on the 'inability to cater for basic needs test' as established in *MSS v Belgium and Greece*.[97] In this case, the applicant had been removed from Belgium to Greece, where he spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. The ECtHR attached considerable 'importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection,' noting 'the existence of a broad consensus at the international and European level concerning this need for special protection.'[98] The ECtHR then stated that it had not excluded the possibility that the responsibility of the state under

94 McAdam, supra n 54 at 145; *Berrehab v the Netherlands* Application No 10730/84, Merits and Just Satisfaction, 21 June 1988; *C v Belgium* Application No 21794/93, Merits and Just Satisfaction, (ECtHR, 7 August 1996); Scott, supra n 56.

95 Scott, supra n 56. I am grateful to Matthew Scott for his insightful comments on this point.

96 *Budayeva v Russia* Application Nos 15,339/02, 21,166/02, 20,058/02, 11,673/02 and 15,343/02, Merits and Just Satisfaction, 20 March 2008.

97 *MSS v Belgium and Greece* (2011) at para 261, supra n 76.

98 *MSS v Belgium and Greece* (2011) at para 251, supra n 76.

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Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with official indifference in a situation of serious deprivation incompatible with human dignity. The ECtHR noted the applicant's constant fear of being attacked and robbed and the total lack of any prospects of his situation improving. It held that the conditions in which the applicant was living reached the Article 3 threshold and found Belgium to be in breach of Article 3 because, *inter alia*, it had transferred the applicant to Greece and thus knowingly exposed him to living conditions which amounted to degrading treatment.

The MSS test was subsequently applied in *Sufi and Elmi,* the facts of which are directly relevant to the topic of this article.[99] The *Sufi* case concerned two Somali nationals whose asylum claims were refused by the UK. They argued, *inter alia*, that if returned to Somalia, they would be at real risk of living in a camp and being exposed to ill-treatment contrary to Articles 2 and 3 of the ECHR. Focusing on the Article 3 claim, the ECtHR noted that the crisis in Somalia was predominately due to the direct and indirect actions of the parties to the conflict, which resulted in widespread displacement and the breakdown of social, political and economic infrastructures. Consequently, the ECtHR opted for the 'inability to cater for basic needs' test set out in *MSS v Belgium.*

The ECtHR made it clear that a general situation of violence would only be of sufficient intensity to preclude return 'in the most extreme cases' where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return. The ECtHR stated that relevant factors in assessing this threshold included (i) whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; (ii) whether the use of such methods and/or tactics was widespread among the parties to the conflict; (iii) whether the fighting was localised or widespread; and (iv) the number of civilians killed, injured and displaced.

The ECtHR is to be commended for its rigorous analysis of the conditions in all proposed areas of relocation. First, the ECtHR examined the possibility of relocating in Mogadishu but found that 'the violence in Mogadishu [was] of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to "powerful actors" would be at real risk of treatment prohibited by Article 3.'[100] The ECtHR found that if an individual relocated outside of Mogadishu, it was 'reasonably likely that he would have to seek refuge in an IDP settlement or refugee camp' where the conditions were 'dire.'[101]

The ECtHR then engaged in a detailed analysis of the conditions within the camps. It noted that prior to the failure of the rains, over half of Somalia's population was dependent on food aid and over a quarter of the population of Somalia faced a humanitarian crisis. Despite the crisis, Al-Shabaab continued to deny international NGOs access to areas under its control. Based on a detailed analysis of government, UN, media and NGO reports; the ECtHR concluded that the conditions in these IDP camps met the threshold of Article 3 because:

99 *Sufi and Elmi v United Kingdom* (2011), supra n 75.
100 Ibid.
101 Ibid, at para 291.

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> IDPs in the Afgooye Corridor have very limited access to food and water, and shelter appears to be an emerging problem as landlords seek to exploit their predicament for profit. Although humanitarian assistance is available in the Dadaab camps, due to extreme overcrowding access to shelter, water and sanitation facilities are extremely limited. The inhabitants of both camps are vulnerable to violent crime, exploitation, abuse and forcible recruitment. Moreover, the refugees living in – or, indeed, trying to get to – the Dadaab camps are also at real risk of refoulement by the Kenyan authorities. Finally, the Court notes that the inhabitants of both camps have very little prospect of their situation improving within a reasonable timeframe. The refugees in the Dadaab camps are not permitted to leave and would therefore appear to be trapped in the camps until the conflict in Somalia comes to an end. In the meantime, the camps are becoming increasingly overcrowded as refugees continue to flee the situation in Somalia. Although the IDPs in the Afgooye Corridor are permitted to leave, in reality the only place they are able to return to is Mogadishu, which the Court has found not to be a safe place for the vast majority of civilians. Consequently, there is also little prospect of their situation improving while the conflict continues.[102]

