The Obligation of Non-Refoulement of Refugees and Asylum-Seekers: Myth or Reality?

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ABSTRACT

This article considers whether or not international refugee law is effective in its protection of refugees and asylum seekers from refoulement by the state in which they are taking refuge. It asks the question whether the legal right to non refoulement is a myth or a reality. It investigated that voice of the refugee or asylum seeker in the refoulement process, the possibility of some measure of control in determining the country of repatriation - as an alternative to being sent back home? In analysing this question, the author looks at status determination decisions from the United Kingdom, her European neighbours and Canada in order to assess the real experience of the asylum seeker with the question of non refoulement. The article concludes that although there are adequate provisions for non-refoulement of refugees and asylum seekers by their host states, this obligation is not always exercised for the benefit of the asylum seeker. The reality on the ground is that considerations of national security, public order, and political, financial or logistical concerns sometimes conspire against the asylum seekers hopes of non-refoulement.

1. INTRODUCTION

Refoulement means summary re-conduction to the frontier, of those who have entered into any country illegally or refusal of entry to those without valid papers. Non-refoulement is a principle of international refugee law which provides that an asylum seeker or a refugee shall not be returned to any country where he or she is likely to face persecution, other degrading treatment or torture.

Non-refoulement of refugees and asylum seekers has become a general principle of international law binding on all states automatically and

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independently of any specific assent. It is primarily meant to protect those who, under Article 1 of the Refugee Convention, qualify as refugees. In principle however, its benefits ought not to be conditioned on formal grant of refugee status. It is therefore, refoulement for a state to refuse to process an application by an asylum seeker for grant of refugee status. Thus, having presented themselves at the borders or frontiers of the state, they have already entered into the country's jurisdiction and sovereign control and are under the protection of Section 33 of the Refugee Convention. Under the law, they cannot be refouled pending the attainment of a durable solution. According to Noll,[1] non-refoulement is the right of an asylum seeker to transgress an administrative border. In *R* v *Immigration Officer at Prague Airport*,[2] it was held that non-refoulement applies from the moment at which asylum seekers present themselves for entry, either within a state or its borders. Thus, they are not to be either returned to the country of their flight or rejected at the border of the state.

2. WHO IS A REFUGEE?

Under customary international law, a refugee is a person who is running away from intolerable conditions or personal circumstances such as wars and other conflict situations. The escape is to freedom and safety.[3] His destination does not matter and may be unknown from the beginning of his flight although it must be to another or foreign country. He is escaping from persecution and not from prosecution, justice or punishment.

Under the Convention on the Status of Refugees,[4] a refugee is as a person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his habitual residence, is unable or, owing to such fear, is unwilling to return to it. Thus, for any asylum seeker

1 G. Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law", 17 *IJRL* (2005), p.548.
2 [2005] 2 A.C. 1; [2004] UKHL 55, para. 26, (per Lord Bingham).
3 Some states, such as France and Germany, do not recognise wars and other conflict situations as a ground for the grant of refugee status but the United Kingdom does.
4 Article 1A, para.2 of the Convention on the Status of Refugees of 1951.

to become a refugee, he must prove to the satisfaction of the state in whose frontiers or territory he is and to which he has applied for refugee status that he: (a) has a well-founded fear of being persecuted in his country of nationality or of habitual residence; (b) his fear is well-founded; (c) his fear is for reasons of either his race, religion, nationality, membership of a particular social group or his political opinion; and (d) he is unable, or owing to such fear, is unwilling to return to such a country. This means that the applicant must have left his country of nationality or of habitual residence for another one but before his application for refugee status is granted, he is only an asylum seeker provided, in the United Kingdom, and he has not exceeded the age of eighteen years.

The applicant must, in addition to being up to eighteen years of age, have claimed asylum at the place designated for doing so by the secretary of the state who must have recorded his claim and which must not have been determined yet.[5] It is after the grant of his claim for asylum that he becomes a (Convention) refugee. In *Tranveer Ahmed* v *The United Kingdom,*[6] the tribunal held that the onus is on the asylum applicant to prove his claim for asylum, and under the Convention,[7] the persecution must be by officials of the state. This means that persecution by individuals or groups of persons do not count in proof of an application for asylum.

The Convention definition of refugee status raises the issues of: what is "well-founded" fear? What is persecution? When is fear of persecution well-founded? Do we have "group refugees" or is refugee status limited to individual cases? Unfortunately, the Convention failed to define what it means by: "well-founded fear" and "persecution."

