International Journal for Empirical Education and Research

Human rights implications of the NonRefoulement & Development

Imrul Sheikh

Department of Law

Stamford University

Bangladesh

Email: sheikhimrul765@gmail.com (Author of Correspondence)

Abstract

States are obliged for protection of refugees under international law on account of their membership of United Nations and signature or accession to International Refugee Instruments as well as International Human Rights Instruments. The legal basis for this international protection may either be customary international law or conventional international law. The basic customary international laws applicable to them are those pertinent fundamental human rights found in the International Bill of Human Rights. Hence, it is submitted that all states should protect the fundamental human rights of refugees under customary international law. Principle of non-refoulement is one of them. The refugee regime has generated a serious body of law that elaborates basic human rights norms and has important implications in and beyond the refugee context. There are a number of universal, regional and domestic human rights instruments and mechanisms which can be employed to enhance the protection of refugees and asylum seekers. This research aims at finding out the role of principle of non-refoulement in protecting refugees and asylum seekers under international human rights law.

Keywords: Non-Refoulement; Human Rights; Implication; UDHR; ICCPR; ICESCR; ECHR ECtHR.

ISSN Online: 2616-4833 ISSN Print: 2616-4817

1. Introduction

Every state exercise its sovereign authority over its territory by which the state has the right to secure its land from the illegal entrance of aliens. After the First World War a muss influx occurred and people being displaced from their land and compelled t move another land/state. In this regard a new situation arise called refugee situation. The international communities in this situation urge to every state that any refugee seeking shelter shall not be returned to the place of danger. By this way a new principle called Non-refoulement come to light. Now in International law, this principle holds a paramount importance. Every sovereign state exercise their power in their territory relating to refugee law and give rise to challenges in the application on the principle of Non-refoulement and in the protection of asylum seekers and refugees. It is manifest that nonrefoulement is inherently connected with a procedure aimed at identifying potential victims of persecution. The procedure can be fair and effective only if it is conducted on state territory accordingly, the prohibition on refoulement cannot be absolutely guaranteed without access to state territory. So awareness of the issue and attention to such situations in procedures and in field operations are vital in order to ensure the application of the principle of nonrefoulement and prevent refugees being returned to a place of danger.

1.1 Historical development

The asylum context the principle of non-refoulement, meaning "forbidding to send back," first appeared as a requirement in history in the work of international societies of international lawyers. At the 1892 Geneva Session of the Institut de Droit International (Institute of International Law) it was formulated that a refugee should not by way of expulsion be delivered up to another State that sought him unless the guarantee conditions set forth with respect to extradition were duly observed (Règles internationales sur l'admission et l'expulsion des étrangers 1892, Article 16). Later on, with a view to the growing international tension in the period between the two World Wars, the principle of non-refoulement explicitly appeared in an increasing number of international conventions, stipulating that refugees must not be returned to their countries of origin [e.g. in the context of Russian and Armenian refugees; the conventions signed in 1936-38 with reference to refugees from Germany also contained similar restrictions on refoulement] (Tóth, 1994: 35; Goodwin-Gill & McAdam, 2007: 202-203). After World War II it was the foundation of the United Nations (UN) that gave a new impetus to the consolidation of this principle in international law. Millions of people were seeking refuge at the time from the clashes and horrors of the six-year cataclysm, looking for the opportunity of settlement in an ultimate host country. In that period, the first context of application where the prohibition of refoulement became universal was the field of humanitarian international law: it was formulated in Article 45 of the 1949 Geneva Convention relative to the Protection of Civilians Persons in Time of War according to which "in no circumstances shall a

protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs." The principle of non-refoulement, granting broader protection, gained generally recognized, positive legal reinforcement at the universal level by virtue of Article 33 of the 1951 Geneva Convention relating to the Status of Refugees, which stipulates that

"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 elaborated more on its contents and conditions of application in detail. Although as regards their normative force these are non-binding (soft law) documents, in many respects they reflect international customary law, established or in formation (see also: Goodwin-Gill & McAdam, 2007: 217). A UNHCR ExCom conclusion adopted in 1977 stipulated, for example, that the implementation of the principle of non-refoulement did not require the formal recognition of refugee status, while the ExCom conclusions passed in 1980 pointed out the need to consider the prohibition of refoulement as an obstacle to extradition and reinforced that the requirement of non-refoulement was to be strictly observed even in the case of the mass influx of refugees; later on, the UNHCR ExCom conclusions passed in 1981 and 2004 made it clear furthermore that the principle of nonrefoulement also included non-rejection at frontiers (adding that access to fair and effective asylum procedures should also be ensured).

