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The Principle of Non-Refoulement in the 1951 Geneva Refugee Convention and Contemporary Asylum Practice

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1. INTRODUCTION

In international law, the 1951 Geneva Refugee Convention¹ guarantees a number of rights to refugees, like the right of non-discrimination and freedom of religion (Articles 3 and 4). A considerable number of articles deals with the judicial and personal status, the rights that a refugee has at the level of property, access to the courts, employment and welfare (Articles 17 to 24) and administrative status (Articles 25 to 34). The rationale behind the Refugee Convention is to offer protection to persons who do not benefit from the protection of their home country any longer.² If the State of which they have citizenship does not protect them any more and they are unable or unwilling to return there for reason of a well-founded fear of persecution, then they benefit this substitute protection of the Geneva Convention.

Probably the most important and essential right in this perspective is the right not to be returned to the country where the refugee would be at risk of persecution and where his or her life or freedom would be threatened (Article 33). This so-called principle of non-refoulement means that States, parties to the Refugee Convention, cannot send refugees back to their country of origin or to any other country where their life or freedom may be threatened.

The principle of non-refoulement gives rise to discussion because it is often confused with a broader principle, namely the principle of asylum. Asylum is the admission to residence and lasting protecti-

on against the jurisdiction of another State.³ Non-refoulement and asylum are not synonymous, as will be shown hereafter. The misconception that they are is one of the causes leading to the weakening of the non-refoulement protection in contemporary European asylum practice.

Much confusion and discussion about the implications of refugee law in Europe these days, results from the mix-up between the principles of non-refoulement and asylum. When these are erroneously considered to coincide, – in the sense that once you allow a refugee to come into your country, you should give him or her permanent stay in that country –, the principles of refugee protection and immigration control clash. National authorities, always keen on restricting immigration to Europe, will consider refugee law a threat from this point of view, since it is believed to be a means to circumvent strict immigration control. This may partially explain the rigidity of both refugee recognition procedures and the interpretation of the Refugee Convention in the last decade and the reluctance to respond swiftly to mass influx of asylum seekers as a result of the Yugoslav wars.

In this perspective three issues will be examined hereafter: (1) the relationship between the principle of asylum and that of non-refoulement; (2) the meaning of the principle of non-refoulement as it is written down in the Refugee Convention of 1951; and (3) the application of the non-refoulement principle in contemporary asylum practice.⁴

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¹ Geneva Convention of 28 July 1951 Relating to the Status of Refugees, 189 *UNTS* 150.

² F. CRÉPEAU, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (Brussels: Ed. Bruylant, 1995), 100–101.

³ G.S. GOODWIN-GILL, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 173.

⁴ The principal sources for this text are F. CRÉPEAU, *Droit d'asile. De l'hospitalité aux contrôles migratoires* (Brussels: Ed. Bruylant, 1995); G.S. GOODWIN-GILL, *The Refugee in International Law* (Oxford: Clarendon Press, 1996); A. TAKKENBERG and C. TAHBAZ (eds.), *Travaux préparatoires. The Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees* (Amsterdam: Dutch Refugee Council, 1990); P. WEIS (ed.), *The Refugee Convention, 1951. The Travaux Préparatoires*

2. REFUGEES, ASYLUM AND NON-REFOULEMENT

The idea of a State offering protection to citizens of another State is certainly not new. Already in the 16th century Hugo Grotius, in his treatise on public international law *De iure belli ac pacis*, recognised that one should not refuse permanent residence to aliens who, after having been expelled from their country, seek protection.⁵ Today too, the terms 'refugee law' and 'asylum law' are used interchangeably in common practice. In general, the common (mis)understanding all too often seems to be that asylum seekers or refugees have both the right not to be returned to their country of origin and the right to stay in a country of asylum or refuge. Legally speaking, however, the picture is quite different. The principle of non-refoulement and that of asylum are two principles that *can* both apply to asylum claimants who are refugees under the Refugee Convention. But they do not necessarily need to apply simultaneously to all cases.

Asylum is the admission to residence and lasting protection against the jurisdiction of another State. It is offered when a State decides that a citizen of another State will not be returned to his or her State of origin or any other State *and* that he or she is allowed to reside legally in that country of asylum, no matter what the reason of his or her unwillingness or inability to return is. As such it is an exercise of the *sovereignty* of a State. An individual, however, has no right to asylum and cannot claim that asylum *must* be given.⁶

The *non-refoulement* principle in Article 33 of the Refugee Convention on the other hand does create an individual right, namely the right of a person not to be returned to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion. It may well be that a person, who is entitled to protection under Article 33 of the Convention, is given asylum – the purpose of most asylum and recognition procedures in domestic law in Europe is the awarding of a residence permit to refugees –, but it is not at all compulsory. A State party to the Refugee Convention is under no obligation to grant a refugee permanent residence status in the country of refuge/asylum. Furthermore, the non-refoulement principle in the Refugee Convention states

a limited number of reasons why the person cannot be removed (threat of life or freedom on five grounds). The non-refoulement principle does not include a right to asylum, nor does the Refugee Convention in general.⁷ If a refugee/asylum claimant is given asylum, that is the result of the application of national legislation, rather than the consequence of the Refugee Convention.⁸

It must be clear that the application of the two principles does not entirely overlap. Some refugees, protected under Article 33 (non-refoulement) will in fact also be given asylum. But asylum can also be given to those who do not fulfil all the conditions under the Geneva Refugee Convention because they are not refugees under Article 1 of that Convention (e.g. war refugees) or because the situation in the country of origin is not tantamount to a threat of life or freedom. In practice persons, who do not come under Article 1, but who would encounter duress and hardship upon return, such as war refugees, are indeed given asylum. Asylum is a much broader concept than non-refoulement.