It appears that it is the discretion of the country to which the asylum seeker has applied for grant of refugee status to determine whether or not his alleged fear is well-founded. Unfortunately, there is no laid down yardstick for the state to use in coming to any conclusion as to that. It is submitted that whether or not the asylum seeker is afraid of persecution is a subjective issue but whether or not his fear of persecution is well-founded is an objective one

5 Section 18 of the National Immigration Act of 2001 of the United Kingdom.

6 [2002] UKIAT 00439.

7 Article 1 A para. 2 of the Convention on the Status of Refugees, 1951. In the United Kingdom, the state gives recognition to persecutions other than by officials of the state such as wars and conflict situations. This is not the case with some states such as France and Germany which do not recognise private persecutions as grounds for grant of refugee status.

which depends on the circumstances surrounding him at the time of his flight out of his country of nationality. Flight from prosecution for an alleged crime may create fear in the asylum seeker but such fear may not be well-founded for the purposes of the Convention and therefore, may not entitle him to grant of refugee status.

The onus is however, on the asylum seeker to prove the grounds of his application for refugee status but the state must give him a fair opportunity, following due process of the law and administration, to do so. It is hereby suggested that he has to prove only his inability or unwillingness, due to his well-founded fear of persecution, to get protected by the country of his nationality or of his habitual residence, and not lack of protection by the government of the state of his nationality or of his habitual residence.

Persecution may be an actual and unjustified ill-treatment or fear of ill-treatment of a person or a member of his family which endangers or threatens to endanger his life or limb or that of any member of his family.[8] Thus, inhuman or degrading treatment may amount to persecution depending on its degree, nature and effect on its victim. This includes genuine fear of a disproportionate punishment for a crime convicted of, or of prosecution for an alleged crime if it is aimed at suppressing legitimate political opposition or expression, or would involve unfair or discriminatory trial or is meant to achieve an ulterior motive. It may involve coercing a person, usually in a weaker position, to drop his right or accept an inconvenient or unfavourable condition.

Refoulement of an asylum seeker to a country where there is real likelihood of his being tortured or receiving death penalty, or failure to process his application for asylum or processing it outside the due process of the law may amount to persecution. Persecution or actual threat of it may result in the victim having well-founded fear the consequence of which is his right to seek

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8 G. Goodwin-Gill and J. McAdams, *The Refugee in International Law*, Oxford, Oxford University Press, (1978), p. 49. However, flight from prosecution for an alleged crime could ground the grant of refugee status when the applicant proves that: the attendant criminal penalty for the prosecution is certainly going to be disproportionate; the law is being used to suppress legitimate political opposition or expression; fair trial is certainly going to be denied; the law is being applied in a discriminatory manner against a group of persons which include the asylum seeker or there is an ulterior reason for prosecuting the allegedcrime. See: D. Seddon, *Immigration, Nationality and Refugee Law: A Handbook*, London, Joint Council for the Welfare of Immigrants, (2006).

asylum in another country.[9] It is after the applicant's stay in the country of his refuge has been approved and formalised by its government that he becomes a refugee.[10]

Under general international law, a group of persons who arrive into the frontiers or jurisdiction of a state together may have their application for refugee status determined collectively as '-block asylum seekers." Where it is not possible to do so, their applications for asylum will be determined on case-by-case basis. The applicants must however, in addition to proving the general factors, show that they are without the protection of the government of their country of origin and have crossed into the frontier or jurisdiction of the state due to conflicts, violations of human rights or international humanitarian law or risk of harm to them due to radical, political, social or economic changes in their country. Excluded from this class are persons crossing into the frontiers or jurisdiction of another state for economic motivation, to seek better lives or to escape from prosecution or punishment for crimes for which they have been convicted.[11]

It is not clear what it means that any group applicants for asylum must show that they are without the protection of the country of their origin or of

9 D. Seddon, *Immigration, Nationality and Refugee Law: A Handbook,* London, Joint Council for the Welfare of Immigrants, (2006), pp. 612-613. In *Soering* v *The United Kingdom* (1989) 11 EHRR 439 an attempted refoulement of the appellant to the State of Virginia in the United States of America which imposes death penalty and would keep the convict waiting on death row under harsh conditions for up to six and eight years before execution, to stand trial for murder was held to amount to persecution.

