PROTECTION OF REFUGEES THROUGH THE NON - REFOULEMENT PRINCIPLE

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INTRODUCTION

The modern concept of refugee protection developed in the wake of World War II, which produced huge numbers of refugees fleeing violence and war. The refugee problem was acknowledged as having international dimensions and requiring global cooperation as far back as 1921-22 in the aftermath of the First World War, the break up of the Austro Hungarian empire and the Russian revolution. However, real movement to protect refugees began only with the 1948 Universal Declaration of Human Rights, which proclaimed basic rights for all human beings irrespective of their nationality or citizenship. The declaration was an important first step for refugees, who are particularly vulnerable in foreign countries. It is therefore incumbent upon the international community to protect their rights both in countries of origin and asylum.

A myriad of specialized and regional human rights instruments have sprung from the foundation of the International Bill of Human Rights. The non-derogable rights enshrined in the Covenants such as Article 6 of the International Covenant on Civil and Political Rights (ICCPR) are also applicable to refugees. The cornerstone of refugee protection is the principle of *non-refoulement*, which provides that no refugee should be returned to any country where he or she is likely to face persecution on grounds of race, religion, nationality, political opinion, or membership of a particular social group. [1] For this principle to have meaning in practice, states must have domestic legal regimes whereby the rights and responsibilities of refugees and their host governments are recognized and

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1 This obligation is contained in Article 33 of the Refugee Convention, and it is also widely accepted to be a norm of customary International Law and therefore binding on all states. See Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), p. 167-170

which establish a fair screening mechanism to determine whether a person or group has a valid claim to refugee status.

The foremost authority on refugee law is the 1951 Convention relating to the Status of Refugees, known simply as the Refugee Convention, which codifies a very precise definition of "refugee"[2] found in the 1951 Refugee Convention. According to UNHCR mandate and the 1951 Convention Relating to the Status of Refugees, the term refugee applies to those people who: (a) have fled their countries because of a well-founded fear of persecution for reasons of their race, religion, nationality, political opinion or membership in a particular social group; and (b) cannot or do not want to return due to fear. The 1967 Protocol to the Convention altered this definition only insofar as it removed the time limit of the former, which only covered refugees who had been displaced as a result of events occurring before 1951.

More contemporary instruments have advanced beyond this limited and legalistic definition by acknowledging civil disturbances and human rights abuses as valid claims for refugee status. The Refugee Convention is a part of international customary law and it should be the moral responsibility of any member state of the United Nations to respect the Refugee Convention.

While the Conventions apply to several countries that are parties to them, they do not, unfortunately, have universal application. Many States are not parties to these instruments, nor do they have domestic laws that deal with the subject of refugees or asylums generally. Nevertheless, customary rules of international law, especially the principle of non-refoulement forbids States from returning or expelling an asylum seeker or refugee to a situation that threatens his or her life and fundamental rights. What this implies for States is that they are obliged to allow access into

[2] Originally a backward looking instrument, this Convention was adopted in order to address the unresolved refugee crisis that emerged from the Second World War. As such, it applied only to persons who became refugees as a result of events occurring prior to the Refugee Convention's adoption. This temporal limitation was removed by the Protocol relating to the Status of Refugees of 31 January 1967, whose Preamble recognized that "new refugee situations have arisen since the convention was adopted." The pre-Convention definition did not take into account the reasons for the refugee's departure from his/her home nation. Gradually, however, states became concerned, culminating in the definition of "refugee". *Human Rights: A Compilation of International Instruments* (United Nations, New York, 1988)

their territories to refugees and to allow them the space within which to find a durable solution to their problems.