The asylum principle figures in some international instruments. Article 14 of the Universal Declaration of Human Rights of 1948 reads that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. This does not count for those who are fleeing from prosecution (not persecution) from non-political crimes or acts contrary to the principles and purposes of the United Nations. The Universal Declaration however is not self-executing and does not create as such any subjective right to asylum.⁹ Asylum is also mentioned in the Declaration on Territorial Asylum, adopted unanimously by the UN General Assembly in 1967¹⁰: asylum granted by a State should be respected by other States (Article 1.1). The granting of asylum still remains a matter of national sovereignty and discretion however: 'it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum' (Article 1.3). Thus, every State will decide whether or not it is willing to grant asylum to a person and for what reasons. Common in both declarations is the fact that they refer to the principle of asylum, but at the same time accept that it remains within the jurisdiction of the States to grant asylum or not.

The Convention on the Specific Aspects of Refugee Problems in Africa, adopted by the member Sta-

Analysed, with A Commentary (Cambridge: Cambridge University Press, 1995).

⁵ H. GROTIUS, *De iure belli ac pacis*, 1625, Lib. II, Cap. II, § XVI.

⁶ F. CRÉPEAU, *o.c.*, 184.

⁷ See e.g. Article 31, 2 (on refugees unlawfully in the country of refuge): 'The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.' (emphasis added) This suggests that the refugee does not have a right to regularisation of his or her stay in the country of refuge.

⁸ G.S. GOODWIN-GILL, *o.c.*, 203.

⁹ F. CRÉPEAU, *o.c.*, 141–142.

¹⁰ UNGA res. 2312 (XXII), 14 December 1967.

tes to the Organisation of African Unity in 1969 and into force since 1974, also refers to asylum.¹¹ This regional convention is only applicable to some African countries. It defines the notion of refugee¹² more broadly and includes also persons who are fleeing from all sorts of aggression (e.g. war refugees). Article II of the Convention states that Member States of the Organisation of African Unity shall use their best endeavours consistent with their respective legislation, to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin. The link between refugee status and the right to asylum is made here. The obligations of the contracting States remain limited though. They 'shall use their best endeavours', thus excluding the individual right to asylum.

A similar approach can be seen, in the context of the Geneva Refugee Convention, in the UNHCR Executive Committee¹³ Conclusion N° 5 of 1977.¹⁴ The Committee appealed to the governments to follow, or continue to follow, liberal practices in granting permanent or at least temporary asylum to refugees who have come directly to their territory. Here too, asylum is linked to refugee status although the latter does not necessarily imply the first. Whereas non-refoulement is compelling because it is written down in the Refugee Convention, asylum is not. States can offer and grant asylum (and are encouraged by the Executive Committee to do so), but are under no formal obligation to do so under the Geneva Refugee Convention.

3. THE INCLUSION OF THE PRINCIPLE OF NON-REFOULEMENT

Before the principle of non-refoulement was adopted in the Refugee Convention, it had already appeared on earlier occasions. Under the 1933 Convention relating to the International Status of Refugees¹⁵ it was not permitted to remove resident refugees or to keep them from the territory by application of police measures such as expulsions or non-admittance at the frontier, unless dictated by national security or public order. The refusal of entry to refugees at the front-

ers of their countries of origin was equally forbidden. After the coming to power of the Nazis in Germany, the Provisional Agreement¹⁶ and Convention concerning the Status of Refugees coming from Germany¹⁷ recognised that these refugees were not to be expelled or sent back across the frontier save for reasons of national security and public order.

They should not be sent to Germany, unless they were given a proper warning and they refused to make arrangements to proceed to another country or to take advantage of such arrangements.

The *Ad Hoc* Committee that drafted the Geneva Refugee Convention in 1950, foresaw that the contracting States would accept the principle of non-refoulement. Article 28 was included in the draft and read: 'No Contracting State shall expel or return, in any manner whatsoever, a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.' The *Ad Hoc* Committee concluded that sending a person back to his or her country would be tantamount to delivering him or her into the hands of his or her persecutors. The drafters also asserted though, that this obligation not to return people did not imply that a refugee must in all cases be admitted to the country where he or she seeks asylum. The distinction between non-refoulement and asylum once again becomes apparent here: although a State cannot send refugees back, there is no obligation for that State to give them entry or some form of permanent residence.¹⁸

The *Ad Hoc* Committee agreed that this Article 28 would be an absolute article, without any exceptions.¹⁹ However, in the course of the later negotiations, exceptions were added. First of all, the United Kingdom formally feared that under the non-refoulement principle countries of asylum might be confronted with non-expellable criminals. The United Kingdom (and other States) wanted guarantees that it could remove from its territory refugees who commit criminal acts after having been admitted into the country.²⁰ Second, the escalation of the Cold War between the East and West gave rise to a concern, especially with the Western European countries, that the

¹¹ 100 UNTS 46.

¹² Art. I, para. 2: 'Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin.'

¹³ The Executive Committee of the UNHCR can advise the United Nations High Commissioner for Refugees on certain issues on refugee law.

¹⁴ UNHCR Ex. Com. Conclusion N° 5 (XXVIII) - 1977, *Report of the 28th Session*, UN doc. A/AC.96/549, para. 53.3.

¹⁵ 159 LNTS N° 3663, ratified by eight States.

¹⁶ 171 LNTS N° 3952, ratified by seven States.

¹⁷ 192 LNTS N° 4461, ratified by three States.

¹⁸ P. WEIS, *o.c.*, 325.

¹⁹ The United Kingdom wanted limitations, but was originally not followed. See P. WEIS, *o.c.*, 326-327.

²⁰ P. WEIS, *o.c.*, 326.