10 In some jurisdictions such as that of the United Kingdom, under Section 18 of their Nationality and Immigration Act of 2002, the applicant for asylum must be up to 18 years; be present in the territory of the state; must have claimed asylum at a place designated for doing so and his claim recorded but not determined yet, before he can be granted a refugee status. Before then, he is an asylum seeker who may be a dependant of an applicant for asylum for the purpose of keeping him safe from the danger he fled in his country of nationality or of his habitual residence. The requirement in the United Kingdom that the asylum seeker must have claimed asylum at the appropriate place appears harsh to him as he may not know which place in the country is appropriate for that purpose. The same is the case for the age requirement, and this raises the question of what happens to the teenage asylum seekers application before he is adopted or he attains the age of eighteen years.

11 An exception is where it can be proved that the attendant criminal penalty for the prosecution is certainly going to be disproportionate; the law is being used to suppress legitimate political opposition or expression; fair trial is certainly going to be denied; the law is being applied in a discriminatory manner against a group of persons which include the asylum seeker or there is an ulterior reason for prosecuting the alleged crime. See D. Seddon, *Immigration, Nationality and Refugee Law: A Handbook*, London, Joint Council for the Welfare of Immigrants, (2006), pp. 612-613.

habitual residence before their application for refugee status may be granted. It is suggested that it suffices if the protection is available but they are unable or unwilling, due to their well-founded fear of persecution in that country of origin or of habitual residence, to get it.

Having well-founded fear of persecution for reason of religious belief is one of the Convention reasons for the grant of an application for asylum. The persecution may not only be because applicant is practising his religion openly but may be in form of coercing him to accept another form of or perceived religion.[12] *In Revenko* v *SSHD,*[13] it was however held that the applicant must prove that he has well-founded fear of persecution because of his religious belief before his application for asylum can be granted so that the onus of such proof is on him. The applicant must show his genuine wish to practice his religion openly and generally and the fear must be of persecution for practising his religion in such a manner and not of prosecution for preaching hatred or sedition. This was the decision of the Immigration and Asylum Tribunal in the United Kingdom in *Muzafa Iqbal v SSHD*.[14] In *Omoruyi* v *SSHD*,[15] asylum was claimed on the ground of well-founded fear of persecution for religious reasons in that the persecutor discriminated against the applicant because of his religion. It was held that it amounts to a Convention reason if the discrimination is motivated by reason of the applicant's religious belief.

It is the discretion of the authority of the state to which the applicant has claimed asylum to determine whether or not his alleged fear of persecution is well-founded or not. This is because the Convention failed to define the words; "well- founded fear." In *R* v *SSHD, ex-parte Silvakumaran*,[16] the House of Lords, per Lord Keith, defined "well-founded fear" to mean reasonable degree or likelihood of persecution; and in *Sandralingham* v *SSHD*,[17] Staughton L.J. said that persecution means exposure to harm or to likelihood of harm.

The test is therefore, objective and not subjective. Thus, whether or not the asylum applicant is afraid of being persecuted is a subjective issue but

12 *RT (Zimbabwe)* v *Secretary of State for Home Department* [2010] ECWA Civ. 12 at 85.

13 (2000) Imm. A R 610 (CA).

14 [2002] UKIAT 02239.

15 15. (2001) Imm. A R 175 (CA).

16 [1988] 1 All E R 193.

17 [1996] Imm. A R 97.

whether or not his fear of persecution is well-founded is an objective one which depends on all the circumstances surrounding each applicant at the time he fled his country of origin or of habitual residence.

3. SCOPE OF NON-REFOULEMENT

3.1 Personal scope

The provisions of the Refugee Convention for non-refoulement apply to any person who meets the requirements of its Article 1; that is, a refugee or an asylum seeker. The later class needs to have a prima facie claim to refugee status to be protected from refoulement, pending the determination of his claim of escaping from persecution in his country of origin. It does not matter that he entered into the country illegally so long as he has succeeded in entering into it and he cannot be prosecuted or punished for his illegal entry into it. He cannot be extradited to another country where he has well-founded fear of persecution or substantial risk of torture.

On arrival by boat or ship at the port of the call-state, the state may refuse him entry into its land and ask the captain of the ship to carry him on to the next country's port. The state may ask the country which owns the ship to assume responsibility over the asylum seeker, pending his resettlement elsewhere but it cannot send him back to a country in which he has well-founded fear of being persecuted or tortured. It is either he is received into the country of his first port of call or he continues travelling in the ship until he gets resettled in a country in which he has no fear of persecution or torture. Refusal to consider his claim of asylum amounts to refoulement.

