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

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Introduction

1. According to Article 38 of the Statute of the International Court of Justice, the Court is required to apply inter alia international custom as evidence of a general practice accepted as law. The Office of the United Nations High Commissioner for Refugees is of the opinion that the principle of non-refoulement satisfies this requirement and constitutes a rule of international customary law. Moreover in Conclusion No. 25 adopted at its 23rd Session in 1982, the Executive Committee of the High Commissioner's Programme reaffirmed the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law.

2. The principle of non-refoulement constitutes an essential component of asylum and international refugee protection. The essence of the principle is that a State may not oblige a person to return to a territory where he may be exposed to persecution. The wording used in Article 33 paragraph 1 of the 1951 United Nations Refugee Convention is "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Since the purpose of the principle is to ensure that refugees are protected against such forcible return it applies both to persons within a State's territory and to rejection at its borders.

3. The view that the principle of non-refoulement has become a rule of international customary law is based on a consistent practice combined with a recognition on the part of States that the principle has a normative character. This conclusion is supported by the fact that the principle has been incorporated in international treaties adopted at the universal and regional levels to which a very large number of States have now become parties. The principle has, moreover, been reaffirmed in the 1967 United Nations Declaration on Territorial Asylum. Finally, the principle has been systematically reaffirmed in conclusions of the UNHCR Executive Committee and in resolutions adopted by the United Nations General Assembly.

4. In the exercise of his supervisory function under paragraph 8 of the Statute of his Office, combined with Article 35 of the 1951 United Nations Refugee Convention and Article II of the 1967 Refugee Protocol, the United Nations High Commissioner for Refugees has frequently been called upon to draw the attention of governments to the need to respect the principle of non-refoulement or to protest to governments in those cases in which the principle of non-refoulement has been disregarded. This action by the High Commissioner has related both to refugees within a State's territory and also to refugees seeking asylum at a State's frontiers. It has enabled the High Commissioner closely to follow the practice of Governments in regard to the application of the principle of non-refoulement and to contribute to the development of this principle into a rule of international customary law.

5. In many cases, the State in question was a party to the 1951 United Nations Refugee Convention or to the 1967 United Nations Refugee Protocol. In these cases the High Commissioner could, of course, base his action on a treaty obligation assumed by the Government concerned. There have, however, also been numerous cases in which the High Commissioner has been required to make representations to States which were parties neither to the Convention nor to the Protocol, and it is here that the Office has necessarily had to rely on the principle of non-refoulement irrespective of any treaty obligation. In response to such representations by the High Commissioner, the Governments approached have almost

invariably reacted in a manner indicating that they accept the principle of non-refoulement as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or by claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle. In this connection, reference can appropriately be made to the Judgementof the International Court of Justice of 27 June 1986 (Case concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America) which contained the following statement:

> "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule." (I.C.J. Reports 1986 page 88 paragraph 186)

6. Cases in which a Government has stated to UNHCR that it is not willing to react positively to its representations on the simple ground that it does not recognize any obligation to act in accordance with the principle of non-refoulement - and are thus entirely free to return a person to a country of persecution - have been extremely rare. On the other hand, Governments of States not parties to the Convention or the Protocol have frequently confirmed to UNHCR that they recognize and accept the principle of non-refoulement. Thus, according to the experience of UNHCR, there is either an express or tacit understanding on the part of Governments that the principle has a normative character. A report on the draft Federal Law on Compulsory Measures in the Aliens Law ("Botschaft zum Bundesgesetzüber Zwangsmaßnahmen im Ausländerrecht" des Schweizerischen Bundesrates, dated 22 December 1993) contains the following section:

