Do the principles of non-refoulement deriving from the Geneva Convention and human rights instruments apply extraterritorially?

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The 1951 Refugee Convention is a product of the Cold War environment, and reflects both the European experience of Nazi war-time persecutions and Western political interests as these were perceived at the time.[1] The principle of non-refoulement became the core of the Refugee Convention. The principle of non-refoulement is an important principle in international law.[2] Non-refoulement is specific to refugee law. The principle of non-refoulement is customary international law and it should be respected by every country as an international humanitarian norm of practice. It concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened if they go back. This applies to refugees who can prove fear of persecution were they to go back to a requested state.[3] This principle is contained in the 1951 Geneva Convention relating to the status of refugee and it is also contained in Article 3 of the

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1 *Hathaway, J. C. 'Reconceiving Refugee Law as Human Rights Protection' Journal of Refugee Studies 4/2 (1991), 113-131.*
2 *Clayton, G., Immigration and Asylum Law (Oxford: Oxford University press, 2008), 408-409.*
3 *Ibid.*

1984 Torture Convention which is the UN Convention against torture.[4]

This article is divided into two main parts. The first part I explains the principles of non-refoulement in international law. The second attempts to explain extraterritorially under the principle of non-refoulement and discusses whether it works in reality?

"Article 33. - Prohibition of expulsion or return ("refoulement")

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 in 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."[5]

Principle of non-refoulement

The principal of Non-refoulement is fundamental for people who have become refugees and fall under the refugee protection law expressed uniquely in article 33 of the 1951 refugee convention. This principle restricts any state from expelling or returning a refugee in any form whatsoever to the area where their life of freedom would be threatened. Distinctively the restriction is not without limitation. A vital aspect of exception comes under article 33, which states that the law will not be deployed if the person is a threat to the nation and national security, in which he or she has been convicted by final judgment of a serious crime and proven to be danger to the community or country.[6]

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[4] *Ibid.*

[5] *The 1951 Refugee Convention*

[6] *Rodger, J. Defining The Parameters of The non-refoulement Principle LLM Research Paper (Wellington: Victoria University of Wellington, 2001).*

However, there are still some aspects which remain unclear to the researcher, i.e. whether the prohibition requires actual admission in to the country or whether it permits denial of access at the border. It is however; very clear that the prohibition applies to all refugees, including asylum seekers, who would compromise the security of the state.[7] The prohibition applies initially to an asylum seeker's legal status or mode of arrival, even though the concept does not trigger or motivate any specific explanation. Where the denial of re-entry to the state may result in the return of access to the individual, it may affect directly or indirectly a certain place where they will meet with prosecution.[8] It usually concurs that this implies at least momentary admission to influence an individual status. Professor James C Hathaway, an eminent scholar in the area of international refugee law, said that it is a duty to admit refugees "since admission is the only means of avoiding impermissible consequences of exposure to risk"

Although the aforementioned protection of non-refoulement is not contained in the 1951 refugee convention,[9] the prohibition has been expressed throughout international and regional refugee, human rights, humanitarian and extradition treaties, and has been continuously embraced by a range of international forums. In another words, it can also be described as principal of customary international law. This means that it is considered to be combined at all stages irrespective of assent.[10]

McAdam and Goodwill Gill argue that not only has non-refoulement acquired such a status due to persecution, but prohibition under the human rights law now includes refoulement as torture. Whether the

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[7] *Feller E., Turk V. & Nicholson F., Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003).*

[8] *Ibid.*

[9] *Clayton, G., Immigration and Asylum Law (Oxford: Oxford University Press, 2008).*

[10] *Goodman, R., Alston, P. & Steiner H.J., and International Human Rights in context (Oxford: Oxford University Press, 2008).*

returned are subjected to brutal and inhuman or degrading treatments to attain such a status is contentious.[11]

Sir Elibu Lauterpacht and Daneil Bethlehem stated that a broad reading of the threat contemplated by article 33 is allowed to the extent that, it precludes any act of refoulement, of whatever form, that includes non-admittance at the border that would be exposed to the effect of refugees and asylum seekers to;

A threat of a persecution on account of race, religion, nationality, membership of a particular social group or political opinion

An actual risk of torture or inhuman activities or even degrading treatments of punishments

A threat of life physical integrity and liberty[12]

They are mainly based on the declaration on diversified command of the UNHCR on the humanitarian objective of the 1951 refugee convention and the fact that some regional human rights components are now understood to apply more broadly and form protection against refoulements. Nevertheless Hathaway also stated that this state of law is unfortunately unsustainable. He mentioned that in his view it would be a matter of concern if state parties to the 1951 convention were needed to implement these specific duties that pursue from other human rights conventions even though the states are not initially parties to those accords.

