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Extraterritorial Effect of Non-Refoulement

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Professor Dr Turk, President of the Republic of Slovenia, Justice Maslesa, President of the Supreme Court of Slovenia, judicial colleagues, ladies and gentleman. I thank the Organising Committee for the invitation to address this Conference.

The subject is "The Extraterritorial Effect of Non-Refoulement".

Whilst non-refoulement obligations arise under the *Convention against Torture*[1] and the *International Covenant on Civil and Political Rights*[2], and under regional instruments in Africa and the Americas, this address will focus on the obligation in Article 33(1) of the Refugees Convention.[3] That provides "*No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*".

The issue raised by the subject is whether this obligation applies to a State where an asylum seeker is not, or is no longer, in the territory of that State.

Two broad circumstances need to be addressed. The first is where asylum seekers are intercepted on the high seas by a State to prevent the asylum seekers landing on its shores, and where they are turned back to the danger of persecution from which they are fleeing.

The second is where asylum seekers, having arrived in the territory of a State, are sent away to a third country for their asylum claims to be assessed in that third country.

The obligation of non-refoulement lies at the heart of the international protection system.

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[1] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (entered into force 26 June 1987)
[2] *International Covenant on Civil and Political Rights* 999 UNTS 171 (entered into force 23 March 1976)
[3] *Convention Relating to the Status of Refugees* 189 UNTS 137 (entered into force 22 April 1954) and *Protocol Relating to the Status of Refugees* 606 UNTS 267 (entered into force 4 October 1967) ("the Refugees Convention")

The thesis which is developed in the paper on which this address is based is that there has been a trend, particularly in the last twenty years, to weaken this core obligation by some States seeking to send their non-refoulement obligations offshore.

The paper outlines the jurisprudence on the obligation of non-refoulement, first, in relation to interception on the high seas, and, then, in relation to protection elsewhere arrangements. Then, the paper attempts to understand the reasons why some States remove their non-refoulement obligations offshore. And, finally, the paper explores the consequences of this trend, and of the jurisprudential responses to it, on the international protection system. I will broadly follow that scheme.

1. The obligation of non-refoulement in relation to interception on the high seas

States not uncommonly seek to intercept unauthorised arrivals on the high seas. Ordinarily some opportunity is given for people to make asylum claims, and some examination is made of the claims. The assessments are often desultory and made by immigration or police officials with insufficient training. But are States required by Article 33(1) to take any such steps at all?

The issue was raised in stark terms in the US in 1993 when the US Supreme Court decided 8 to 1 that Article 33(1) does not have extraterritorial effect: *Sale*[4]

The case involved Haitians fleeing to the US by sea. Between 1981 and 1991 25,000 people had been intercepted, but it was not the practice to return asylum seekers to Haiti without some, albeit cursory, examination of their claims. In September 1991, President Aristide was overthrown. Gross human rights abuses followed, and in the next six months 34,000 Haitians were intercepted by US authorities.

The pressure of these events caused President Bush to make an Executive Order requiring the Coast Guard to intercept vessels and return them to Haiti. The preamble to the Order stated that Article 33(1) does not apply to persons outside the territory of the US.

[4] *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al v Haitian Centers Council, Inc, et al,* 509 US 155, United States Supreme Court, 21 June 1993 ("Sale")

The Court relied on textual arguments including that "return" in Article 33(1) referred to the defensive act of resistance or expulsion at the border rather than to transporting a person to a particular destination. The Court also relied on the views of scholars Robinson, Grahl-Madsen, and Goodwin-Gill. The Court concluded:

> The drafters of the Convention and the parties to the Protocol … may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

The majority then supported this conclusion by reference to the drafting history of Article 33 which demonstrated, so it was held, that the obligations only applied after a person had entered the territory of a State.

Blackmun J, in dissent, said that the words of Article 33 were clear, and that therefore the drafting history could not be taken into account, but, in any event, that history did not support the majority conclusion.

Then, eleven years later the House of Lords in *Regina v Immigration Officer at Prague Airport*; *Ex parte European Roma Rights Centre*[5] expressly support the *Sale* judgment.

The House of Lords held that Article 33(1) did not prevent preclearance checks of Czech Roma at Prague Airport undertaken by UK officials because the Roma where not outside their country of nationality as required by Article 1A of the Refugees Convention for them to qualify as refugees.

