Yanina Grabova
National University «Odesa Law Academy», Ukraine

CONCEPT OF NON-REFOULEMENT AS A PRINCIPLE OF ASYLUM

The article is devoted to non-refoulement as a principle of international regime for asylum-seekers protection. In the article, the author notes that the principle of non−refoulement is a cornerstone of the right for asylum and of international refugee protection regime. The article outlines the origins of the concept and then considers the views expressed by various states, particularly in the UNHCR Executive Committee and in the decisions of European Court of Human Rights.

The author analyzes establishment of the principle of non-refoulement in Ukrainian legislation and practice. During the preparation of ths article the normative acts and theoretical base were taken into consideration. The author concluded that the principle of non-refoulement is a necessary condition for implementation of the human right for asylum.

Key words: non-refoulement, asylum-seekers, right for asylum, refugee, international protection, Ukrainian legislation, decisions of European Court of Human Rights.

Introduction

The contemporary world faces the refugee and migration crisis, which is claimed to be the largest since World War II. The situation becomes more complicated from day to day. Exactly during the crisis periods the violations in many spheres including Human rights become obvious and numerous. Millions of people today are forced to flee their homes as a result of conflict, systemic discrimination, persecution, and other violations of their human rights.

The principle of non-refoulement is the cornerstone of asylum and of international refugee protection regime. Following from the right to seek and to obtain in other countries asylum from persecution, as set forth in Article 14 of the UDHR[1], this principle reflects commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. This principle presumes that person cannot be returned to the place, where his life or freedoms can be threatened.

Analysis of the latest publications. The rights of asylum seekers is a topical subject of modern jurisprudence. Thus, the subject of studies conducted by Ukrainian lawyers and practices were different aspects of the issue. In particular, theoretical and practical aspects of a legal status of refugees and asylum seekers were investigated by M. Baymuratov, L. Bila-Tiunova, O. Goncharenko, A. Kopylenko, S. Czechowicz, V. Shapoval, M. Shulga.

The aim of the article is to analyze the principle of non-refoulement as one of major principles of international protection regime and to create some proposals to improve Ukrainian legislation and legal practice in the field of asylum.

Up to the 1930s this principle did not even exist in international law[2]. In this context the author supposes that in order to understand the principle it will be useful to look at the circumstances and reasons surrounding its development. During the first half of the 20th century the idea that it was fundamentally wrong to return refugees to places where they would clearly be in danger was mentioned occasionally by states in agreements or statutes, or was evident in the practice of some states. Although by 1905 it had been enshrined in the UK statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later that the idea of non-refoulement of such people became widely accepted[3]. It was first expressed at international law in the 1933 Convention relating to the Status of Refugees which, however, was ratified by very few states[4]. The massive refugee flows produced by the

[1] *Universal Declaration of Human Rights* (10 December 1948 217 A (III) UN General Assembly), *Refworld.* <http://www.refworld.org/docid/3ae6b3712c.html> (2016, July, 30).

[2] Newmark, Robert L. (1993). Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs. *Washington University Law Review*, 833-870

[3] Goodwin-Gill, Guy, McAdam, Jane (2007). *The Refugee in International Law.* Oxford: OUP Oxford; 3 edition, 118.

[4] Goodwin-Gill, Guy, McAdam, Jane (2007). *The Refugee in International Law.* Oxford: OUP Oxford; 3 edition, 119.

ructions of the World War II provided an impetus for a thorough examination of the rules relating to refugees. Prior to this time states had been very aware of the extent to which consent to rules, especially international rules, relating to refugees, would impact on their sovereign right to determine who was allowed to reside within their boundaries[1]. Although many appeared to have accepted that there was a moral duty to accept refugees, and not return them, this was done largely on an ad hoc basis. However, in the first few years of its creation, the United Nations showed its concern with the refugee issue. In 1946 the General Assembly passed a resolution stating that refugees should not be returned when they had 'valid objections'. This concern, prompted largely by the huge number of refugees in Europe following the war, eventually led to the drafting of the United Nations Convention Relating to the Status of Refugees, which was signed in 1951[2].

The principle is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party under the 1967 Protocol. Article 33(1) of the 1951 Convention provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion"[3]. This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. The words "where his life or freedom would be threatened" have been the subject of some discussion. It appears from the *travauxpréparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1 A (2). This different wording was introduced for another reason namely to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution[4].