> "Völkerrechtliche Schranken.
>
> Zwingende Bestimmungen des Völkerrechts verbieten es weitgehend, im Rahmen des Asylverfahrens solch weitführende Sanktionen zu verhängen, um disziplinierend auf Asylbewerber einzuwirken und strafbares Verhalten zu ahnden. Ein Freiheitsentzug ist nur unter den in Artikel 5 Absatz 1 der Europäischen Menschenrechtskonvention (EMRK; SR 0.101) abschliessend aufgezahlten Voraussetzungen zulässig. Und auch fur Asylbewerber gilt grundsätzlich die Unschuldsvermutung gemäss Artikel 6 Absatz 2 EMRK.
>
> Mit der Ratifizierung des Abkommens über die Rechtsstellung der Flüchtlinge (FK: SR 0.142.30) vom 28. Juli 1951 hat sich die Schweiz verpflichtet, niemanden in einen Staat auszuschaffen, in welchem ihm eine schwerwiegende Menschenrechtsverletzung als Folge einer Verfolgung droht. Das in Artikel 33 FK statuierte Non-refoulement-Gebot, welches sowohl den Gesetzgeber wie auch die rechtsanwendenden Behörden gleichermassen bindet, schützt nicht nur anerkannte Flüchtlinge, sondern auch Asylbewerber während der Dauer des Asyl- und Wegweisungsverfahrens. Zudem verbietet Artikel 3 EMRK die Ausschaffung eines Ausländers, wenn konkrete Anhaftspunkte dafür bestehen, dass ihm bei seiner Rückkehr Folter oder sonst eine unmenschliche oder erniedrigende Strafe oder Behandlung droht. Der Grundsatz des Non-refoulements bindet die Schweiz selbst dann, wenn sie jene Staatsverträge künden würde, stellt dieses Prinzip doch anerkanntermassen Völkergewohnheitsrecht dar.

> Da der Grundsatz der Nichtrückschiebung an das Verhalten des Verfolgerstaates und nicht an jenes des schutzsuchenden Ausländers anknüpft, wird er durch dissoziale oder rechtswidrige Handlungen eines Asylbewerbers nicht aufgehoben. Einzig dann, wenn erhebliche Gründe dafür vorliegen, dass eine Person die Sicherheit der Schweiz gefährdet oder wenn sie als gemeingefährlich gelten muss, weil sie wegen eines besonders schweren Verbrechens rechtskräftig verurteilt worden ist, kann sie in Anwendung von Artikel 45 Absatz 2 AsylG and Artikel 33 Absatz 2 FK ohne Rücksicht auf das flüchtlingsrechtliche Refoulement-Verbot in den Verfolgerstaat zurückgeschafft werden. Auch in diesem Fall muss jedoch die absolut and für jedermann geltende Schranke von Artikel 3 EMRK beachtet werden.
>
> An das genannte Rückschiebeverbot sind neben den Asylbehörden im Übrigen auch die mit der Strafverfoloung and dem Strafvollzug betrauten kantonalen Behörden gebunden. Dies gilt nach bundesgerichtlicher Rechtsprechung insbesondere auch für die Beurteilung der Zulässigkeit der allenfalls durch den Strafrichter als Nebenstrafe ausgesprochenen Landesverweisung. (BGE 116 IV 105).
>
> Damit steht fest, dass zwingende völkerrechtliche Schranken die soforige Ausschaffung eines Asylbewerbers, der sich durch kriminelles Verhalten strafbar gemacht hat, ohne vorgängige Abklärung der Flüchtlingseigenschaft ausschliessen."

7. The Office of the UNHCR considers that the practice of Governments including the provisions of national legislation which have traditionally incorporated the principle of non-refoulement, corresponds to the criteria for the formation of international customary law i.e. a uniform practice combined with a growing legal conviction. Thus according to Verdross-Simma:

> "Nach der heute herrschenden Lehre wird VGR [Völkergewohnheitsrecht] in der Regel durch eine gleichförmige Übung mit allmählich hinzutretender Rechtsüberzeugung gebildet." (A. Verdross, B. Simma: Universelles Völkerrecht. 3. völlig neu bearbeitete Auflage, Berlin 1984, p. 347).

The Office of the UNHCR believes that this condition can now be regarded as ratified as far as the principle of non-refoulement is concerned. This view is strongly supported by the consistent reaffirmation of the principle by the UNHCR Executive Committee which is composed of States directly affected by the refugee problem and by the United Nations General Assembly when dealing with refugee issues.

