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The Extent and Content of the Non-Refoulement Principle

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Abstract

With the Syrian refugee crisis after the civil war, which broke out in Syria in 2011, the attention of the international community has once again turned to the international refugee law. In this context, it is possible to claim that the refugee influx from Syria has brought important and problematic areas in refugee law to daylight. In this framework, especially precautions taken by unwilling states for not allowing refugees to step in and worsening situation of the refugees in front of the closed borders have made the non-refoulement principle an important subject in the agenda of the international community. Since regulations concerning the principle in different treaties and state practice vary, some important points of the principle remain vague and as a result of this vagueness unwilling states interpret the principle accordingly with their political and economic interests. This paper critically outlines the important points of the principle and evaluates the principle by referring treaty law, the decisions of different international courts and treaty bodies and to the doctrine. Furthermore, in line with these evaluations, in this paper, some reform proposals with regards to defining the non-refoulement principle are presented.

Keywords: *UNHCR, non-refoulement principle, Syrian refugee crisis.*

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Geri Göndermeme İlkesinin Kapsamı ve Esasları

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Öz

2011 yılında Suriye'de patlak veren çatışmalar sonrasında yaşanan mülteci krizi ile birlikte uluslararası toplumun dikkati bir kez daha uluslararası mülteci hukukuna döndü. Bu çerçevede, Suriye topraklarından gelen mülteci akını, bu alandaki problem sahalarını tekrar gündeme getirdi. Bu kapsamda; bazı isteksiz devletlerin mültecileri kabul etmemek için aldıkları tedbirler ile mültecilerin kapalı sınırlar önündeki kötüleşen yaşam şartları, geri göndermeme ilkesini uluslararası toplumun gündemine taşımıştır. Antlaşma ve uygulamalardaki farklılıklar neticesinde, bu ilkenin bazı önemli noktaları belirsiz kalmakta ve bu belirsizliğin bir sonucu olarak bazı devletler ilkeyi ve bu ilkenin gereklerini politik ve ekonomik çıkarları çerçevesinde yorumlamaktadır. Bu makale, geri göndermeme ilkesinin önemli noktalarını eleştirel bir şekilde özetlemekte ve ilkeyi uluslararası sözleşmeler, içtihatlar ve doktrin ışığında değerlendirmektedir. Ayrıca bu eleştiri ve değerlendirmeler neticesinde "geri göndermeme ilkesi"nin tanımlanması hususunda bazı reform önerileri sunulmaktadır.

Anahtar Kelimeler: *BMMYK, geri göndermeme ilkesi, Suriye mülteci krizi*

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INTRODUCTION

Because of the civil war which broke out in Syria in 2011, the world has been witnessing the most tragic refugee crisis since WWII (UNHCR, 2016a). It is estimated that over 5.6 million people have been forced to escape from their country to neighboring countries and 6.6 million people have been displaced internally since the beginning of the war in Syria (UNHCR, 2018a). As the population of refugees coming from Syria increase, it became possible to observe that some states have begun to close their borders (Gatten, 2016) and some of them have begun to push refugees back (UNHCR, 2016b) which worsen the tragic situation of Syrian refugees.

As a result of the emerged refugee crisis, especially with the continuous flow, the attitude of "unwilling states"[1] (UNHCR, 2018) has drawn the attention of international community once again to the international immigration system and refugee law/policies (Whitehouse, 2015). In this connection, along with the other components, one of the cornerstones of the international refugee law: the non-refoulement principle (the principle) has taken its place in the agenda of the international community (Tokuzlu, 2006: 1). It is possible to claim that especially above-mentioned negative attitude of some states in solving the crisis and their precautions not to allow refugees to step up have increased the importance of the principle.

However, despite its importance; as it will be discussed more detailed below, the practice of the states and international organization shows important differences from each other (Tokuzlu, 2006: 15), mostly due to political/economic concerns of states and unclear parameters of the principle (Rodger, 2001: 5).

In the context of information presented above, the purpose of this paper is evaluating the parameters of the non-refoulement principle with reference to treaty law, case law and doctrine. As a result of this evaluation, it is aimed to conclude whether the legal framework regarding this princi-

1 Within this study, the term "unwilling states" refers to states which are reluctant about providing meaningful protection for refugees and asylum-seekers.Unwilling attitude of some states can be illustrated with the uneven distribution of the Syrian refugees to different countries. For statistical data: see UNHCR, (2018), "Situation Syria Regional Refugee Response"

ple has some vague points as asserted and therefore needs reforms.

In the first part of this study, a broad definition of the principle will be presented. In the second part, relevant treaty law concerning the principle will be provided. In the third part of this study, the extent and the content of the principle will be evaluated. In the last part, some reform proposals will be discussed and presented in lieu of a conclusion.