Lord Bingham, with whom each of the other Law Lords agreed, (other than Lord Steyn, who did not deal with the issue) went on to say that Article 33(1) does not have extraterritorial effect. He quoted Nehemiah Robinson at [72]:

> if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.

[5] *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004 ("European Roma Rights Centre")

Lord Bingham said that this view was supported by scholars including Grahl-Madsen, by the majority in *Sale*, and by two recent judgments of the High Court of Australia. He said:

> The House was referred to no judicial authority to contrary effect.

Lord Bingham then considered that the drafting history supported the view that Article 33 was not to have extraterritorial effect.

Lord Hope separately said that he did not think *Sale* was wrongly decided. He particularly agreed with the textual arguments adopted by the majority.

The judgment in *Sale* has been strongly criticised by scholars including Hathaway, Goodwin-Gill, McAdam and Foster.[6] They argue that the text, the drafting history, and the humanitarian object of the Convention support the extraterritorial application of Article 33(1).

In January 2007, the UNHCR published the *Advisory Opinion of the Extraterritorial Application of Non-Refoulement Obligations under the Convention*.[7] The Advisory Opinion restates the arguments that support UNHCR's view that Article 33(1) has extraterritorial effect, and refutes and rejects the arguments relied upon by the majority in *Sale*.

The judgment of the final appellate courts in the US, the UK and Australia, spanning over eleven years is a considerable barrier to the acceptance of the views of the expert scholars and UNHCR.

However, the Advisory Opinion expands the debate in ways not considered by those authorities. In particular it draws on the complementarity between international human rights law and international refugee law. It argues that it has been accepted that international human rights obligations have extraterritorial application by the Human Rights Committee in relation to obligations under the *International Covenant on Civil and Political Rights*, by the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

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[6] See e.g. James C. Hathaway, *The Rights of Refugees Under International Law* (2005) 336-9, Guy S. Goodwin-Gill and Jane McAdam *The Refugee in International Law* (3rd ed, 2007) 247-8, Michelle Foster 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 223, 251-255.

[7] UN High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007

Territory[8], and by the European Court of Human Rights in cases such as *Bankovic v Belgium*[9], and *Issa v Turkey*[10].

Suffice it to say, that the final chapter on the correctness of *Sale* might not yet have been written. But at present for some of the worlds leading developed countries, in accordance with the judgments of their highest appellate courts, it is lawful for a State to intercept and return asylum seekers on the high seas to face persecution in their country of nationality.

2. The obligation of non-refoulement in relation to protection elsewhere arrangements

How does the obligation of non-refoulement apply in the situation where an asylum seeker has entered the territory of a State but that State (the Sending State) wishes to transfer the asylum seeker to another State (the Receiving State) for protection to be provided there?

This practice has grown over the last two decades.

The Convention is silent as to whether a State is able to transfer an asylum seeker to another State so that protection is provided elsewhere. The drafters of the Convention probably did not envisage that States would send asylum seekers away for protection elsewhere. Such conduct does not sit comfortably with the humanitarian responsibilities accepted by the signatories.

There have been several judicial voices which have doubted whether protection elsewhere is permitted by the Convention.[11]

However, it has been generally accepted that protection elsewhere is permitted under the Convention. This is because the Sending State is not relieved of its Convention obligations by reason of the asylum seeker being sent from its territory. The discussion therefore has centred on the

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[8] International Court of Justice, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, General List No 131, 9 July 2004, at [111]

[9] *Bankovic & Ors v Belgium & Ors*, application no 52207/99, [2001] ECHR 890 (12 December 2001), at [59]

[10] *Issa and Others v Turkey*, application no 31821/96, [2004] ECHR 629 (16 November 2004)

[11] *NAFG v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 152; (2003) 131 FCR 57 at [60] per Gray J*;* and *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6; (2005) 213 ALR 668 at [93] per Kirby J.

means by which the Sending State can discharge its duties when the asylum seeker is no longer in its territory.

A number of essential obligations on the Sending State have been recognised in order to justify sending an asylum seeker for protection elsewhere. For example, see the *Michigan Guidelines*[12] and the *European Union Asylum Procedures Directive*.[13]

In order that the asylum seeker avoids the risk of refoulement from the Receiving State, that State must afford the asylum seeker a meaningful legal and factual opportunity to make a claim for protection, and the Sending State must be satisfied that this is available before the transfer is made.[14]

Further, the Sending State must conduct a good faith empirical assessment whether the asylum seeker will be accorded the rights under Articles 2 – 34 of the Refugees Convention in the Receiving State. The Sending State must not act on political expediency. And the asylum seeker must have the right to challenge the transfer if these protections are not provided.[15]

Some examples of protection elsewhere arrangements and their inadequacies

The following four random examples of protection elsewhere arrangements demonstrate that Sending States have often failed to ensure that asylum seekers are protected from non-refoulement when sent from the territory of that State. The examples also explore whether refugee law has been able to hold those States to account. The examples span two decades and come from the US, the EU, and Australia.