Incorporation of the principle of non-refoulement in international treaties

8. The Office of the United Nations High Commissioner for Refugees considers that the incorporation of the principle of non-refoulement in various international instruments to which a very large number of States have subscribed is evidence of a consistent practice, giving the principle a significance beyond that of a mere contractual obligation limited to a particular treaty. The widespread incorporation of the principle of non-refoulement in international treaties can indeed contribute to giving this principle the character of a rule of international customary law. As is known, the principle of non-refoulement is incorporated in Article 33 of the 1951 Refugee Convention which is one of the Articles of the Convention to which - in view of its fundamental character - no reservation is permitted (Art. 42 Section 1 Refugee Convention). It may be useful in this connection to mention the following statement by the International Court of Justice in the North Sea Continental Shelf Cases, (I.C.J. Reports 1969 pages 38-39, paragraph

63):

> "For speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provision will figure amongst those in respect of which a right of unilateral reservation is not conferred or is excluded."

In light of this reasoning the principle of non-refoulement as embodied in Article 33 of the 1951 Convention can be considered a rule of international customary law and could indeed have been regarded as an emerging rule of international customary law already at the time when the Convention was adopted.

(a) International Agreements defining the legal status of refugees adopted prior to World War II

9. The principle of non-refoulement was already incorporated in various international instruments adopted under the auspices of the League of Nations viz: the Convention relating to the International Status of Refugees of 28th October 1933, the Provisional Arrangement concerning the status of refugees coming from Germany of 4 July 1938 (Article 4) and the Convention concerning the status of refugees coming from Germany of 10 February 1938 (Article 5). Among the pre-war instruments, the principle of non-refoulement was stated in the most far-reaching terms in Article 3 of the Convention relating to the International Status of Refugees of 28 October 1933, which should receive particular mention in the present context. According to this Article:

> "Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures such as expulsions or non-admission at the frontier (refoulement), refugees who have been authorized to reside there legally, unless the said measures are dictated by reasons of national security or public order.

It undertakes in any case not to refuse entry to refugees at the frontiers of their country of origin." (Underlining added)

(b) The 1951 United Nations Refugee Convention and the 1967 Refugee Protocol

10. The incorporation of the principle of non-refoulement in an international convention was therefore part of an already existing tradition. When the 1951 Convention was in the course of preparation, the United Nations Secretary General submitted a Memorandum dated 3 January 1950 to the Ad Hoc Committee on statelessness and related problems. (Document I/AC.32/2). This Memorandum contained the text of a draft Convention which was to form the basis of discussion by the Committee. Article 24 paragraph 1 of this draft Convention was worded as follows:

> "Each of the High Contracting Parties undertakes not to remove or keep from its territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement) refugees (and stateless persons) who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order."

According to paragraph 3 of the same draft Article:

> "Each of the High Contracting Parties undertakes in any case not to turn back refugees to the frontiers of their country of origin, or to territories where their life or freedom would be threatened on account of their race, religion, nationality or political opinions."

11. In his comments to these draft provisions the Secretary-General stated the following:

> "Turning a refugee back to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinions, if such opinions are not in conflict with the principles set forth in the United Nations Charter, would be tantamount to delivering him into the hand of his persecutors.

The text of paragraph 3 reproduces that of the 1933 Convention (Article 3 paragraph 2) but with an addition which takes into account not only the country of origin, but also other countries where the life or freedom of the refugee would be threatened for the same reasons."

12. Wording identical to that of the first paragraph quoted above was included in the Report of the Ad Hoc Committee at its first session. (January/February 1950). The report also contained a reference to the corresponding provision in the 1933 Convention and again stated that in the text adopted reference was made not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened for the reasons mentioned [Document E./1618 page 61].

13. The wording of Article 3 of the 1933 Convention made it clear that the principle of non-refoulement as therein defined also applied to rejection at the frontier. The reference to the 1933 Convention in the Secretary-General's Memorandum of 3rd January 1950 and in the Report of the Ad Hoc Committee at its first session would seem to indicate that there was to be no deviation from the standard laid down in the pre-war instruments. The draft provision adopted by the Ad Hoc Committee was in the following terms:

> "No Contracting State shall expel or return 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 or political opinion."

The text of this draft provision was substantially the same as the text of what became Article 33 paragraph 1 of the 1951 Convention.