DEFINITION

First of all, it should be stated in advance that although the non-refoulement principle is considered as one of the cornerstones of the refugee law (UNHCR, 2007: 2; Allain, 2001: 533), there are still debates over the definition of the principle stemming from the disagreements over the scope and the extent (Pirjola, 2007: 644).

Yet, still it is mandatory to make a brief definition in order to evaluate the content of the principle further. In this context, in order to avoid disadvantages arising from inconsistencies between varying interpretations by different bodies/parties, it is useful to refer to the definition made by United Nations High Commissioner for Refugees (UNHCR). In UNHCR's note on non-refoulement principle, the principle is simply defined as the "protection against return to a country where a person has reason to fear persecution" (UNHCR, 1977).

Having noted this; it is possible to attach some additional elements to this broad definition. First of all, although it is not possible to see a precise definition of "fear of persecution"; in most cases, the treaty provisions set some boundaries for it. Although this subject will be held more detailed below; for the purpose of establishing a definition beforehand; it is possible to note that in most cases the fear of persecution is limited with the physical integrity and/or freedom of the individuals.[2]

2 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 22.Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art II(3), art II. American Convention on Human Rights "The Pact of San Jose, Costa Rica", 1969 Organization of American States Treaty Series No.35,9 ILM 673, art 22.

Similarly, it is also possible to state that in treaty law and doctrine fear of persecution is usually accompanied by some specific reasons.[3] Although these reasons differ between different international documents[4], with a more comprehensive approach and with respect to regulations in the 1951 Refugee Convention, it should be noted that the fear of persecution should stem from membership to a certain race, religion, nationality, membership of a particular group or political opinion. [5]

In the last analysis, with this more comprehensive approach, it is possible to define non-refoulement principle as,

> a concept which prohibits states from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, and membership of a particular social group or political opinion." (Lauterpacht & Bethlehem, 2003:89)

TREATY LAW

As it was mentioned above, the non-refoulement principle can be specified as one of the most important concepts of refugee law and therefore it is regulated in several international treaties/conventions (UNHCR, 1977). In this part of this study, these treaty provisions will be presented leaving a more detailed evaluation of the principle to following parts since these documents will be referred continuously in the following sections.

Among treaty law regulating the non-refoulement principle, 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention) should come first since with the words of UNHCR we can specify the 1951 Refugee Convention as the "key legal document in defining who is a refugee, their rights and the legal obligations of states" (UNHCR, 2016c).

The principle is regulated in article 33 of the 1951 Refugee Convention as;

Prohibition of expulsion or return ("refoulement")

3 İbid.

4 These differences between different texts will be held more detailed below.

5 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 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. (…)[6]

In addition to the 1951 Refugee Convention, at the universal level, the principle is also regulated in non-binding texts like the United Nations Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967. Although it contains different conditions especially for the issues related with a derogation, article 3 of the Declaration reads that;

> 1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution. (…)[7]

In addition to above-mentioned sources, it is also possible to note that the principle has been reiterated by UNHCR in its conclusions (UNHCR, 2016d). In these conclusions, it is possible to observe that UNHCR constantly reminds the importance of the principle and enlightens the fundamental points of it.

Similar to the global systems, the non-refoulement principle is also regulated in regional systems/treaties (Lauterpacht & Bethlehem, 2003: 90). For instance, Article II (3) of the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa reads;

> 3.No person shall be subjected by a Member State 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 for the reasons set out in Article I, paragraphs 1 and 2.[8]

6 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

7 UNGA, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII) art 3.

8 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 art II(3), art II.

Other than the treaties in refugee law realm, the non-refoulement principle is also regulated in the human rights documents (Tokuzlu, 2006: 2). In the context of human rights treaties, it is possible to observe that the principle is often held as a component of some specific rights and freedoms as right to live, prohibition on torture or cruel, inhuman and degrading treatment or punishment, prohibition of slavery and forced labor, freedom of thought, conscience and religion, prohibition on enforced disappearances (IOM, 2014).

For example, 1966 International Covenant on Civil and Political Rights (hereinafter the Covenant or ICCPR) (International Covenant on Civil and Political Rights, 1966) which can be defined as one of the most important human rights treaties (Joseph, Schultz & Castan, 2000: 3) imposes the responsibility to avoid conduct amounting to the refoulement. Although the principle is not regulated directly in the Covenant, UN Human Right Committee –the supervisory body of the Covenant– ruled that in order to comply with the article 7 of the Covenant which prohibits torture and cruel, inhuman and degrading treatment or punishment; states should ensure not exposing individuals to torture and cruel, inhuman and degrading treatment or punishment as a result of extradition, expulsion, and refoulement (Human Rights Committee, 1986, art 7; Lauterpacht & Bethlehem, 2003: 92).

