NON-REFOULEMENT PRINCIPLE IN THE 1951 REFUGEE CONVENTION AND HUMAN RIGHTS LAW

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Abstract
The principle of *non-refoulement* has acquired a vital importance in international law with the enforcement of the Refugee Convention in particular which provides a protection by prohibiting states to return people to territories where they may be in danger of being subjected to persecution. A great deal of achievement has been secured through the Refugee Convention as it set standards for the treatment of refugees in the host country. However, it needs to be stated that the 1951 Convention does not guarantee *non-refoulemet* as it permits derogations and exceptions. Since there remains to be disagreement related to *jus cogens* status of the Convention, people may face the risk to be returned to territories where they may face persecution or to be suspended their rights. Thus, despite its pioneering position, the Convention has attracted some criticism mainly based upon the implementation of the *non-refoulement* principle. However, it is well established that international human rights instruments have also created some obligations on states related to the status of the refugees beyond the 1951 Refugee Convention. In this article, the protection of refugees with regard to *non-refoulement* principle will be discussed in relationship with other three human rights instruments namely the European Convention on Human Rights, the Convention against Torture and International Covenant on Civil and Political Rights. The absolute protection against *refoulement* in these three instruments will be analysed. For that reason, the human rights law which are perceived as a secondary source of law will be assessed in comparison with the Refugee Convention, and it will be claimed that international human rights law has overtaken the 1951 Geneva Convention as the main source of protection for refugees and asylum-seekers from *refoulement.*

Key Words: 1951 Geneva Convention, Refugees, Human Rights Instruments, *Non-Refoulement* Principle

1951 MÜLTECİ SÖZLEŞMESİ VE İNSAN HAKLARI HUKUKUNDA GERİ GÖNDERMEME İLKESİ

Özet
Geri göndermeme ilkesi, özellikle insanların zulümle karşı karşıya kalabilecekleri bölgelere dönmelerini engelleyerek koruma sağlayan Mülteci Sözleşmesi'nin yürürlüğe girmesiyle birlikte uluslararası hukukta yaşamsal önem kazanmıştır. Geri göndermeme ilkesi, insanları zulüm görebilecekleri topraklara göndermekten devletleri engelleyen Mülteci Sözleşmesinin yürürlüğe girmesiyle birlikte uluslararası hukukta hayati bir önem kazanmıştır. Bununla birlikte, 1951 Sözleşmesi'nin, istisnalara ve muafiyetlere izin verdiği için geri göndermemeyi garanti etmediği belirtilmelidir. Sözleşmenin 'jus cogens' niteliği taşıyıp taşımadığına dair anlaşmazlıklar var olduğu için, insanlar zulme uğrayabilecekleri yerlere geri gönderilme veya haklarının askıya alınması riskleri ile karşı karşıya kalabilirler. Bu nedenle, Sözleşme, öncü konumuna rağmen, ağırlıklı olarak geri göndermeme ilkesinin uygulanmasına dayanan bazı eleştirileri çekmiştir. Bununla birlikte, uluslararası insan hakları belgelerinin, 1951 Mülteci Sözleşmesi'nin ötesinde mültecilerin statüsüyle ilgili olarak devletler üzerinde bazı yükümlülükler yarattığı da iyi bilinmektedir. Bu makalede geri göndermeme ilkesiyle ilgili olarak mültecilerin korunması; Avrupa İnsan Hakları Sözleşmesi, İşkenceye Karşı Sözleşme ve Kişisel ve Siyasal Haklar Uluslararası Sözleşmesi gibi

diğer üç insan hakları belgesi ile bağlantılı olarak ele alınacaktır. Bu üç belgede geri göndermeme konusundaki mutlak koruma analiz edilecektir. Bu bağlamda, ikincil bir hukuk kaynağı olarak algılanan insan hakları hukuku, Mülteci Sözleşmesi ile karşılaştırmalı olarak değerlendirilecek ve uluslararası insan hakları hukukunun, mültecilerin ve sığınmacıların geri gönderilmeleri ile ilgili temel korunma kaynağı olarak 1951 Cenevre Sözleşmesi kadar önemli kaynaklar olduğu vurgulanacaktır.