14. As regards this latter provision, the Office of UNHCR considers that its application to rejection at the frontier follows from its clear wording. It is difficult to conceive that the words "return" and "refouler" are not sufficiently broad to cover a measure of this kind and are limited to refugees who have already entered the territory of a Contracting State. According to Article 31 of the 1969 Vienna Convention on the Law of Treaties, a "treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (paragraph 1). According to Article 32, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Having regard to the clear wording of Article 33 paragraph 1 of the 1951 Convention it would seem to be questionable whether there is any need to have recourse to the travaux-préperatoires in order to "explain" its meaning.

15. The travaux-préparatoires are nevertheless of interest in clarifying the background of Article 33 paragraph 1 and in confirming that this provision is applicable to rejection at the frontier. They show in the first place that the principle of non-refoulement was regarded as a fundamental principle which could only be derogated from in very exceptional and clearly defined circumstances. This is apparent from the reluctance originally shown to introduce an exception such as that now contained in paragraph 2 of the Article. It is also apparent from the very restrictive manner in which this exception is formulated. In view of these considerations, it would be difficult and even illogical to conclude that Paragraph 1 of the Article only applies to refugees present in the territory of a Contracting State and not to refugees who present themselves at the frontier, even if their rejection would oblige them to return to a territory where their life or freedom would be threatened. Stated in other terms, a refugee in the territory would enjoy all the guarantees of the Article including the strictly defined restrictions on the exception contained in Paragraph 2, whereas if he presents himself at the frontier his plight and the dangers facing him in the event of return could simply be disregarded. Such a conclusion would be wholly artificial and inconsistent with the article's humanitarian purpose.

16. The proposed text of the non-refoulement provision accepted as a basis for discussion (Document E/C.2/242) covered two distinct issues:

i) the prohibition of the return of a refugee to a country of persecution, and

ii) the expulsion of a refugee authorized to reside regularly in the territory of a Contracting State.

In view of the possible inter-relationship between these issues, the discussion understandably proved to be somewhat complex.[1] At one point, the Chairman suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution on account of their race, religion, nationality or political opinion should not be pushed back into the arms of their persecutors. He invited the representatives of Belgium and the United States of America to confer with him to attempt the preparation of a suitable draft for later consideration (E/AC.32 SR.21 page 7). This statement would seem to be a clear indication that the principle defined in the draft article was of a fundamental character and that further discussion should relate to its scope and interpretation bearing in mind that the draft Article also covered the expulsion of refugees who had been admitted for lawful residence.

17. The discussion in the Ad Hoc Committee at its First Session certainly contained no indication that the refoulement provision was not applicable to rejection at the frontier, in the sense that a state would be entitled to return a refugee who had not yet entered its territory to a country of persecution. As already mentioned, the Chairman noted a consensus that refugees fleeing from persecution should not be pushed back into the arms of their persecutors. Again, the representative of the United States recalled that the Committee had decided to delete the chapter on admission, considering that the Convention should not deal with asylum and that it should merely provide for a certain number of improvements in the position of refugees. It did not, however, follow that the Convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties. Whether it was a question of closing the frontier to a refugee who asked admittance or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom would be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the state concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp. Paragraph 1 (dealing with non-refoulement) should therefore apply without reservation to all refugees, whether or not they had been admitted to residence. In order that

there should be no doubt on the matter, he proposed that the words "undertakes not to expel or return" should replace the words "not turn back". (E/AC.32/SR.20, page 12).

18. As mentioned above, the Ad Hoc Committee adopted the following wording for the non-refoulement provision in the draft convention:

> "No Contracting State shall expel or return 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 or political opinion." (Document E/1618/page 61)

This wording is sufficiently clear as to include rejection at the frontier and not to permit any exception.

19. The Report of the Ad Hoc Committee contained the following statement regarding the non-refoulement Article: "This article does not imply that a refugee must in all cases be admitted to the country where he seeks entry". (Document E/1618 page 61). The words "the country to which he seeks entry" can be taken to mean that there would be no duty to admit if the refugee could obtain admission to another country, i.e. not a general authorization to return him to a country of persecution. Moreover, an exception might be called for in serious cases of national security.