1.2 Principle of Non-refoulement Described

The fundamental humanitarian and human right principle of non-refoulement is a core principle of refugee law that prohibits states from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened. The term 'refoulement' originates from the French word 'refouler, meaning literally to drive back or repel in the context of immigration control summary reconduction to the frontier of those found to have entered illegally and summary refusal of admission of those without valid docurnents. 1 Refoulement, as Helene Lambert says, includes and refers to expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e. persecution, torture or inhumane treatment.2 Article 33 of the 1951 Convention on the Status of Refugees 3 prescribes that no refugee should be returned to any country where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This provision constitutes one of the important Articles of 1951 Refugee Convention, to which no reservation are permitted. The principle of non-refoulement is broader than article 33 and also encompasses non-refoulement prohibitions deriving from human rights obligations, including Article 3 of the United Nations Conventions against Torture and other Cruel, Inhuman, or Degrading Treatment or

Punishment (CAT Convention) and Article 7 of International covenant on Civil and Political Rights (ICCPR). The principle is considered International customary law. Persons meeting the Refugee definition, whether under Article 1A (1), Article 1A (2) or 2nd paragraph of Article ID of 1951 Convention, are automatically entitled to this fundamental right. The principle also applies when a person seeking asylum, i.e., prior to recognition of refugee status or until it is established that the applicant does not fulfill the refugee definition. There is another concept named "nonrefoulement through time" which is a concept located between states' obligation of non-refoiilement and states' discretion in granting asylum. This idea has been supported and explained by Goodwin-Gill. There is also another almost similar concept of "temporary protection". This idea has been developed by Susan Akram and Terry Rempel, who argue for establishment of a global unified temporary protection regime for Palestinian refugees.

1.3 History: 1905

A U.K. Statute enshrined a provision that returning the refugees who fears persecution on return on political or religious grounds should be allowed in the country.5 1930: Prior to this time the principle of NonRefoulement did not exist in international law.6 1933: Principle of Non-Refoulement was first expressed in a Convention relating to Status of Refugees, though ratified by few states.7 1939-1945: Massive flow of refugees of World War II created an impetus for thorough examination of the rules relating to refugees. 1946: UN General Assembly passed a resolution that refugees should not be returned when they had valid objections.8 1951: UN Convention on the Status of Refugees was drafted and adopted. 9 It was initially limited to protecting European refugees after World War II but 1967 Protocol removed the geographical and time limits, expanding the Convention's scope.

1.4 Article 33 of 1951 Convention

For our purposes Article 33 of the Convention is of primary relevance. The first paragraph of this article states that: 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. Although this was intended to be an absolute right, states remained concerned about the erosion of their sovereignty that this could create. Therefore, a second paragraph was tacked on, providing that the right of non-refoulement could not be claimed by someone who was seen as a risk to the security of the country, or who had been convicted of a 'particularly serious crime’.

Since 2013, 145 States (as of August 5, 2013) have signed the Convention, thereby accepting the principle of non-refoulement expressed therein. 10 However, problems have arisen regarding the interpretation of Article

33. Debate continues to surround the issue of 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. 11 There was also discussion 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 on Refugees (UNHCR), and general state practice, it has been accepted that Article 33 applies to all refugees, whether or not they fit the prescribed definition12.

