The Principle of Non-refoulement and the Right of Asylum-seekers to enter State Territory

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A worldwide trend of reduction in the number of asylum applications is observed. According to the United Kingdom Home Office asylum statistics, the number of asylum applications in the UK for 2002 was 84,130. In 2003 this number was greatly reduced to 49,405, in 2004, 33,960, in 2005, 25,710, in 2006, 23,610, and in 2007, 23,430 asylum applications were submitted in the UK. The total number of asylum applications in the European Union has experienced a similar decrease. In 2006, some 192,000 asylum applications were lodged in all 27 member states. This number, compared with over 670,000 applications in 1992, marks a significant decrease in EU asylum applications. Withstanding the year 2007, when a limited worldwide increase in the asylum applications was observed, similar trends of decline are recorded in North America, New Zealand, and Australia. Despite the worldwide decline in asylum applications, the world has not become safer. The number of people who flee their homes due to conflicts and fear for their lives has not diminished. Instead, the reason for the “decrease” in asylum-seeker applications is that states prevent access to their territory, in this way exposing refugees to refoulement.

In international law, there is a principle that is of paramount importance—the principle of non-refoulement (prohibition to return). The principle is applicable to any refugee, asylum-seeker or an alien who needs some form of shelter from the state whose control he/she is under. The non-refoulement principle means that states cannot return aliens to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk.

In view of the absolute prohibition under international law of refoulement, the international community must address whether asylum-seekers are entitled to enter the territory of the state where they seek asylum and whether states are under an obligation to provide asylum-seekers access to their territory. The present paper argues that there cannot be protection from refoulement without access to state territory. In order to uphold the principle of non-refoulement, and therefore state’s obligations under international law, a state
has to conduct a fair and effective refugee status determination procedure, which is possible only within that state’s territory. The fact that so many people try to reach the territories of developed countries and claim asylum should not be used by states as a justification for undermining the refugee protection regime. States have undertaken international obligations regarding refugees and any qualification or implied limitation of these obligations is to the detriment of human rights.

The first part of the paper generally presents states’ obligations concerning asylum-seekers. The second part presents views in asylum literature on the relation between non-refoulement and access to state territory. It contains the core arguments in support of the claim that there cannot be an absolute prohibition of refoulement without access to state territory. The third part is devoted to three groups of asylum-seekers (asylum-seekers intercepted in the high seas, rescued asylum-seekers and stowaway asylum-seekers), which are all victims of the state practice of blocking access to territory. These three groups of asylum-seekers have been chosen for the purposes of this paper because they constitute highly vulnerable groups.

II. STATES’ OBLIGATIONS CONCERNING ASYLUM-SEEKERS

States are entitled to control immigration, a practice recognized to be within the reserved domain of their sovereignty. Immigration control presupposes two prerogatives—denying or blocking access to state territory, and ensuring the return of those aliens who have succeeded in entering. At the same time, immigration control as an expression of state sovereignty is subject to the principles and norms of international human rights law. More specifically, the prerogatives of states to control entrance, residence, and deportation of aliens are subject to certain human rights obligations. However, immigration control and human rights protection come into conflict when asylum-seekers flee their countries and try to find safe shelter.

Potential countries of asylum are often unwilling to offer protection. In fact, they actually try to prevent asylum-seekers from reaching their territory as well as return those who have managed to enter. When states implement such security mechanisms, no distinction between refugees and other immigrants is made. Refugees are not illegal immigrants; they are people whose human rights have been violated. Their countries of origin are unwilling or unable to offer them protection and, accordingly, they are in need of international protection. However, the procedure for determining immigrants’
status and for identifying the real refugees is expensive and time-consuming. Consequently, states prefer not to take the responsibility of offering protection.

Article 14 of the Universal Declaration of Human Rights recognizes the right “to seek and to enjoy in other countries asylum from persecution.” “Asylum” is protection offered by states to aliens who flee persecution and human rights violations. Accordingly, asylum-seekers are persons whose applications for asylum are under review by the state authorities and who might or might not receive protection. When they do not receive asylum or refugee status and when they have no other legal ground to stay in the country, they must leave. Asylum-seekers are potential refugees, and they receive the status of “refugee” if they prove that they have a well-founded fear “of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”

The most important international human rights instruments, which prohibit exposure to refoulement, are the Geneva Convention relating to the Status of Refugees, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights. Each imposes a prohibition on refoulement. Article 33 of the Refugee Convention stipulates that

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.