20. It should be mentioned that during the discussion of the non-refoulement provision in the Ad Hoc Committee a proposal was made by the United Kingdom to introduce an exception on grounds of "national security". This proposal was not accepted: With regard to this proposal made by the United Kingdom, the representative of France considered that the addition of the phrase proposed by the United Kingdom would nullify the effect of the non-refoulement provision. If ever it was absolutely essential to refuse admittance to a refugee for reasons of national security, for example, it would always be possible to direct him to territories where his life or his freedom would not be threatened. The representative of the United States supported the view of the Belgian representative made in the course of the discussion that a state could easily avoid turning back a refugee to a territory in which he would be in danger. (E/AC.32/SR.20 page 5). At a later point, in reply to a similar proposal by the representative of Venezuela, the representative of the United States pointed out that the Committee had already agreed that even for reasons of national security and public order, refugees should not be turned back to countries where their life or liberty was threatened. At its Second Session in August 1950, in regard to a similar proposal put forward by the representative of the United Kingdom to introduce an exception based on national security, the representative of the United States said that he was sure that the United Kingdom representative did not wish to impair the principle of the Article. He felt that it would be highly undesirable to suggest in the text of that article that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution. (E/AC.32/SR.40 page 31). The representative of France considered that any possibility, even in exceptional circumstances, of a genuine refugee, that is to say a person coming under the definition contained in Article 1, being returned to his country of origin would not only be absolutely inhuman, but was contrary to the very purpose of the Convention (Ibid page 33). In the report on its Second Session the Ad Hoc Committee gave the following explanation regarding the rejection of the proposal:

> "While the question was raised as to the possibility of exceptions to Article 28, the Committee felt strongly that the principle here expressed was fundamental and that it should not be impaired." (E/1850 page 13)

21. As is known an exception along lines suggested was nevertheless introduced by the 1951 Conference of Plenipotentiaries and now figures in paragraph 2 of Article 33 of the 1951 Convention. This exception cannot in any way be taken as an indication that the Article has no application to rejection at the frontier. It can rather be taken to support the opposite

conclusion. It would indeed be wholly inconsistent to provide a refugee in the territory of a Contracting State with all the safeguards contained in paragraph 2 while at the same time giving Contracting States an unqualified right to reject them at the frontier and to return them to a country of persecution. It is interesting to note that an exception on the lines of Article 33 paragraph 2 was not included in subsequent international instruments which incorporate the principle of non-refoulement.

22. At the Second Session of the Ad Hoc Committee the representative of Switzerland stated the problem of the effect of the non-refoulement provision in a somewhat different manner which later, during the Conference, gave rise to a discussion which has been erroneously interpreted as throwing doubt on the general applicability of Article 33 of the Convention to rejection at the frontier. The representative of Switzerland presumed that the article did not mean that a refugee who reported to the authorities at the frontier of a country should be admitted solely because he could not be returned to a country where his life would be threatened. In his understanding the article concerned only refugees lawfully resident in the country and not those who applied for admission or entered the country without authorization. The representative of Switzerland then gave an explanation which probably reflects the underlying reasons for his statement: "An extraordinary influx of refugees into Switzerland might make it impossible for the Federal authorities to accept them all despite their desire to receive as many as possible." (E/AC.32/Sr.40 Page 32).

23. A similar view was expressed by the representative of Switzerland at the Conference of Plenipotentiaries in 1951. He stated that Switzerland approved the main outlines of the draft Convention, especially the provision under which refugees should not be returned across the frontier of territories where their lives or freedom would be threatened. The Swiss delegation considered, however, that it went without saying that the Contracting States must also help each other and support a country invaded by a mass influx of refugees because of its geographical position by relieving it of some of the refugees it had admitted. It was obvious that a small country could not accept an unlimited number of refugees without endangering its very existence. (A/CONF.2/SR.3 pp 9-10).

24. At a later point the representative of Switzerland considered that the rewording left room for various interpretations particularly as to the meaning to be attached to the words "expel" and "return". In the Swiss Government's view, the term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term "refoulement" on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The States represented at the Conference should take a definite position with regard to the meaning to be attached to the word "return". The Swiss Government considered that in the present instance, the word applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross their frontier. (A/CONF.2/SR.16 page 7).