▣ non-refoulement vs. extraterritorially

The main problem which needs to be addressed is whether the non-refoulement principle applies extraterritorially. Can the rejection at a frontier or the interdiction of ships be construed as refoulement? Article 33, states that *'No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories....'* States have a responsibility for their actions which lead to refugees being returned whether it is directly or indirectly

[11] *Ibid.*
[12] *Supra note 6.*

responsible. Many countries construe this article even more strictly. For instance, the case of Sale v Haitian Centers Council where the U.S. Supreme Court ruled that the President's executive order that all aliens who were blocked on the high seas could be released and that the executive order was not limited by the Immigration and Nationality Act of 1952 or Article 33 of the United Nations Convention Relating to the Status of Refugees.[13] Starting with the issue that non-refoulement only accrues to refugees once they are within the territory of the state; this is supported by the 1951 Conference that negotiated the Refugee Convention.[14] There are many countries in Europe such as Switzerland, Belgium and the Netherlands, which supported this approach at the Conference. The Supreme Court felt that it would be too much to give states obligations which applied to their borders. The US has agreed with this view since the case of *Sale*.[15] Recently Australian authorities have shown their adherence to this approach by intercepting an Indonesian ship that was carrying Sri Lankan asylum-seekers in the wake of the Tampa crisis.[16] This is a major concern for numerous states that recognise the fact that 'non-rejection at the frontier implicates fundamental sovereignty issues', which then leads to the idea of guarding state sovereignty. Adhering to a non-refoulement obligation does not always include rejection at the frontier which confers the practical benefits of fewer refugees, less costs and more often than not has the support of the domestic population.[17]

Despite all the benefits, there is a strong argument to suggest that non-refoulement does apply extra-territorially. Although it is generally accepted that this was not the case

[13] *Supra note 7.*
[14] *ibid.*
[15] *Sale v Haitian Centers Council, Inc. [1993], 509 U.S.*
[16] *New Zealand Herald, 'Australian keeps out second migrant ship' available from http://www.nzherald.co.nz; accessed 27 April 2010.*
[17] *Fitzpatrick J., 'American Society of International law',Temporary Protection of Refugees: Elements of a Formalised Regime' 94 (2000), 279.*

in the 1951 convention, it is suggested that the principle has subsequently come to encompass non-rejection at the frontier.[18] The UNHCR has a set of principles that applies to asylum-seekers both at the borders and within the territory[19] ; the substantial amount of state practices also suggests that this is the case. For example, three of the states who opposed extraterritoriality at the refugee conference in 1951 now have procedures in place to ensure that the rejection of bona fide refugees does not occur on their borders.[20] Article 2(3) of the OAU Convention relating to refugees specifically rules out the possibility of the rejection of refugees at the frontier.[21] Considering the international condemnation of the Tampa incident, as well as the situations concerning the Liberian ships, there is an argument that the international community generally disapproves of rejection at the frontier.

Although there has been disapproval of the actions of states this does not necessarily lead to the conclusion that those actions were illegal; furthermore, the only clear thing about state practice is that it is not consistent. The US has taken one view, but many European states have taken another. Some states have changed their view depending on the circumstances. There has been some commentary that argues the need to clarify this area of non-refoulement so as to 'prevent protectionist, and ultimately short-sighted policies from prevailing'.[22] This shows that it is as much in the interests of the states as asylum-seekers to sort out the problem, so ensuring that if an incident such as the Tempa does occur again states will be clear as to what their legal obligations are.

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[18] *Goodwin-Gill G.S., The Refugee in International Law (Oxford, Clarendon Press, 1996), 123 pp.*

[19] *UNHCR, 'Executive committee report of UNHCR' available from http://www.unhcr.ch/refworld/unhcr/excom/xconclexcom6.htm; accessed 10 May 2010.*

[20] *Taylor, S., 'Report from United Nations' Australia's Implementation of its Non-Refoulement obligations under the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (New York: United Nations, 2001). 435 pp.*

[21] *OAU, 'International Journal of Refugee Law' Convention governing the specific aspects of refugee problems in Africa 1/4 (1989), 560.*

[22] *Newmark, R., 'International Journal of Refugee Law', Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs 2/14 (2002), 301.*

Some of the examples that have been used to define the parameters of non-refoulement are; extraterritoriality or the safe third country principle, temporary protection systems and justifications and exceptions. In each of the four cases the interest of states are against those of the refugees, with both sides having genuine concerns that need to be addressed. Further into the report I will be putting forward some practical proposals for clarifying non-refoulement, with the necessity of looking at any proposed changes in a way which takes into account the current political climate and realistically balances the needs of both refugees and states as whole.

Conclusion

Do the principles of non-refoulement deriving from the Geneva Convention and human rights instruments apply extraterritorially? In my opinion, in the sense of enforcement of the convention, there still needs to be further clarification and development. In the sense of human rights, there should be continued study of the impacts on basic rights. For example, it is the principle of non-refoulement rather than a general obligation to refugees, wherever they are, that is at the core of the Refugee Convention. Rather than asserting the right of individuals to stay home or to return home and enjoy basic human rights, the Convention has thus institutionalized the notion of exile as a solution to refugee problems. Exile is an inappropriate solution to modern refugee problems in an age of globalization and regionalization. As an important provision in human rights, it still needs to be developed in order to gain a real acceptance from all people.