Article 3 of CAT states that “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.” The European Court of Human Rights has interpreted Article 3 (Prohibition for torture) of the European Convention in such a way as to include a prohibition on refoulement.

The principle of non-refoulement applies to asylum-seekers who are still under the refugee status determination procedure; to individuals who cannot be returned since there is a risk that they will be subjected to torture or to inhumane or degrading treatment or punishment; and to individuals who have

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been recognized as refugees within the meaning of Article 1 of the Refugee Convention. Any act of removal is prohibited, which means that the formal description of the act—deportation, expulsion, extradition, return—is not material.\footnote{13}

III. STATES’ OBLIGATION TO GRANT ACCESS TO THEIR TERRITORY

Article 13 of the Universal Declaration of Human Rights stipulates that “Everyone has the right to freedom of movement and residence within the borders of each state” and “Everyone has the right to leave any country, including his own, and to return to his country.” Accordingly, asylum-seekers have the right to leave their countries, but they are not entitled to enter other countries. While freedom of movement within the borders of each state is recognized, freedom of movement across international borders is a controversial issue.

There is no explicit international norm that obliges states to grant asylum and consequently to accept refugees into their territories. Goodwin Gill finds that state practice permits only one conclusion: the individual has no right to be granted asylum.\footnote{14} He further explains that there is no necessary connection between non-refoulement and admission or asylum; the discretion to grant asylum and the obligation to abide by non-refoulement remain divided.\footnote{15} María-Teresa Gil Bazo affirms that there is no international recognition of the right to be granted asylum of universal scope.\footnote{16} Similarly, the non-refoulement principle provided for in Article 33(1) of the Refugee Convention does not give individuals the right to receive asylum in a particular state.\footnote{17} The prohibition for refoulement therefore does not negate the sovereign right of states to regulate the entrance of aliens in their territory.\footnote{18} Gill states that non-refoulement is not so much about admission to a state as it is about not returning refugees to where their lives or freedom may be endangered.\footnote{19}

\footnote{14} Guy Goodwin Gill, The Refugee In International Law 202 (Clarendon, 1996).
\footnote{15} Ibid.
\footnote{16} María-Teresa Gil Bazo, New issues in Refugee Research, UNHCR Research paper No.136, Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum under EU Law, at 7, available at http://www.unhcr.org/research/: “It’s worth noting that despite the lack of an international recognition of the right to be granted asylum of universal scope, the entry into force of the Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted], around 100 of the 146 states parties to the Geneva Convention and/or its Protocol are now bound by an obligation under international law (of regional scope) to grant asylum.”
\footnote{17} Paul Weis, The Refugee Convention, 1951: The Travaux Preparatoires Analyzed With A Commentary By Dr. Paul Weis 342 (Cambridge University Press, 1995).
\footnote{19} Guy Goodwin Gill, The Refugee In International Law 132 (Clarendon, 1996).
At the same time, it has been recognized that non-refoulement to a certain degree limits state sovereignty, because the prohibition in Article 33(1) could in certain situations amount to a de facto obligation to accept asylum-seekers in a state’s territory if the denial of acceptance “in any manner whatsoever” results in exposure to risk. James Hathaway finds that acceptance in a state’s territory could be the only way the consequences from risk exposure can be avoided. Alice Edwards has suggested that, read together, Articles 1 and 33 of the Refugee Convention place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Further, Edwards points out that access to asylum procedures is an implied right under the 1951 Convention, without which obligations of non-refoulement, including rejection at the frontier, could be infringed.

Non-refoulement cannot be guaranteed without granting asylum-seekers access to state territory. Denial of access to state territory equates to a denial of fair refugee status determination procedure. If a refugee status determination procedure is not conducted, it becomes impossible to identify those asylum-seekers who face risk of persecution if denied protection. Since non-refoulement prevents violations of human rights, which are recognized to hold such significant value (like the prohibition of torture) that states should invest special efforts in order to achieve some degree of certainty that these rights are not breached. Along these lines of reasoning, conducting refugee status determination procedures is of paramount importance. The procedure has the objective of determining who is a refugee and who is not a refugee, and therefore what rights each is entitled to. In order for states to meet their obligations stipulated in the Refugee Convention, including the prohibition of refoulement, they have to assess on an individual basis the story of each asylum-seeker.