This is a welcome authority for the proposition that the cumulative conditions inherent in encampment (such as lack of food, water, sanitation facilities and shelter;[103] overcrowding;[104] violent crime;[105] exploitation; abuse; forcible recruitment; possibility of *refoulement*;[106] restrictions on freedom of movement;[107] and little prospects of the situation improving) can constitute a violation of Article 3 of the ECHR. Other cases concerning encampment (albeit not in relation to Somalia) have pointed to additional factors which can give rise to a violation of Article 3, including the temporary nature of encampment;[108] whether the applicant can travel to the proposed area, gain admittance and settle there;[109] lack of medical assistance;[110] difficulties to integrate,[111] the secluded nature of camps;[112] lack of education;[113] power struggles within the camp;[114] limited access to physical and legal protection;[115] and vulnerability to sexual and labor

102 Ibid.

103 One or more of these factors were deemed relevant in finding a violation of Article 3 in the following removal cases concerning encampment: *Sharifi and Others v Italy and Greece* Application No 16643/09, Merits and Just Satisfaction, 21 October 2014; *Salah Sheekh v the Netherlands* Application No 1948/04, Merits and Just Satisfaction, 23 May 2007.

104 *Auad v Bulgaria* (2012) which concerned removal and encampment also found, inter alia, that overcrowding within camps can give rise to a violation of Article 3, supra n 74.

105 Ibid (violence within camps can give rise to a violation of Article 3).

106 *Salah Sheekh v the Netherlands* (2007), supra n 103, which concerned removal and encampment, also found, *inter alia*, that risk of refoulement from camps can give rise to a violation of Article 3.

107 *Auad v Bulgaria* (2011) supra n 74.

108 *Sharifi and Others v Italy and Greece* (2014), supra n 103.

109 *Salah Sheekh v the Netherlands* (2007), supra n 103.

110 *Sharifi and Others v Italy and Greece* (2014), supra n 103; *Salah Sheekh v the Netherlands*, Ibid.

111 *Sharifi and Others v Italy and Greece*, Ibid.

112 *Auad v Bulgaria* (2011), supra n 74.

113 *Salah Sheekh v the Netherlands* (2007), supra n 103.

114 *Auad v Bulgaria* (2011), supra n 74.

115 *Salah Sheekh v the Netherlands*, supra n 103.

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exploitation, eviction, and destruction and confiscation of assets.[116] In addition, the ECtHR later clarified that a distinction is to be made between removal to Contracting and non-Contracting ECtHR States—in the latter case, removal is only prohibited in 'exceptional and extreme' circumstances.[117]

Although *Sufi and Elmi* found that removal to Somalia would be a breach of Article 3 and laid out clear considerations that should be taken into account in cases involving encampment, the jurisprudence that followed failed to apply these considerations properly. The case of *KAB v Sweden* involved facts almost identical to that of *Sufi and Elmi*, yet the ECtHR did not engage in rigorous analysis of the facts as was done in *Sufi*. Somewhat surprisingly, the ECtHR found in *KAB* that the security situation had improved to such an extent in *just 2 years* since *Sufi and Elmi* were decided that return to Mogadishu would not violate the ECHR.

The decision of *KAB* can be summarised as follows. In *KAB*, the ECtHR said that it was assessing the situation in Mogadishu according to the factors set out in *Sufi*, namely: (i) the general level of violence, (ii) the number of civilian casualties, (iii) the number of IDPs and (iv) the unpredictable and widespread nature of the conflict. The ECtHR's treatment of criteria (i) and (ii) was very brief. It noted that al-Shabaab was still present in the city and performed bombings and shootings which resulted in daily civilian casualties. It also found that the 'human rights situation in Mogadishu is serious and fragile and in many ways unpredictable.'[118] In respect of criteria (ii), the ECtHR relied on sources that indicated that civilian casualties had decreased.[119] However, those same sources stated that 'it was difficult, if not impossible, to present exact figures as there is often no reporting' of the number of civilian casualties,'[120] which makes the ECtHR's reliance on these sources questionable. The ECtHR failed to examine criteria (iii), namely, the number of IDPs in Mogadishu which is particularly worrying given that in 2013, the number of IDPs in Mogadishu had *doubled* since *Sufi* was decided.[121] Unfortunately, this pertinent fact of widespread displacement was sidestepped by the ECtHR. Finally, although the ECtHR explicitly acknowledged that the conflict was unpredictable, it paid little attention to criteria (iv) to determine whether the conflict was unpredictable enough to reach the threshold of Article 3.

The *KAB* decision did not apply *Sufi* correctly, as it purported to do. The dissenting judges (Power-Forde and Zupančič) noted the 'deficiency' in the ECtHR's analysis and 'the prematurity of its conclusions regarding the general security situation in Mogadishu.'[122] This is particularly apparent when we consider the ECtHR's previous assertions that 'the assessment of the existence of a real risk must necessarily be a rigorous one,' and that 'guarantees' must be in place before removals on the basis of

116 Ibid.

117 *SHH v United Kingdom* Application No 60367/10, Merits and Just Satisfaction, 29 January 2013 at para 91.

118 *KAB v Sweden* Application No 886/11, Merits and Just Satisfaction, 5 September 2013 at para 91.

119 Danish Immigration Service and Norweigian Landinfo, 'Update on security and human rights issues in South-Central Somalia, including Mogadishu' (2013), available at: www.refworld.org/docid/511ca6b12.html [last accessed 6 November 2020].