The *Non–Refoulement* Principle: Development of the Principle

The principle of *non-refoulement* is seen by most in the international law arena, whether governments, non-governmental organizations or commentators, as fundamental to refugee law. Since its expression in the Refugee Convention in 1951, it has played a key role in how states deal with refugees and asylum seekers. An expert in refugee law defines it as the idea that "no refugee should be returned to any country where he or she is likely to face persecution or torture".[3]

Prior to the 1930s this principle did not exist at international law.[4] The surrounding and circumstances for the development of the *non-refoulement* principle was the idea that it was fundamentally wrong to return refugees to places where they would be clearly be in danger was mentioned occasionally by states in agreements or statutes, or was evident in the practice of some states. Although by 1905 it had been enshrined in a UK statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later that the idea of *non-refoulement* of such people became widely accepted.[5] It was first expressed at international law in the 1933 Convention relating to the Status of Refugees, which, however, was ratified by very few states.[6]

There is no doubt that non-refoulement is a legal concept, and "not simply a means by which States can device political solutions in the in the refugee field".[7] More than a legal principle, however, non-refoulement has acquired the status of a norm of customary international law, that is, a general practice which states accept as law. Some authoritative sources attribute to this principle a higher standing, deeming it a peremptory norm of international law, or *jus cogens*. Peremptory rules of international law are

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3 Guy Goodwin-Gill, *The Refugee in International Law* (2 ed, Clarendon Press, Oxford 1996) 117.

4 Robert L. Newmark '*Non-Refoulement run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs'* (1993) 71 Wash U.L.Q 833,837.

5 Guy Goodwin-Gill, *The Refugee in International Law* (2 ed, Clarendon Press, Oxford 1996) 118

6 Guy Goodwin-Gill, above, 118

7 Marx, Reinhard, "*Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*", International Journal of Refugee Law,Vol.7,No.3 (July 1995),p.392

those which cannot be set aside, derogated from or limited in any way, whether by another treaty or by agreement between states. Thus, "State A and B cannot agree that, *inter se* , they will allow prisoners of war that they hold to be freely killed."[8] *Jus cogens* norms apply to all states, even those which have not consented to the rule. The 1984 Cartagena Declaration states that non-refoulement should be acknowledged and observed as a rule of *jus cogens*. Conclusion No.25 (1982) of UNHCR's Executive Committee refers to the principle of non-refoulement as "progressively acquiring the character of a peremptory rule of international law". Any treaty provision incompatible with *jus cogens* is void.

Incorporation of the Principle in the 1951 Refugee Convention

In 1949, the United Nations Economic and Social Council (ECOSOC) decided to appoint an *Ad hoc* Committee to 'consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention.[9] The *Ad hoc* Committee on Stateless and Related Problems met twice in New York in January-February and August 1950.[10] In turn, it decided to focus upon the refugee, and duly offered the text of a draft convention. In August 1950, ECOSOC returned the draft convention to the Ad hoc Committee for further review, prior to its being considered by the General Assembly, and finalized the Preamble and refugee definition. In December 1950, the General Assembly decided to convene a Conference of Plenipotentiaries to complete the draft convention relating to the status of refugees.[11] In the course of its discussions, the Ad hoc Committee drew up the following

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8 Higgins, R., *Problems and Process: International Law and How We Use It*, Clarendon Press,Oxford,1994,p.21

9 ECOSOC res. 248 (IX) B, 8 Aug. 1949

10 The most important United Nations documents from this period are usefully collected in Takkenberg, A. and Tahbaz,C.C., *The Collected Travaux Preparatories of the 1951 Convention relating to the Status of Refugees*,3 volumes, Dutch Refugee Council/European Legal Network on Asylum, Amsterdam , 1988

11 UNGA res.429 (V), 14 Dec. 1950. See generally Report of the Ad hoc Committee on Refugees and Stateless Persons, Second Session: UN doc.E/1850. The Committee had been renamed in the interim.

provision, which was considered so fundamental that no exceptions were proposed :[12]

> No contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion or political opinion.

The drafters of the Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk. The language of article 33 and of complementary regional instruments is nevertheless broad and unequivocal. It prohibits both the expulsion of a refugee from a contracting State and the return of a refugee to a territory where his or her life or freedom would be endangered. The term 'return' necessarily looks to the place 'to' which a refugee is returned. The word 'expel' on the other hand refers to the treatment of refugees present in a State's not present. *Non-refoulement* or non-return thus bars the involuntary repatriation of refugees 'in any manner whatsoever' to a place where their lives or freedom would be threatened, including by way of deportation, expulsion, rejection at the frontier, extradition, as well as any other method of forced repatriation.