1.5 Non-Refoulement in Human Rights Law and Humanitarian Law Instruments

UN Convention on the Status of Refugees, 1951: Article 33 of this Convention speaks about the principle of non-refoulement and also the relevance of State security in denying it. International Covenant on Civil and Political Rights (ICCPR): Article 13 of this Convention states that anyone who is lawfully within the territory of a state shall not be expelled from that state without due process.13 However, this rule does not have to be followed if national security is at stake. The article does not mention refugees specifically, and only refers to aliens 'lawfully' within a state. Article 7 of the ICCPR is also relevant as it protects against torture. The Human Rights Committee has taken this provision into account when dealing with cases of expulsionand extradition.14

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 15 Article 3(1) of this Convention 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' and the 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.16

Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention): 17 the principle of non-refoulement is enshrined in Article 2(3) of this Convention is not as limited as its equivalent in the UN Convention. No requirement of 'fear of persecution1 is there, and the five reasons for leaving the previous state are greatly expanded. Furthermore, breach of the rule will not be accepted. OAU Convention, unlike many other instruments, explicitly 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.18 European Convention on Human Rights:19 The European Commission on Human Rights and The European Court of Human Rights (ECtHR) has used Article 3 in order to deal with the non-refoulement issue, which is not itself specifically mentioned in the Convention.20 Also, 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.

The Charter of Fundamental Rights of the European Union: 21 Article 19(2) of the Charter talks and emphasizes about non-refoulement.

Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures 1995: Article II (1) provides that the member state's asylum procedures will fully comply with the Refugee Convention 1951, and especially with the nonrefoulement provision. Furthermore, Article II (2) states that a potential refugee will not be expelled until a decision on their status has been made.

American Convention on Human Rights: 22 Article 22(8), dealing with non-refoulement, 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'. This provision seems closest to the UN Convention because it gives specific reasons why the 'alien' would be in danger when returned. Although the situations in which the rule can be breached are not stated, 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 crises, which would seem to defeat the purpose of the provision.23

International Convention for the Protection of all persons from Enforced Disappearance:24 Article 16 of the Convention prohibits the transfer of persons who risk the death penalty.

Fourth Geneva Convention, 1949: Article 45(4) of the Convention provides that- In no circumstances shall a protected person be transferred to country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.25

Third Geneva Convention, 1949: Article 12 of the Convention applies to prisoners of war. Both of these 3rd and 4ih Geneva Convention apply to transfers between allied powers in an international armed conflict, and there is no parallel provision for noninternational armed conflicts. Nonetheless, if countries contributing troops to a multi-national force in a non-international armed conflict transfer detainees among each other, the principle underlying Article 12(2) of the 3rd and 45(3) of the 4th Geneva Convention should be taken into account.

1.6 Debated issues

There are as yet some unclear questions with regard to the essence of the principle of nonrefoulement, by now over one-hundred-years-old. One of these questions concerns the personal scope governed by the principle

[scope ratione personae] (Goodwin-Gill & McAdam, 2007: 205). In the international refugee law context, as formulated by the 1951 Geneva Convention, it is refugees (those who meet the definition of refugee formulated by the Convention) who are eligible for this protection, i.e. the right to stay in the host State's territory. The UNHCR ExCom Conclusion passed in 1977 assigned a broadening interpretation to this: according to the Committee's position the non-refoulement principle can be applied to asylum seekers as well. In this respect it is totally indifferent whether the asylum seeker is staying in the territory of the host country lawfully or unlawfully, or what migratory or other legal status s/he has otherwise (it also flows from the requirement to implement the 1951 Geneva Convention in good faith (Hathaway 2005, 303-304). In the human rights context the personal scope of the principle is straightforward stemming from the 1984 Convention against Torture. The latter can be regarded as a universal instrument, and the regional human rights codifications all use general subjects ("someone;" "no one") in their formulation, so the subject of protection is the 'individual'without any restrictions, which includes, beyond the totality of foreigners, the State's own citizens as well. Another, more frequently disputed key issue is the range and permissibility of exceptions from the prohibition of non-refoulement – a prohibition of fundamental character (Goodwin-Gill & McAdam, 2007: 234-244; Kugelmann, 2010: para. 34). In the asylum context, the 1951 Geneva Convention does not create absolute protection from refoulement. Under Article 33 (2) of the Convention "[t]he benefit of the present provision may not, however, be claimed by a refugee wh om there are reasonable grounds for regarding as a danger to the security of the country in which he or she is or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." At the same time, contrary to this universal normative framework, the 1969 AddisAbaba Convention recognises no exception from the principle of non-refoulement. In the human rights context, the 1984 Convention against Torture, just like, at the regional level, the American Convention on Human Rights and the ECHR, as well as the Strasbourg case law based on Article 3 of the latter, formulate an absolute ban without exceptions, which is an obstacle even to removing persona non grata or dangerous individuals. The EU Charter of Fundamental Rights has adopted the same approach. In view of the above the question may arise: Did the principle of non-refoulement, interpreted as a human rights guarantee in the broad sense, not make the exceptions specified under Article 33 (2) of the Geneva Convention of 1951 superfluous? It may be argued that if an asylum seeker was returnable under the quoted provision of the Geneva Convention, but the imperative of the comprehensive, humanrights-driven principle of non-refoulement prevented the expulsion of the person concerned from the territory of the given country, the logical result would be that the person would keep his/her refugee status and would be practically impossible to send back. If, on the other hand, the individual in question fell under the scope of the excluding clause (Article 1 F) of the Geneva Convention, he would not be given conventional refugee status in any case