25. The representative of the Netherlands supported the Swiss representative's observations. He appreciated the basic importance of the principles underlying the article but, as a country bordering on others, the Netherlands was somewhat diffident about assuming unconditional obligations as far as mass influxes of refugees were concerned, unless international collaboration was sufficiently organized to deal with such a situation (see above paragraph 23). (A/CONF. 2/SR.16 page 11).

26. The representative of Italy asked for some clarification of the meaning of the words "expel or return". Under the Article, no State could expel or return a refugee to a territory where his life or freedom would be in danger. On the other hand he felt that a State could not commit itself not to expel or return large groups of refugees who presented themselves on its territory and who might endanger public security (loc cit). The representative of the Federal Republic of Germany supported the observation of the Netherlands' representative concerning countries

subject to a large influx of refugees. (Ibid. page 17). The representative of Belgium drew attention to the fact that in the article the prohibition of returning refugees to the frontier could be construed as applying to individuals and not to large groups. Such was the interpretation placed on it by the Belgian Government (loc cit.).

27. Similar arguments were put forward during the second reading of the draft Convention at the Conference. The representative of the Netherlands recalled that at the first reading the Swiss representative had expressed the view that the word “expulsion” related to refugees already admitted to the territory whereas the word “return” (“refoulement”) related to a refugee already within the territory but not yet resident there. According to that interpretation, the article would not have involved any obligation in the possible case of mass migrations across frontiers or attempted mass migrations. He wished to revert to that point because the Netherlands Government attached very great importance to the scope of the provision now contained in Article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory. (Ibid SR. 35 page 21). At the first reading, the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden, had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation. In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or attempted mass migrations was not covered by Article 33. There being no objection, the President ruledthat the interpretation given by the Netherlands representative should be placed on record. (loc cit.).

28. This part of the negotiating history has been described in some detail because it has sometimes been quoted in support of the view that Article 33 paragraph 1 may not be applicable to rejection at the frontier. It is, however, questionable whether the “ruling” by the President can be taken as an authoritative interpretation which can detract from the clear wording and obvious intent of the provision i.e. to ensure that refugees are not “pushed back into the arms of their persecutors”. It is also significant that the President did not place on record the interpretation suggested by the representative of Switzerland that the words “return” or “refoulement” only applied to refugees who had already entered the territory of a Contracting State. He only placed on record the interpretation proposed by the representative of the Netherlands that the possibility of mass migrationsacross frontiers or attempted mass migration was not covered by Article 33. Moreover from the above quoted statements by various representatives regarding the non-applicability of Article 33 paragraph 1 to situations of “mass migrations” it is clear that what was intended was not simply the arrival of a large number of asylum-seekers, but the arrival of asylum-seekers in such large numbers as to go beyond the capacity of the asylum-state to handle without the co-operation of the international community. Later events have shown that with further development and strengthening of international co-operation in dealing with refugee problems, these understandable fears have been largely overcome and the principle of non-refoulement is now regarded as fully applicable in large-scale influx situations. In this connection, mention should be made of Conclusion No. 22(XXXII) adopted by the UNHCR Executive Committee in 1981 on the Protection of Asylum-Seekers in Situations of Large-Scale Influx. In Section IIA paragraph 1 of this Conclusion, it is stated that in “all cases of large-scale influx the principle of non--refoulement - including non-rejection at the frontier - must be scrupulously observed”.

29. As a corollary to this principle, however, Conclusion 22(XXXII) contains an entire section on “International solidarity, burden-sharing and duties of States”. This conclusion, as will be seen, was specifically endorsed by the United Nations General Assembly in 1981. Its importance was moreover reaffirmed by the UNHCR Executive Committee in the General Conclusion on International Protection adopted at its Forty-Fourth Session in 1993 [UNGA Doc. A/48/12 Add.1 paragraph 19 (m)].