Anahtar Kelimeler: 1951 Cenevre Sözleşmesi, Mülteciler, İnsan Hakları Sözleşmeleri, Geri Göndermeme İlkesi

اتفاقية اللاجئين 1951 ومبدأ عدم الإعادة في قوانين حقوق الإنسان

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ملخص

مبدأ عدم الإعادة، حاز على أهمية حيوية في الحقوق الدولية وخاصة مع دخول إتفاقية اللاجئين قيد التنفيذ والذي كان يحمي الناس من الظلم الذي قد يواجهونها في المناطق من خلال منع الحواجز. مبدأ عدم الإعادة حاز على أهمية كبيرة جداً في الحقوق الدولية وخاصة مع دخول اتفاقية اللاجئين قيد التنفيذ الذي يمنع الدول من إرسال الناس إلى المناطق التي قد يرون فيها الظلم. مع كل هذا يجب أن يوضح اتفاقية 1951 ضمان عدم الإعادة لكونه يتيح المجال للإستثناءات والإعفاءات. ولأن الإتفاقية تتضمن خلاف على أنها تحمل قابلية 'jus cogens' أم لا تحمل، فمن المحتمل أن يواجه مخاطر إعادة الناس إلى الأماكن التي قد يرون الظلم وأن يعلق حقوقهم. ولهذا السبب، اجتذبت الاتفاقية رغم موقفها الرائد بعض الانتقادات في تنفيذ مبدأ عدم الإعادة. ومع هذا يعرف أن بيانات حقوق الإنسان الدولية فيما بعد باتفاقية اللاجئين 1951 بمايخص وضع اللاجئين خلق بعض الأعباء على الدول. في هذه المقالة حماية اللاجئين من خلال التصدي لمبدأ عدم الإعادة وستتم معالجة البيانات الثلاثة الأخرى لحقوق الإنسان مثل الاتفاقية الأوروبية لحقوق الإنسان واتفاقية مناهضة التعذيب والعهد الدولي الخاص بالحقوق المدنية والسياسية فيما يتعلق بالوثيقة. سيتم تحليل الحماية المطلقة بموضوع عدم الإعادة في البيانات الثلاثة. وسيكون موضع تقدير نسبيًا اتفاقية اللاجئين ويشدد على أن القانون الدولي لحقوق الإنسان لا يقل أهمية عن اتفاقية جنيف لعام 1951 بإعتبارها ضمانة رئيسية ضد اللاجئين وطالبي اللجوء.

كلمات مفتاحية: 1951، اتفاقية جنيف، اللاجئين، اتفاقية حقوق الإنسان، مبدأ عدم الإعادة.

1. INTRODUCTION

The principle of *non-refoulement* has been the milestone in international protection of refugees which provides the prohibition of expulsion or return of a refugee to any country where he or she might be tortured or face persecution or other ill-treatment (Gorlick, 2000: 8). In situations where an asylum seeker is unwilling to go to his or her country of origin, compelling them to return their country could be based on the condition if there is no existing obstacle for them to return. Therefore, protection against *refoulement* can be regarded as similar concept with the protection against torture (Lambert, 1999: 2). As the number of asylum-seekers has been increased seriously in the last decades, the protection of refugees and asylum-seekers has become a prominent subject of the states under international law. However, limited ratification of instruments and lack of conventions regulating the rights of refugees on an unequivocal base prevented to reach a strong *non-refoulement* principle. Besides this, protection needs of refugees were provided by ad hoc mechanisms which are short of cohesion and predictability (Durieux, 2004: 2). States tend to be mostly reluctant to recognize the right of asylum to people as it has been

conceived restricting their rights on the controls of frontiers. Therefore, it has been agreed that the establishment of the principle of *non-refoulement* as an obligation under international law is a vital step in order to ensure the respect for fundamental human rights of refugees and asylum-seekers (Durieux, 2004: 2).

The 1951 Refugee Convention has been a preliminary document that provides a great advancement to asylum-seekers and protects them from returning their countries of origin. However, in some respects, the 1951 Refugee Convention has lacked to offer a full range of protection from *refoulement*. Therefore, international human rights law has arisen as a crucial aspect where the 1951 Refugee Convention fails to encompass a wider scope for a definition of a refugee. In this essay, first, the *non-refoulement* principle and the instruments which encompass the protection of refugees and asylum-seekers will be explained briefly. Second, substantial provisions related to the principle of *non-refoulement* under the Refugee Convention and other international human rights instruments will be examined, and their effectiveness in terms of protection against *refoulement* will be assessed with comparison to each other. Third, it will be evaluated which fundamental features of individuals are required in order to protect them against *refoulement*. Finally, a standard of proof that is necessary for the principle of non-refoulement will be focused.