Since a fair and effective determination procedure includes the right to appeal a negative decision in front of national courts, the procedure can be fair and effective only if it is conducted on state territory. The availability of appeal precludes carrying out procedures on states’ borders or immediately before them in international zones.

Another pertinent issue, except the right to appeal, would be whether asylum-seekers have access to legal assistance. Without legal help, asylum-seekers are at the mercy of state immigration officials, which is a premise for arbitrariness. Further, although the duty to ascertain and evaluate all relevant facts is shared between the applicant and the examiner, generally the burden of proof lies on the individual submitting a claim. Demonstrating that the particular situation of an asylum-seeker falls within the conditions of Article 1A of the Refugee Convention is an arduous endeavor even for a person with

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a legal background. It follows that access to state territory also means access to legal aid and real chances for asylum-seekers to prove their asylum claims. Equally important is the availability of an interpreter. Preliminary interviews at state borders and in international zones might not include an interpreter, which makes it impossible for asylum-seekers to communicate their stories.

Consequently, there is a clear connection between the prohibition on *refoulement* and access to state territory. Access to state territory means access to fair and effective procedure for determining if an asylum-seeker needs protection. Therefore, the practices applied by states to block potential access to their territory are in violation of the prohibition of *refoulement*. Interception of asylum-seekers on the high seas is an example of such a practice. Similarly, asylum-seekers rescued at sea and stowaway asylum-seekers are vulnerable groups since states do not allow them to enter their territory and to submit applications for asylum.

IV. INTERCEPTION ON THE HIGH SEAS

The United States’ practice of returning asylum-seekers from Haiti is a notorious example of denying access to state territory. It is also an example of how states can exercise extraterritorial jurisdiction and, after that, claim that they are not responsible for the actions of their officials committed outside national borders. In the *Sale v. Haitian Centers Council* decision,24 the majority of the USA Supreme Court held that United Nations Protocol Relating to the Status of Refugees25 does not apply to actions taken by the Coast Guard on the high seas. Accordingly, in the opinion of the majority, the *non-refoulement* principle embodied in Article 33 (1) from the Refugee Convention is inapplicable outside USA borders.

The idea that states are not responsible for human rights violations committed by their agents in so-called international zones is unacceptable. By signing international human rights treaties, states have undertaken obligations to respect the rights of individuals under their jurisdiction. Article 2(1) of the International Covenant on Civil and Political Rights stipulates, “Each State Party to the present Covenant undertakes to  respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…” The phrase “within its territory” cannot be interpreted as allowing states to commit such human rights violations in international zones, which they cannot commit in their own territory.26 The United Nations Human Rights Committee has stated that the phrase “within its terri-

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24 *Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Center Council, Inc., et al.*, 509 U.S. 155 (1993). Only Judge Blackmun had Dissenting Opinion. Judge Blackmun’s main reasons for dissenting were the following: the language of Article 33(1) of the Refugee Convention is unambiguous—refugees should not be returned; Article 33(1) of the Refugee Convention does not contain geographical limitation; it limits only where a refugee may be sent “to,” not where he may be sent from.


tory and subject to its jurisdiction” refers not to the place, but to the connection between the individual and the state. The concept of jurisdiction is therefore not limited to national territory. Furthermore, the European Court of Human Rights has emphasized that the phrase “within their jurisdiction” includes state responsibility for actions of state officials in international zones at airports and actions of state authorities irrespective of the place where they have been committed. The decisive factor is whether the individual is under the effective control of the state officials. The International Court of Justice has also noted that the drafters of the International Covenant on Civil and Political Rights “did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”

A narrow interpretation of Article 33(1) of the Refugee Convention allows the return of asylum-seekers to persecution with the justification that they have not set foot on state territory and accordingly states do not have any obligations regarding them. However, such interpretation is unacceptable since it is inconsistent with the objectives of the Refugee Convention, which is an international instrument within the international human rights treaties framework.

V. ASYLUM-SEEKERS RESCUED AT SEA

 Intercepted asylum-seekers could turn into people in distress at sea. In this case, the issue that arises is which states are responsible for the rescued asylum-seekers. International refugee law and international maritime law are both relevant when examining the problem. Many questions need answering, such as those that deal with the obligations of the coastal state and of the state whose ship rescued the asylum-seekers.