Refugee Convention might be abused by some Eastern European States for espionage purposes. A State might well try to move spies into another State under the refugee status. At the Conference of Plenipotentiaries amendments limiting the right of non-refoulement, in the form of exclusion from this protection, were introduced to offer a solution.²¹ In this sense the principle of non-refoulement in the Refugee Convention differs from the one in other treaties. The European Court of Human Rights has recognised a right of non-refoulement in Article 3 of the European Human Rights Convention²²: a State cannot remove an alien to a country where he or she would be subjected to torture, inhuman or degrading treatment or punishment, even when this State is not a party to the European Human Rights Convention. The Court has explicitly stated that 'the prohibition provided by Article 3 against ill-treatment is (...) absolute in expulsion cases'. In this sense the 'protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees'.²³ Thus, under Article 3 of the European Human Rights Convention, a terrorist for instance will be protected from refoulement. Whereas under the non-refoulement principle in the Refugee Convention, he or she can be removed from the country, because Article 33, 2 excludes persons who form a threat to the security of the asylum State.

4. ANALYSIS OF ARTICLE 33

Article 33 Refugee Convention consists of two paragraphs:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not,

however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country on which he is or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

4.1. PARAGRAPH 1: NON-REFOULEMENT

4.1.a. Refugee

Article 33 repeats, to a certain extent, the notions of refugee, persecution and the grounds for persecution. The term 'refugee' in Article 33 is to be understood under its definition in Article 1 Refugee Convention.²⁴ It must be a person who is outside his or her country of origin, who is unwilling or unable to return to that country due to a well-founded fear of persecution for one of the five grounds mentioned in the Convention, and who finds no protection against that persecution from the authorities in the country of origin. State practice in reality however demonstrates that in certain cases, States do accept the moral obligation not to return people who would be in danger of their life or freedom.²⁵

A person is a refugee from the moment that he or she fulfils the conditions of Article 1 of the Convention. This means that the principle of non-refoulement is applicable to every person who meets the criteria of Article 1, even if he or she has not gone through the whole asylum procedure yet and thus may not yet have obtained formal recognition of refugee status.²⁶

In order for the immigration authorities to know if they can refuse a person entry and residence and return him or her to another country without violating Article 33 Refugee Convention, they should first determine 1) whether that person actually is a refugee or not, and 2) whether he or she would be subjected to any treatment forbidden under Article 33 if returned to another country. Several authors have quite correctly concluded that Article 33 actually requires

²¹ See *infra* para. 4.2.

²² Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

²³ E.Ct.H.R., *Chahal v. United Kingdom*, 15 November 1996, *Eur. Ct.H.R. Publ.* 1996-V, 23, § 80. The Court distinguished the protection from refoulement from the right to asylum: 'it must be noted that the right to political asylum is not contained in either the Convention or its Protocols', *ibid.*, § 73. See also O. ANDRYSEK, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures', (1997) *IJRL* 392; G.S. GOODWIN-GILL, *o.c.*, 147-155 and 311-321. Other cases are: E.Ct.H.R., *Soering v. United Kingdom*, 7 July 1989, *Eur. Ct.H.R. Publ.*, Serie A, N° 161; E.Ct.H.R., *Cruz Varas v. Sweden*, 20 March 1991, *Eur. Ct.H.R. Publ.*, Serie A, N° 201; E.Ct.H.R., *Vilvarajah et al. v. United Kingdom*, 30 October 1991, *Eur. Ct.H.R. Publ.*, Serie A, N° 215; E.Ct.H.R., *Ahmed v. Austria*, 17 December 1996, *Eur. Ct.H.R. Publ.* 1996-VI, 24; E.Ct.H.R., *H.L.R. v. France*, 29 April 1997, *Eur. Ct.H.R. Publ.* 1997-III, 26.

²⁴ F. CRÉPEAU, *o.c.*, 168.

²⁵ According to GOODWIN-GILL, Article 33 is of a 'fundamentally norm creating character such as could be regarded as forming the basis of a general rule of law'. There may be arguments to state that the non-refoulement principle may become a principle of customary international law, extending to other displaced persons who do not fall within the scope of the Refugee Convention. The question remains controversial though. See G.S. GOODWIN-GILL, *o.c.*, 134-136. On this discussion see also G.S. GOODWIN-GILL, 'Non-Refoulement and the New Asylum-Seekers', (1986) *VIJL* 897 and K. HAILBRONNER, 'Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Thinking?', (1986) *VIJL* 857.

²⁶ F. CRÉPEAU, *o.c.*, 176; G.S. GOODWIN-GILL, *o.c.*, 137.

that a State give some form of temporary asylum, temporary right of stay or temporary entry to a person. During this stay they can assess if that person is a refugee or not.²⁷ This does not mean that every asylum claimant should be entitled to go through the entire recognition procedure leading to a permanent stay in a country. But as long as one has not assessed the status, one cannot know if the removal of such claimant will be in compliance with Article 33 or not. Pending this assessment, the asylum claimant should be given a temporary stay, which can be in a special centre.²⁸

Since Article 33 only applies to persons meeting the criteria set out in Article 1 of the Convention, this means that persons who are excluded by Article 1, D, E or F do not profit from Article 33 protection. This applies to a person, with respect to whom there are serious reasons for considering that he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime or who has been guilty of acts contrary to the purposes and principles of the United Nations. His or her exclusion from refugee status equally excludes him or her from protection against refoulement, even when there is a risk that his or her life or freedom will be threatened when returned to another country. This person may however benefit from the protection under other human rights instruments.²⁹

4.1.b. *Expel or return*

The use of the terms 'expel' and 'return' gave occasion to some discussion during the drafting of the Convention. The term expel seems applicable only to persons who are already admitted in a country or who have been given the right to stay in a country. Article 32 of the Convention too mentions the expulsion of refugees who are 'lawfully staying' in a country;

'lawfully' there means that they have been given some form of residence permit on the basis of their refugee status. So expel certainly means that refugees who have a right of residence in the country or refuge, cannot be sent back to a country where their life or freedom would be at risk.