2. HISTORICAL BACKGROUND OF THE PRINCIPLE OF *NON-REFOULEMENT*

After the Second World War, the devastation caused the creation a large number of refugees in Europe. Moreover, the subsequent political disorder during the Cold War period led to further movements of large numbers of people within the continent. Therefore, it is widely agreed to adopt international instruments concentrating on *non-refoulement* which has a preliminary significance. As a result, two primary international agreements were adopted in order to protect the refugees which are the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) and its additional Protocol Relating to the Status of Refugees (1967 Refugee Protocol) (Bailey, 56). Although, these two instruments provide a crucial improvement for the refugees and asylum-seekers, they are still being criticized because of not meeting the expectations of the people waiting for a refugee status. First, it has been contended that the 1951 Refugee Convention has a limited scope as it was created with intent to protect primarily the European people who were suffering from persecution and ill-treatment in the Soviet bloc states after the Second World War. Furthermore, the main reason of requiring asylum has changed over years and now it does not exactly fall under the conditions of the 1951 Refugee Convention today. For instance, the recent movements are mainly based on civil war, military occupation, natural disasters and bad economic conditions rather than political, racial persecution covered by the 1951 Refugee Convention. Thus, the changing nature and problems of the refugees has pointed out the necessity of reconfiguration of the conditions of giving a refugee status (Poynder, 2003: 173). Moreover, the interpretation of the Refugee Convention in a strict and legalistic way by western states restricts the protection provided to the asylum-seekers. Therefore, alternative ways of assisting asylum-seekers and refugees have been a prominent debate in order to provide protection against *refoulement* under different instruments from the 1951 Refugee Convention. Thus, the principle of *non-refoulement* has been embodied in other international instruments so that the international protection need is tried to be fulfilled by using other mechanisms outside the 1951 Convention Related to the Status of Refugees. As a result, the principle of *non-refoulement* has emerged in complementary areas in order to fill that protection gap. The major complementary protection is provided by the 1950 European Convention on Human Rights and Fundamental Freedoms (the European Convention), the 1966 International Covenant on Civil and Political Rights (the Political Covenant) and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture) (Mandal, 2005).

3. PROTECTION AGAINST *REFOULEMENT* UNDER THREE INSTRUMENTS IN COMPARISON WITH THE 1951 REFUGEE CONVENTION

The prohibition of *refoulement* has been the guiding principle of the refugee law. However, as noted above, the 1951 Refugee Convention offered some protection gaps in terms of providing *non-refoulement* principle. Therefore, with the purpose to compare the effectiveness of these instruments with regard to an

asylum-seeker perspective, it is important to determine which instrument provides best protection against *refoulement*. Hence, it is necessary to examine the admissibility and evidentiary requirements to grant a refugee status. In addition, it is also important to evaluate what sorts of inhuman acts constitutes the substantial grounds to claim protection from *refoulement* under both the 1951 Refugee Convention and other international law instruments. (Lambert: 1999). Thus, at first, to identify the *non-refoulement* principles codified in different articles of these instruments has been the primary task of the evaluation. By this means, it would be clarified which instrument provides a broader protection to asylum-seekers in the face of *refoulement* risk.

3.1. Substantial Provisions Prohibiting *Refoulement*

It can be asserted that the refugee protection system is based on the *non-refoulement* principle. Therefore, it has been included to the Refuge Convention by Article 33 and to the Convention against Torture by Article 3. Although the other two instruments do not contain an explicit *non-refoulement* provision, they have been interpreted to include it. However, it is necessary to indicate that the absence of an explicit prohibition of *refoulement* would not create an obstacle before the human rights treaties if the *non-refoulement* is provided in the strict sense (Lambert, 1999: p.5). Therefore, the question whether the Refugee Convention falls behind the international human rights instruments does not take precedence as long as they provide protection to asylum-seekers and refugees from *refoulement*.

3.2. The 1951 Convention Relating to the Status of Refugees:

The Convention was adopted on 28 July 1951 and entered into force in 1954. As of March 2018, there are 145 state parties to the Convention. The Convention emphasizes the term of the persecution rather than torture and other cruel, inhuman or degrading treatment. Moreover, the term refugee is defined under Article 1(A) of the Convention and it includes some basic requirements such as: a well-founded fear of being persecuted must take place, this persecution must be based on race, religion, nationality, membership of a particular social group or political opinion, the applicant must be outside the country of his nationality (or the applicants who do not have nationality must be outside the his former habitual residence), and must unable or unwilling to avail himself of the protection of that country and the applicant must be unable or unwilling to return to it (Convention and Protocol Relating to the Status of Refugees, Article 1).

The 1951 Refugee Convention identifies *non-refoulement* provision in Article 33(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.

The principle of *non-refoulement* constitutes an indispensable condition of refugee protection. Therefore, the significance of the obligation not to expel a refugee to a territory where he or she would be in danger of persecution has been clarified; and non-derogable nature of the principle of *non-refoulement* has been stated in many Conclusions of the Executive Committee of UNHRC and under Article 42(1) of the Convention. (UN High Commissioner for Refugees, Advisory Opinion, 2007: 5). However, Article 33(2) of the Refugee Convention could be presented as an exception to the principle of *non-refoulement* as it limits the protection of refugees from *refoulement* on two grounds: First, if there are reasonable grounds to believe that a person is able to threaten the security of the country where he lives, he or she may not be able to claim to benefit the *non-refoulement* provision. Second, if the refugee has been convicted by a final judgment of a particularly serious crime and because of his or her past offences or the likelihood of subsequent offences, the refugee constitutes a danger to the community of that country. Under these circumstances, states may determine individually the application of this provision taking into account the refugee contains one of these conditions provided under Article 33(2) of the 1951 Convention.