3.2 The Risk factor

To benefit from the provision for non-refoulement under the Convention, the asylum seeker must prove that the fear he has of persecution in his country of origin or of his habitual residence is well-founded. The questions however are, for a person arriving by boat or ship, at what point should he prove this - at the port of call or while already in the state? What is the standard or burden of

proof required? The Convention does not provide the answers. It is suggested that the asylum seeker is to be received first and then asked to prove, within a reasonable time, that he has well-founded fear of being persecuted in his country of origin for reasons of his race, religion, nationality, membership of a particular social group or political opinion,[18] or be denied refugee status. It is further suggested that he needs to prove only that he will certainly face serious risk of being persecuted at home which risk may not amount to a clear probability of persecution.

Grant of refugee status is discretionary but non-refoulement is binding and compulsory. In *R* v *Secretary of State for the Home Department, ex-parte Sivakumaran*,[19] the House of Lords held that: "It is plain, as in deed was reinforced in argument, with reference to the *travaux preparatoires,* that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention." Non-refoulement extends, in principle, to every person who has well-founded fear of persecution or substantial grounds for believing that he would be in danger of torture or to inhuman or degrading treatment or punishment if returned to a particular country.[20]

3.3 Time, place, ways and means of protection from refoulement

The duty of a state to protect the asylum seeker arises immediately he enters into the territory or jurisdiction of the host state, irrespective of whether or not his status has been formally determined.[21] The Convention does not make his protection limited to the duration of his stay or his lawful residence. The requirement that protection is afforded only if the asylum seeker is within the jurisdiction of the state produces an unconscionable effect as this means that the state may refoule him while on the territory of another state in transit to the protecting state. It is submitted that, in order to avoid being held accountable for any persecution or torture of the asylum seeker, the state which has him in

18 Article 1A, para.2 of the Convention on the Status of Refugees of 1951.

19 [1989] 1 A.C. 598.

20 G. Goodwin-Gill and J. McAdams, *The Refugee in International Law*, Oxford, Oxford University Press (1978), p. 234. See also: Article 3 of the Convention against Torture of 1984.

21 Article 33 (1) of the Convention.

its custody would not refoule him to any place where he has well- founded fear of persecution or torture.

The Convention prohibits the return of asylum seekers or refugees "in any manner whatsoever" to the frontiers of territories where they may be persecuted. This includes extradition, expulsion, deportation or rejection at the frontier of the state regardless of whether the relevant act of return or refoulement occurs beyond the national territory of the state in question, at its border posts or other point of entry, in the international zones or at transit points.[22] Thus, refoulement of the asylum seeker or refugee to any place he is at material, not imaginary, risk of persecution is prohibited. It does not matter that that territory is his country of origin. The legal status of the place he is to be refouled is immaterial so long as he is at real risk of either persecution or torture. It may be inside the state, its vessel or ship, its diplomatic mission or military base abroad. The state cannot, through its agents, refoule him to his country of flight, usually his country of origin, but must offer him protection pending consideration of his claims following the due process of the law.

It does not appear that, in the case of seeking asylum in a foreign embassy within one's country of origin, the principle of extra-territoriality agrees with the Convention definition of a refugee to mean a person who is already outside the country of his origin. Can a person be a refugee in his own country? It is submitted that extra-territorial protection from refoulement applies to refugees within the Convention definition and not to "diplomatic asylum seekers."[23]

Once the asylum seeker is in the territory of a state, the state cannot refoule him unless he fails to establish that he has well-founded fear of persecution. Having considered his claim and granted him a refugee status, he cannot be refouled unless he constitutes a danger to the security or public order of the state or is found to have been convicted of a serious non-political crime in the state from which he flew.[24]

Refoulement to a third country, otherwise called "indirect or chain refoulement," is also prohibited except if the repatriating state is satisfied that the asylum seeker or refugee would not be at any risk of persecution or torture, inhuman or degrading treatment or punishment or death penalty. Even then, the

22 E. Lauterpacht and D. Bethlehem, *Non-refoulement: Opinion (No.23),* para.67, 114.

23 *R* v *Immigration Officer at Prague Airport* [2005] 2 A.C.1.