The Convention itself deals with various aspects of law relating to refugees and remains the primary instrument of refugee law. It was intended to consolidate the various international laws and practices impacting on refugees and asylum seekers. It was also recognized that certain countries bore a much bigger burden than that of others with respect to the refugee flows. Therefore, it was imperative that an international approach to the problem be taken.[13] The Convention defined who exactly was to be viewed as a refugee, and spelled out what rights these people would have. In 1967, by way of a Protocol, the Convention was amended and signatories were given the opportunity to remove the geographical and temporal restrictions present in the original document.[14]

According to Article 33 (2) of the Refugee Convention:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convinced

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12 UN doc. E/1850, para.30

13 United Nations Convention Relating To The Status of Refugees (28 July 1951) 189 UNTS 137

14 United Nations Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 297

by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

In a country of asylum, refugee treatment must correspond with obligations to respect fundamental human rights, including the right not to be returned to a territory where the individual may be subjected to persecution, that is, *non-refoulement.*[15] Problems have arisen regarding the interpretation of Article 33. It gives rise to questions involving issues whether or not a refugee must be inside the state in order for the right to accrue to them. If so then states would be perfectly within their rights to turn away asylum-seekers at the borders or ships at sea.[16] Debate seems to continue as to whether a refugee had to meet the strict requirements of the Convention before they could be granted the right of *non-refoulement.* However, through the work of the United Nations High Commissioner for Refugees, and general state practice, it has been accepted that Article 33 applies to all refugees, whether or not they fit the prescribed definition.[17]

Incorporation of the principle of *non-refoulement* in other Instruments

The principle of *non-refoulement* , the cornerstone of refugee protection was only the first example of non-refoulement being enshrined in international law. Numerous treaties and conventions thereafter have directly or indirectly dealt with the rights of refugees and have repeated the principle. These are also extremely relevant as they illustrate the various options open to both refugees and states when dealing with problems of *non-refoulement.*

Article 13 of the International Covenant on Civil and Political Rights (ICCPR) states that anyone who is lawfully within the territory of a state

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15 Non-refoulement provisions are included in several United Nations documents, including the 1951 convention/1967 Protocol: See article 33. Even states not parties to the United Nations instruments are bound to respect non-refoulement as a fundamental principle of customary international law: see Goodwin-Gill, G. *The Refugee in International Law* (1983),p.97; Conclusion No.6 (XXVIII), in UNHCR, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the High Commissioner's Programme (1980) p.14.

16 See for example: Robert L. Newmark '*Non-Refoulement run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs'* (1993) 71 Wash U.L.Q 833

17 Todd Howland '*Refoulement of Refugees*: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l & Pol'y 73

shall not be expelled from that state without due process.[18] The article does not mention refugees specifically, and only refers to aliens "lawfully" within a state. Therefore the application is limited. It is important in the sense that it specifies what action must be taken before anyone can be forcibly expelled. Article 7 of the ICCPR is also relevant as it protects against torture.

Some regional instruments like Organisation of African Unity's Convention (OAU Convention) Governing the Specific Aspects of Refugee Problems in Africa,1969 and the Cartagena Declaration on Refugees 1984 also made substantial contributions to the development of refugee law. The principle of *non-refoulement* is enshrined in Article 2 (3) of the OAU Convention. The principle is not as limited as its equivalent in the UN Convention. There is no requirement that there be a "fear of persecution", and the five reasons for leaving the previous state are greatly expanded. The OAU Convention, unlike many other instruments, recognizes that particular countries will have to call for help when they are over burdened with refugees, and it imposes a duty on the other states to assist.[19]

Article 3 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The article also provides that authorities must look at whether there is a consistent pattern of serious human rights violations in the country in question. Article 3 (1) provides broader protection than the 1951 Convention in that it is an absolute right, however, its effect is restricted in that it only applies to situations involving torture.[20]

Similarly, Article 3 of the European Convention on Human Rights prohibits torture or other cruel, inhumane or degrading treatment, and

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[18] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171

[19] Paul Kuruk '*Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian Refugees'* (1999) 35 Stan.J.Int'l L.313, 332.