In addition to the Covenant, the principle is also regulated in the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 3 of the CAT provides;

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[9]

In addition to global human rights regimes, it is also possible to see that the non-refoulement principle is also an important component of

9 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3.

regional human rights systems. In this context, it is possible to claim that the most prominent example is the European Council. Although the principle is not regulated directly in the European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR) has ruled many times that state parties should act accordingly with the non-refoulement principle in order to comply with certain regulations of the convention (Soering v the United Kingdom, 1989; Chahal v the United Kingdom, 1996).

In addition to the European system, the non-refoulement principle is also regulated in the American Convention on Human Rights (IACHR) and being enforced by Inter-American Courts on Human Rights. Article 22 (8) of the 1969 American Convention on Human Rights provides;

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.[10]

As a result, it is possible to conclude that the non-refoulement principle is regulated both in global and regional systems from the aspects of refugee law and human rights law. After presenting the most prominent examples from different treaties regulating the principle, it should be noted that most of the international community have ratified above-mentioned treaties/conventions and accordingly recognized the non-refoulement principle. For example, the Covenant has 170 parties and 74 signatories (treaties.un.org, 2018a), 1951 Refugee Convention has 145 parties and 19 Signatories (treaties.un.org, 2018b). Similar to the global regulations it is also possible to claim that most of the states have made a commitment about complying with the principle via regional systems like the European Council or Organization of American States.

Moreover, it should also be noted that the principle is being implemented by many different and effective international/national courts and bodies including UNHCR, UN Human Rights Committee, Committee against Torture, ECtHR and Inter-American Court of Human Rights.

10 American Convention on Human Rights "The Pact of San Jose, Costa Rica", 1969 Organization of American States Treaty Series No.35,9 ILM 673, art 22.

ANALYSIS OF THE PRINCIPLE

After the introduction and presenting relevant treaty law, in this part of the study parameters of the principle will be evaluated by holding them in different subsections. These evaluations will specifically focus on the vague points of the principle in order to emphasize the need for a reform.

More specifically, the personal and territorial scope of the principle will be evaluated in order to reveal the scope of protection that the principle provides. Furthermore, acts which breach the principle and exceptions of it will be presented for enlightening the conduct foreseen by the non-refoulement principle.

Who is protected?

Before dealing with details of the conduct principle foresees, it is useful to evaluate the personal scope of the principle and enlighten who is protected by the principle of non-refoulement. It is important to make this evaluation since states in some cases apply the non-refoulement principle accordingly with their political and economic goals and interpret the principle narrowly (Human Rights Watch, 2001). As a result of these applications, it is not rare to see that individuals are left without the protection of the principle to the territories they fear persecution.

It is possible to claim that although states sometimes interpret the principle narrowly as mentioned above and limit the application of the principle with refugees and asylum seekers, doctrine and case-law converges on a wider interpretation (Lauterpacht & Bethlehem, 2003: 115-120). According to this common interpretation, the application of the principle should contain all aliens and even internally displaces persons regardless of their statuses (IOM, 2014, s, 3).

These arguments in favor of a wider scope of protection are based on the relationship between refugee status and non-refoulement (Tokuzlu, 2006: 90). Unlike the refugee status, the non-refoulement principle does not grant an individual to stay in the target country per se. Therefore non-refoulement should be regarded as "the last and strongest barrier erected against the realization of the risk of persecution" (Tokuzlu, 2006: 93).

In more concrete terms, after the evaluation made by the target state, an individual may or may not be declared to have a refugee status. In case of a positive result, the successful applicant is given a refugee status and a residence permit attached to it (Tokuzlu, 2006: 91). However, the important point is that this mechanism does not function vice versa. In other words, not granting the refugee status to an individual does not mean that target state can send him/her to the territories where there is a risk of persecution (Tokuzlu, 2006: 91).

Therefore if the other conditions are met in order to benefit from the protection of the principle, target states may use other options like temporary protection or transferring the individual to safe third countries (Ciğer, 2016: 76; Tokuzlu, 2006, s, 93).

In this regard, it is possible to refer decisions of different courts/bodies confirming the above-mentioned argument. For example, Human Rights Committee concluded in its "Comment on Nature of the General Obligations on States Parties to the Covenant" that the rights protected by the ICCPR should be applied to all individuals regardless of their nationality and their status (like asylum seeker, refugee, migrant etc.) (Human Rights Committee, 2004).