The use of 'return' proved to be more problematic as to its exact meaning. Switzerland was very strict here. Since the 1930s the Swiss government had demonstrated its reluctance to take on unlimited numbers of asylum seekers. Also during the drafting process of the Refugee Convention, the Swiss agreed to the principle of non-refoulement, but wanted to see it limited, in its application, to those persons whom the government had already admitted onto its territory.³⁰ In this interpretation, a State could determine itself the scope of non-refoulement protection via its immigration policy: only those allowed to immigrate and resident in the country obtain protection. This would imply that the protection is not available to persons who arrive at the borders of a country. The fear for mass influx of asylum claimants and the impossibility to accept them all, inspired the Swiss government's position. The Dutch government too, although not following the strict Swiss interpretation, explained that the possibility of mass migration across frontiers or of attempted mass migrations is not covered by Article 33.³¹ Other States did not follow this strict interpretation and did not accept the possibility of exceptions and held that the principle of non-refoulement should be applicable at all points of time. The preparatory proceedings are thus unclear as to whether it applies to refugees arriving at the border. The only formal exception to be found in them applies to mass influx: for a majority of contracting States in 1950-1951, Article 33 was not applicable in the case of mass migration across frontiers or attempted mass migrations.³²

²⁷ See J.Y. CARLIER, *Droits des réfugiés* (Brussels: E. STORY-SCIENTIA, 1989), § 50; R. FERNHOUT, *Erkenning en toelating als vluchteling in Nederland* (Deventer: Kluwer, 1990), § 20.

²⁸ Article 31 should be respected here: (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

²⁹ On Article 3 European Convention of Human Rights, see *supra* para. 3. On Article 7 of the International Covenant on Civil and Political Rights of 19 December 1966, the UN Human Rights Committee held: 'The Covenant does not recognise the right of aliens to enter or reside in the territory of a State party [...] however, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.' (UN Human Rights Committee, *General Comment N° 15* (26th session), 1986, § 5). See also M. DE MERIEUX, 'Extradition as the Violation of Human Rights. The Jurisprudence of the International Covenant on Civil and Political Rights', (1996) *N.Q.H.R.* 23. On Article 3 of the Convention Against Torture of 10 December 1984, see B. Gorlick, 'Refugee Protection and the Committee against Torture', (1995) *IJRL* 504 and the case law of the Committee against Torture, *i.a.* CAT N° 13/1993, 27 April 1994, Mutombo/Switzerland; CAT N° 15/1994, 15 November 1994, Khan/Canada; CAT N° 21/1995, 31 January 1995, Alan/Switzerland; CAT N° 36/1995, 17 November 1995, X./Netherlands; CAT N° 41/1996, 12 February 1996, Kisoki/Sweden; CAT N° 43/1996, 7 March 1996, Tala/Sweden; CAT N° 34/1997, 9 May 1997, Aemei/Switzerland.

³⁰ P. WEIS, *o.c.*, 326.

³¹ P. WEIS, *o.c.*, 330-331.

³² See P. WEIS, *o.c.*, 335.

Since then other legal instruments and legal doctrine have accepted that the principle of non-refoulement applies to all refugees, whether they are formally recognised as such and given a residence permit or are still at the frontier. Anyone who sets foot to the territory of a Contracting State is protected, without regard of the legal or illegal nature of his or her entry.³³ To illustrate this point, one may refer to the 1967 Declaration on Territorial Asylum. Article 3, 1 states that no asylum claimant 'shall be subjected to measures such as rejection at the frontier or, if he or she has already entered the territory in which he or she seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution'. The UNHCR Executive Committee, too, has emphasised the broad application of the non-refoulement principle, by reaffirming 'the fundamental importance of the observance of the principle of non-refoulement – both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognised'.³⁴ This applies to situations of large scale influx too, when 'persons seeking asylum should be admitted to the State in which they first seek refuge (...) In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.'³⁵ The mere presence of a refugee on the territory is sufficient for the non-refoulement principle to become effective.³⁶ As Goodwin-Gill remarks: '(.) States in their practice and in their recorded views, have recognised that non-refoulement applies to the moment at which asylum seekers present themselves for entry. (.) the concept now encompasses both non-return and non-rejection.'³⁷ Thus, refugees 'in transit' or 'international zones' in international airports for instance, are protected by it too.

Sometimes States try to limit the physical access of asylum claimants to their territory and thus to ban them from the protection under Article 33. Well known in this regard is the U.S. interdiction programme at the high sea to prevent Haitian refugees from claiming asylum in the United States. Beginning in 1981, the U.S. Coast Guard boarded all vessels coming from Haiti and heading for the U.S. coast. If the passengers indicated that they wanted to apply for asylum in the U.S., their claims were already screened at sea. If the claim was found not to be well-founded,

the person was returned to Haiti. After the 1991 military coup against President Aristide the interdiction programme was temporarily suspended. In 1992 the repatriation programme continued, this time without any prior screening of the asylum claims. The screening was only initiated again in 1994. This interdiction programme was contested in court and the case went up to the Supreme Court. In *Sale v. Haitian Centers Council*³⁸ the U.S. Supreme Court held that the protection offered by the principle of non-refoulement, as implemented in U.S. law (§ 243 (h) Immigration and Naturalisation Act) is only applicable to strictly domestic procedures. In the court's view, Article 33 Refugee Convention refers only to the expulsion of refugees already admitted into a country and the return of refugees already within the territory but not yet resident there.³⁹ In this interpretation, it is possible for a State to interdict ships all over the world to prevent people at a distance from coming into the country.