[20] David Weissbrodt and Isabel Hortreiter '*The Principle of Non-Refoulement* : Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement provisions of other international human rights treaties' (1999) 5 Buff.Hum.Rts.L.Rev.1,47

therefore provides similar protection for refugees as the Torture Convention.[21] However, the European Convention differs in some respects. Article 3 of The European Commission on Human Rights deals with the issue of *non-refoulement* which is not specifically mentioned in the Convention.[22] Furthermore, the right which the Convention creates (to be protected from torture) is absolute and non-derogable, as is the right to be protected from refoulement in the OAU Convention.

Several European instruments have dealt specifically with the problem of asylum and refugee flows. Article 11 (1) of Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures 1995 provides that the member state's asylum procedures will fully comply with the Refugee Convention 1951, and especially with the *non-refoulement* provision. Also, Article 11 (2) states that a potential refugee will not be expelled until a decision on their status has been made.

The 1969 American Convention on Human Rights also deals with the principle of *non-refoulement*. Article 22 (8) states that 'in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions'. The provision gives specific reasons why the 'alien' would be in danger when returned but does not state the situations in which the rule can be breached. Article 27 allows derogation in certain circumstances of war or emergency. It has been suggested that this provision could possibly be interpreted to allow derogation during massive refugee crisis, which would seem to defeat the purpose of the provision.[23]

Treaty Interpretation in International Law

The sources of international law are set out in Article 38 (1) of the Statute of the International Court of Justice as the law which the Court is to apply in deciding disputes. International conventions are the primary source of international law, followed by international custom. Although treaties are interpreted primarily by the state parties, interpretation is also undertaken by international courts, arbitral bodies, and international organization "which, although not a party, [have] to apply a treaty or control its

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[21] European Convention of Human Rights (4 November 1950) 213 UNTS 221

[22] David Weissbrodt and Isabel Hortreiter,above,28

[23] David Weissbrodt and Isabel Hortreiter,above, 47

application."[24] Treaty interpretation is governed by numerous rule, in particular the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980. These rules of treaty interpretation bind the parties and other bodies responsible for treaty interpretation and must apply the same rules. This is also the case for UNHCR for interpreting the refugee conventions.

Under the Vienna Convention, treaties are binding upon the parties. As Reuter writes: "The effect of treaty is essentially to create legal rules, to generate rights and obligations."[25] According to Article 31 (1) they are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose."

Reuter further adds : "The requirement of good faith is essential in all actions governed by international law and in the performance of any obligations …. Treaties must be interpreted in good faith …. Good faith implies the requirement to remain faithful to the intention of the parties without defeating it by a literal interpretation or destroying the object and purpose of the treaty."[26]

Article 31 of the 1969 Vienna Convention on the Law Treaties, which restates principles of customary international law, also requires that the 1951 Convention be interpreted consistently with international law, including therefore the content of the norm of non-return in customary international law. In international law, the subsequent practice of States parties to a treaty is relevant to its interpretation. Article 31 of the 1959 Vienna Convention provides with respect to the general rule of interpretation,

(3) There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions ;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties….

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24 Reuter, Paul, *Introduction to the Law of Treaties*, Pinter, London, 1989, p.74

25 Ibid,p.73

26 Ibid,p.114

The subsequent agreement and practice of States parties can be derived or inferred, *inter alia*, from their actions at diplomatic level, including the adoption or promulgation of unilateral interpretative declarations; and at the national level, in the promulgation of laws and the implementation of policies and practices. The rules of treaty interpretation permit recourse to 'supplementary means of interpretation' (including the preparatory work of a treaty) only where the meaning of the treaty language is 'ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.[27] When the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable and recourse to such sources is discouraged.[28] The use of treaty's negotiating history is appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable results'. Article 32 of the Vienna Convention provides : "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

Human rights perspective

Unlike most other areas of human rights where it is possible to chart progress over the last decades, states have largely regressed in their commitment towards protecting refugees. At the centre of international refugee regime is the fundamental right of any individual to seek and enjoy asylum from persecution in other countries. Enshrined in article 14 (1) of the 1948 Universal Declaration of Human Rights, the principle of asylum recognizes that when all other forms of human rights protection have failed, individuals must be able to leave their country freely and seek refugee elsewhere. The 1951 Refugee Convention was one of the first major human rights instruments to be established after the 1948 Universal Declaration of Human Rights. While it clearly had shortcomings, not least in failing to incorporate an explicit right to seek and enjoy asylum, the

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27 Article 32, 1969 Vienna Convention on the Law of Treaties

28 This principle has long been established in international law. See for example, Interpretation of Article 3 (2) of the *Treaty of Lausanne*, 1925 P.C.I.J. (ser.B) No.12, at 22; *The Lotus Case*, 1927 P.C.. I.J. (ser.A) No.10, at 16; *Admissions to the United Nations Case*, 1950, I.C.J. Reports, 8.