but, considering the legal obstacle to expulsion, he would be allowed to continue to stay in the country concerned in a kind of "tolerated" status.

2. Human rights implications of the NonRefoulement

2.1Critical Analysis of Application & Omission in Application of Non-Refoulement as well as Human Rights Concerns & Courts' view worldwide

The practice of non-refoulement is a humanitarian act. If a state unreasonably violates this principle, then it may amount to human rights violations. As we know, the principle 2 documents relating to human rights law are International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 7 of the ICCPR prohibits torture and other forms of cruel, inhuman or degrading treatment or punishment. This prohibitions contains an implicit obligation of non-refoulement, according to Human Rights Committee in its General Comment no. 20 (1992). Similarly, sometimes socio-economic deprivations amounting to 'inhuman or degrading treatment' may be a reasonable ground for allowing non-refoulement.

In Suresh case 26, the Supreme Court of Canada considered whether Canadian law precluded deportation to a country where Suresh ran a risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada (regarding combating terrorism) and whether mere membership of an alleged terrorist organization sufficed. The main legal issue indicated a balancing act between the protection needs of Suresh (that is, the risk of being tortured upon return) and the security interests of Canada. According to the Canadian Supreme Court, A balancing act is permitted but need to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law. In spite of small theoretical possibility to apply a balancing test the Supreme Court leaves the door open that 'in an exceptional case such deportation might be justified (...) in the balancing approach (...)' (paragraph 129). Ultimately, Suresh was deported to Sri Lanka, as he was a member of LTTE (a listed terrorist organization then in Canada), though he did not committed any act of violence in Canada.

The case of Soering v the UK 27 established the principle that a state would be in violation if its obligations under ECHR if it extradites an individual to a state, in this case the U.S.A., where that individual was likely to face inhuman or degrading treatment or torture contrary to Article 3 ECHR.28

The Court said: In the Court's view this inherent obligation not to extradite also intends to cases in which the fugitive would be faced in the receiving State by real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article.

The most significant authority confirming the Soering principle to deportation case is Chahal v United Kingdom29, the applicant an Indian national belonging to Sikh population, was suspected of having terrorist acts. He had asked for asylum in the U.K. Although, the British authority considered a balancing act between the national security of U.K. and the protection needs of Chahal to be necessary, the European Court ruled that the absolute character of Article 3 does not permit deportation to India if there is a real risk of being subjected to torture or inhuman or degrading" treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the U.K. The Court concluded that 'if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Therefore, the deportation would lead to a violation of Article 3 ECHR. The Court concluded that Article 3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals.