24 Articles 32 and 33(2) of the Convention on the Status of Refugees of 1951.

refouling state must ensure that its process of doing so does not, itself, amount to persecution or torture. This is because each state is in control of its territory and is obliged to respect and protect the rights of all human beings who are physically, even if not legally, within it.[25]

4. OBLIGATION OF NON-REFOULEMENT: MYTH OR REALITY?

4.1 Non-refoulement and expulsion

The grant of "durable asylum" to any asylum seeker and its continued enjoyment or its refusal or termination is at the discretion of each state. Under the Convention,[26] states are not to expel any refugee in their countries except on grounds of national security and public order and in accordance with the due process of the law which gives him right of fair hearing and of appeal unless the circumstances dictate otherwise. It is not required before they are protected from refoulement that asylum seekers or refugees must have entered into the territory of the state lawfully by way of having entry permits in form of visas. This is because the nature of asylum-seeking entails flight from persecution which does not make any room or time to apply for and wait for the grant of visas. Illegal entry is therefore, no ground for expulsion of the asylum seeker or refugee from the country of his refuge.[27] He is also not liable for prosecution or penalties for entry into the country or remaining there illegally. He must however, present himself to the authority without delay and show good cause for his illegal entry into and presence in the country of his refuge.[28]

The questions are: What is "good cause" for illegal entry? What does "without delay" before presenting himself to the authority of the state mean? It is suggested that causes such as proof of flight from genuine and imminent threat to the asylum seeker's life or freedom or to those of members of his

25 Article 2 (1) of the Convention on Civil and Political Rights of 1966; Article 1 European Convention on Human Rights of 1950; Article 1 of the African Charter on Human and Peoples Rights of 1969.

26 Article 32 of the Convention.

27 Article 31 of the Convention.

28 G. Goodwin-Gill, "Article 31 of the 1951 Convention on the Status of Refugees: Non-penalisation, Detention and Protection" in E. Feller, V. Turk and F. Nicholson, (eds.) *Refoulement Protection in International Law*, UNHRC GCIP, (2003), p.187

family would suffice. It is further suggested that what would amount to "without delay" are objective factors depending on the circumstances surrounding the asylum-seeker. He needs not prove that he escaped from his country straight to that of his refuge provided he shows that the passage countries constituted actual or potential threats to his life or freedom so as to justify his passage of all other countries to that of his refuge.[29]

An applicant for asylum shall not be refouled to a country where he would face persecution or torture, degrading or inhuman treatment or punishment.[30] The court or tribunal is to determine whether the applicant will be ill-treated if he is returned to his home state or village or to a third country or if his relocation internally in his country would be the right option.[31] Thus, in *Sithokozile Mlauzi* v *Secretary of State for Home Department (SSHD)*,[32] following credible evidence that the applicant's well-founded fear of persecution was possible throughout his country, the appeal tribunal held that relocating him internally within his country was not the right option and as a result refused his expulsion to his home. Similarly, in *I.A and others (Ahmadis) in Pakistan* v *SSHD,*[33] the Tribunal held that Rabwah in Pakistan did not constitute a safe haven for any Ahmadi at risk of persecution elsewhere in Pakistan and should not, without more, be treated as a safe place for internal relocation. The court of appeal also applied the same principles in refusing to uphold the expulsion of the asylum applicants in *Kerruche* v *SSHD*[34] and *Iyaduri* v *SSHD*.[35]

The removal of an asylum applicant to a country where there is no medical treatment to attend to his serious health problems would amount to persecution contrary to the state's obligation of non-refoulement. In *Bensaid* v *UK*,[36] the asylum applicant was being treated in the United Kingdom for schizophrenia and the issue was whether deporting him to Algeria where he

29 J.C. Hathaway, *The Rights of Refugees under International Law*, Oxford, Oxford University Press, (2005).

30 Articles 32 and 33 (2) of the Convention on the Status of Refugees, 1951.

31 *Levent* v *SSHD* [2004] EWCA Civ. 1766.

32 (2005) EWCA Civ. 128.

33 [2007] UKAIT 00088.

34 [1997] 1 A R 610.

35 [1998] 1 A R 470.

36 (2001) 33 EHRR 205.

would have limited access to the treatment was in breach of his Convention right under Article 3. The court held that if, after considering all surrounding circumstances, there is a real risk of the intended refoulement violating the standards of Article 3, it should rule against his removal. Thus, In *N SSHD*,[37] it was held that the removal of any asylum applicant to countries where he would not get proper medical treatment for his terminal illness or where he faces real risk of committing suicide breaches his right against refoulement.[38]

Similarly, in *D* v *SSHD*,[39] it was held that in considering whether terminal illness would ground non-removal of any asylum seeker, the following factors have to be taken into account: the seriousness of the illness, unavailability or inadequacy of medical treatment in the receiving country, absence of an alternative support to the applicant and the consequences of the deportation to the asylum applicant's health and life. In *N* v *SSHD*,[40] a Ugandan was receiving treatment for AIDS in the United Kingdom and could remain well for decades if he remained in the state but would deteriorate swiftly and die if returned to Uganda. Article 3 was held to apply and his deportation to Uganda stopped. In the same vein, Lords Law J. and Dyson J. held in *D* v *UK*,[41] that the proposed removal of a citizen of St Kitts Island dying of Acquired Immune Deficiency Syndrome in the United Kingdom was contrary to the state's Article 3 obligation of non-refoulement of refugees and asylum seekers.