Refugee Convention nevertheless reflected states' sense of responsibility and moral obligation towards protecting refugees in the aftermath of the second world war.

The object and purpose of the 1951 Refugee Convention is to protect refugees and assure them the widest possible exercise of fundamental rights and freedoms.[29] Any human rights treaty must be interpreted in the light of protecting human rights. A treaty's object and purpose is taken as stated, at face value, in reality, the parties may not share a common intention, and their underlying intentions may not be those that are stated. In 1995, the Executive Committee stressed the importance of interpreting and applying international instruments for the protection of refugees "in a manner consistent with their spirit and purpose". [30]

Even though the formal scope of the 1951 Convention and 1967 Protocol has not been extended, the extent of protection due under international law to refugees, displaced persons and various other categories has developed. This is due in part to the cumulative effect of increasingly extensive human rights schemes, agreed by States at multilateral and regional levels, and including the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1981 African Charter of Human and Peoples' Rights, the 1969 American Convention on Human Rights and the 1950 European Convention on Human Rights. More specifically focused is the 1984 UN Convention against Torture which has enhanced the international law standing of the principle of non-refoulement, while the principles of customary international law have been consolidated in the practice of Sates and in the practice of international organization , such as the UNHCR.

The obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction is of particular importance. This duty is recognized, for example, in article 2 (1) of the 1966 Convention in Civil and Political Rights,[31] in article 1 of the 1950

[29] Goodwin-Gill, Guy S., *The Refugee in International Law*,2nd edn., Clarendon Press, Oxford, 1996, citing Preamble to the 1951 Convention, p. 367

[30] Executive Committee, Conclusion No. 77 (XLVI), General Conclusions on International Protection, para.(e).

[31] "Each State Party … undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant…."

European Convention,[32] and in article 1 of the 1969 American Convention.[33]

As concerns the human rights focus of the 1951 Refugee Convention, it is noteworthy that the direct line of descent from the UN Charter and the Universal Declaration of Human Rights is stated in its preamble. The Convention affirms "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination". International refugee law instruments also codify a number of specific rights which states are obliged to provide to refugees. In view of rapid developments in the domain of human rights law which may complement and inform the interpretation of the refugee instruments, the Refugee Convention is very much a living document which, despite its vintage, maintain its relevance in respect of providing a normative framework to address contemporary refugee problems.[34]

Non-Refoulement and Asylum

In the years since 1951, many states have adopted the refugee definition as the criterion for the grant of asylum, and as the sole criterion for the grant of the specific, limited, but fundamental protection of non-refoulement. The practice of asylum, i.e., states granting protection to individuals from persecution or violence by another states, has been recognized. Article 14 (1) of the Universal Declaration of Human Rights lays down, " Everyone has the right to seek and enjoy in other countries asylum from persecution."[35] The first need for a refugee who has entered a state other than his own, is asylum. Asylum is the protection which a state grants on its territory or in some other place under the control of certain of its organ, to a person who comes to seek it.[36] The recognized refugee with a well founded fear of persecution, is not only presumptively entitled to asylum in the sense of residence, but also guaranteed against return to the country as

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32 "The …..parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention".