The primary reason which gives effect to the international human rights law rather than the Refugee Convention can be derived from the nature of the definition relating to *non-refoulement* under Article 33. This is because the Refugee Convention is the only instrument among others which does not provide an absolute and unconditional protection to *non-refoulement*. The protection of asylum seekers and refugees from *refoulement* has been restricted with regard to two reasons (Lambert, 1999: 5). First, as mentioned above in Article 33(2), the security obligations of states make them to perceive the refugees who are or

having been convicted by a final judgment of a particularly serious crime as a danger to their security. Two main tests have been proposed by Hathaway and Harvey in order to assess whether the asylum seeker or refugee constitutes a threat to the security of governments of asylum. The first test requires 'reasonable grounds' in order to satisfy the claims against asylum-seekers and a high level of proof is vital to decide that the presence of asylum-seekers and refugees is a danger to the security of the asylum state. The second test whether he or she constitutes a danger depends on having been convicted by a final judgment or particularly serious crime. If so, limitations can be imposed on the *non-refoulement* principle and they should be forced to return to their country of origin. It has been also noted that a real link must be established between the conviction and the danger posed by the refugee to the national security in order to give rise to exceptions of *non-refoulement* (Duffy, 2008: 3). Second, the other exception contained in the Refugee Convention is Article 1(F) which allows exclusions in specific circumstances. The background of this exclusion lays in the purpose of refusing those deemed unworthy and unnecessary of taking the advantages of refugee status under the Convention (Duffy, 2008: 3). Therefore, Article 1 (F) prohibits to grant asylum to any person whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, or a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee, or has been guilty of acts contrary to the purposes and principles of the United Nations (Convention Relating to the Status of Refugees, Article 1.F)

However, in contrast to the Refugee Convention, the European Convention, the Convention against Torture and the Political Covenant permit no exceptions. While the Refugee Convention allows exclusions with regard to the principle of *non-refoulement*, the other three instruments have an absolute character and prohibit *refoulement* on every ground.

3.3. The European Convention for the Protection of Human Rights and Fundamental Freedoms:

Under the European Convention, the refugees and asylum seekers are presented more protection against *refoulement* than the Refugee Convention. Even though the European Convention for Protection of Human Rights and Fundamental Freedoms does not involve any wordings with regard to *non-refoulement* principle, the protection of refugees and asylum seekers from *refoulement* is provided implicitly under Article 3 of the European Convention. It states:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

With regard to Article 3, the European Court of Human Rights and its Commission have built a body of case law through their judgments and decisions that will serve the protection of persons by prohibiting the removal of them to their home country where they face human rights violations (Weissbrodt and Hortreiter, 1999: 28). However, the European Court of Human Rights has not made an exact definition of torture, inhuman or degrading treatment. In order to assess whether the treatment should be considered under Article 3, the Court searches for 'minimum level' of severity in each specific case (Weissbrodt and Hortreiter, 1999: 30). After the 'minimum level' of severity is reached, the Court makes a decision in order to qualify these treatments as torture, inhuman or degrading with respect to the level of the severity (Weissbrodt and Hortreiter, 1999: 30).

Under the first inter-state complaint (Ireland v. United Kingdom), the European Court pointed out the unconditional character of Article 3 and torture and inhuman or degrading treatment have been prohibited on an absolute ground. Besides this, it has been stated that Article 3 cannot be subject to derogation even if there is public emergency posing a threat to the security of nations (Duffy, 2008: 6). Another case related to the extradition of a German national to United States (Soering v. United Kingdom) has underlined the peremptory character of Article 3 by determining that the case of sending the person back where he may face persecution or cruel treatment would result in violation of Article 3. Thus, the purpose of the European Convention would have been demolished what was intended by Article 3 by his extradition. Moreover, in Chahal case, it has been again specified that Article 3 of the European Convention has an absolute and non-derogable character (Duffy, 2008: 7). In Chahal case, the applicant, Mr. Chahal, had been a politically active Sikh leader and entered the United Kingdom illegally. Although his stay in the U.K. had been regularized by a general amnesty, he was assumed as a threat to national security. Thus, a deportation issue was ordered and he was detained. However, the European Court of Human Rights found a violation of Article 3 of the European Convention and decided that he would be in

danger of facing a real risk of torture, inhuman or degrading treatment if he was deported to India. The guarantee provided by Article 3 is absolute in expulsion cases, therefore the national security interests cannot be used as a justification of the *refoulemet* of the applicant. Besides this, the Court stated that protection provided by Article 3 of the European Convention is broader than Article 32 and 33 of the 1951 Refugee Convention (Weissbrodt and Hortreiter, 1999: 37). Furthermore, in the case of M.S.S. v. Belgium and Greece, it has been stated that 'international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment'. It has been pointed out that the duty not to return them extends not only to refugees but also to asylum-seekers whose status has not been decided yet. Besides this, the principle of *non-refoulement* has been considered as a binding rule of customary international law (Case of M.S.S. v. Belgium and Greece, European Court of Human Rights, 2011: 297). As no reservations and exceptions are permitted against Article 3, it could be accepted on a broad extent that the European Convention has overtaken the Refuge Convention with regard to protection from *refoulement*.