It is a breach of the right of an unsuccessful asylum applicant under the European Convention on Human Rights[42] to be refouled out of any country where his wife or children remain. In *R* v *SSHD*,[43] it was held to be disproportionate to do so even on the ground that the asylum applicant had a criminal conviction in the country. In *Safer Djiali* v *IAT,[44]* the Court of Appeal held that for removal to be lawful, it must amount to a proportionate and fair balance in

37 [2005] 2 W L R 1124.

38 Article 3 of the Convention against Torture and Article 33 of the Convention on the Status of Refugees of 1951.

39 [1997] 2 WLR 124

40 [2004] 1 N L R 10.

41 [1997]1 AR 172.

42 Article 8 (a) of the European Convention on Human Rights of 1950.

43 [2000] QBD 10.

44 [2003] EWCA Civ. 1371.

pursuit of a legitimate aim. This is because Article 8 does not oblige member states to open their borders to non-nationals for their entry nor to accept non-national spouses for settlement their territories. In *Barehab* v *The Netherlands*,[45] it was however, held that an asylum applicant could not be deported after a marriage which produced children and gave right to abode ended because child-parent relationship is entitled to be respected.

It is submitted that for Article 8 right to be upheld and the asylum applicant's unity with his family given priority consideration, the applicant must show genuine dependency on the financial and emotional support of his family. This does not however, impose any duty on the state to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in their country. Thus, in *Shala* v *Secretary of State for Home Department*,[46] an application for asylum in the United Kingdom was refused even when the applicant had got married and supposedly settled own in the country.

The obligation of non-refoulement has not always been realistic. This is because in some cases applicants for asylum have been expelled to either their countries or third countries without any reference to them or getting a guarantee from the receiving state that it would not transfer them to states where they could be ill-treated or tortured even when they alleged that they would be refouled by the receiving states to states where they would be persecuted, tortured or inhumanly treated. In *A* v *Netherlands*,[47] a Tunisian asylum applicant was expelled even when there was evidence that he would face torture at home; and belatedly, the appeal court held that his expulsion was a potential violation of his right under Article 3 of the Convention against Torture. Similarly, in *Brogan and others* v *United Kingdom,*[48] the asylum applicants were deported irrespective of their allegation that they would be tortured. The state did so on the ground that the United Kingdom had a "public emergency threatening the life of the nation" thereby subjecting the right of the asylum applicant against refoulement to the interests of the host state. In *Mohammed Hussein* v

45 (2003) 1 NLR 349.
46 (1988) 1 EHRR 322.
47 (1999) 1 HRR 666. See: *Avedes* v *Sweden* (199) 1 HRR 672; *R* v *SHHD ex parte Asgar* (1971) 1 WLR 129.
48 (1988) 11 EHRR 439.

Netherlands and Italy,[49] the asylum applicants feared that if transferred by the Netherlands to Italy, they would be ill-treated. The court ordered their transfer without Netherlands getting any guarantee from Italy, the receiving state, that they would not be ill-treated or transferred to another state where they would face real risk of persecution or torture.

No state is obliged to give refuge to serious criminals or those alleged to have committed international crimes or who pose threats to the security of the host state. Such persons are not entitled to being granted refugee status; and as asylum seekers, are not protected from refoulement under Article 33 of the Convention.[50] Thus, in *Pushpanathan* v *Minister of Citizenship and Immigration,*[51] the Supreme Court of Canada, per Bastarache J., held that:
Persons falling within Article 1 (F) of the Convention are automatically excluded from the protections of the Convention. Not only may they be returned to country from which they have sought refuge without any determination that they pose a threat to public safety or national security, but their substantive claim to refugee status will not be considered. The practical implications of such an automatic exclusion relative to the safeguards of Article 33 (2) are profound.

All persons accused of or convicted for serious or non-political crimes are liable to refoulement, except to a state where they have well-founded fear of persecution, torture, inhuman or degrading treatment or punishment or to receive death penalty. This is to enable them receive their trials or, if already convicted, to serve their sentences or pay appropriate penalties.