120 Ibid at 13.

121 UN Office for the Coordination of Humanitarian Affairs, OCHA Mogadishu Head Office, 11 April 2013 as cited in *Sufi and Elmi v United Kingdom* (2011), supra n 75.

122 *Sufi and Elmi v United Kingdom* (2011), supra n 75.

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relocating within the country of nationality can proceed.[123] This sets a high threshold of evidence in terms of the returnee's future safety, and it is up to the removing state to ensure that the individual's treatment will not violate Article 3, by providing evidence to the ECtHR and if necessary, seeking assurances. This was not adhered to in *KAB*. Consequently, it is submitted that *KAB*'s application of *Sufi* to the facts in *KAB* was incorrect.

KAB has left an unfortunate legacy in the form of *RH v Sweden,* which also concerned the return of asylum-seekers to Mogadishu.[124] In *RH*, the ECtHR noted that *KAB* had established that return to Mogadishu would not breach Article 3 of the ECHR. The ECtHR in *RH* therefore noted that the pertinent issue was whether the situation in Mogadishu had worsened since *KAB* was decided.[125] Once again, despite painting a very bleak picture of the conditions in Mogadishu, the ECtHR did not find a violation of Article 3 because those conditions were *no worse* than at the time *KAB* was decided. In blindly adhering to the ECtHR's factual findings in *KAB*, the decision of *RH* missed the wood for the trees. In future cases concerning encampment, the ECtHR should engage in rigorous analysis of whatever facts come before it as it did in *Sufi and Elmi* and consider explicitly criticising the analysis in *RH* and *KAB*.[126]

(iii) Where the harm results from 'purely' naturally occurring phenomena

Type 3 cases have focused exclusively on the removal of seriously ill or disabled migrants. The ECtHR's position as set out in *N v UK* is that where the harm is of a naturally occurring nature, the grounds against removal must be exceptionally compelling, i.e. the individual must be close to death.[127] *N*'s harder edges were softened recently by the decision of *Paposhvili v Belgium*,[128] where the ECtHR stated that 'other

123 *NA v United Kingdom* Application No 25904/07, Merits and Just Satisfaction, 17 July 2008 at para 111; *NANS v Sweden* Application No 68411/10, Merits and Just Satisfaction, 27 June 2013 at para 25; *MYH v Sweden* Application No 50859/10, Merits and Just Satisfaction, 27 June 2013 at para 54.

124 Although there was no question that the applicant would be forced to live in an IDP camp, this case is nonetheless relevant to this article because it concerns the application of *KAB* and *Sufi and Elmi* which are the leading cases regarding complementary protection and encampment.

125 Paras 66–68. The ECtHR went on to list various factors which, this article argues, paints a horrific picture of the situation in Mogadishu. It noted that (i) while security in Mogadishu had improved over the last few years, al-Shabab were still able to stage attacks that caused civilian deaths and injuries every week; (ii) although the outright fighting in the city had gone down, but the number of dead and injured civilians had reportedly increased; (iii) government and allied forces often failed to provide protection or security for civilians and were themselves a source of insecurity; (iv) although the human rights situation was considerably better in areas with a strong presence of the African Union Mission in Somalia or the Ethiopian army (thus including Mogadishu) than in areas controlled by al-Shabaab, it was still uncertain whether the police, the courts and other authorities were at all functioning; (v) Somali National Armed Forces soldiers were reportedly robbing and raping civilians; (vi) the overall security situation in Somalia remained volatile and attacks continued in Mogadishu, including casualties among government officials, civilians and security personnel.

126 The ECtHR is not bound by its own jurisprudence. Lupu and Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2011) 42(2) *British Journal of Political Science* 413.

127 *N v United Kingdom* Application No 26565/05, Merits, 27 May 2008; *SHH v United Kingdom* Application No 60367/10, Merits and Just Satisfaction, 29 January 2013.

128 *Paposhvili v Belgium* (2016), supra n 77. On the application of the new test see *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17.

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exceptional cases' would include where an individual, although not at imminent risk of dying (as was the case in *N*), would face a real risk, on account of the absence or lack of access to appropriate treatment in the receiving country, 'of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.'[129] It also affirmed that where serious doubts persist about the conditions in the receiving state, assurances must be sought from the receiving state as a precondition for removal.[130] The ECtHR limited its discussion to situations of seriously ill deportees, and did not illustrate how the threshold might apply in other situations. It is argued here that conditions in a camp environment that would result in 'intense suffering' or 'a significant reduction in life expectancy' would bring an individual within the *N* and *Paposhvili* threshold. This is a welcome clarification of the threshold established in *N* because an individual does not need to show that they are at imminent risk of dying to fall within the remit of Article 3. However, the threshold set by *Paposhvili* is nonetheless a very difficult one to meet.

(iv) Assessment of the ECtHR's jurisprudence on removal and encampment

The position of the ECtHR on Article 3 and encampment seems to be as follows. A 'real risk' of having to live in a camp will not, in itself, give rise to an Article 3 violation. However, the cumulative conditions within camps may in certain circumstances give rise to an Article 3 violation.[131] This approach seems to fit with the ECtHR's overall position on Article 3, which examines relevant facts on a case-by-case basis. However, two problems remain with the ECtHR's approach.