A similar approach is also adopted by ECtHR and IACHR. In Ahmad v. Austria decision the ECtHR ruled that the applicant, who lost refugee status due to criminal conviction, should still be under the protection of the principle and accordingly the possible results of the expulsion should still be evaluated in the context of the principle by Austrian authorities (Ahmad v Austria, 1996: 42). Similarly IACHR ruled in Familia Pacheco Tineo v. Bolivia case that not only refugees and asylum seekers but also other aliens should be entitled to the protection of the principle when their life, integrity, freedom are in danger (Familia Pacheco Tineo v Bolivia, 2013: 135).

It is also possible to note that this approach is also adopted by the UNHCR since the Executive Committee affirms that the principle should be applied to all individuals who may be subjected to persecution irrespective of formal recognition as a refugee (UNHCR Executive Committee, 1977).

In this context, it is possible to conclude that every individual regardless of their status should benefit from the protection of the principle when they meet other requirements. In other words, the protection of the principle does not depend on the ability to gain or maintain the refugee status formally (IOM, 2014: 3).

Territorial Limits of the Responsibility

Another important parameter of the principle is the territorial limits of the responsibility of states. It is important to evaluate this issue since similar with the other aspects of the principle presented in this paper, it is not rare to observe that unwilling states exploit the term and interpret the territorial limits accordingly with their political and economic goals. In this part of the study, these limits will be evaluated and the responsibility of states for incidents happened outside of their borders will be emphasized.

Before evaluating the physical limits of the responsibility within the context of the principle, it should be noted in advance that as a general principle of international law[11], states are responsible for "the conduct in relation to persons 'subject to or within their jurisdiction'" (Lauterpacht & Bethlehem, 2003:110). Accordingly, with this general approach on the territorial limits it is possible to note that responsibility is not limited with physical borders of states -as some unwilling states claim- but with their area of jurisdiction for the non-refoulement principle too.

In line with the above-referred principle, it is also possible to encounter decisions relating to the non-refoulement principle supporting the above-presented argument. For example, in the Haitian Centre for Human Rights et al. v. the United States decision, concerning the interdiction of Haitians by US authorities on high seas, IACHR concluded that;

> The Commission has noted the petitioners' argument that by exposing the Haitian refugees to the genuine and foreseeable risk of death, the United States Government's policy of interdiction and repatriation clearly violated their right to life protected by Article I. The Commission has also noted

11 It is also possible to observe that this general approach also affected the codification processes for example see Article 2(1) of ICCPR, Article 1 of the ECHR and Article 1(1) of the ACHR.

> the international case law which provides that if a State party extradites a person within its jurisdiction in circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant (The Haitian Centre for Human Rights et al v United States, 1997:167)

The above-mentioned argument is also emphasized by the Human Rights Committee in its General Comment 31 as;

> This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation. (Human Rights Committee, 2004, § 10)

As a result, it is possible to conclude that states are responsible to comply with the non-refoulement principle in circumstances they exercise an effective control which is often larger than the physical borders of the state. In this respect, as it will be evaluated more detailed in the following sections, the conduct of states like interdiction on high seas and rejection at the border cannot be justified by stating that the acts are being conducted outside the borders of the country.

Prohibited conduct

After evaluating of the personal scope and limits of responsibility of states, in this part of this study, prohibited conduct in the context of the non-refoulement principle will be evaluated.

The Harm/Persecution/Threat

As it can be seen in the definition and treaty law, the non-refoulement principle aims to protect individuals from future harms they might face in the territories that states intent to expel them. Accordingly, in the context of the evaluation of the principle the interpretation of this future "harm/persecution" has the utmost importance especially for determining the boundaries of the application. In this context, bearing in mind that non-refoulement principle is regulated both in human rights and refugee law treaties; the term harm/persecution should be evaluated in two subsections from the points of view of human rights and refugee law.

From the perspective of human rights treaties, it is possible to observe that non-refoulement principle is often held as a component of some specific rights and freedoms such as freedom from torture and cruel, inhuman or degrading treatment or punishment, right to life, freedom from slavery and forced labour, right to a fair trial, freedom of expression, conscience and religion (IOM, 2014: 3). Concurrently, from the aspect of human rights treaties, "the harm" (from which the principle protects individuals) is violation of these rights and freedoms.

In the context of refugee law, it is possible to observe that although different inscriptions exist, the principle aims to protect individuals from the threats on their "life and freedom". Herein it should be stated that bearing the humanitarian character of the principle and convention in mind, the term "threat on life and freedom" should be "construed in a manner that favors the widest possible scope of protection consistent with its terms" (Lauterpacht & Bethlehem, 2003: 125). Accordingly, it would not be wrong to note that the term "harm" or "persecution" within the context of the non-refoulement principle should be interpreted in a manner that includes some certain human rights violations and other threats on individuals' life, physical integrity or liberty (Lauterpacht & Bethlehem, 2003: 125).