3.4. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment:

The Convention was adopted in 1984 and entered into force in 1987 (www.ohchr.org). Article 5 of the Universal Declaration of Human Rights and Article 7 of the Covenant of Civil and Political Rights have been the main sources in the creation process of the Torture Convention. The principle of *non-refoulement* is expressed in Article 3(1) of the 1984 Convention against Torture, and under Article 3(1) the basic humanitarian principle of *non-refoulement* has been affirmed and it prohibits the removal of a person to another State where there are substantial grounds to consider that he would face a risk of being subjected to torture. According to Article 3 of the Convention, expulsion, return and extradition shall be prohibited where there are risks for persons to experience torture. It could be noted that there are slight differences between these terms. Expulsion imply to the removal of persons who have entered legally to host states. On the other hand the word of return (refouler) means sending back the people who have crossed the border illegally. Therefore, Article 3 of the Convention covers the prohibition of transition of people who have entered the territories not only legally but also illegally to the territories where they would be in danger of being subjected to torture (Weissbrodt and Hortreiter, 1999: 7). It is also important to note that the principle of non-refoulement under Article 3 is implemented to not only direct expulsion, return or extradition; but also to indirect removal of people to third country territories. This is because, a possibility for them to face persecution is still held as the third country may send them to their country of origin. (Weissbrodt and Hortreiter, 1999: 8).

Nevertheless, the Convention against Torture has a limited scope in comparison with the European Convention and the Political Covenant. Although the Convention against Torture is also subject to no derogation on the torture and *non-refoulement* provisions, the prohibition of *refoulement* is confined only to the cases of torture (Lambert, 1999: 6). Therefore, the Convention against Torture has been criticized because of ignoring to encompass the risk of cruel, inhuman or degrading treatment in order to prohibit *refoulemet*; hence falls behind the protection provided by the European Convention (Duffy, 2008: 8). The drafting committee of the Convention explained the main reason of restricting the protection of Article 3 to torture on the ground that torture could be defined in specific terms while the statements of other cruel, inhuman and degrading treatment has no specific definition (Weissbrodt and Hortreiter, 1999: 9). The intention of the drafters was to establish a legally binding norm that could be obeyed by all State parties. Therefore, they concluded that the terms of cruel, inhuman and degrading treatment cannot be defined precisely and it would be impossible to charge states and protect refugees by using the norms which are constructed on vague and indefinite terms (Weissbrodt and Hortreiter, 1999: 9).

In order to function the prohibition of *non-refoulement* principle, a detailed expression of torture is needed to facilitate the application. For this purpose, the Convention against Torture contains the definition of 'torture' in Article 1. The term torture has been defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person with the consent or acquiescence of a public official or other person acting in an official capacity." (www.ohchr.org). It could be concluded from the definition that there must be some elements for an act to be assumed as torture: (Weissbrodt and Hortreiter, 1999: 10) One of the major element to consider any act as torture is the

infliction of severe physical pain or mental suffering. Here, the intensity of the pain suffered by victim is essential and it must reach a severe level. It could be both physical and mental suffering. Apart from that, according to Article 1 again, the act of torture must be intentionally inflicted on a person. Therefore, in order to be qualified as torture the act needs to have an aim or plan that was designed before. A few purposes have been exposed and they are sorted in Article 1. The last major criteria for an act to be considered as torture is that the act must be conducted with the consent or acquiescence of a public official or other person acting in an official capacity. Therefore, any person who face a risk to suffer from non-public actor with an intention to punish or intimidate them, are not considered within the scope of the Convention and it does not provide protection from *refoulement* (Weissbrodt and Hortreiter, 1999: 11).