By linking the principle of non-refoulement to the responsibility of a State limited to its territory, other acts of a government – outside the territory – but nevertheless resulting in the factual refoulement of a refugee are not covered by Article 33. Hence that protection may become void. The U.S. Supreme Court's position was therefore criticised for being contrary to customary international law and certainly to the spirit of the Refugee Convention. In its *amicus curiae* brief the UNHCR had already argued: 'the obligations of a State with respect to such a fundamental right cannot stop at the state's borders. The obligation (.) arises whenever the government encounters the individual, irrespective of whether that government waits for the refugee to arrive at its border or intercepts him or her on the high seas.'⁴⁰

4.1.c. In any manner whatsoever

The term 'in any manner whatsoever' has to be taken literally, meaning that you cannot do this directly or indirectly. Any action that would ultimately result in the return of a refugee to a country where his or her life or freedom are at risk, is forbidden.

The application of this rule is obvious in cases where a State would consider sending a refugee back on a direct flight to his or her country of origin. Discussions normally start when the refoulement is the result of an indirect action, namely after the removal of a re-

³³ See A. GRAHL-MADSEN, *The Status of Refugees in International Law* (Leiden: Sythoff, 1966), vol. 2, 94–99; F. CRÉPEAU, *o.c.*, 168–171.

³⁴ UNHCR Ex. Com. Conclusion N° 6 (XXVIII) – 1977, *Report of the 28th Session*, UN doc. A/AC96/549, para. 53.4.

³⁵ UNHCR Ex. Com. Conclusion N° 22 (XXXII) – 1981, *Report of the 32nd Session*, UN doc. A/AC.96/601, para. 57(2).

³⁶ F. CRÉPEAU, *o.c.*, 175–176.

³⁷ GOODWIN-GILL, *o.c.*, 123–124.

³⁸ *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993).

³⁹ *Ibid.* at 2564.

⁴⁰ *Amicus curiae* brief filed by UNHCR in *Sale v. Haitian Centers Council, Inc.*, cited by F. Crépeau, *o.c.*, 174.

fugee to a third country. If this third country, where the refugee does not risk his or her life or freedom, in the end returns the refugee to the country where this well-founded threat does exist, then the responsibility of both the third country and of the first country of asylum (that removed the refugee to the third country) may well be at stake. The original Swedish proposal for Article 33 therefore also explicitly stated that refoulement is forbidden not only to a territory where life or freedom would be threatened, but also to territories where the refugee would be exposed to the risk of being sent to a territory where his or her life or freedom would thereby be endangered.⁴¹

The development of asylum practice in the European Union under the Dublin Convention⁴² bears in it the potential risk of such indirect refoulement. This can be illustrated by an example. Let us suppose that a Pakistani asylum claimant flees from his country and arrives in Poland. He does not apply for asylum there, since he wants to join his nephew in Paris who has been granted residence in France as a refugee. He succeeds in passing first the Polish-German and later the German-French border and travels on to Paris. When he states his asylum claim in France, the French immigration authorities will probably refuse to take this application into consideration. Under the Dublin Convention, the State responsible for hearing this claim in the European Union is likely to be Germany, the country where the Pakistani asylum claimant first entered the European Union.⁴³ Germany will probably have to take back the Pakistani claimant and his claim. However, under the Dublin Convention Germany's obligations are limited to the 'examination' of the asylum claim. This does not guarantee an examination of the merits of the asylum claim, *i.e.* the question if the claimant is indeed a refugee under Article 1 of the Refugee Convention. Article 3 (5) of the Dublin Convention even recognises the right of Member States to send an applicant for asylum to a third State, pursuant to its national laws and in compliance with the provisions of the Refugee Convention.

Important in this context is the use of bilateral agreements between E.U. and non-E.U. States, which provide for and facilitate the readmission of asylum seekers who have illegally crossed a common border. Let us thus suppose, in our example, that such an agreement exists between Germany and Poland, allowing the expulsion of aliens who have crossed the

German-Polish border illegally or irregularly into Germany. When the German asylum authorities hear that the Pakistani claimant has previously entered Germany from Poland illegally, they may well apply the German-Polish Agreement and return the man to Poland. Hence, not the German but the Polish authorities become responsible for examining the asylum claim. Once again, the Pakistani claimant and his claim may be transferred, without any examination as to the merits of this claim by any European Union Member State. In the end, it will be the responsibility of the Polish authorities to decide if the Pakistani asylum claimant does or does not have a well founded fear under Article 1 and if he is protected from refoulement under Article 33. In the case that they erroneously reject his claim and return him to Pakistan where he eventually becomes the victim of persecution and of violations of his life and freedom, the principle of non-refoulement will have been violated not only by the Polish authorities, but also by the French and German who are indirectly responsible for the forced return of that refugee to his country of origin.

It is obvious that States must be careful when leaving the determination of refugee status up to other States. Returning a refugee to a prior country of refuge without warranties for the substantial and qualitative determination of refugee status and protection from refoulement, may bring with it the liability for violation of Article 33 Refugee Convention.⁴⁴ As will be seen further, the use of the 'safe third country'-concept must prevent this from happening.⁴⁵

The protection from refoulement also plays when the extradition of a refugee is asked by another country.

Even when a country of refuge decides to expel a refugee, which is an exercise of its sovereign jurisdiction, it should bear in mind that the refugee continues to benefit from Article 33 Refugee Convention. Additionally, Article 32 contains a number of guarantees. When a refugee is lawfully in the territory of a State, that State cannot expel him or her, save on grounds of national security or public order (Article 32, 1). The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear him- or herself, and to appeal to and be represented for the purpose before

⁴¹ P. WEIS, *o.c.*, 328.

⁴² Dublin Convention of 15 June 1990 Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, effective 1 September 1997. The Convention aims at indicating one and only one European Union Member State to be responsible for the examination of each asylum claim introduced within the European Union. To determine this responsibility, use is made of criteria like the delivery of visa or residence documents, country of first entry, etc.