Lastly, it should also be stated that in some treaties and by some scholars the term harm within the meaning of the principle is defined by reference to some specific reasons. For example in the 1951 Refugee Convention – like many similar treaties- these reasons are listed as "on account of his race, religion, nationality, membership of a particular social group or political opinion". In order not to ramble, instead of evaluating these terms, I will settle with noting that these terms should also be interpreted broadly. In this context, it is even possible to observe that there are views in doctrine stating these references are not material and with respect to the developments in human rights realm, non-refoulement principle provides protection from threats stemming from reasons other than listed (Lauterpacht & Bethlehem, 2003: 126).

Element of Risk

Another important aspect of the principle is the determination of the risk that can trigger the principle. In this perspective, although the wordings differ in some of them it is possible to observe that various international documents explicitly or tacitly stipulate some certain degree of risk for the application of the non-refoulement principle.

If it is needed to evaluate the provision in the 1951 Refugee Convention firstly, it is possible to observe that although article 33 of the 1951 Refugee Convention does not include a specific term to indicate triggering risk level, if the article 33 is read together with article 1A(2)[12], it is possible to conclude that "well-founded fear of persecution"[13] is a requirement in applying article 33 of the 1951 Refugee Convention. In addition to the 1951 Refugee Convention, a similar approach is also showed by other international texts. For example, the element of risk is regulated with the phrase "danger of being violated …"[14] in 1969 American Convention on Human Rights, as "substantial grounds for believing that he would be in danger …"[15] in 1984 CAT. In addition to the above-mentioned provisions of treaty law, it is possible to observe that doctrine also converges on the necessity of a minimum risk level in order to trigger the principle (Lauterpacht & Bethlehem, 2003: 123-126).

Accordingly, with the information given above, it should be stated that although the wording of the provisions and responsible supervising bodies do not match up with each other, it is possible to observe that

12 Article 1A (2) reads that "As a result of events occurring before 1 January 1951 and owing to wellfounded 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 former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. …"

13 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

14 American Convention on Human Rights "The Pact of San Jose, Costa Rica", 1969 Organization of American States Treaty Series No.35,9 ILM 673, art 22.

15 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 3.

both case law and doctrine converged upon the minimum requirement of a well-founded risk of a persecution as a result of refoulement.

In this context, it is also possible to note that the minimum level of risk has been specified more detailed by evaluation of different cases by different international courts and bodies. In its A.R.J. v. Australia decision Human Rights Committee specified above-mentioned minimum level as "real risk" and concluded that in order to determine "real risk", the persecution should be a "necessary and foreseeable consequence" of the deportation (ARJ v Australia, 1997). In addition to the Human Rights Committee, Committee Against Torture also adopts a similar approach by using the same inscription in Mutombo v. Switzerland (Mutombo v Switzerland, 1994, 9.3). In this regard, it is possible to conclude that in order to determine a risk in the context of the principle the risk of persecution should be "foreseeable and necessary consequence" of the refoulement.

Moreover, for further evaluating the risk concept, it should be stated that in order to determine a breach of principle risk to confront persecution as a result of refoulement should go beyond mere theory or general thread stemming from the situation of the country or other ill treatment that does not amount to persecution. This argument is expressed by ECtHR in case of Vilvarajah and Others v The United Kingdom as;

> The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants (…) A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3. (Vilvarajah and Others v The United Kingdom, 1991: §111)

Accordingly, it should be concluded that risk of persecution should be in some serious level. Yet it should also be noted that restrictions related to the "risk" should not be interpreted in a way that burdens the migrant to prove "a high probability". This argument was expressed by Committee Against Torture in its General Comment 1 as;

> Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. (Committee Against Torture, 1998: §6).

After evaluating the minimum level of risk, it is also important to enlighten how courts/international bodies apply the risk test to cases. First of all, it should be said that similar to other criteria "the element of risk" is also evaluated by individual basis before courts/bodies. In other words, instead of settling with the general human rights situation courts utilize all the information they can reach (Vilvarajah and Others v The United Kingdom, 1991, §107) and evaluate the individuals' position and the probability of the persecution. In determining the existence of real risk within the meaning of principle, it is possible to observe that courts use "general comments on human right situations, reports of international and non-governmental organizations, medical and judicial history of the applicant" (IOM, 2014: 3).