The article 3(1) of the Convention against Torture also refers to the statement of 'substantial grounds'. If there are substantial grounds for believing that the person who applied for asylum would be in danger of being subjected to torture, he will be utilized the principle of non-refoulement. There must be subjective and objective elements in order to assess the presence of the substantial grounds for believing (Weissbrodt and Hortreiter, 1999: 12). The subjective element is based on the positive consideration of the Committee Against Torture whether the asylum-seekers and refugees are in danger of torture. Besides this, the Committee evaluate each specific applicant's case separately and reach a conclusion within their own circumstances. These circumstances can comprise applicant's ethnic background, alleged political relationship (Weissbrodt and Hortreiter, 1999: 13). Furthermore, the Committee Against Torture must also assess the overall circumstances besides the specific conditions. As stated in the Article 3(2) of the Convention, 'the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights' may constitute a threat to life of the applicant. However, it needs to be noted that the applicant must be individually in danger of being subjected to torture. Otherwise, it is not possible to apply the non-refoulement principle to persons who fled their own countries if the human rights violations possess a general nature and the person is not affected personally from this act of violence. Moreover, even if the country is not experiencing serious human rights violations, the Committee may consider the applicant will have a risk to be tortured upon his or her return to the country where they come from (Weissbrodt and Hortreiter, 1999: 13). The point to be emphasized here is that the torture that the applicant experienced in the past does not constitute a guarantee for him not to be returned. According to the Convention Against Torture, the substantial grounds to believe that the applicant would be in danger of being subjected to torture build the main understanding of the *non-refoulement* principle. Therefore, it needs to be indicated that the future possibility to occur human rights violations is more important rather than the past events.

3.5. The 1966 International Covenant on Civil and Political Rights:

Article 7 of the 1966 International Covenant on Civil and Political Rights has been interpreted as encompassing an implied provision against *refoulement*. The right to be free from torture, cruel, inhuman or degrading treatment or punishment has been guaranteed Under Article 7. Besides this, state parties shall not expose individuals to medical or scientific experimentation without their free consent. (International Covenant on Civil and Political Rights, 1976: Article 7)

It could be said that the prohibition of *refoulement* provided in the Political Covenant has a broader scope than provided under the Convention against Torture. This is because; Article 7 includes cruel, inhuman and degrading treatment or punishment which the Convention against Torture does not incorporate (Goodwin-Gill, McAdam, 2007: 209). This understanding of the Human Rights Committee emerges from the combination of Article 7 and 2(1) which indicates that 'each State Party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction' (International Covenant on Civil and Political Rights, 1976: Article 2(1)). Therefore, this provision extends the protection to refugees and asylum-seekers within the territory (Goodwin-Gill, McAdam, 2007: 209). Consequently, the human Rights Committee justifies the principle of *non-refoulement* by its interpretation of Article 7 and prohibits extradition, deportation of individuals to the places threatening their life.

4. LACK OF AN ENFORCEMENT MECHANISM TO PROHIBIT *REFOULEMENT*

Another comparison should be made on the basis of an effective enforcement mechanism. The main responsible body in enforcing and supervising the protection of refugees and asylum-seekers from

refoulement is national authorities under the Refugee Convention. The United Nations High Commissioner for Refugees (UNHCR) does not have much competence over states except asking them to amend some practices (Lambert, 1999: 6). Therefore, as the status of granting refugee is determined under the domestic administrative system, it creates a doubt over the decision makers whether they consider all kinds of findings in order to determine fairly. Besides this, the Convention has been criticized of having no mechanism for holding states accountable in order to supervise their compliance with the provisions under the Refugee Convention (Crock, 2003: 55). As the Refugee Convention lacks of an effective complaint mechanism, people who are denied asylum have difficulties to find an appropriate way of expressing their concerns (Poynder, 2003: 178). Nevertheless, the protection against *refoulement* has been implemented more effectively in other international human rights instruments through individual complaints mechanisms and monitoring state reports. However, it is also not true to say that the Human Rights Committee and the Torture Committee has an effective enforcement mechanism against *refoulement*. This is mainly because they do not have a binding judicial power like the European Convention (Lambert, 1999: 7).

5. THE SCOPE OF INDIVIDUALS COVERED UNDER THE PROTECTION AGAINST *REFOULEMENT*

The right to protection from *refoulement* begins when an individual comes under the authority of an asylum state even if the refugee status has not been determined yet (Hathaway, Neve, 1997: 46). In other words, according to the Refugee Convention, an individual must be a refugee or at least an asylum-seeker in order to get the advantages of *non-refoulement* provision under Article 33. In order to identify who is covered by the provision, it is necessary to look at the Convention. However, the definition of 'refugee' has been characterized in a narrow and specific nature under Article 1.A(2) of the Refugee Convention which states 'any person who, owing to a 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 (or her) nationality and is unable or, owing to such fear, is unwilling to avail himself (or herself) of the protection of that country' (Convention Relating to the Status of Refugees, Article 1.A(2)). In order to satisfy the definition, an applicant must subject to persecution on the basis of identified reasons specified in Article 1.A(2). Therefore; race, religion, nationality and membership of a particular social group, or political opinion are four main requirements in order to seek asylum and refugee status. Furthermore, the persecution faced must be reasonably linked to the Convention reason. Even if it seems accurate for an individual to face persecution after his return to the country of origin, it is highly possible for him to be refused if he cannot propose a reasonable link (Poynder, 2003: 176).