First, recent cases before the ECtHR have illustrated a lack of rigorous analysis of the conditions in the camps and concluded that there was no violation of Article 3. If such a trend continues, it is unlikely that an individual will be able to contest removal based on the cumulative conditions within the camps in which they are likely to live upon return.

Second, the very fact that there are three tests, based on the arbitrary factor of whether the circumstances are due to state action or omission, is illogical and its use should be revisited by the ECtHR. The introduction of these tests has watered down the basic principle expounded in *Soering*, that is, that the responsibility of the removing state is engaged if 'substantial grounds' are shown for believing that the person concerned if removed, 'faces a real risk' of being subjected to treatment contrary to Article 3, and it is up to the removing state to ensure that the individual's treatment will conform to that principle, by providing evidence to the ECtHR and if necessary, seeking assurances.[132]

The logic behind this position is straightforward—the ECtHR does not wish to place an obligation of non-removal on a Contracting State in order to alleviate socioeconomic disparities between it and receiving states, which may be labeled as the 'floodgates' argument.[133] A finding to the contrary would place too great a burden on Contracting States, and may hinder their cooperation with the ECtHR. However,

129 *Paposhvili v Belgium* (2016), at para 183, supra n 77.
130 *Paposhvili v Belgium* (2016), at para 191, supra n 77.
131 *Sufi and Elmi v United Kingdom* (2011), supra n 75.
132 *Soering v United Kingdom* (1989), supra n 57 at 72.
133 *N v United Kingdom* (2008), 2008 at para 44, supra n 127; McAdam, supra n 54, 167.

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Mantouvalou makes the argument that budgetary considerations have not in previous cases prevented the ECtHR from establishing a breach of the ECHR and the ECtHR has rejected the argument that limited resources may exempt a state from its obligations.[134] She argues that the logical conclusion of accepting the 'floodgates' argument 'would be that, even if Ms N had a right to remain in the UK [. . .]it might have been relieved from this correlative duty, had there been concrete evidence that the decision would lead to waves of medical asylum seekers wishing to benefit from treatment available in the country.'[135]

In addition, it is difficult to see how the focus on the actions of the receiving state as set out in *Sufi and Elmi* is compatible with the logic by which the non-removal principle established in *Soering* is applied.[136] Generally speaking, the ECHR does not apply extraterritorially, that is, it does not apply outside the jurisdiction of its Contracting States.[137] It is the act of removal that exposes the applicant to violations of ECHR rights, rather than the violations of the rights themselves in the receiving states that attract responsibility of the removing state under the ECHR. There is no question about establishing the responsibility of the receiving state. Therefore, whether the conditions are as a result of the action or omissions of the receiving state should not be determinative when applying the *Soering* principle. What matters is whether the conditions at hand reach the Article 3 threshold, regardless of the involvement of the receiving state. In a similar vein, it is highly questionable whether requiring the harm to be the result of the action or omission of the receiving state is compatible with the absolute nature of Article 3, which has been reiterated repeatedly by the ECtHR.[138]

B. Human Rights Committee

The HRC has examined various removal cases with facts that are relevant by analogy to situations of removal and potential encampment. All these complaints have been considered on the basis of Article 7, the prohibition of cruel, inhuman or degrading treatment or punishment. In finding violations of Article 7, the HRC has taken into account a risk of exposure to hardship, destitution and homelessness;[139] potential lack of medical, social or humanitarian assistance;[140] exposure to conditions of indigence and extreme precarity;[141] and the prospects of finding a humanitarian solution.[142]

134 Mantouvalou, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *The Modern Law Review* 815 at 825.

135 Ibid at 826.

136 *Soering v United Kingdom* (1989), supra n 57.

137 The Convention may apply extraterritorially where the state is exercising effective control. See *Hirsi Jamaa v Italy* Application No 27765/09, Merits and Just Satisfaction, 23 February 2012.

138 *Soering v United Kingdom* (1998) at para 88, supra n 57; *N v United Kingdom* Application No 26565/05, Merits, 27 May 2008 at para 24; *D v United Kingdom* Application No 30240/96, Merits and Just Satisfaction, 2 May 1996 at para 47; *Salah Sheekh v the Netherlands* (2007), supra n 103; *Sufi and Elmi v United Kingdom* (2011) at para 212, supra n 75. See Graham, 'Jeanty v Belgium: saving lives provides (another) exception to Article 3 ECHR' (2021) *Human Rights Law Review* (forthcoming).

139 *Warda v Denmark* (2014), supra n 70; *Abdilafir v Denmark* (2512/2014), Views, CCPR/C/119/D/2512/2014.

140 *Abdilafir v Denmark* (2014), Ibid; *Warda v Denmark* (2014), supra n 70.

141 *Warda v Denmark* (2014), supra n 70.

142 *Abdilafir v Denmark* (2014), supra n 139.