The question of violating economic, social and cultural rights is also related with violation of the principle of non-refoulement. European Court of Human Rights (ECtHR) has dealt with some socioeconomic rights in this regard. The question whether the lack of medical treatment can be considered 'inhuman or degrading treatment' has been considered far more~ intensely by the ECtHR in the context of interpreting almost identically worded Article 3 of European Convention on Human Rights (ECHR): 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Although an inability to benefit from medical care could potentially enliven consideration of the right to life, most cases have been considered by the ECtHR under the prohibition in Article 3 of ECHR. But, how do we define 'cruel, inhuman or degrading treatment'? The ECtHRhas emphasized that 'illtreatment must attain a minimum level of severity if it is to fall within the scope of Art 3 of the ECHR'. It should be noted at this point that a claim that treatment will amount to 'degrading treatment' requires a higher threshold than 'persecution'.30 The ECtHR has also explained that the assessment of the 'minimum level of severity' is relative, and 'it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim'.31 The first case in which European Courts of Human Rights was asked to consider whether a state might be prevented from expelling a person where the harm feared took the form of a lack of medical treatment was D v. United Kingdom,32 a case concerning a St Kitts citizen with advanced AIDS, whose removal from United Kingdom would 'hasten his death on account of unavailability of similar treatment in St. Kitts'.33 The court went on to explain that, in light of the 'fundamental importance' and 'absolute character' of Art 3 of the ECHR, it was entitled to 'scrutinize an applicant's claim under Art 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibilities of the public authorities of that country, or which, taken alone, do not in

themselves infringe the standards of that Article'.34 The European court of Human Rights thus concluded that in view of these exceptional circumstances and 'bearing in mind the critical stage now reached in the applicant's fatal illness', the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent state in violation of Art 3 of the ECHR.35 Importantly, once the treatment was found to have attained the requisite level of severity, the obligation not to return was said not to be subject to any derogation or exaction. Rather, it was absolute. Therefore, the applicant's criminal activity in the United Kingdom could not justify his removal, however 'reprehensible' it might have been. The absolute nature of the protection in Art 3 of the ECHR has been reiterated repeatedly in subsequent case law.36 One further point should be made about D v United Kingdom. Although case has mostly been seen as concerned only with the unavailability of medical treatment,37 the reasoning of the Court included reference to the generalconditions of poverty and squalor in which D would be required to live, in addition to the lack of medical treatment. 38 The significance of this is that it highlights that inhuman or degrading treatment, in the removal context, might be constituted by deprivations of socio-economic rights other than medical treatment. D v. United Kingdom represented a significant conceptual development in the jurisprudence of European Court of Human Rights and prompted a number of member states of the Council of Europe to amend their domestic law and policy to accommodate it. For example, the French Code de I'entree et du Sejout des Etrangers et du droit d' Asile now sets out a list of persons who may not be the subject of an expulsion order (other than in exceptional circumstances).39 In the United Kingdom, the Asylum Policy Instructions have been amended to include some medical claims also.40 But, while States have accepted the important conceptual shift represented in D v United Kingdom, they have been careful to limit it, at least in the medical cases, to exceptional situations. This emphasis on the 'exceptional' nature of an Article 3 claim based on lack of medical treatment is in fact consistent with the way in which the ECtHR explained its reasoning in D, as set out above. Indeed, the ECtHR has repeatedly emphasized that the ECHR does not permit non-citizens to remain in the territory of a Contracting State 'in order to continue to benefit from medical social and other forms of assistance provided by the expelling state'. Rather, the ECtHR has continued to emphasize the extreme circumstances that gave rise to the successful claim in D, particularly by 'distinguishing most other subsequent claims from D and thus finding them inadmissible.41 European Court of Human Rights was recently presented with the opportunity to revisit the scope of D v. United Kingdom in N v Secretary of the State for the Home Department (Terrence Higgins Trust intervening)42 , a recent case involving the decision by the United Kingdom to expel a woman suffering from HIV/AIDS to Uganda. The decision to expel was upheld by the House of Lords and N challenged this decision in the ECtHR.43 Rather than taking theopportunity to overrule D, in fact the ECtHR in N v United Kingdom44 reiterated the position articulated in D that:45 The decision to remove an alien wlio

is suffering from a serious mental or physical illness to a country wliere the facilities for tlie treatment oftluit illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, wliere the humanitarian grounds against the removal are compelling. Although the European Court of Human Rights did not overrule D v United Kingdom, it does appear to have been at pains to stress its exceptional nature, and thereby to have limited any potential for an expansive approach to medical care cases in the future.