30. The above described negotiating history of Article 33 of the 1951 Convention was referred

to by the United States Supreme Court in the case of Sale vs. Haitian Centers Council Inc. in support of the view that the Article does not apply outside the territory of a Contracting State. In an Amicus Curiae Brief submitted to the United States Supreme Court, the Office of UNHCR expressed the view that the travaux-préparatoires did not support such a conclusion. It also considered that the clear wording and intent of the Article did not permit the arrest of boatloads of asylum-seekers on the High Seas and their forcible return to their country of origin. This view is still maintained by UNHCR. It is however noted that the wording of the judgementdoes not appear to exclude the application of the Article to refugees who present themselves at the frontier of a Contracting State in order to request asylum.

31. It should be recalled that the first two paragraphs of the Preamble to the 1951 Convention state the following:

> "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavouredto assure refugees the widest possible exercise of these fundamental rights and freedoms."

Article 14 paragraph 1 of the Universal Declaration of Human Rights states that "everyone has the right to seek and to enjoy in other countries asylum from persecution". If Article 33 paragraph 1 of the Convention were considered not to extend to rejection at the frontier, with the implied right for governments to send a refugee back to a country of persecution, this could be seen as contrary to Article 14 of the Universal Declaration. Rejection at the frontier, if it results in return to a country of persecution, would be inconsistent with a person's fundamental right to seek asylum.

32. As will be seen below, international instruments adopted subsequent to the 1951 Convention, dealing with the principle of non-refoulement, state expressisverbis that it applies to rejection at the frontier. This should not be taken as an a contrarioargument that rejection at the frontier is not covered by Article 33 paragraph 1. It should rather be taken as a clarification reflecting the practice of states in regard to the application of the principle of non-refoulement.

33. UNHCR considers that the principle of non-refoulement clearly applies to persons who seek asylum in the so-called "international area" of a State's airport, since they are already on the territory and within the jurisdiction of a that State. Failure to examine an asylum request in such circumstances would at the very least amount to "rejection at the frontier".

(c) The Convention relating to the Status of Stateless Persons of 28th September 1954

34. This Convention regulates the status of stateless persons by a series of provisions very similar to those contained in the 1951 United Nations Refugee Convention. As regards the question of non-refoulement, the Conference which adopted the Convention unanimously adopted the following resolution in its Final Act:

> "The Conference,
>
> Being of the opinionthat Article 33 of the Convention Relating to Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person 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.

Has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an Article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951." (Underlining added)

(d) The OAU Convention governing the specific aspects of refugee problems in Africa of 10 September 1969

35. The principle of non-refoulement also finds expression in Article II paragraph 3 of this Convention in the following terms:

"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." (Underlining added)

Paragraph 1 of Article I of the Convention contains a refugee definition on the lines of the definition in Article 1 A (2) of the 1951 Convention. Paragraph 2 of the Article I contains the "wider" refugee definition.

(e) The American Convention on Human Rights of 22 November 1969

36. The principle of non-refoulement has also been incorporated in Article 22 paragraph 8 of this Convention in the following terms:

"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 of life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion."

(f) The United Nations Declaration on Territorial Asylum of 14 December 1967

37. Article 3 of this Declaration adopted by the United Nations General Assembly states the following:

"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.

2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State."

This Article of the United Nations Declaration calls for the following comments. Firstly, persons referred to in article 1 paragraph 1 are persons entitled to invoke Article 14 of the Universal Declaration of Human Rights according to which everyone has the right to seek and to enjoy in other countries asylum from persecution. Secondly, paragraph 2 is formulated in very strict

terms. An exception to the principle of non-refoulement is only permissible "for overriding reasons of national security or in order to safeguard the population" (Underlining added). It is believed that the words "as in the case of a mass influx" must be read in relation to this condition.

That is to say, a "mass influx" or the arrival of a large number of asylum-seekers is not in itself sufficient to justify an exception unless such an exception is necessary "to safeguard the population". Thirdly, if an exception is considered necessary for overriding reasons this should not automatically result in persons being forcibly returned to a country of persecution. The persons concerned should be given the opportunity by provisional asylum or otherwise of proceeding to another state.