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However, similar to the ECtHR, the HRC has required that the complainant shows special distinguishing factors that make his or her situation particularly exceptional. For example, in *Hussein v Denmark,* the HRC considered that although if removed from Denmark to Italy, the complainant would be left homeless and destitute, the fact that she might 'possibly be confronted with serious difficulties upon return by itself [did] not necessarily mean that she would be in a special situation of vulnerability—and in a situation significantly different to many other refugee families—such as to conclude that her return to Italy would constitute a violation of the State party's obligations under article 7 of the Covenant.'[143]

The potential of becoming an IDP returned was examined in a single complaint—*AAS v Denmark*.[144] This complaint considered the issues of returns to Mogadishu and was decided just 1 year after the ECtHR's decision of *Sufi and Elmi*, which also concerned return to Mogadishu. Therefore, the approaches of the HRC and ECtHR on returns to Mogadishu can be readily compared.

In *AAS,* the complainant argued that his forcible return to Somalia would constitute a breach of article 7 of the ICCPR, as he would be at risk of being subjected to torture or to inhuman or degrading treatment. He alleged that it was very difficult to survive in Mogadishu for persons belonging to minority clans and for newcomers, i.e. 'foreign Somalis,' without a support network. He stated that he would have lack knowledge of how to behave and manage in the country from which he fled at the age of five. The complainant further submitted that he would be considered an IDP if returned to Somalia. He argued that young people such as himself who are IDPs are considered to be the most vulnerable groups in Mogadishu in terms of malnutrition and lack of medical treatment. In this respect, he observed that he contracted tuberculosis during his stay in Greece for which he received treatment for 8 months and that, without proper follow-up care, the illness could come back. Finally, he submitted that in the event of his return to Mogadishu he risked being subjected to forced recruitment to al-Shabaab.

Although Denmark's immigration authorities concluded that the complainant's individual circumstances did not justify recognition as a refugee and that it was safe to return him to Mogadishu, the HRC observed that current reports in the public domain concerning the human rights situation in Somalia, and those to which the parties referred, indicated that abuse of and discrimination against minority clans was widespread, clan militias and al-Shabaab continued to commit grave abuses throughout the country, persons returning to Somalia from abroad were extremely vulnerable unless they have a strong clan and family connections, and Somalis returning from western countries tended to be regarded as foreigners, having western viewpoints, intentions and motives. The HRC thus considered that Denmark had not given sufficient weight to the cumulative effect of the author's individual circumstances, which made him particularly vulnerable. It, therefore, found that the complainant's removal to Somalia would constitute a violation of Article 7 of the ICCPR.

143 *Hussein v Denmark* (2734/2016), Views, CCPR/C/124/D/2734/2016 at para 9.9. See also *Abdilafir v Denmark* (2014), supra n 139 which found a violation of Article 7 citing the applicants 'exceptional hardship and destitution' and their 'special vulnerability.'

144 *AAS v Denmark* (2014), supra n 70.

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The HRC's approach differs from that of the ECtHR in numerous ways. The first and most obvious difference is that although the HRC found a violation of the ICCPR in *AAS*, the ECtHR had just 1 year previously in *KAB*, considered that the conditions in Mogadishu, and the IDP camps in Mogadishu in particular, did not amount to a violation of the ECHR. It is pertinent that even though the ECtHR's jurisprudence—notably *Sufi* and *Elmi*—was relied upon by the complainant in *AAS*, the HRC did not engage with the ECtHR's approach. This may have been because if it did so, the HRC would either have to engage with the ECtHR's most recent case on the matter—*RH*—which as aforementioned was not a well-reasoned case. The HRC is, therefore, to be commended for not simply adopting the approach of the ECtHR, but rather engaging in rigorous analysis of the conditions in Somalia on its own terms.

The HRC and the ECtHR also differ in terms of their focus. In the *Sufi* case, the ECtHR found it relevant that the conditions at hand were as a result of the acts or omission of the state. The source of harm was not in issue in the *AAS* complaint. Moreover, in the *Sufi* case, much of the reasoning was devoted to whether the cumulative conditions in IDP camps in Mogadishu amounted to a violation of Article 3 ECtHR. The essence of the *Sufi* decision was that anyone who would likely end up in an IDP camp in Mogadishu would suffer a violation of Article 3 of the Convention. In *AAS*, although the complainant argued that he would become an IDP on return and this fact was not contested by the state, the views of the HRC did not focus on his likely displacement or on whether he would end up in camp. Rather, the HRC focused on the complainant's personal circumstances and noted that they were distinguishable from other Somalis abroad who risked being removed to Mogadishu. It, therefore, seems that the reasoning of the HRC cannot be considered to be applicable to all individuals who would become IDPs in Somalia.

The approach of the HRC to potential future cases concerning encampment and removal is therefore likely to be as follows: (i) the risk of living in a camp will not, in itself, amount to a violation of Article 7 of the ICCPR; (ii) an individual must show that if returned, he or she will face exceptional hardship compared to the rest of the population; (iii) conditions such as potential hardship, destitution, homelessness and lack of medical attention may be relevant when considering complaints under Article 7.