33 The …. Parties undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction (their) free and full exercise…".

34 Ivor C Jackson, *"The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection"*, IJRL vol 3,no 3 (1991)

35 U.N.G.A. Res 217 A (111), December 10, 1948, at Art 14 (1)

36 See Art.1 of the Resolution adopted by the Institute of International Law in September 1950, 4 Am J. Int'l L. (Suppl) 15 (1951)

against which he or she had a well founded fear of persecution. So far as States have resisted any formal obligation to grant asylum, they have nevertheless accepted the peremptory character of the principle of non-refoulement, applicable to those at initial point of entry, or who have already entered state territory, or who may be liable to extradition proceedings. This view is supported by Article 111 (4) of the Principles Concerning Treatment of Refugees 1966,[37] Article 3 (3) of the United Nations Declaration on Territorial Asylum,[38] Article II (5) of the OAU Convention on Refugees 1969[39].

Refugees benefit from non-refoulement and the refugee status is often but not necessarily the sufficient condition for the grant of permanent or durable asylum. Refugees may also be subject to measures falling short of non-refoulement, which prevent them from effectively making a claim to status or asylum, or in securing admission to a particular country.

Non-refoulement and Extradition

Non-refoulement is not synonymous with asylum. Similarly, non-extradition for 'political' offence is not synonymous with residence in the State refusing surrender, and neither does it entail any necessary immunity from persecution. In both cases, a limited but fundamental protection is involved; in the case of *non-refoulement*, the protection must be accorded to the refugee having a well founded fear of persecution, or to one whom there are serious reasons to believe may be tortured in the State to which he or she is surrendered.[40]

The 1957 European Convention on Extradition prohibits extradition and further states that 'if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons.[41] This article

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[37] Principles Concerning Treatment of Refugees, Bangkok Principles, 1966, Doc.No.AALCC/XXIV/II, Annexure 1.

[38] UNGA Res. 2312 of 14 Dec.1967

[39] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Sept.10,1969, OAU Doc. CM/LEG/67/3/Rev.5 (1981)

[40] Besides being mandated by the 1984 United Nations Convention on Torture, this protection is implicitly guaranteed in human rights covenants, such as art.7, 1966 Covenant on Civil and Political Rights.

[41] Article 3 (2) : European Treaty Series ,No. 24

was expanded expressly to include the basic elements of refugee definition, and to close the gap between the political offender and the refugee.

The extradition of refugees was examined in 1980 by the Executive Committee, which reaffirmed the fundamental character of the principle of non-refoulement, and recognized that 'refugees should be protected in regard to extradition to a country where they have well founded reasons to fear persecution on the grounds enumerated in Article 1 (A) (2) of the 1951 Convention.[42] Anxious to ensure not only the protection of refugees, but also the prosecution and punishment of serious offences, the Executive Committee stressed 'that protection in regard to extradition applies to persons who fulfil the criteria of the refugee definition and who are not excluded by virtue of Article 1 (F) (b)' of the Convention. A review of state practice confirms that the principle of non-refoulement applies wherever a State would seek to return a refugee in any manner whatsoever.

Temporary Protection and *Non-refoulement*

The concept of temporary protection emerged in response to countries receiving mass influxes of asylum seekers, particularly in the poorer regions of the world. As a result of regional political instability in the developing world, those states which had borders with countries experiencing conflict received influxes of asylum seekers which were beyond the capacity of their existing procedures and resources to cope. Under international customary law, all states are obliged to meet the minimum requirements of protection in the form of the principle of non-refoulement.

As already discussed earlier that the only protection guaranteed under the 1951 Convention is that of non-refoulement articulated in article 33. Article 1C (5) (cessation clauses) clearly allows states to withdraw refugee status if the conditions in refugees' country of origin which provoked their flight have ceased to exist. Nonetheless, Article 1 C (5) of the 1951 Convention also includes the provision that this article should not be applied in cases where a person is able to "invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality". This is reinforced in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status[43] which acknowledges that some refugees may have been so

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[42] See Report of the Executive Committee on the on the 31st Session (1980): UN doc.

[43] UNHCR 1992, Handbook on Procedures and Criteria for Determining Refugee Status, 136

traumatized by their experiences that it would be unreasonable to expect them to return to their country of origin. This suggests that the UNHCR believes that there are some cases where permanent resettlement is the most humane and appropriate response.