Therefore, it may be concluded that the Refugee Convention offer protection against *refoulement* under a strict restriction. However, this strict sense of definition of refugees that has a crucial importance in determining the *non-refoulement* principle has been changed positively under other international human rights law instruments. Article 3 of the European Convention, Article 3 of the Convention against Torture and Article 7 of the Political Covenant provides a broad protection regardless of people's conduct and nationality (Lambert, 1999: 8). All three international human rights instruments have declared that the *non-refoulement* and other principles under the Conventions and Covenant apply to everyone without any discrimination, not only to those who meet the requirements of refugee definition under the Refugee Convention. The Committee against Torture has declared that the principle of *non-refoulement* applies even to people suspected of terrorism (Duffy, 2008: 10). Therefore, international human rights instruments provide a crucial base for rejected asylum-seekers, and even criminals to acquire a protection under the principle of *non-refoulement* that prevents them to return and face a risk of persecution upon their return. It might be true to assert the 1951 refugee Convention lacks a great deal of deficiency in terms of providing protection against *refoulement* without discrimination with regard to other three instruments.

6. DIFFERENCES IN TERMS OF STANDARD OF PROOF REQUIRED TO THE PRINCIPLE OF *NON-REFOULEMENT*

During the consideration of a legal claim, standard of proof and the system used to examine evidence are essential factors in order to qualify the effectiveness of protection offered to the refugees and asylum seekers against *refoulement*. Whereas the Refugee Convention does not arrange these requirements, the

UNHRC guidelines set forth 'good reasons' as a necessary element that must be showed by the asylum-seekers and the fear of 'a reasonable degree' should be proved in order to consider the applicants within the limits of doubt (Lambert, 1999: 21). However; as the competence has been given to states parties to determine over the status of the asylum-seekers, they are independent to use their own requirements in order to decide who is eligible to grant a refugee status. Furthermore, states parties are also free to identify the appropriate standard of proof according to their own decisions; therefore there would be a tendency for states to evaluate the presence of fear of persecution more restrictively. However, although a final decision has not been reached over the status of the asylum-seeker on the basis of evidence, a protection against *refoulement* should be nevertheless provided.

The Political Covenant and the European Convention set a higher standard of proof than the UNHRC. For making a *non-refoulement* claim admissible on a general ground, an applicant must prove two important things: the existence of substantial grounds and the existence of a real risk. While the first one refers to a less possibility to face ill-treatment in the case of expulsion, the latter indicates that in the case of expulsion, it is highly possible to face persecution (Lambert, 1999: 21).

The European Convention differs with regard to the level of standard of proof that is necessary for an acceptable *non-refoulement* claim since the European Court requirement is relatively high (Duffy, 2008: 6). Although it requires such high level of standard of proof, the asylum-seekers do not need to show a nexus between the risk of persecution and any reasons related to the five grounds required for protection of refugees under the Refugee Convention. In contrast, Article 3 of the Convention against Torture applies a lower level of standard of proof as the existence of a large-scale torture in the country of origin seems to be accepted as a 'substantial grounds' requirement in the determination process (Lambert, 1999: 22). However; it does not prompt directly to the application of the principle of *non-refoulement* as it is required to demonstrate that the applicant would face a risk of torture upon return (Goodwin-Gill, McAdam, 2007: 305). The Committee against Torture emphasized that 'substantial grounds' refers to a 'real and personal risk' of torture instead of imaginary, weak theories based on the existence of a possibility of torture and the Committee recognized that the threat must be 'more than a mere possibility of torture', but does not necessarily have to be 'highly likely to occur' (Goodwin-Gill, McAdam, 2007: 305). Besides this, the asylum-seekers' activities in the past in their country of origin is also a considerable standard in order to evaluate the substantial grounds. Both oral statements and written evidence are accepted by the Committee against Torture in evaluating the substantial grounds. Therefore, the ongoing existence of 'gross, flagrant or mass violations of human rights' helps asylum-seekers to be protected under the *non-refoulement* principle as the evidence for the substantial grounds has increased (Lambert, 1999: 28).

European States are generally of the view that a sufficient fact should be supplied to the national authority by asylum-seekers in order to convince them there would be a risk to face violation in case of returning to the country of origin. However, while some states put high standards on legal test for risk, some other states do on the contrary. Some different procedures should be given in order to clarify the responsibility of states to carry out the risk assessment: Swiss and German courts assert there must be a 'considerable probability' for persecution for asylum-seeker upon return. Nevertheless, the United Kingdom has claimed the requirement of a 'reasonable degree of likelihood' (Lambert, 1999: 30). Besides this, European States have criticized the Refugee Convention as having individualistic approach and not granting protection against *refoulement* to members of large groups. With the adoption of Conclusion No.22, the protection of asylum-seekers from *refoulement* in a position of large-scale influx have been tried to be protected with durable solutions, but at least temporary protection has been guaranteed (Chimni, 2000: 86).