The following paragraphs will set out a test scenario to determine whether the situation within a 'normal'[145] camp can trigger complementary protection, taking into account the analysis of the HRC, ECtHR and general approach of courts and TMBs as set out in section 3.

5. TEST CASE: CONTESTING REMOVAL TO A SITUATION OF ENCAMPMENT

Aamira fled Sudan's civil war in 2019. Her asylum application in Arcadia was unsuccessful. She now faces removal from Arcadia to Sudan, where she will likely end up living in an IDP camp in Darfur.

145 A 'normal' IDP camp for the purposes of this article has the characteristics identified in section 2.

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At present, there is an estimated 2.1 million IDPs living in camps in Darfur.[146] The conditions in the IDP camps have been reported as follows:

1. There is an acute shortage of food and water country-wide and in IDP camps as a result of rising food prices, famine, floods and droughts.[147] Many people were forced to leave the camps to find work to feed their families, making them vulnerable to labor exploitation and, in the case of women, rape.[148]
2. There are also medicine shortages within IDP camps, which have been exacerbated by an ongoing cholera epidemic and outbreaks of disease.[149]
3. Despite a ceasefire between the government and various armed opposition groups which has largely held since June 2016, violence against IDPs continues to be widespread. In the majority of the 66 camps across Darfur, there are reports of random shootings at night, forced disappearances, targeted assassinations, acts of criminality and harassment of displaced persons, and sexual violence, including rape.[150] In addition, there are reports of government attacks on IDP camps in recent months, leading to fatalities. Some of these attacks were in response to peaceful protests of IDPs.[151]
4. Many such attacks occur with impunity. Victims cited the absence of police stations, lack of confidence in the authorities, social stigma and fear of reprisals as reasons for not reporting the attacks.[152]

A. Applicable Rights

Most complementary protection cases are decided on the basis of the prohibition of cruel and inhuman or degrading treatment, and all of the cases specifically dealing with encampment have focused on this right. Aamira would, therefore, have to frame her case as a violation of this right to maximise her chances of a successful claim. As the next section will reveal, each of the respective bodies and courts addressed in this article

146 Internal Displacement Monitoring Centre, 'Sudan' available at: www.internal-displacement.org/countries/sudan [last accessed 6 November 2020].

147 US Aid, 'Sudan—Complex Emergency', 30 March 2018, available at: www.usaid.gov/sites/default/files/documents/1866/sudan_ce_fs03_03-30-2018.pdf [last accessed 6 November 2020]; International Organisation for Migration, 'Appeals 2018—Africa and the Middle East—Sudan 2018', available at: humanitariancompendium.iom.int/appeals/sudan-2018 [last accessed 6 November 2020]; ibid.

148 UNAMID, 'The Human Rights Situation of Internally Displaced Persons in Darfur', 21 November 2017, available at: reliefweb.int/report/sudan/human-rights-situation-internally-displaced-persons-darfur-2014-2016 [last accessed 6 November 2020].

149 International Organisation for Migration, 'Appeals 2018—Africa and the Middle East—Sudan 2018' available at: humanitariancompendium.iom.int/appeals/sudan-2018 [last accessed 6 November 2020].

150 UN News, 'Security Council stresses need of "sustainable solutions" for millions displaced in Darfur', 31 January 2018, available at: news.un.org/en/story/2018/01/1001711 last accessed 6 November 2020.

151 Amnesty International, 'Sudan: Downsized UN Mission for an Oversized Human Rights Crisis', 28 June 2018 available at: www.amnesty.org/download/Documents/AFR5486802018ENGLISH.pdf [last accessed 6 November 2020].

152 UN News, 'Security Council stresses need of "sustainable solutions" for millions displaced in Darfur', 31 January 2018, available at: news.un.org/en/story/2018/01/1001711 [last accessed 6 November 2020].

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has taken a relatively broad approach to the types of conditions that can trigger the application of this right.

B. Applicable Threshold

From a personal perspective, it would matter little to Aamira what the cause of her displacement was. Similarly, for the majority of courts and bodies referred to in this article, the source of the risk would not matter for the purposes of analysing the prohibition of cruel, inhuman and degrading treatment. Therefore, should Aamira make a complaint before these bodies, the standard of treatment necessary to trigger a violation of this prohibition would be an irrelevant factor. However, as set out above, the ECtHR applies different thresholds depending on the source of harm. This threshold increases along a continuum, with a lower (albeit already very high) threshold required for the direct and intentional infliction of harm (Type i), a somewhat higher threshold for acts which are seen as being the predominant cause of a humanitarian crisis (Type ii) and a still higher 'exceptional' threshold where conditions on the return are seen as being entirely naturally occurring (Type iii).[153] The CJEU also sets higher thresholds depending on the source of harm feared.[154]

The humanitarian crisis in Darfur is a result of a combination of factors: civil war, high food prices, famine, floods and drought. It is clear that Amira's circumstances would not fall under a Type (i) case as there is no indication that the harm suffered is a result of direct or intentional actions of the state. However, the line between humanitarian conditions that are due to direct or indirect state actions (Type ii cases) and those which are simply natural misfortune (Type iii cases) is a difficult one to draw, particularly where the harm stems from multiple sources. In order for the lower (albeit very high) standard to apply (namely whether she was 'unable to cater for [her] most basic needs')[155] Aamira would have to show that the state's acts and/or omissions were the predominant cause of harm in her circumstances. To do so, she could draw parallels with the facts of *Sufi and Elmi*, where the ECtHR found that the humanitarian crisis was due to the parties of the conflict because of *inter alia*, the restricted access of aid agencies to the region and the state's indiscriminate attacks against IDPs.