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49 Suit No. 27725/10 of 2nd April, 2013. See also: *MSS* v *Greece and Belgium*, Suit No. 30696/09 of 26th January, 2011 where the asylum applicant feared that if transferred by Greece to Belgium, he would be deported to Afghanistan where he would be tortured. Greece transferred him to Belgium without getting any guaranteed from Belgium that he would not be deported to Afghanistan where it was evident h would be tortured. In a similar vein, in *TI* v *United Kingdom,* Suit No. 43844/98 of 7th March, 2008. A Sri Lankan national asylum applicant feared that if the United Kingdom transferred him to Germany, he would be deported to Sri Lanka where he would be tortured. Without any guaranteed from Germany against his alleged deportation to Sri Lanka where he would be tortured, the United Kingdom transferred him to Germany.

50 J. C. Hathaway, *The Rights of Refugees under International Law*, Oxford, Oxford University Press, (2005), p. 342. See also the decision of the Supreme Court of Canada in *Pushpanathan* v *Canada* (1998) 1 SCR 982, pp. 58 and that of the Court of Appeal of New Zealand in *Attorney General of New Zealand* v *Zaoui* (2005) 1 NZLR 690 (C.A.).

51 (1988) C.S.C 29 52. See *Soering* v *United Kingdom* (1989) 11 E C H R 498 at [88]; D. Seddon, *Immigration, Nationality and Refugee Law: A Handbook*, London, JCWI, (2006), p. 821.

4.2. Non-refoulement and human rights mechanisms

The duty imposed on the refuge state not to return the refugee to any state in which there is a risk of serious harm to him is either express or implied. The Convention against Torture[52] expressly prohibits states from returning the asylum seeker or refugee in any manner whatsoever where there are substantial grounds to believe that doing so would expose him to the risk of being tortured.

The European Convention on Human Rights[53] and the International Convention on Civil and Political Rights[54] also prohibit, by implication, the refoulement of asylum seekers or refugees to countries where they will face real risk of torture, or degrading treatment or punishment. In *Soering* v *The United Kingdom,*[55] and *Chahal* v *The United Kingdom*,[56] the European Court on Human Rights and the European Committee on Human Rights respectively interpreted the above conventions as prohibiting the refoulement of asylum seekers and refugees to where they will face torture, inhuman or degrading treatment or punishment. The Convention on the Rights of the Child[57] and the Universal Declaration of Human Rights[58] equally prohibit, by implication, the exposure by refoulement, of asylum seekers or refugees to countries where they will be tortured.

The International Convention on Civil and Political Rights[59] enjoins all

52 52. Articles 3 (1) and (2) of the Convention against Torture of 1984. This is an absolute ban on refoulement no matter how undesirable or dangerous the asylum applicant's conduct is. This provision is in conflict with the provisions of Articles 32 and 33(2) of the Convention which provides circumstances which may warrant the refoulement of an asylum applicant to either his country or a third one, provided he would not be exposed to real danger of being persecuted, tortured, inhumanly or degradingly treated or punished or of receiving the death penalty.

53 Article 3 of the Convention, 1950.

54 Articles 2 (1), 6 and 7 of the Convention, 1966.

55 (1989) 11 ECHR 439.

56 (1996) 23 ECHR 413.

57 Article 22 of the Convention of 1989.

58 Article 5 of the Charter of 1945.

59 Article 2 (1) of the International Convention on Civil and Political Rights of 1966. Article 4 of the Geneva Convention on the Protection of Civilians in Times of War of 1949 offers further protection to asylum seekers and refugees when it defines "protected persons" as those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals. These are usually the asylum seekers and the state in whose territory they find themselves are not to transfer them to one of the conflicting states or to where they have reason to fear persecution

state parties to grant all convention rights, including non-exposure to torture, to all persons within their territories or subject to their jurisdictions, including asylum applicants and refugees, by not extraditing, deporting or expelling or otherwise removing them from their territories if there are substantial grounds to believe that there is risk of irreparable harm to them either in a country to which the removal is to be made or in a country to which they may subsequently be removed.

The African Charter on Human and Peoples' Rights[60] also protects asylum seekers and refugees. It provides that every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.