The 1951 Convention was only the first example of non-refoulement being enshrined in international law. Subsequently numerous treaties and conventions, dealing either directly or indirectly with the rights of refugees, have repeated the principle. In some cases it was a direct transfer of the wording of the Convention, while in others the principle was broadened somewhat. As the issues of human rights and regional organization continue to gain strength in international discussion, these instruments will become increasingly important. They are also extremely relevant as they illustrate various options open to both refugees and states when dealing with problems of non-refoulement. Also at the universal level, it should mentioned that the United Nations Declaration on Territorial Asylum was unanimously adopted by the General Assembly in 1967. In article 3(1) of this Declaration it is stated that: "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"[5]. It is necessary to stress the point that in each state there is a specific procedure of granting the refugee status. But the formal recognition of refugee status is not a precondition for protection against refoulement to apply[6]. Asylum-seekers may be refugees, it is a wide spread practice of numerous states that the person, who is asking for asylum, is not returned until the final determination of his status.

UNHCR believes that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, satisfies the criteria, which are prescribed to regard the norm of international law as a customary one (UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law,

[1] Newmark, Robert L. (1993). Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs. *Washington University Law Review*, 837.

[2] Rodger, J. (2001). *Defining the parameters of the non-refoulement principle.* Wellington: LLM research paper International Law (LAWS 509), 4-5.

[3] *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954). <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> (2016, July, 30).

[4] Note on Non-Refoulement, Executive Committee of the high Commissioner's Programme (1977). *UNHCR.* <http://www.unhcr.org/3ae68ccd10.html>.

[5] *Declaration on Territorial Asylum* (adopted 14 December 1967), A/RES/2312(XXII). <http://www.refworld.org/docid/3b00f05a2c.html> (2016 July 30)

[6] UNHCR (2005). *Refugee Status Determination Identifying who is a refugee Self-study module* 2. Geneva, 13.

satisfies these criteria and constitutes a rule of customary international law)[1]. So there is a credible basis to view the principle of non-refoulement as a customary norm of international law, which is one of the sources of International law under Artciel 38 1(b) of the ICJ Statute.

Individuals, who can be protected under the principle of non-refoulement are refugees and asylum seekers, because they can become refugees after an official confirmation of their legal status. Article 1A(2) provides the characteristics, which are necessary to be present if the person would like to obtain the refugee status: "…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". It is necessary to conclude that the Convention and other subsidiary documents (for instance, works of UNHCR) stay quite silent and do not provide the precise definitions and requirements of the most important criteria which is well-founded fear of being persecuted. Such approach lets the states to develop domestic legislation in the refugee protection sphere and at the same time in particular cases can cause problems, when the state standards are too high for applicants.

In order to satisfy the needs of refugee, the Convention presumes that all state parties should assist him [her] in exercising the basic human rights: rights are those, relating to movable and immovable property, respect of the protection of industrial property, establishment of non-political and non-profit-making associations and trade unions, judicial protection including access to courts, rights connected with labor relations, social provision and others. However there is a difference in the status of conventional and prima facia refugee. The last are believed to come back after the fear of persecution that made them to leave the state will come to the end. That is why states do not provide so much assistance to them in exercising their rights. Especially it concerns the right to naturalization.

It should be noted that the provisions of the Convention are general in nature, and therefore the decision of the ECHR are extremely important in terms of specifying the rules of the Convention.

The first case, which is analyzed is the case of HirsiJamaa and Others v Italy. The Applicants were part of a group of nearly two hundred individuals who left Libya for Italy in 2009. They were aboard three vessels. On 6 May 2009, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The Applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to provide a due screening. On arrival in the Port of Tripoli they were handed over to the Libyan authorities. Applicants claim that they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. Two of the Applicants died in unknown circumstances after the abovementioned events. Fourteen of the Applicants were granted refugee status by the Office of UNHCR in Tripoli between June and October 2009. Regarding the issue of non-refoulement the Grand Chamber noted that the obligations of States arising out of international refugee law, including the "principle of non-refoulement" must be performed. Furthermore, the Court considered that the shared situation of the Applicants and many other clandestine migrants in Libya did not make the alleged risk any less individual and concluded that by transferring the Applicants to Libya, the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the Convention. The Court also concluded that when the Applicants were transferred to Libya, the Italian authorities had or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their respective countries of origin[2]. This case is an example of direct breach of Article of 33 (1) of the Refugee Convention by Italy. The Courts decision obliges the states to perform their duties, which arise in connection with the fact that they are parties to the Convention.