"Expel, Return, Refouler, Extradite"

After evaluating the harm and risk factors, it is also important to reveal the concept of "refoulement" in order to determine which acts of states fall within the scope of prohibited conduct. In this perspective, firstly it is needed to note that states are authorized to decide about the presence and admittance of the aliens in their territory and granting asylum. As a natural result of this power, states are also authorized to reject aliens who demand admittance at the border, take appropriate precautions to prevent trespassing or remove the illegal residents. Yet as mentioned above, in some cases international law limits this authority of states for protecting individuals from persecution.

In this sense, firstly the terms "expel, return, refouler, extradite" will be evaluated since as it is presented above these acts are listed as prohibited conduct in different texts and accordingly analyzing these acts will enlighten the way to conclude about the scope of the principle.

If it is needed to approach these terms with a literal interpretation; the term "expel" can be defined as "in regard to trespass and other torts,

(...) to eject, to put out, to drive out and generally with an implication of the use of force" (Black, 1999), the term "extradite" can be defined as "(...) (to) surrender of a criminal by a foreign state to which he was fired for refugee from prosecution to the state which whose jurisdiction the crime was committed, upon the demand of the latter state, in order that he may be dealt with according to its laws" (Black, 1999), the term "return" should be understood as "'to go, come or send back to a place' and refers, by contrast to expulsion, to the place whence one came and whether one is going, rather than where one is." (Wouters, 2009: 50) and "the word "refouler" refers to the original French and Belgian legal concept of refoulement which must be interpreted as describing any (police) conduct which results in the summary removal of aliens or the refusal to allow them to enter the State's territory." (Wouters, 2009: 50).

In the light of this, it is possible to note that all acts forcing a refugee or an asylum seeker to go to/stay in the frontiers where he/she has a well-founded fear of persecution are prohibited. In other words, especially with reference to the term "refouler", the non-refoulement principle does not refer to the name of the precautions taken by states but to the results of these acts. In other words, taking the "in any manner whatsoever" phrase stated in the article 33 of the 1951 Refugee Convention into consideration (Tokuzlu, 2006: 14), it is possible to conclude that the principle refers to the result rather than the name and quality of the precaution taken by states (Tokuzlu, 2006: 14; Wouters, 2009: 113).

Yet it should also be stated that although above-mentioned terms can easily be qualified as prohibited acts it is possible to claim that there is still a grey area which is sometimes exploited by states. Most common acts in this context are "rejection at the border" and "interdiction on the high seas". Accordingly, it is useful to evaluate these acts in this part of this study.

In this context, firstly it should also be emphasized that in article 33 of the 1951 Refugee Convention and in other international instruments, list of prohibited conduct is usually accompanied by the phrase "in any manner whatsoever". With respect to this phrase, it should be noted that this in-

scription indicates that acts listed in documents are not exhaustive and any removal act leaving the individuals to the fear of persecution is prohibited (Tokuzlu, 2006: 16; Lauterpacht & Bethlehem, 2003: 112). Accordingly, it is possible to refer that there might be acts breaching the principle which are not listed explicitly in the treaty law.

Moreover, it is possible to claim that the aims and the spirit of the regulations are also important in interpreting the norms of international law (Lauterpacht & Bethlehem, 2003: 104). Taking the humanitarian spirit of the principle and the "good faith" obligation regulated in the Vienna Convention on Law of Treaties[16] (Tokuzlu, 2006: 17) the term "refouler" should be interpreted in an inclusive way. Accordingly it is possible to conclude that "refouler" contains all the acts that result with leaving people to territories in which they have a well-founded fear of persecution (Lauterpacht & Bethlehem, 2003: 113) including aforementioned "rejection at the border" and "interdiction on high seas" (Tokuzlu, 2006: 25; Ciğer, 2016: 79). In addition to that, it is possible to claim that interpreting "refouler" narrowly may end up with nullifying the non-refoulement principle. In other words, unwilling states' conduct in this narrow context constitutes *fraus legi facta*.

It is possible to observe that this argument is also adopted by different international courts/bodies. For example, UNHCR Executive Committee has stated in its conclusion that "Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement" (UNHCR Executive Committee, 1979) and emphasized that all acts of states leaving the individuals to face fear of persecution -regardless of its name- falls within the scope of the principle (Lauterpacht & Bethlehem, 2003: 116).

Similarly, UN General Assembly has condemned "all acts that pose a threat to the personal security and well-being of refugees and asylum-seek-

16 Vienna Convention on Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 331, art 31.

ers, such as refoulement" (UNGA, 2001). It is possible to conclude by evaluating this resolution that international community sees no difference between different precautions taken by states as soon as they result with posing a threat to the personal security of refugees and asylum seekers by leaving them in territories they may face persecution.