⁴³ It may also be possible, in the hypothesis that French asylum procedure provides such a possibility, that the claimant is directly returned to Poland under a French-Polish agreement, without the Dublin Convention even playing a part. This was certainly the intention of the European Immigration Ministers in 1992 when introducing the 'safe third country'-rule. See *infra* para. 5.2.

⁴⁴ G.S. GOODWIN-GILL, *o.c.*, 342.

⁴⁵ See *infra* para. 5.2.

competent authority or a person or persons specially designated by the competent authority (Article 32, 2). Most importantly, the expelling States shall allow such a refugee a reasonable period within which to seek legal admission into another country (Article 32, 3).

4.1.d. To the frontiers of territories

Article 1, A, (2) defines that the refugee definition is applicable only in the case of well-founded fear for persecution in the country of nationality. In contrast, Article 33 does not limit the threat of life and liberty to the situation in the country of nationality. Refoulement is forbidden to any territory where such a threat may exist.

This broader application *ratione loci* stems from the idea of substitute international protection where the protection by the country of origin is lacking. Normally, if a person is in danger being sent to a territory where his or her life or freedom is threatened, he or she will have the possibility to return to his or her country of nationality and find protection there. If this call upon the national protection is absent, as it is in the case of refugees, then international protection from any expulsion to a territory where life and freedom would be threatened, becomes essential.

4.1.e. Life or freedom would be threatened

The last element of Article 33, 1 is the potential threat to life or freedom. At this point too, there is a difference in formulation between Article 1, which says that there is a well-founded fear of *persecution*, and Article 33, where only a *threat of life or freedom* is mentioned. From the commentaries on the Convention and Article 33 and State practice in general follows that the threat to life and freedom in Article 33 means exactly the same as the fear of persecution in Article 1.⁴⁶ Essential is the well-founded nature of the risk. This well-founded character is present when there is a serious risk, reasonable likelihood, considerable likelihood, strong probability.⁴⁷ U.S. case law has tried to quantify this risk. In *Cardoza-Fonseca* the U.S. Supreme Court held: 'one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place'.⁴⁸ In other words, a risk of e.g. 10% may be sufficient, it is not necessary that it is more likely than not that the persecution will actually happen when returning

to that country of risk.

4.2. PARAGRAPH 2: EXCLUSION

Paragraph 2 excludes the protection from refoulement in certain instances. It is a response to the concern of some of the contracting States that criminals and unwanted subjects, such as spies for other foreign governments, would abuse the non-refoulement protection to develop their unwanted activities in the country of refuge, without the authorities in this country being able to respond efficiently to them.⁴⁹ For this reason, the benefit of non-refoulement may not be claimed by 1) a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is (e.g. spies), or 2) a refugee who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

The category of persons against whom there are reasonable grounds for regarding them as a danger to the security of the country in which they are staying, requires an evaluation by the government as to the level of danger. Only if the danger likely to be encountered by the refugee is outweighed by the threat to the community, the protection of Article 33, 1 can be denied.

For the category of persons who are convicted of a particularly serious crime by a final judgement and who constitute a danger to the community, three elements play a role. First, there must be a conviction by a final judgement, which is an objective element. Second, the government must assess if the crime is particularly serious, which is not an automatism in case of any conviction by a court of law. And third, there must be a proportionality test: the offence in question and the threat to the community must be extremely grave, before further protection under Article 33, 1 can be denied.⁵⁰

In these cases, where the protection under Article 33, 1 is not offered to a person who is a refugee, the country of refuge must still respect Article 32: such a refugee should be given a reasonable period within which to seek legal admission into another country.

Additionally, one must remember that since the protection from refoulement can only be claimed by refugees, those asylum claimants who are excluded from Article 1 (see article 1, F in particular) will also be excluded from protection under Article 33. Since these persons are not refugees, they cannot invoke Article

⁴⁶ G.S. GOODWIN-GILL, *o.c.*, 138.

⁴⁷ On this subject and on the interpretation of Article 1 Refugee Convention in general in Europe and North America, see J.Y. CARLIER, D. VANHEULE, K. HULLMANN and C. PEÑA GALIANO (eds.), *Who Is A Refugee? A Comparative Case Law Study* (The Hague/Boston: Kluwer Law International, 1997).

⁴⁸ *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 (1987).

⁴⁹ See P. WEIS, *o.c.*, 329-330 and 333-334.

⁵⁰ GOODWIN-GILL, *o.c.*, 140.

le 32 either. Their only solace will be the application of non-refoulement clauses in other treaties.

5. NON-REFOULEMENT AND CONTEMPORARY ASYLUM PRACTICE

5.1. MASS INFLUX, TEMPORARY REFUGE AND TEMPORARY PROTECTION

At the time of the drafting of the Convention, there was a concern that at moments of mass influx refugee claimants should not be protected against refoulement. Although State practice now indicates that in these cases too protection from refoulement counts, the reaction against mass influx is typical in immigration and asylum law. As soon as large numbers of people are involved, States are surprisingly willing to give up the recognised, individual protection of those people. All sorts of guarantees seem to disappear then, such as the access to the courts for review of administrative decisions on the recognition of refugee status or, substantially, the right to social welfare benefit, the right to education, etc.

In the 1970s and 1980s governments have been looking for solutions in situations where many people, who cannot possibly be returned to their country of origin, are arriving simultaneously and where it is impossible under the existing asylum procedure to have their claims determined rapidly. Temporary refuge or protection was the solution found for this dilemma. It is a form of protection from refoulement.⁵¹

The idea of temporary refuge was already implemented after the 1956 uprising in Hungary. It was accepted that Hungarians fleeing from Hungary to Western Europe would be given temporary protection or temporary refuge in mainly Germany and Austria. The basic idea was that they would be resettled later in other European and American countries, where they would be given permanent residence. A similar practice developed in the 1970s and 1980s with people fleeing from Indochina (resettlement in Europe and North America through the intermediary of UNHCR) Chile and Argentina (resettlement in Europe).