Although we have already noted above the referenceby the ECtHR to policy issues in discussing the scope of the implied non-refoulementdoctrine, this passage from N v United Kingdom is significantly more farreaching as it suggests that not only are policy reasons able to justify a limited application of the non-refoulementprinciple to the full range of rights in the ECHR, but such concerns also permits exceptions to the absolute nature of the protection in Art 3 in certain expulsion cases. This results in a differentiated understanding of the same right depending on whether the person is a European Union citizen seeking protection against violation Art 3 of the ECHR within a state party,46 or a non-citizen liable to removal.47 While this may be possible (albeit difficult) to justify in respect of the question of which rights may be protected under the non- refoulementprinciple, it is impossible to justify as a matter of principle in respect of the scope of the Art 3of the ECHR, which, as the ECtHR has repeatedly reminded us is absolute. 48 Indeed this was emphasized by the joint dissenting opinions of judges Tulkens, Bonello, and Spielman in N v United Kingdom49 . As the judges noted, the majority of the Court added 'worrying policy considerations' to its reasoning. 50 They expressed their 'strong disagreement' with the 'highly controversial' statement that a balancing exercise is inherent in the whole ECHR. As the judges noted, 'the balancing exercise in the context of Article 3 was clearly rejected by the Court in its recent Saadi v Italy judgment'.51 In Saadi v Italy, the Court stated:52 Since protection against the treatment prohibited by Art 3 is absolute, that prohibition imposes an obligation not to ... expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from the rule.... Indeed, so much is born by an analysis of post-N decision in the United Kingdom Courts. For example, in CA v Secretary for the State for the Home Department,53 the intended removal of a woman whose (unborn) child was at risk of contracting HIV who would not have access to adequate treatment to prevent transmission of infection was held to violate Art 3 of the ECHR, 'since there will be substantial risk of exposing the child to HIV/AIDS and this would amount to exposing the appellant [the mother] to inhumane or degrading treatment'. In AJ (Liberia) v Secretary of State for the Home Department,54 a claim by a 17-year old former child soldier was remitted to the United Kingdom Asylum and Immigration Tribunal because it had failed to consider whether having 'no money, no home, and no support', the applicant 'would obtain the necessary medication in Liberia on return'.

The Canadian Federal Court of Appeal in Covarrubias v Canada 55 has now rejected the argument that a claim can be made where a country has the 'financial ability to provide emergency medical care, but chooses, as a matter of public policy, not to provide such care freely to its underprivileged citizens'.

Although the Federal Court in Singh v Canada56 had previously acknowledged that 'it is not entirely clear what Parliament's intent was in this regard', 'Inability', therefore, includes inability either to provide any medical treatment or to provide medical treatment that is free of charge (or at least affordable), but it does not include unwillingness to provide medical care. Claims based on unwillingness may still be made out in Canada, as exemplified in Re X.57

Although most discussion concerning the application of Art3/Art7 to removal has focused on the right to medical treatment, there is an important question as to whether it can apply to other contexts as well other than the medical treatment. In Dulas v Turkey,58 the ECtHR found that the action of the Turkish security forces in burning down the applicant's home, who was aged over 70 at the time of the events, in the course of a security operation amounted to a violation of Article 3 of the ECHR. In the United Kingdom there is developing jurisprudence on the extent to which Art 3 of the ECHR prohibits the removal of a person in circumstances where he or she will face seriously disadvantaged economic conditions on return, other than a lack of medical treatment. In GH (Afghanistan) v Secretary of State for the Home Department59 the special adjudicator had found that to return the applicant and his family to Kabul would amount to inhuman and degrading treatment in view of the fact that the family would be 'reduced either to living in tent in a refugee camp or... in a container with holes knocked in the side to act as windows'. In addition the applicant would not be likely to obtain work and he would 'be competing with others for scarce resources of food and water as well as accommodation'. The Special Adjudicator was particularly concerned about the impact of these conditions on the 'five young (some of them very young) children'. The Secretary of State appealed against this decision on the basis that 'a disparity in the social medical and other forms of assistance in the two States not by itself sufficient'. But the English Court of Appeal rejected the appeal.

In more recent decision in Mayeka v Belgium,60 the ECtHR found that Belgium had violated Art 3 of the ECHR in connection with the manner in which it expelled a child, namely, in the fact that it did not ensure that she was accompanied or that she was met on return to Kinshasa in the Congo.