An important example of this argument within the context of extraterritorial refugee push back applications of states is Haitian Centre for Human Rights et al. v. the United States decision ruled by IACHR. In this sense, it is useful to place the argument of the respondent government firstly in order to reveal above-referred efforts of some states for interpreting the principle narrowly. In its response to the merits, the U.S. Government stated that,

> (…) The most substantial limitation that states have been willing to accept is the non-refoulement obligation of Article 33 of the Refugee Convention, which protects a refugee against return to a place of persecution. That is a limited obligation, only relevant with respect to refugees who have reached the territory of a contracting state, and does not apply to persons interdicted on the high seas. In addition, the obligation does not prevent a contracting state from sending a refugee to any place other than the country of persecution. (The Haitian Centre for Human Rights et al v the United States, 1997: §71)

It is useful to note that the petition of the US is a good example to the short-cuts unwilling states find. In this context, the evaluation of the U.S. argument by the court is important in revealing the content of prohibited acts. In its evaluation, the court ruled that,

> 156. (…) The Supreme Court of the United States, in the case of Sale, Acting Commissioner, Immigration and Naturalization Service, Et.. Al. v. Haitian Centers Council, INC., Et. Al., No. 92-344, decided June 21, 1993, construed this provision as not being applicable in a situation where a person is returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle of non-refoulement in Article 33 did not apply to the Haitians interdicted on the high seas and not in the United States' territory.
>
> 157. The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations. (The Haitian Centre for Human Rights et al v the United States, 1997: §156-157).

In the context of the evaluation of the court, it is important to note that along with the extraterritoriality this evaluation has importance also in determining the scope of prohibited conduct. Accordingly, with the argument of the court, it is possible to conclude that not only acts removing refugees/asylum seekers from inside to outside but also acts pushing them back falls within the context of the principle.

However, it should also be stated that the non-refoulement principle cannot be interpreted as a mechanism creating a right to asylum automatically (Lauterpacht & Bethlehem, 2003: 112). In this context, it should be concluded states can take appropriate precautions in the context of their sovereignty that does not amount to refoulement. For example, transferring asylum seekers to safe third countries cannot be qualified as a contradiction to the principle.

Accordingly, it is possible to conclude that while respecting the sovereignty of the states, the non-refoulement principle prohibits actions giving rise to confront a refugee/asylum seeker with the fear of persecution. In that vein, the principle should be interpreted in the light of above-mentioned information in order to preserve the gains of the principle, protect individuals from atrocities and prevent states from conducting *fraus legi facta*.

Exceptions

Another important and controversial aspect of the principle is the authority of states to make derogations especially with the communal reasons like security and economic situation of the country. In this context, firstly it should be stated that in the above-mentioned treaties regulating the principle, there exists exception clauses authorizing states to avoid the conduct principle requires in some cases. In addition to treaty law, in practice, it is not rare to observe states sometimes declare above-mentioned reasons as an excuse for their actions breaching the principle (Chahal v the United Kingdom, 1996: §76). Accordingly, determining the exceptions of the principle has the utmost importance in order to prevent unwilling states from avoiding their responsibilities under international law with above-mentioned rationale.

As mentioned above, it is possible to see that especially in the realm of refugee law, treaties sometimes foresee escape clauses when regulating the non-refoulement principle. For example, article 33 1951 Refugee Convention reads that;

> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[17]

Accordingly, at first sight, it is possible to claim that the protection principle provides is not absolute and states in some cases expel/return/refouler individuals to the territories they fear persecution. Yet as mentioned above, in addition to regulations in the refugee law realm, the principle also has been integrated with human rights as a result of developments in human rights. In the light of evaluations made in the previous sections, it is possible to note again that the principle is an inseparable component of some fundamental rights and freedoms such as freedom from torture and inhumane and degrading treatment or punishment (Hamdan, 2016: 31).

Accordingly, before a quick conclusion about this subject it should be stated that in evaluating the exceptions, the provisions of human rights treaties should also be taken into consideration along with the above-referred escape provisions.

In order to reveal the approach of human rights, it is possible to refer decisions of different international courts and treaty bodies. For example in its landmark Chahal v. United Kingdom decision, in its evaluation about the argument of the United Kingdom stating that the deportation of Mr. Chahal is an obligation for the anti-terrorism campaign (Chahal v the United Kingdom, 1996: §76), ECtHR concluded that;

> Article 3 (…) enshrines one of the most fundamental values of democratic society (…). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment,

17 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

> irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation. (Chahal v the United Kingdom, 1996: §79)

A similar approach is also adopted by the Human Rights Committee in its General Comment 20. It is concluded by the Human Rights Committee that;

> 3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. (…)
>
> 9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end. (Human Rights Committee, 1994: art 7)

Accordingly with the information presented above and with respect to the approach of human rights and customary international law, it is possible to conclude that although some certain exception clauses exist in international documents regulating the principle; courts/treaty bodies and doctrine converged on the non-derogable character of the principle when some certain rights of the individuals are at stake.