The duty to render assistance to persons in distress at sea is established in both international treaty and customary law. However, the case of rescued asylum-seekers constitutes a problem for the following reasons—the asylum-
seekers do not want to go back to their countries of origin and at the same time no other state is obliged to accept them in its territory.\textsuperscript{35} Asylum-seekers in distress on the high seas have to be rescued; however, it is not clear who should take responsibility for them after their rescue. There is no provision in international maritime law to stipulate where the rescued asylum-seeker can disembark from the ship which has rescued them. States are obliged not to return asylum seekers to the frontiers of territories where their lives or freedom might be threatened. No state, nevertheless, has the positive obligation to accept them. It is not clear which state is responsible to review their applications for asylum. Without procedure aimed at identifying the refugees, the observance of non-refoulement cannot be ensured.

The incident of the Norwegian ship \textit{Tampa} and Australia’s unwillingness to accept asylum-seekers on its territory illustrates how asylum-seekers rescued at sea fall into a legal limbo.\textsuperscript{36} The pending questions at the time of the incident were if \textit{Tampa} was entitled to enter Australian territorial waters and port and whether Australia had any obligation regarding the rescued individuals who wanted to submit applications for asylum in Australia.

After rescuing asylum-seekers in distress at sea, \textit{Tampa} was not allowed to enter Australian territorial waters and port. The position of Australia was that \textit{Tampa} carried individuals who intended to enter Australia illegally,\textsuperscript{37} which is a breach of the conditions for admission.\textsuperscript{38} Consequently, closure of the Australian harbor is necessary for the prevention of the entrance of illegal immigrants. Further, international maritime law entitles coastal states to demand that a ship, which carries illegal immigrants, should leave their territorial waters.\textsuperscript{39} It could be concluded that current maritime law does not take into consideration the problem of asylum-seekers.

However, an issue which should raised is whether the individuals saved by \textit{Tampa} could be labeled as illegal immigrants. Australia cannot define them as illegal immigrants, since it has not conducted refugee status determination procedures. Some of the rescued asylum-seekers could be refugees and, as it was already clarified, refugees are not illegal immigrants.

From the perspective of international refugee law, it has to be mentioned that no provision explicitly indicates where the obligation for reviewing the asylum application arises.\textsuperscript{40} However, once an asylum-seeker is under the jurisdiction of a particular state and claims to be in need of international protection, that state is obliged to fulfill its obligations under the Refugee Convention and to determine the status of the person. In respect to the \textit{Tampa} case, it

\textsuperscript{37} Willheim, \textit{supra} note 35.
\textsuperscript{38} Article 25(1) of the Convention on the Law of the Sea stipulates: “In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”
should be emphasized that the ship entered Australian territorial waters, in which Australia has full sovereign rights. The asylum-seekers expressed their desire to submit applications for asylum and to seek protection in Australia. Accordingly, by denying review of their asylum applications, Australia exposed them to potential refoulement.

VI. STOWAWAYS

International human rights law does not contain specific binding rules concerning stowaway asylum-seekers. An international convention—the Brussels Convention—relating to stowaways was adopted in 1957, but it has not yet entered into force due to the absence of a sufficient number of ratifications by states.\textsuperscript{41} Therefore, its provisions are valid only as recommendations. Article 1 of the Brussels Convention defines a stowaway “as a person who, at any port or place in the vicinity thereof, secretes himself in a ship without the consent of the shipowner or the Master or any other person in charge of the ship and who is on board after the ship has left that port or place.” If a stowaway is found on board, the Master may deliver him to the appropriate authority at the first port in a state party to the convention at which the ship calls after the stowaway is found. The state of first port of disembarkation only temporarily accepts the stowaway. That state may return the stowaway to his country of nationality, to the state where his port of embarkation is considered to be situated, or to the state in which the last port at which the ship called prior to his being found is situated. Finally, the state of first port of disembarkation could return the stowaway to the state whose flag was flown by the ship in which he was found. The Brussels Convention specifically indicates that the Master of the ship and the appropriate authorities of the port of disembarkation should take into account the reasons which may be put forward by the stowaway for not being disembarked at or returned to those ports or states mentioned in the convention.

The Brussels Convention does not provide for an adequate solution to the problem of stowaway asylum-seekers. The possibility for chain transferring equates to a lack of any responsibility on the part of a state for conducting a refugee status determination procedure. Moreover, among the asylum-seekers there could be refugees, who have already undergone human rights violations and the transfer could be very traumatic for them. The process of transfer itself could even amount to inhumane and degrading treatment.