The UNHCR Handbook[44] also suggests that it is undesirable for states to make refugee status subject to 'frequent review', acknowledging the additional trauma that such a state of limbo can cause. This would be contrary to the spirit of the 1951 Convention and the sense of security that protection is intended to provide. This again suggests that the UNHCR believes that temporary protection can be undesirable and not keeping with the spirit of the Convention. There is however, no specific mention of a right to permanent resettlement in the 1951 Convention itself, only the suggestion in article 34 that states should "facilitate the assimilation and naturalization of refugees".

There is, however, nothing in the 1951 Convention to excuse states from their obligations in a situation of mass influx of asylum seekers and no reason why the 1951 Convention cannot be applied in such situations. Therefore the use by developed states of current temporary protection measures should be seen in the context of an overall strategy to reduce the number of asylum applications and the associated costs with processing them, rather than a desire to promote the human right of asylum seekers to return to their countries of origin.[45]

Exceptions to the Principle of *non-refoulement*

The refugee definition of the 1951 Convention is not an absolute guarantee of protection. Article 1 (F), expressly excludes those whom there are serious reasons to believe have committed war crimes, or crimes against humanity, a serious non-political crime prior to their entry to the State of refuge, or acts contrary to the purposes and principles of the United Nations.[46] Article 33 (2) also contains an exception to the prohibition on refoulement, designed to protect the community of refuge from those

44 Ibid, 135

45 Fitzpatrick, J. 1994, "*Flight from Asylum : Trends toward Temporary 'Refugee' and Local Responses to Forced Migrations*", Virginia Journal of International Law, 10, 1, pp.139-70

46 Guy Goodwin-Gill, *The Refugee in International Law* (2 ed, Clarendon Press, Oxford 1996) 65

convicted of particularly serious crimes or who constitute a danger to security.

In contrast to the 1951 Convention, the 1969 OAU Convention declares the principle of non-refoulement without exception. No formal concession is made to overriding considerations of national security, although in cases of difficulty 'in continuing to grant asylum' appeal may be made directly to other member States and through the OAU. Provision is them made for temporary residence pending resettlement, although its grant is not mandatory. Again, Article 3 of the Declaration on Territorial Asylum, adopted by the General Assembly only two years before the OAU Convention, not only acknowledges the national security exception, but also appears to authorize further exceptions 'in order to safeguard the population, as in the case of a mass influx of persons'.

Conclusion

The international system to protect refugees is in crisis. Many people who deserve protection are falling through the net. They are denied access to asylum procedures and wrongly told that they do not qualify as refugees and they are sent back to the countries where they will not be safe.

The formal requirements of non-refoulement may be limited to Convention refugees, but the principle of refuge is located within the body of general international law. Both international conventions and customary international law reaffirm the prohibition against return or refoulement of a refugee to situations endangering life or freedom as one of the most fundamental principles of refugee protection.

It emerges from the foregoing discussion that like any body else refugees are also entitled to human rights and fundamental freedoms set forth in human rights treaties, covenants and declarations. Looked at from this perspective, the restrictive practices adopted by the countries *vis-a-vis* asylum seekers are legally unjustified, morally reprehensible and strategically counter-productive. The international community must therefore take initiatives to address the human rights concerns of refugees in a positive and constructive way.

International law, including refugee law, has never been divorced from pragmatism, let alone form states' perceptions of their own interests. As one international legal expert has remarked, the law-any law-"is inevitably

bound up with the accommodation of the different interest of states."[47] Against this backdrop there is a need for better cooperation between the UNHCR and the U.N High Commissioner for Human Rights. The role of the civil society organizations is important and they should work together more closely than in the past. In recent years, UNHCR has incorporated a number of human rights principles in its working e.g., legal rehabilitation, institution building, law reform and enforcement of the rule of law, humanitarian assistance to internally displaced persons and given due importance to the establishment of increased cooperation with international and regional human rights mechanism.[48] In this regard, the most important linkages now established between non-refoulement in its traditional sense, and the comprehensive protection required by international human rights law, remain to be fully developed. Although States may be the bearers of the obligations, UNHCR has both legal standing and a duty to continually promote and defend the principle of *non-refoulement*.

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[47] Brownlie, I, *Principles of Public International Law*, 5th edn., Clarendon Press, Oxford, 1998,p.29

[48] Brian Gorlick, "*Refugee and Human Rights*", Seminar (1998 Spring), p. 19