CONCLUSION AND REFORM PROPOSALS

Conclusions

In this study; the key importance of the non-refoulement principle is emphasized and the main components of the principle have been evaluated in the light of treaty law, case law and doctrine. During these evaluations, it is pointed out that despite its importance for the refugee law; due to political/economic concerns and deficiencies in defining the parameters of the principle, the practice of the principle by different states and international organizations differ on a large scale (Tokuzlu, 2006: 15). Especially, when combined with the restrictive policies towards asylum-seekers (Rodger, 2011: 100-101), these vague points of the principle increase the risk for asylum-seekers.

In this context, it should be emphasized that especially with the changing characteristics of conflicts/migration and restrictive approach of states (Tokuzlu, 2006:1); the non-refoulement principle is even more important today. Yet in spite of that importance, it is possible to claim that both international treaties and efforts of international court/bodies' do not suffice for the desired protection of refugees within the meaning of non-refoulement especially because of ambiguity at some points of the principle (Tokuzlu, 2006: 16). Moreover, it is also possible to claim that as communication and transportation means and characteristics of conflicts change, some additional blurred parts are added to above- mentioned ambiguity.

In the context of these blurred points; first of all, it was noted that personal scope of the principle is subject to different interpretations and restrictive approaches taken by some states do not comply with the requirements of the principle. More specifically; as it was noted, in some cases, states tend to limit the scope of protection only with those officially given the status of refugee which does not comply with the spirit and requirements of the principle (Tokuzlu, 2006: 91).

Similar with the case for personal scope, it is possible to encounter restrictive interpretations in terms of territorial scope of the principle. More specifically, some states carry out extraterritorial precautions to repel the refugees and asylum-seekers for not shouldering the responsibility not to "refouler" them. It is noted above that such an approach does not comply with the requirements of the principle.

As a result of the above-referred tendencies; it is also not rare to see that states interpret the terms harm/persecution, risk and "refouler" to relieve themselves from the requirements of the principle. As noted above, accordingly with the spirit of the principle, these terms should be interpreted with good faith in a manner to allow a wider protection.

Lastly, it is asserted above that some states bring exceptions forward for legitimizing their activities breaching the principle. In this context, it is pointed above that although 1951 Refugee Convention and some other texts allow for exceptions in order to public order and public safety; states are obliged to consider non-derogable character of some certain rights and freedoms.

Reform Proposals

In accordance with the above-noted explanations, it is possible to assert that serious steps should be taken in order to clarify the gaps causing atrocities and allowing conduct with bad faith. In other words, in order to provide a consistent and stable protection for the individuals and prevent atrocities, a consistent international approach to the analyzing and implementation of the principle is needed (D'angelo, 2009: 280).

In the context of this approach, it is possible to claim there are various options. Evaluating the advantages and disadvantages of these methods fall out of the scope of this study, yet it is still beneficial to list them. One of these options is to adopt a new convention to replace the 1951 Refugee Convention in order to create a more efficient refugee system. Similarly, adopting an additional protocol regarding the obligations of states in implementing the principle would be another course of action for alleviating the above-referred vague parameters (Hathaway, 2005: 362). Another option of the international community may be adopting resolutions for clarifying the grey areas.

No matter which method is preferred, it is a fact that the current provision of the 1951 Refugee Convention should be re-formulated (Rodger, 2001: 87). In the context of this re-formulation, above noted parameters should be clarified in a manner to establish a sufficient basis for the implementation of the principle. In this context, it can be argued that the experience gained with the application of the principle may ease such an amendment.

In this perspective, in order to clarify the debates about the personal scope of the principle, the re-formulated provision should include precise limits regarding these subject. In this context, it should be explicitly noted that the protection of the principle is not related with the "legal status" of the individuals and therefore it does not depend on the ability to gain or maintain the refugee status formally. (IOM, 2014: 3) Similarly, the territorial scope of the protection should be explicitly indicated in a manner to cover the activities of the states "within their jurisdiction" (Rodger, 2001: 89).

In that vein, although it is not practically possible to cover all the probable situations in the text; key parameters like harm/persecution, risk and "refoulement" should be defined precisely in accordance with the experience gained so far with the implementation of the principle.

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