2.2. Non-Refoulement and Outsourcing Torture

The issue of non-refoulement in many ways constitutes the background to the subject of "outsourcing torture" through Renditions, Memoranda of Understanding, Diplomatic Assurances and extraction of Evidence under torture. All of these practices in some respects involve, or implicate a violation of the absolute prohibition of

non-refoulement. The practice of renditions, whereby an individual is handed over by the authorities of one state to the authorities of another state, in secret, and without any formal process, constitutes by definition a violation of the right not to be returned to torture. The Committee against Torture has ruled on this issue in the case of JosuArkauz Arana v. France, which involved a member of the Bask separatist organization ETA finding that rendition can so significantly heighten the risk of torture as to bring the claim within the purview of article 3 of the Convention against Torture, even in the context of a country which does not practice torture systematically against detainees. The reasoning in this case leads one to conclude that the Committee would not have found a violation had the French authorities afforded the applicant in that case proper procedures which would have allowed him to raise a claim to protection under article 3 of CAT. Similarly, diplomatic assurances are used by states to refoule persons to other states where there is a real risk of torture, because in the absence of such a clear risk diplomatic assurance would not be necessary. Here also, the Committee against Torture has had an opportunity to pronounce itself on these practices in the recent case of Agiza v. Sweden62 where it stated that that the procurement of diplomatic assurances did not suffice to protect the applicant against the manifest risk of torture.

And lastly, regarding evidence extracted under torture and other ill-treatment, such evidence is often extracted in situations where persons have been rendered or otherwise returned to other countries in violation of the non-refolement rule, often deliberately so that the state of destination can extract evidence through torture and share it with the state that returned the individual. One example of this practice is the well-known case of Maher Arar63 where it appears that the objective of the US authorities in returning him to Syria, rather than to Canada, which they could have done, was specifically in order that information be extracted from him in Syria by means which the US or Canadian authorities were more reluctant to use.

Judicial practice

The principle of non-refoulement frequently comes up in the case law of regional human rights courts, and these decisions have greatly contributed to unfolding the scope and contents as well as highlighting the respective aspects of the principle. At the forefront of all this has been the European Court of Human Rights which, with its abundant jurisprudence starting with the Soering Case (1989), has played a very active role in shaping the set of criteria related to the non-refoulement principle (considering the essential elements of the principle; significantly lowering e.g. the level of individualisation; increasingly focusing on the protection of the individual; and meaningfully and strictly controlling the application of legal concepts called upon by the States such as “safe third country” or “internal flight alternative”). The issue of non-refoulement has also come up in the case law of the InterAmerican Court of Human Rights, even though the number of such cases has

been by orders of magnitude lower (consider e.g. the judgement in Caso Familia Pacheco Tineo v Estado Plurinacional de Bolivia in 2013). Before the Court of Justice of the European Union (CJEU) there have not really been any cases, with the exception of a few references, where the meaning of nonrefoulement, the nature of protection, or the scope of application, etc. were meaningfully dealt with. A recent CJEU judgement contains explicit reference to the pertinent provision of the EU Charter. It assimilated the ramifications of the prohibition of non-refoulement under EU law with those stemming from the case law of the ECtHR (Tall – C-239/14). At the same time, everything is given as regards both competence and positive law to make the CJEU active in this field as well. It suffices to think of Article 19 (2) of the EU Charter, as well as the newly codified asylum acquis constituting the second generation of the Common European Asylum System, and the EU's foreseen accession to the European Convention on Human Rights in the future. Beyond the international (regional) level, it is noteworthy that there exists massive case law with regard to the non-refoulement principle also before national courts. The latter have mutually affected the judicial practice of one another as well as the development of the contents of the principle (e.g. British, Australian, Canadian, French, German, Italian and US court verdicts).