Article 3 of the European Convention has been accepted relevant to the expulsion of asylum-seekers by the European Court and the substantial grounds has been pointed out as follows: 'that the person concerned, if extradited, faces a real risk of being subjected to torture, inhuman or degrading treatment or punishment in the requesting country against the standards of Article 3' (*Soering* v. *United Kingdom*, 7 July 1989 Ser. A, No.161. para. 91). Therefore, Article 3 holds states parties responsible for consequences of extradition of asylum-seekers, and the importance of *non-refoulement* principle has been emphasized with an interpretation of the decision of the Court (Lambert, 2005: 3). In order to assess whether there are sufficient substantial grounds in terms of breach of Article 3, the Court of Human Rights emphasizes on the expulsion and its possible consequences which may conclude ill-treatment towards the applicant. The

foreseeable consequences of expulsion must be resulted with severe acts contrary to Article 3. There is no obligation to prove ill-treatment has occurred, but rather it must be showed that there is a real risk in case of expulsion (Lambert, 2005: 3). Therefore, after the reasonable grounds have been established, the period of assessment of 'real risk' should be followed.

As the last human rights instrument in this paper, it could be said the Human Rights Committee's *non-refoulement* jurisprudence is limited in comparison with other instruments. This is mostly because the decisions of the Human Rights Committee have a non-binding nature (Goodwin-Gill, McAdam, 2007: 306). It would not be wrong if it is said that the jurisprudence of the European Court of Human Rights has helped to the Human Rights Committee in establishing its own approach, thus their approach is not very different from each other with regard to the evidentiary requirements of the principle of *non-refoulement*. Thus, following the jurisprudence of the European Court of Human Rights, the Human Rights Committee has adopted the *non-refoulement* principle by increasing its territorial scope of protection and charging the states responsible which send individuals to face torture and human rights violation out of their territories.

7. CONCLUSION

It is extremely important for people who are in need of protection under foreign authorities out of their countries of origin. Therefore, the principle of *non-refoulement* has been an essential legal assurance for not only refugees, but also others who have not acquired refugee status yet to protect them from being subject to human rights violations or other ill-treatments. Taking into account its binding character on all states in international refugee law, it could be said that the principle of *non-refoulement* has acquired the level of customary international law (Allain, 2001). Besides this, the norm prohibiting *refoulement* has also been claimed to have attained a *jus cogens* status mainly based on the acts and determinations of the UNHCR Executive Committee. However, it needs to be said that the acquirement of *non-refoulement* principle a *jus cogens* status is disputable as exceptions and derogations are permitted under Article 33 (1) and 1 (F) of Refugee Convention. (Bruin and Wouters, 2003:1; Duffy, 2008). Since the all instruments have some basic similarities in terms of protection against *refoulement*, it is difficult to indicate precisely which one has a priority.

As the 1951 Refugee Convention is the oldest instrument among others, it is likely possible for it to have some deficiencies in order to protect asylum-seekers against *refoulement*. The Refugees Convention has been often criticized as it has been described as a product of Cold War and as a tool of western countries that is used against eastern bloc. Furthermore, taking into consideration of the protection of the principle of *non-refoulement*, it seems that the Convention falls short of with respect to other three international human rights instrument. As the Refugee Convention has a limited scope and specific nature of definition of refugee, it excludes some people from its protection under Article 1(F) by stating that the Convention shall not apply to any person if there are serious reasons for considering that they have committed some specific crimes. Besides this, by allowing states to apply a balancing test, the risk towards national security often outweighs the risk of torture. Therefore, it might be true to state that the Refugee Convention has been overtaken by the other international instruments. However, three human rights instruments cannot be claimed to have without any discrepancies. For instance, the Human Rights Committee has followed the case law of the European Court of Human Rights, thus reliance on the European Convention and Convention against Torture, and the use of evidence in a restrictive way does not make it an effective instrument to protect asylum-seekers from *refoulement*. Moreover, although the Convention against Torture does not allow derogation, the protection against *refoulement* has been confined to the concept of torture. Thus, the Convention Against Torture follows a narrower approach in the protection of refugees from *refoulement* as it mainly focus on the protection against torture. However, in comparison with Convention against Torture, Article 3 of the European Convention proscribes torture and other inhuman or degrading treatment on a wider ground, and Article 33 of the Convention on Refugees prohibits any form of persecution which holds five requirements, thus provides a substantially broader circle of applicants facing persecution. Besides this, the Convention Against Torture again does not have strict evidentiary rules. On the contrary, the European Convention has a strict admissibility requirement; however it provides a broader protection by extending its scope not only to torture but also to other inhuman or degrading treatment. Therefore, it could be concluded that the prohibition of *refoulement* has been developed crucially by the jurisprudence of human rights instruments. Although the Refugee

Convention is necessary in order to acquire the status of refugee, the principle of *non-refoulement* has been advanced extremely by the three instruments. Despite their contributions are not equal, it does not reduce the value of the developments of human rights systems to the agenda of refugee rights.

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