The Yugoslav crisis in the early 1990s caused the revival of the idea of temporary refuge. There was, however, one important difference with the programmes in the previous decades. Temporary protection

was not longer offered awaiting permanent resettlement in third countries. It was only a temporary residence status (without the full Convention guarantees for refugees) until the situation in the country of origin would improve. After the Dayton Peace Agreement some of these asylum seekers, who had not obtained permanent residence in their refugee status, were being returned to former Yugoslavia.⁵²

5.2. SAFE THIRD COUNTRIES

As was mentioned above, refoulement offers protection against a removal to any territory where the life or liberty would be threatened. Conversely, the authorities of a country of refuge can remove a refugee to any other country where they esteem that such a risk is not present (a so-called safe third country). In that case they must bear in mind, however, that they will still be liable for indirect refoulement, if that safe third country eventually returns the refugee to a territory where the life and freedom are threatened.

In an effort to limit the raising number of asylum applications in Europe, the practice of removing asylum seekers to 'safe third countries' has become general in Western Europe. In 1992, the European Ministers responsible for Immigration decided to adopt a policy of returning asylum seekers to safe third countries.⁵³ The underlying idea is that a refugee should state his or her claim to refugee status in the first country where it is possible to find this protection. If he or she nevertheless travels on into the European Union, he or she will ultimately be returned to that safe third country. Safe third countries are therefore countries where (1) life and freedom are not threatened; (2) there is no exposure to torture, inhuman or degrading treatment; (3) the claimant had prior protection or the opportunity to obtain this protection; and (4) he or she is afforded affective protection from refoulement as meant in Article 33.

The implementation of such a policy means that once a refugee has entered the European Union via a safe third country, he or she will not be given the right of residence in the E.U. but will be returned to the safe country. In combination with the Dublin Convention, which indicates the State responsible within the European Union to hear an asylum claim, this practice of safe third countries may, as has been illustrated earlier,⁵⁴ finally result in the move of a part of

⁵¹ See J. FITZPATRICK, 'Flight from Asylum: Trends Toward Temporary and Local Response to Forced Migrations' (1994) *Virg.J.I.L.* 13.

⁵² See K. KERBER, 'Temporary Protection: An Assessment of the Harmonisation Policies of the European Union Member States' (1997) *IJRL* 453; M. KJAERUM, 'Temporary Protection in Europe in the 1990s' (1994) *IJRL* 444.

⁵³ Resol. Min. Imm. E.C. N°SN 4823/92 WGI 1283 AS 147, 30 November and 1 December 1992. The English text can be found in H. Meijers et al., *A New Immigration Law for Europe? The 1992 London and 1993 Copenhagen Rules on Immigration* (Utrecht: Nederlands Centrum Buitenlanders, 1993). On this subject see also R. Fernhout, 'Status Determination and the Safe Third Country Principle', in J. Y. Carlier and D. Vanheule (eds), *Europe and Refugees: A Challenge?* (The Hague/Boston: Kluwer Law International, 1997), 187.

⁵⁴ See *supra* para 4.1.c.

the substantial asylum determination process outside the European Union. Only in the case where it is, in practice, impossible to return the claimant to a safe third country, will the claim be examined by one of the Member States.

Such a policy risks to send the asylum claimant 'into orbit' without any substantial refugee claim determination. This particularly counts when the domestic legislation of the safe third country would, on its turn, exclude that examination for purely technical or formal grounds, such as the fact that the claimant did not introduce his or her claim immediately upon his or her first arrival in the safe third country, but circulated a time in the European Union before finally ending up back in the safe third country. To avoid these situations, the UNHCR Executive Committee, in its Conclusion N° 58 (1989) emphasised that it is essential that the safe third country is willing to re-admit the asylum seeker.⁵⁵ In order to be genuinely safe, that country should accept the responsibility to determine the claim, notwithstanding the claimant's departure after the first entry. The treatment of asylum claimants should be in accordance with generally accepted standards. During his or her stay in the safe third country, the claimant should receive the necessary means of subsistence and be treated according to the norms of human dignity.

By sending some asylum claimants to the bordering safe countries from which they have entered the European Union, Europe is at the same time respecting the principle of non-refoulement without having to deal with the claims effectively. This use of the safe third country technique means that the States bordering the Union are given an increasing responsibility in the substantial refugee determination process and are the actual guardians of the efficient respect of the principle of non-refoulement.

6. CONCLUSION

It will be obvious that the protection of non-refoulement is probably the core element in the Refugee Convention. The Chairman of the *ad hoc* committee in 1950 felt that if the work of the committee resulted in the ratification of the non-refoulement article alone, it would have been worth while.⁵⁶ Non-refoulement and asylum are not synonymous. The latter may be broader in its application, but legally it offers less guarantees than the first, which in reality creates a fundamental individual right. This fundamental right has, since 1950, also been recognised in other international instruments and in State practice.

However, the mixing of protection and immigration policies has resulted in a decline of the willingness

of western States to offer asylum and permanent protection. Whilst they are still concerned with the basic principle of non-refoulement, the practice of removals to third safe countries carries in it a danger that, indirectly, the right of non-refoulement is violated when that third country proves not to be as safe as hoped for. The protection offered by the Refugee Convention may in that case become very void.