However, the ECtHR has shown reluctance to use the Type ii threshold because it does not wish to place an obligation of non-removal on a Contracting State in order to alleviate socioeconomic disparities between it and receiving states.[156] It is particularly notable that there are 2.1 million IDPs in Sudan, many of whom would face circumstances similar to Aamiria. The ECtHR could characterise her case as a 'Type iii case,' identifying droughts, floods and famine as purely naturally occurring harms,[157] and argue that her situation is no more compelling than other IDPs in Somalia. It

153 Scott, supra n 56.

154 Case C-578/26 PPU *CK and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127; Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* [2014] ECLI:EU:C:2014:2453.

155 Sufi and Elmi v United Kingdom (2011) at para 283, supra n 75.

156 N v United Kingdom (2008), supra n 127 at para 44. Costello has pointed out that the reluctance of the ECtHR of opening the 'floodgates' to 'environmental refugees' 'could without more, lead the Court to apply the "very exceptional" and "compelling test."' See Costello, supra n 74.

157 The argument that natural disasters are purely naturally occurring is addressed in Scott, 'Finding Agency in Adversity: Applying the Refugee Convention in the Context of Disasters and Climate Change', (2016) 35 *Refugee Survey Quarterly* 26.

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could also rely on its dicta in SHH, where it said that in order for socioeconomic conditions to preclude removal to a non-Contracting State, the conditions there must be exceptionally bad.[158] In that case, the ECtHR found that even though there were different sources of harm that was predominantly caused by a lack of resources and thus Article 3 was not triggered.

Aamira's prospects before the ECtHR are, therefore, not particularly good, as it would be difficult for her to meet the applicable threshold of Article 3. However, Aamira's prospects should be better before other bodies such as the HRC as set out above, as well as the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights. These latter two TMBs are not examined in detail in this article as they have not dealt with a removal case concerning encampment. However, their broad approach to non-removal cases is similar to that of the HRC, in that they do not threshold based on the source of the harm. Therefore, TMBs may view Aamira's complaint as more favorable than the ECtHR.

C. Substantive Criteria

To date, the ECtHR has paid the most heed to the question of a return to encampment. A 'real risk' of having to live in a camp will not, in itself, give rise to an Article 3 violation. However, the cumulative conditions within camps may in certain circumstances give rise to an Article 3 violation. This tends to reflect the general approach of TMBs in non-removal cases as set out in section 3—namely, they tend to focus on whether there is a violation of the prohibition of cruel, inhuman, and degrading treatment; and assess whether return would lead to a 'real risk' of 'irreparable harm.'

Thus, whether return to a situation of encampment would violate the prohibition of cruel, inhuman and degrading treatment depends on an assessment of the conditions in the camp. Aamira could draw on various factors which the ECtHR has deemed relevant including the temporary nature of encampment;[159] lack of basic necessities such as sanitation, water, food, or medical assistance;[160] limited legal protection;[161] IDPs' vulnerability to crime, sexual and labor exploitation, eviction, forced recruitment and destruction and confiscation of assets;[162] whether NGOs and international organizations have access to the camp;[163] and violence.[164] She could argue that like asylum seekers (as per the dicta in MSS), the state has particular responsibilities toward IDPs on the grounds of their vulnerability.[165] The ECtHR has also examined the prospects of the situation improving within a reasonable timeframe.[166] In situations of generalised violence, the ECtHR would also take into account the four criteria in *Sufi and Elmi*,

158 SHH v United Kingdom Application No 60367/10, Merits and Just Satisfaction, 29 January 2013.

159 *Sharifi and Others v Italy and Greece* Application No 16643/09, Merits and Just Satisfaction, 21 October 2014.

160 *Sharifi and Others v Italy and Greece* (2014), Ibid; *Salah Sheekh v the Netherlands* (2007), supra n 103; *Sufi and Elmi v United Kingdom* (2011), supra n 75.

161 *Salah Sheekh* (2007), supra n 103.

162 *Ibid*; *Sufi and Elmi v United Kingdom* (2011), supra n 75.

163 Ibid.

164 *Auad v Bulgaria* (2011), supra n 74.

165 *MSS v Belgium and Greece* (2011), supra n 76.

166 *Sufi and Elmi v United Kingdom* (2011), supra n 75.

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namely: (i) the general level of violence; (ii) the number of civilian casualties; (iii) the number of IDPs; (iv) and the unpredictable and widespread nature of the conflict.

However, as aforementioned, it is likely that the ECtHR would apply the 'exceptional circumstances' threshold in Aamira's case. As the facts do not disclose that she is close to death or at real risk 'of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy,'[167] it is unlikely that her case would be successful.