US – Mid 90s

Although the judgment in *Sale* permitted the US to intercept and return Haitians on the high seas, in fact, the US resumed processing of Haitian asylum claims in the mid 1990s.

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[12] University of Michigan Law School*, The Michigan Guidelines on Protection Elsewhere,* 3 January 2007 ("Michigan Guidelines")

[13] European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006 ("Asylum Procedures Directive")

[14] See e.g. Article 27 of the Asylum Procedures Directive and paragraphs 3, 4, 8, 12 and 16 of the Michigan Guidelines.

[15] See e.g. Article 27(1) and (2) of the Asylum Procedures Directive and paragraphs 8 and 12 of the Michigan Guidelines.

The US made agreements with Jamaica and with the United Kingdom in respect of its Caribbean territory, Grand Turk Island. The arrangements permitted the US to process asylum seekers outside its own territory in those places.

The decision making process was not constrained by legal controls. Decisions were made by reference to non-binding administrative guidelines. There was no right of appeal to an independent tribunal. The US procured laws by the local States which prevented challenges to the process in those places. US laws prevent a challenge in the US.

Australia – 2001

In the wake of the Tampa case the Australian government passed legislation permitting it to take asylum seekers to declared countries. Papua New Guinea and Nauru were declared.

Australia conducted asylum claim processing in these places and bore the entire cost of the operation including accommodation and transport. The processing had no statutory basis in Australian, Nauruan or PNG law. It was inferior to the system used in Australia for other asylum seekers. There was no right of appeal to an independent tribunal. Local laws were passed in Nauru and Papua New Guinea which prevented legal challenges to the system there. In Australia the government successfully resisted legal challenges by resort to the act of State doctrine.

The Australian innovation was no doubt informed by the US Caribbean experience. However, it took the development a step further. In effect, it applied to almost all irregular arrivals rather than to a particular group, as in the case of the US arrangements.

European Union - 2011

In *MSS v Belgium and Greece*[16], the European Court of Human Rights in January this year, defined the obligation of Member States to examine the asylum system of a Receiving Member State to where asylum seekers are to be sent for protection elsewhere.

Under the Dublin 2 Regulation[17], a Member State is entitled to send an asylum seeker back to the Member State into which the asylum seeker first entered irregularly.

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[16] *MSS v Belgium and Greece*, application no 30696/09, [2011] ECHR 108 (21 January 2011) ("MSS v Belgium and Greece")

[17] European Union: Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, 18 February 2003

An Afghan asylum seeker first arrived in Greece but then travelled to Belgium where he made an asylum application. The Belgium authorities sent him back to Greece under Dublin 2 for processing there.

The Asylum Procedures Directive sets out the requirements of an effective asylum processing system for Member States, including that the asylum seekers must be given information about the procedures and in a way that they can understand, they must have the assistance of interpreters, the decisions must be in writing, reasons must be given for negative decisions, and asylum seekers must be informed of the outcome of their cases.[18]

The Court found that the Greek asylum determination was inadequate in each of these respects. The *Charter of Fundamental Rights of the European Union*[19] includes, in effect, the non-refoulement obligation contained in Article 33(1) of the Convention. The inadequacy of the Greek determination system meant that the applicant was in danger of refoulement. The Court found that Belgium knew or ought to have known of that danger. By sending the applicant back to Greece, Belgium acted in violation of Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[20] which guarantees an effective remedy for a violation of rights, and Article 3 which provides that no one shall be subjected to torture or to inhumane or degrading treatment or punishment.

The case is an example of enforcement in a regional context, but by reference to the non-refoulement principle in the Convention, of the protection elsewhere requirement that the Sending State ensure that the Receiving State provides a fair and effective asylum determination process.

Unlike the previous two examples, in this case the determination process was to be undertaken by the Receiving State rather than the Sending State.

Australia – 2011

This brings us to the most recent attempt at protection elsewhere by Australia.