RESUME

Zásada non-refoulement bývá často směřována se zásadou azylu. Azyl však představuje přijetí jednotlivce za účelem pobytu a trvalé ochrany před jurisdikcí jiného státu. Non-refoulement a azyl nejsou synonymní, neboť se nutně neaplikují souběžně, a to ve všech případech. Subjektivně nazřeno, azyl je výkonem svrchovanosti státu. Jedinec tak nemá právo na azyl a nemůže tudíž nárokovat poskytnutí ochrany. Zásada non-refoulement zahrnutá do čl. 33 Ženevské úmluvy o právním postavení uprchlíků na straně druhé zakládá právo jednotlivce, čili oprávněné osoby nebýt navrácena do země, kde by její život anebo svoboda byla ohrožena z důvodu rasy, náboženství, národnosti, členství v určité společenské skupině nebo pro její politický názor. Princip non-refoulement neobsahuje právo jedinice na azyl a ani tak nečiní Ženevská úmluva v obecném pojetí. Jestliže uprchlík coby žadatel získává azyl, je to dáno aplikací vnitrostátní legislativy, spíše než následkem použití Ženevské úmluvy. Zásada azylu se objevuje v některých mezinárodních dokumentech. Všeobecná deklarace lidských práv z roku 1948 stanoví, že každý má právo vyhledat a požívat azyl před pronásledováním v jiných zemích. Všeobecná deklarace není bezprostředně použitelná a nekonstituuje takové subjektivní oprávnění azylu. Azyl je taktéž zmíněn v Deklaraci o územním azylu z roku 1965. Podle Deklarace azyl udělený státem by měl být respektován jinými subjekty mezinárodního práva. Poskytnutí azylu tedy zůstává záležitostí národní suverenity a uvážení.

Zásada non-refoulement se již objevuje v předválečných mezinárodních smlouvách. Úmluva o mezinárodním postavení uprchlíků z roku 1933 zakazovala, byť s výjimkami, navracení chráněných osob ve formě policejních opatření jako vyhoštění či nepřijetí na hranici. Zásada byla později uznána v Prozatímní dohodě a Úmluvě o postavení uprchlíků přicházejících z Německa. Při přípravě návrhu čl. 28 Úmluvy o právním postavení uprchlíků pojímal Ad hoc výbor ustanovení jako absolutní, bez jakýchkoli výjimek. Velká Británie se však formálně obávala, že státy by mohly být konfrontovány se zločinci, kteří nemohou být vyhoštěni či navraceni. Kromě toho se objevoval názor, že v čase

⁵⁵ UNHCR Ex. Com. Conclusion N° 58 (XL) – 1989, *Report of the 40th Session*, UN doc. A/AC96/737, para. 25.

⁵⁶ P. WEIS, *o.c.*, 327.

studené války by mohlo být pravidlo zneužíváno pro špionážní účely.

Osobní rozsah aplikace pravidla non-refoulement zahrnuje uprchlíky podle definice čl. 1 Ženevské úmluvy. Osoba se stává uprchlíkem od okamžiku, kdy splní podmínky utělené do čl. 1. Výhody pravidla non-refoulement ovšem nepožívají jednotlivci, kteří jsou vyloučeni z mezinárodní ochrany dle čl. 1 odst. D, E nebo F Úmluvy.

Věcný rozsah aplikace normy vystihuje několik právních obrátů. Pojem „vyhoštění“ se objevuje v čl. 32 Úmluvy. Vyhoštění znamená pro účely Úmluvy, že uprchlíci, kteří mají právo pobytu v zemi nebo právo útočiště, nemohou být posláni zpět do země, kde by jejich život a svoboda byly ohroženy. Termín „návrát“ (navrácení) není přesný ve svém významu. Švýcarsko během kodifikačních prací vyjádřilo mínění, že pravidlo non-refoulement se vztahuje na uprchlíky, kteří již byli přijati na území. Podle takového výkladu stát by mohl určovat rozsah ochrany prostřednictvím přistěhovalecké politiky. „Švýcarský“ způsob interpretace normy byl podnícen obavou z hromadného uprchlictví. Nizozemská vláda nesdílěla striktní pohled Švýcarska, nicméně vylučovala z věcné působnosti pravidlo masový příliv osob. Stanovisko právní nauky zahrnuje spíše širší výklad. Pravidlo se totiž použije v okamžiku, kdy žadatelé o azyl požadují vstup na území. Pojem tudíž pokrývá případy nenavrácení i neodmítnutí na hranici. Výkonný výbor UNHCR kráčí ve svém vý-

kladu ještě dále, když se domnívá, že norma se aplikuje v situacích hromadného příchodu uprchlíků, pokud hledají první útočiště. Nejvyšší soud USA v případě *Sale versus Haitian Centers Council* uvažoval, že čl. 33 Ženevské úmluvy se výlučně použije proti osobám, které již byly vpuštěny na území státu. Podle takového výkladu může stát bránit lodím, které mají uprchlíky na palubě, veplout do pobřežního moře.

Ustanovení čl. 33 Ženevské úmluvy zakazuje chování, jež spočívá v navrácení anebo vyhoštění, ať tak činí stát přímým nebo nepřímým způsobem. Vývoj azylové praxe v Evropské unii podle Dublinské úmluvy vytváří nebezpečí tzv. nepřímého non-refoulement, což dokumentují některé případy.

Čl. 33 odst. 2 vylučuje z ochrany zločince a jiné nežádoucí osoby jako vyvědče pro jinou mocnost. Jedná se o jedince, kteří jsou nebezpečím pro stát, na jehož území pobývají. Důležitou otázkou je zhodnocení takového nebezpečí. Pouze tehdy, když převažuje hrozba pro společnost nad rizikem žadatele o azyl, může být ochrana podle čl. 33 odst. 1 Úmluvy odepřena. U osob, jež byly odsouzeny za zvláště závažný zločin na základě konečného rozsudku a jsou nebezpečné pro teritoriální stát, musí být posuzována jejich případná ochrana dle závažnosti spáchaného skutku jako nebezpečí pro společnost a podle přiměřenosti: daný čin musí naplnit stupeň zvláštní závažnosti a vytvářet hrozbu pro komunitu, přičemž taková hrozba převažuje nad požadavkem poskytnutí ochrany.