Similarly, the HRC has tended to focus on the individual's particular vulnerabilities in assessing return to a situation where he/she would be an IDP. The facts do not disclose that Aamira has any particular circumstances that would make her life in an IDP camp worse than others there. Therefore, it is unlikely that Aamira's complaint would be successful before the HRC on this aspect.

Finally, it should be noted that none of the other international courts or TMBs appear to have dealt with a complaint on removal and encampment. However, there are a number of relevant instruments that have rights that could be invoked in a complaint contesting removal to face encampment, such as the International Covenant on Economic, Social and Cultural Rights;[168] the American Convention on Human Rights;[169] and the African Charter on Human and Peoples' Rights.[170] Each of these treaties has a complaints mechanism,[171] and thus complaints could be brought before these bodies. However, TMBs often cite each others' decisions and follow each others' approach.[172] Therefore, even if a complaint was brought before one or more these bodies, it is unlikely that their views would differ significantly from the approach of the HRC or ECtHR.

D. Factual Analysis

As noted, the ECtHR's most recent case on removal to face encampment—*KAB*—suffered from a lack of rigorous reasoning. This and reluctance to find violations of rights other than Article 3 in non-removal cases means that removal to a situation of encampment can only be successfully contested before the ECtHR in the narrowest of circumstances. The approach of the HRC in *AAS v Denmark* is preferable, whereby

167 *Paposhvili v Belgium* (2016), supra n 77 at para 183.

168 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3. Relevant rights include the right to an adequate standard of living (Article 11) and the right to physical and mental health (Article 12).

169 American Convention on Human Rights 1969, 1144 UNTS 123. Relevant rights include the right to humane treatment (Article 5) and freedom of movement (Article 22).

170 African Charter on Human and Peoples' Rights 1981, 1520 UNTS 217. Relevant rights include the right to life (Article 4); the right to dignity (Article 5); freedom of movement (Article 12) and the right to the best attainable state of physical and mental health (Article 16).

171 The Committee on Economic, Social and Cultural Rights, Inter-American Court of Human Rights, Inter-American Commission on Human Rights, African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights.

172 Ní Ghráinne and McMahon, 'Access to Abortion in cases of Fatal Fetal Abnormality: A New Direction for the European Court of Human Rights?' (2019) 19(3) *Human Rights Law Review* 56; Slaughter, 'A Global Community of Courts, (2003) 44(1) *Harvard International Law Journal* 191 at 201; Helfer and Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273; Case 12.534, *Mortlock v USA (2008),* supra n 9, Inter-American Commission of Human Rights Report No 63/08 (2008); Case 10,675, *Haitian Centre for Human Rights* et al. *v. USA*, (1997), supra n 9.

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the HRC engaged in an extremely thorough analysis of the conditions in Mogadishu. It is therefore more likely that Aamira's complaint will be given a more thorough analysis before the HRC. Regarding other courts or TMBs, it is difficult to predict the rigor with which they might assess Aamira's case, given that no such case has come before them. However, as the previous sections have already found that Aamira's case is unlikely to trigger the applicability of the prohibition of cruel, inhuman and degrading treatment, the question of whether an international court or monitoring body would engage in the deep analysis is somewhat futile as her case is unlikely to be successful even if it is thoroughly analysed. It, therefore, seems unlikely that removing Aamira from a camp in Darfur would be a violation of international human rights law. Only if Aamira can show that her circumstances are particularly worse than the general population of the camp, might she have a chance of a successful complaint before TMBs and international courts.

6. CONCLUSION

This article has illustrated that although life in a camp can be terrible, the removal of an individual to a country where they will likely end up living in a camp will not necessarily violate their human rights.

Generally speaking, even if an individual can show that their circumstances in a camp environment will be particularly harmful, their chances of a successful challenge to removal are low. Courts and TMBs do not wish to place an obligation of non-removal on State Parties in order to alleviate socioeconomic disparities between it and receiving states. This reticence stems from the fact that TMBs/international courts have to tread a delicate balance between, on the one hand, declaring that states have violated international human rights law, and on the other hand, ensuring that in doing so they maintain the respect of states.[173] States alone have the ability to implement the views/judgments of TMBs/international courts, and thus their support for these institutions is vital.[174]

As a result, courts and TMBs tend to apply a high threshold to the prohibition of cruel, inhuman and degrading treatment. To successfully challenge a removal decision, an individual would need to show that the conditions within the camp are exceptional and/or that the individual has particular circumstances that would make their life in a camp worse than that of the hundreds—if not thousands—of others who have sought refuge there. If the individual's argument is simply that the conditions in the camp are very poor it is unlikely that their case will be successful. Therefore, unless an individual can show that he or she satisfies the refugee definition, it is unlikely that the possibility of living in a camp will preclude a return to their state of nationality.

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173 Smekal and Šipulová, 'DH v Czech Republic 6 years later: On the power of an international human rights court to push through systemic change.' (2014) 32(3) *Netherlands Quarterly of Human Rights* 319.

174 Ní Ghráinne and McMahon, supra n 173.

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