If the problem is approached from the international maritime law perspective, it should be pointed out that once a ship enters the port of a coastal state, that state is then entitled to exercise full immigration control. Although a ship is considered to be part of the territory of the country whose flag the ship flies, once the ship enters the coastal state territorial waters, the stowaway asylum-seekers on the ship are already physically present in the sovereign territory of the coastal state. Further, Article 24 of the Convention on the Territorial Sea and the Contiguous Zone stipulates that “in a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control nec-

\textsuperscript{41} The International Convention relating to Stowaways, Brussels, 10 October 1957. Nine countries have ratified the convention: Belgium, Denmark, Finland, Italy, Madagascar, Morocco, Norway, Peru, and Sweden. Ten ratifications are required in order for the convention to enter into force.
necessary to prevent infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea.” Hence, not only in the port and in the territorial sea, but also in the zone contiguous to the territorial sea, coastal states have jurisdiction. Accordingly, from the international refugee law perspective, once a stowaway is found on board and once the ship enters the contiguous zone of a coastal state, the stowaway asylum-seeker is within the jurisdiction of that coastal state.

Immigration laws of coastal states require that shipmasters notify the authorities of the presence of stowaways upon arrival at the port of entry and that stowaways are held on board until they can be presented to the authorities for examination.\(^\text{42}\) When coastal states face a situation with stowaway asylum-seekers, they might demand from the shipmaster to hold the stowaways on board. The coastal state could require that the flag state take responsibility for the stowaways if the next port of disembarkation is not an acceptable option. Allowing disembarkation under the condition of subsequent resettlement is another possible alternative.\(^\text{43}\)

The immigration authorities of the coastal state could intercept the ship and officials could embark in order to determine if the stowaways are “genuine” asylum-seekers. Subsequently, some form of a refugee status determination procedure could be initiated. However, such a practice is very problematic. It is difficult to imagine how an asylum-seeker, who is scared and exhausted by the long journey, with barely any knowledge of the foreign language, could reveal his/her reasons for fleeing his/her country of origin. The absence of an interpreter constitutes another problem. The interviews at ships are not real refugee status determination interviews; they are a preliminary procedure, on whose basis immigration officials make an assessment whether to allow asylum-seekers to disembark the ship in order to submit applications for asylum. Preliminary interviews at ships are of paramount significance since asylum-seekers will not have the chance to submit an application for asylum if they are not allowed to disembark.

A possible solution to the problem of stowaway asylum-seekers, which would guarantee them access to international protection, could be the following: the state, at whose port the ship first calls (after stowaways are found on board by the shipmaster) should accept them on its territory and that state is then responsible for the conduction of a refugee status determination procedure. They have already entered that state’s territory and are under its jurisdiction. At the same time, that state as a party to the Refugee Convention has undertaken certain responsibilities for offering international protection to people whose rights are endangered if returned. If it transpires that the state at whose port the ship first calls after stowaways are found is not an acceptable destination, because the safety of the potential refugees cannot be guaranteed, then the state whose flag the ship flies should take appropriate measures to ensure that the stowaway asylum-seekers are not exposed to refoulement and their applications for asylum be reviewed. This means that the state whose flag the ship flies should arrange that another state, at whose port the ship calls, accept the stowaway asylum-seekers, or, alternatively, that the state


whose flag the ship flies accepts the asylum-seeker on its territory. The overall consideration should be that the asylum applications be reviewed as soon as possible.

VII. CONCLUSION

This paper has shown that non-refoulement is inherently connected with a procedure aimed at identifying potential victims of persecution. The procedure can be fair and effective only if it is conducted on state territory. Accordingly, the prohibition on refoulement cannot be absolutely guaranteed without access to state territory.

States can argue that they have no human rights obligations, including granting access to a refugee status determination procedure, concerning individuals who have not set foot on their territory. However, as demonstrated in the section devoted to asylum-seekers intercepted on the high seas, this argument has been universally condemned. Once an individual is under the effective control of state officials, the state has to fulfill its human rights obligations. States can attempt to use some gray zones in international law, which result in unregulated situations to the detriment of human rights protection, as it is the case with asylum-seekers rescued at sea and stowaway asylum-seekers. However, even in these gray zone cases, human rights treaties and customary law in support of non-refoulement must be emphasized and considered. It is specifically because of these human rights protections that states’ obligations to grant access to their territory in order not to expose refugees to refoulement must be clearly stated.