Conclusion

There are number of Universal, Regional and Domestic Human Rights instruments where principle of Non-Refoulement has been annotated. All there instruments give an implicit obligation to the state under non-refoulement principle to protect the rights of refugees and asylum seekers. Not only civil and political rights but also sometimes socio-economic deprivations amounting to inhuman or degrading treatment' may be a reasonable ground for allowing non-refoulement . This short piece sketched out the formation and the evolution of the principle of nonrefoulement under international law in order to highlight the logic behind its existence and the need for further extending and refining its scope. After its inception in the asylum context, and its subsequent infiltration into and establishment within international human rights law, convergences could be witnessed in the course of later developments regarding the content of the non-refoulement principle. Nevertheless, there still exist certain controversial issues and blurred lines, which have surfaced through the practical application of the prohibition of refoulement, and are rooted in the sometimes eclectic State practice. This leaves some questions unresolved.

References

1. See Goodwin-Gill, The Refugee in International Law, Oxford University Press. New York, 1998. P.I 17

2. Lambert, H., 48 International and Comparative Law Quarterly, 1999, p-519; see also Islam, Md. Towhidul., 'Protection of Refugees against Refoulement' in The Dhaka University Studies. Pan-F \vl. Xv (l): 215-238, June 2004.
3. Approved at a special United Nations conference on 28 July 1951. It entered into force on 22 April 1954.
4. Akram and Rempel, "Temporary Protection as ail Instrument for Implementing the Right of Return for Palestinian Refugees," p.161.
5. Ibid.
6. Newmark. R. L, 'Non-Refoulement run afoul: The Questionable
7. International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
8. Weissbrodt, D. and Hortreiter, I., "The Principle of Non-ReJintlement: Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refouleinent provisions of other international human rights treaties' (1999) 5 Buff. Hum.Rts.L.Rev.1, 43.
9. Convention against Torture or other Cruel. Inhuman or Degrading Treatment (10 December 1984) 1465 UNTS 113.
10. Organization of African Unity Convention governing the specific aspects of refugee problems in Africa (10 September 1969) 1001 UNTS 45.
11. Kuruk, P., 'Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Sian.J.Int'1 £.313, 332.
12. European Convention on Human Rights (4 November 1950) 213 UNTS 221.
13. Drafted by the European Convention and solemnly proclaimed on 7 December 2000 by the European Parliament, the Councilof Ministers and the European Commission. However its then legal status was uncertain and it did not have full legal effect until the entry into force of the TreatyofLisbonon 1 December 2009.
14. American Convention on Human Rights (18 July 1978) 1144 UNTS 123.
15. Adopted by the United Nations General Assemblyon 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010.
16. While the 'persecution' is not defined in humanitarian law, it refers as a minimum, to serious violations of human rights (right to life, freedom and security) on such grounds as ethnicity, nationality, religion or political opinion. See Article 1 of the 1951 Refugee Convention; UNHCR Handbook Procedures United Kingdom Border Agency. Asylum Policy Instructions (October 2006) \5.;see, for example. O

v Independent Federal Asylum Board (UBAS) (26 September 2007) Case 1282: Administrative Court (Austria), Case no.2006/19/0521 (translation by Anne Kallies).

17. Allain, Jean (2001): 'The jus cogens Nature of non-refoulement', International Journal of Refugee Law 13, 533-558. Betlehem, Elihu and Lauterpacht, Daniel (2003): 'The scope and content of the principle of non-refoulement: Opinion.' In: Erika Feller, Volker Türk and Frances Nicholson (eds.): Refugee Protection in International Law: UNHCR's Global

18. Consultations on International Protection. Cambridge, Cambridge University Press, 88-177. Farmer, Alice (2008): 'Non-refoulement and jus cogens: limiting anti-terror measures that threaten refugee protection.' Georgetown Immigration Law Journal 23, 1-38. Goodwin-Gill, Guy S. and McAdam, Jane (2007): The Refugee in International Law. Oxford, Oxford University Press, 3rd edition. Hathaway, James C. (2005): The Rights of Refugees under International Law. Cambridge, Cambridge University Press. Kugelmann, Dieter (2010): 'Refugees.' In: Rüdiger Wolfrum (ed.): The Max Planck Encyclopedia of Public International Law. Oxford, Oxford University Press, (at http://opil.ouplaw.com – article last updated: March 2010). Pirjola, Jari (2007): 'Shadows in Paradise – Exploring Non-Refoulement as an Open Concept.' International Journal of Refugee Law 19, 639-660.