The United Nations Human Rights Council, through its Executive Committee, reaffirmed the fundamentality of the principle of non-refoulement of asylum seekers and refugees when it emphasised "The fundamental importance of the observance of the principle of non-refoulement, both at the border and within the territory of a state, of persons who may be subjected to persecution if returned to the country of their origin irrespective of whether or not they have been formally recognised as refugees."[61]

because of their political opinion or religious belief. Article 11 (3) of the Convention on Specific Aspects of Refugee Problems in Africa of 1969 prohibits refoulement of asylum seekers and refugees. It provides that no person shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened. Thus, non-refoulement is an absolute right of the asylum seeker or refugee in Africa although the host state may appeal to other treaty members for assistance in handling its refugee problems.

60 Article 12 (3) of the Charter of 1986.

61 Executive Committee Conclusion No. 6 of 1977. The onus is on the asylum seeker or refugee to prove satisfactorily that there is real risk of his facing torture, inhuman or degrading treatment or punishment in the country he is fleeing from. However, consistent states' practice, such as those of the United Kingdom and France, show their willingness to protect asylum seekers fleeing civil wars and generalised violence, like the Syrian and Myanmar situations. See: K. Hailbrooner, "Non-refoulement and Humanitarian Refugees: Customary International Law or a mere Wishful Thinking?", 1986 (26) *Virginia Journal of International Law*, p. 857 and G. Goodwin-Gill, "Non-refoulement and New Asylum Seekers", 26 *Virginia Journal of International Law* (1986), p.897.

5. CONCLUSION

The definition, by the Convention, of who a refugee is and who is therefore, entitled to international protection by way of non-refoulement and other range of refugee rights is a great achievement by the treaty. The bottom line however, remains that an asylum seeker or the refugee has no right of non-refoulement. The state into which territory he has crossed has the discretion as to whether to grant or refuse his application for asylum or refugee status, including the form and content of any grant, and the duty not to refoule him to face persecution or torture is mandatory.

Although he shall not be refouled, this right is not always realistic and does not guarantee him the grant of refugee status. States are however, obliged to treat asylum seekers according to standards that permit permanent solution to their problem either by voluntary repatriation, local integration or resettlement in another safe country. The transfer of the responsibility of processing asylum claims to a third state on the ground that the first state considers it a safe state for the asylum seeker without actual enquiry as to whether that may expose him to the prohibited risk of torture amounts to refoulement if he gets tortured eventually. This is because whether or not a third state is safe for him is a subjective issue which is relative to the asylum seeker depending on his tribe, religion, race or political opinion. The transferring state ought therefore, to get the guarantee of the receiving state about the safety of the asylum seeker especially that it will not refoule him to be tortured or persecuted and that it will process his claim according to the due process of law.

For the obligation of non-refoulement to be realistic, the refugee or asylum seeker must not be subjected to any risk of persecution, refoulement, torture or risk to his life and genuine and durable solution to his refugee problem must be in the offing. He must not be exposed to arbitrary expulsion, deprivation of his liberty and must have adequate and dignified means of subsistence. The unity of his family must be preserved and his specific protection needs, such as age and gender, must be recognised and respected.[62] He must have easy access to asylum claims and processing. There should be no restrictions on access in

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62 Ms. Feller, UNHCR: UN Doc. A/AC.96/SR.585, para. 28 (2004).

form of placing time limits, quotas in the granting of refugee status and absence of policy or legal reasons adversely affecting some group of asylum seekers. The transferring state must guarantees its readiness to re-admit the asylum seeker and to process his claim for asylum irrespective of his transfer or illegal entry. Above all, he should be treated according to the internationally accepted standard before being transferred to another state by way of providing him with social assistance such as health care, free education for his children, access to the labour market and respect for his human dignity and family unity.

As Siraj Sait put it: "States can retain their strictest controls regarding economic migrants, but the fundamental principle of non-refoulement obliges them not to arbitrarily reject asylum claims from forced migrants. International Refugee Law, through a combination of human right strategies, seeks to balance a state's legitimate security concerns with the protection of refugees fleeing persecution or loss of homeland."[63] Thus, the obligation of non-refoulement of asylum seekers and refugees by their host states is neither mythical nor always realistic. This is because, although it adequately provides for their non-refoulement, the enforcement of this right is sometimes rendered ineffective by considerations of national security, public order, political, financial or logistics concerns of the host states which are discretionary, thereby making their obligation of non-refoulement to be of secondary consideration and therefore, not always realistic.

63 S. Sait, "International Refugee Law: Excluding the Palestines" in J. Strawson (ed*.), Law After Ground Zero*, Australia, The Glasshouse Press, (2004), pp. 90-107.