[18] Asylum Procedures Directive, Article 10.
[19] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01)
[20] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5

In July, Australia and Malaysia entered into an arrangement whereby Australia would send 800 irregular arrivals to Malaysia, and would resettle 4000 refugees from Malaysia over the next four years.[21]

Under the arrangement the UNHCR was to process asylum applications in Malaysia. Australia was to pay all the costs associated with the arrangement. Australia said in the written arrangement that it would treat the transferees with dignity and respect in accordance with the human rights standards. The arrangement also stated that it recorded the intention and political commitment of the participants, but was not legally binding.

Malaysia is not a party to the Convention, does not have an asylum determination procedure, provides no legal protection to asylum seekers, and exposes illegal entrants to imprisonment, fines and caning.

In order to authorise the transfer of irregular arrivals, the Minister had to make a declaration that the country involved provides access to an effective determination procedure, provides protection to asylum seekers before and after determination of their refugee status, and meets human rights standards in providing that protection.[22]

Two Afghan asylum seekers challenged the validity of the declaration. Last Wednesday in a 6 / 1 decision the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*[23] struck down the declaration. The Court held that a declaration could only be made if the access to fair asylum procedures and the protections of asylum seekers were provided as a matter of legal obligation in Malaysia. As they were not, the declaration was invalid.

3. Why do some States seek to remove their non-refoulement obligations offshore?

In the four examples referred to, the removal of the non-refoulement obligations offshore have been to the detriment of asylum seekers. In each case, the steps have been taken by nations most able to address

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[21] Commonwealth of Australia, Department of Immigration and Citizenship, *Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement* (http://www.minister.immi.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf, accessed 20/9/2011)

[22] *Migration Act 1958* (Cth), s 198A

[23] *Plaintiff M70/2011 v Minister for Immigration and Citizenship and Another* [2011] HCA 31; (2011) 280 ALR 18

protection needs. This conduct is not consistent with the broad generosity underlying the international protection system.

Why have some States moved in this direction? The reason usually expressed by governments is that removing asylum seekers from the domestic asylum processing system will act as a deterrent to asylum seekers and other irregular arrivals.

This is hard to accept. Refugees are by definition likely to be desperate people. They will not be deterred by being sent elsewhere. Witness the thousands who have perished in dangerous sea journeys. And those who are not refugees can be best and most economically dealt with by efficient and speedy asylum determination processes.

A more likely explanation for the increased use of offshore processing schemes lies in the perceived political advantage in demonising outsiders. This feeds societal fear in uncertain times. The outsider becomes the lightening rod for anxieties such as currency collapses or faltering military expeditions.

4. What then are the consequences for the international protection regime?

This year we celebrate the 60th anniversary of the Convention. There is much to be proud off. The system has transformed hundreds of thousands of people's lives. This is a monumental achievement.

The transfer of non-refoulement obligations offshore has the potential to weaken the international protection system. UNHCR has been a very active voice against this potential. It has participated as amicus in each of the major cases to which I have referred – *Sale*, *European Roma Rights Centre*, *MSS v Belgium and Greece*. The 60th anniversary is a time to recognise the high quality of UNHCR leadership in the attempt to develop principled jurisprudence. Maybe the success of UNHCR intervention in the MSS case, and the result in the recent Australian case of M70, are positive signs for future developments whereby States may be more constrained in sending their non-refoulement obligations offshore.

The reflection which comes with the celebration of the 60th anniversary of the Convention, and this trend of States resorting to interception and protection elsewhere arrangements, and the jurisprudence of domestic courts which have sanctioned a narrow view of the extraterritorial effect of the non-refoulement obligation might suggest that it is time for a redraft of the Convention to make explicit provision for the circumstances in which interception and protection elsewhere would or would not be permissible. However, the practical obstacles make this option unrealistic.

It may however be that these circumstances demonstrate the desirability of some strengthening of the supervisory role of the UNHCR.

To take recent events in Australia as an example. Once government was committed to the arrangement with Malaysia, there was a need to work with it to make the best of an undesirable situation. UNHCR did this in a most effective and diplomatic way without publically antagonising government.

But there is also a place for a clear voice of legal authority to say that the arrangement is in breach of the Convention. That voice could be provided by an International Refugee Court. Unlike the present guiding decisions of domestic or regional courts, this body could emphasise the international legal obligations which apply. I have written and spoken about such a concept at previous conferences. In the proper development of the principles applicable to the extraterritorial application of the obligation of non-refoulement such a body could contribute to the rule of law in a way which may be missing in the present international protection system.

Thank you for your kind attention.