[1] UN High Commissioner for Refugees (UNHCR) *The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93.* <http://www.unhcr.org/home/RSDLEGAL/437b6db64.html>

[2] *HirsiJamaa and Others v Italy* No. 27765/09 (Judgment (Grand Chamber) 23 February 2012.

The next case which is analyzed is the case of N. v. Sweden. On 13 August 2004 the applicant and her husband, X, arrived in Sweden and on 16 August 2004 they applied to the Migration Board (Migrationsverket) for asylum and residence permits. The applicant was interviewed on 4 October 2004 and 8 March 2005. She had no identity papers and could not prove her identity. She stated that she was born and grew up in Kabul, where her parents, one of her two brothers, her aunt and her uncle resided. Her other brother had left Afghanistan a long time ago. She also had an uncle in Mazar-e-Sharif. The applicant had attended school for twelve years in Kabul and had studied at the university. The applicant and her spouse also submitted that they had been persecuted since 1996 because X had been a politically active member of the communist party, leading to his arrest on two occasions. Following his second release they had moved to Kabul, but they alleged that some fundamentalists had come looking for X there as well with the intention of killing him. The applicant submitted that she also had shown her political stance by acting as a teacher for women, which was not accepted by parts of the leading elite in Kabul. Therefore, they had fled the country. When they had left their home, they had stayed with her uncle in Mazar-e-Sharif and the latter had helped them finance their journey to Sweden by paying a smuggler 24,000 US Dollars. Lastly, X invoked his poor mental health, stating that he was suffering from anxiety, sleeplessness and aggressive behavior. On 29 March 2005 the Migration Board rejected the couple's application. It first noted that the security situation in Afghanistan varied between different parts of the country but that it was better in Kabul than in other parts of the country. The Board then considered that X had given vague information about his activities and had failed to demonstrate that he had held a prominent or leading position within the communist party. Hence, it questioned the claim that his life would be endangered because of his membership in that party. The Board therefore found that neither X nor the applicant had shown that they had been persecuted in Afghanistan or that they would risk persecution upon return. Thus, even having regard to X's poor mental health, the Board found that there were no grounds on which to grant them right to remain in Sweden. The appeal, which was made by the Applicant was also rejected by the board.

The matter why this case possesses a particular value is that the Court in its judgment has established an important principle: “The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof” [1]. This phrase let a lot of people to appeal for their refugee status despite particular doubts of the benches.

And finally the author would like to provide the case, in which the ECtHR stated that “owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State is not able to obviate the risk by providing appropriate protection”[2].The case concerned the following facts. On 14 May 1989 the applicant, who was travelling from Colombia to Italy, was arrested while in transit at Roissy Airport in possession of a package containing 580 grammes of cocaine. According to the record of the interviews that took place on 16 May 1989, whilst he was in police custody H.L.R. supplied information on the instigators of the traffic and on H.B., by whom he had been recruited. That information subsequently enabled Interpol to identify H.B., who appeared in their records under two different names and had been arrested on 21 May 1989 at Frankfurt-on-Main Airport in possession of 552 grams of cocaine. H.B. was convicted and on 23 January 1990 was sentenced by the Frankfurt-on-Main Regional Court to two years and eight months' imprisonment; he was deported to Colombia pursuant to an order issued on 12 April 1990 by the Chief Administrative Officer (Landrat) of the district (Landkreis) of Darmstadt-Dieking. In the meantime, on 25 September 1989, the Bobigny Criminal Court had convicted the applicant of an offence under the misuse of drugs legislation and sentenced him to five years' imprisonment. It also made an order permanently excluding him from French territory. On 24 July 1992 the Paris Court of Appeal upheld both that judgment and the judgment of 22 June 1992 of the same court whereby his application to have the permanent exclusion order cancelled was dismissed. On 31 July 1992 the applicant, arguing in particular that he had assisted the judicial authorities, petitioned the President of the Republic to have the exclusion order rescinded. His petition was dismissed on 20 September 1994. On 18 December 1992 the Bobigny public prosecutor, who had initially instructed the Prefect of the Dordogne département to enforce the exclusion order on 30 December, the date of the applicant's release, ordered that his deportation be

[1] *N. v. Sweden* no. 23505/09 (Judgment (Third Section), 20 July 2010.
[2] *H. L. R. v. France* No. 11/1996/630/813 (Judgment (Grand Chamber) 22 April 1997

stayed. After serving his sentence, the applicant was given accommodation, at the home of one of his prison visitors. This decision showed that a threat to life and freedoms of persons, which form the persecution, can come not only from the governmental institutions. And this thesis of the Court influenced the views of states on content of persecution.

Conclusions. From this we can conclude about the effectiveness of the principle of not expelling as the main content of asylum and its special role as part of human rights protection.

At this stage national refugee-related legislation in Ukraine is relatively precise and transparent. In particular, the Law 'On Refugees and Persons in Need of Complementary or Temporary Protection'[1] is a directly applicable law, since all the procedural issues are precisely and consistently regulated in it, there are practically no provisions that are optional as to their content.

However, cases of non-compliance with this principle, Ukraine still occur. The main admonitions of the European Court of Human Rights to Ukraine reduced to a breach of the principle of non-refoulement by ignoring the real threat in the countries they conducted expulsion and inconsistent regulations (like laws and regulations) that govern the implementation of extradition of our state and law, regulating the status of asylum seekers.

The problem remains as regards adjustment of provisions of other laws with provisions of the new Law. In addition, in the course of almost ten years since the moment of Ukraine's accession to the Convention Relating to the Status of Refugees, the problem of compliance of Ukraine's national legislation with its provisions has not been solved.

The maximum approximation of national legislation in the area of refugees and asylum with the respective legislation of the European Union, in the author's opinion, is complicated because of differences in the contents of the notion of asylum. In particular, provisions of the Constitution of Ukraine on asylum have been borrowed from the USSR legislation on political emigrants, which is not adjusted to the notion of asylum generally accepted in the international law.

In the author's opinion, for full harmonization of Ukraine's legislation in the area of asylum with EU legislation, amendments have to be introduced to the Constitution of Ukraine including, in particular, exemptions of provisions on granting asylum by the President.

References:

1. *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954). <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> (2016, July, 30) [in English].
2. Declaration on Territorial Asylum (adopted 14 December 1967), A/RES/2312(XXII). <http://www.refworld.org/docid/3b00f05a2c.html> (2016 July 30) [in English].
3. Goodwin-Gill, Guy, McAdam, Jane (2007). *The Refugee in International Law*. Oxford: OUP Oxford; 3 edition [in English].
4. H. *L. R. v. France* No. 11/1996/630/813 (Judgment (Grand Chamber) 22 April 1997 [in English].
5. *HirsiJamaa and Others v Italy* No. 27765/09 (Judgment (Grand Chamber) 23 February 2012 [in English].
6. *N. v. Sweden* no. 23505/09 (Judgment (Third Section), 20 July 2010 [in English].
7. Newmark, Robert L. (1993). *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*. Washington University Law Review, 833-870 [in English].
8. Note on Non-Refoulement, Executive Committee of the high Commissioner's Programme (1977). *UNHCR*. <http://www.unhcr.org/3ae68ccd10.html> [in English].
9. Rodger, J. (2001). *Defining the parameters of the non-refoulement principle*. Wellington: LLM research paper International Law (LAWS 509), 4-5 [in English].
10. UN High Commissioner for Refugees (UNHCR) The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93. <http://www.unhcr.org/home/RSDLEGAL/437b6db64.html> [in English].
11. UNHCR (2005). *Refugee Status Determination Identifying who is a refugee Self-study module 2.* Geneva, 13 [in English].
12. Universal Declaration of Human Rights (10 December 1948 217 A (III) UN General Assembly). *Refworld*. <http://www.refworld.org/docid/3ae6b3712c.html> (2016, July, 30) [in English].
13. *Pro bizhentsiv ta osib, iaki potrebuiut' dodatkovoho abo tymchasovoho zakhystu 2011* [On refugees and persons in need of additional or temporary protection 2011] (Verkhovna Rada Ukrainy) [Verkhovna Rada of Ukraine]. Official website of the Verkhovna Rada of Ukraine. <http://zakon3.rada.gov.ua/laws/show/3671-17> (2016, July, 30) [in Ukrainian].

[1] *Про біженців та осіб, які потребують додаткового або тимчасового захисту 2011* (Верховна Рада України). *Офіційний сайт Верховної Ради України.* <http://zakon3.rada.gov.ua/laws/show/3671-17> *(*2016, July, 30)