Reaffirmation of the importance of the Principle of Non-refoulement by the Executive Committee of the High Commissioner's Programme

38. The Executive Committee of the High Commissioner's Programme, in its Conclusions on International Protection, has consistently expressed its concern that refugees have been the subject of forcible return in disregard of the principle of non-refoulement. Thus in Conclusion No. 3 adopted in 1977 [XXVIII], the Executive Committee expressed its grave preoccupation that in a number of cases, refugees had been subjected to measures of forcible return in disregard of the principle of non-refoulement. In 1979, the Committee noted with concern that refugees had been rejected at the frontier or had been returned to territories where they had reasons to fear persecution, in disregard of the principle of non-refoulement [Conclusion No. 14 (XXX)]. In 1981, the Committee noted with particular concern that in certain areas refugees had been rejected at the frontier or subjected to measures of forcible return in disregard of the fundamentalprinciple of non-refoulement [Conclusion No. 21 (XXXII)]. In 1984 the Committee noted with concern that in many parts of the world the fundamentalprinciple of non-refoulement had been violated [Conclusion No. 33 (XXXV)]. In 1985 the Committee noted with serious concern that despite the development and further strengthening of established standards for the treatment of refugees, in different areas of the world, the basic rights of refugees continued to be disregarded and refugees had inter alia been exposed to refoulement (Conclusion No. 36 (XXXVI)).[2] In 1993, the Executive Committee called upon States "to uphold asylum as an indispensable instrument for the international protection of refugees and to respect scrupulously the fundamental principle of non-refoulement". (General Conclusion on International Protection, UNGA Doc. A/48/12/Add.1, paragraph 19(g)]

39. The Executive Committee has, however, also stated views which are more directly relevant to the nature and degree of acceptance of the principle of non-refoulement itself. Thus in 1977, the Committee adopted a Conclusion dealing specifically with non-refoulement [Conclusion No. 6 (XXVIII)]. In this conclusion the Committee

> "(i) recalled that the fundamental humanitarian principle of non-refoulement had found expression in various international instruments adopted at the universal and regional levels and was generally accepted by States; and
>
> (ii) reaffirmed the fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State- of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees." (Underlining added)

40. In 1978 the Committee recalled the Conclusion adopted in the previous year concerning the importance of the observance of the principle of non-refoulement and expressed its grave concern that this principle had been disregarded. In its Conclusion on refugees without an asylum country [Conclusion 15 (XXX)] adopted in 1979 the Committee stated 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 recognizedprinciple of non-refoulement. In its Conclusion on the Protection of Asylum-seekers in situations of Large-scale Influx [Conclusion 22 (XXXII)] adopted in 1981, the Committee considered that:

> "(i) in situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge ...; and
>
> (ii) in all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed."

Finally, in Conclusion 25 (XXXIII) adopted in 1982 the Committee reaffirmed the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law.

41. In the light of these various statements by the Executive Committee, it would seem difficult to consider the principle of non-refoulement as being without any force unless incorporated in a binding international legal instrument. From the categorical manner in which these statements are formulated, it would appear similarly difficult to regard them as mere exhortations to governments not reflecting a duty to treat refugees in accordance with a recognized fundamental normative principle. Moreover, these reaffirmations of the principle by the Executive Committee represent an "acquiescence" on the part of a substantial number of States directly concerned with the refugee problem i.e. States "whose interests are especially affected" (North Sea Continental Shelf Cases (I.C.J., Reports, 1969 page 43). They can be taken as indicating an opiniojuris, contributing to the creation of an international custom.

42. It may be added that a practice has recently developed whereby certain members of the Executive Committee either refuse to join in the consensus for the adoption of a Conclusion on International Protection or subsequently introduce "reservations" or "explanations". Such practices bear a certain resemblance to those followed in the case of international treaties. They would also tend to show that the Conclusions of the Executive Committee on International Protection are accepted by Governments with a high degree of seriousness which cannot be disregarded when evaluating their impact on the development of international customary norms.

Systematic reaffirmation of the principle of non-refoulement by the United Nations General Assembly

43. The principle of non-refoulement has been consistently referred to by the United Nations General Assembly in its various resolutions on the High Commissioner's Annual Report. The Office of UNHCR considers that these references to the principle of non-refoulement, taken together with the above-mentioned Conclusions of the Executive Committee constitute further evidence of its acceptance as a basic normative principle. In a series of resolutions the General Assembly has consistently expressed concern that refugees have been forcibly returned to their country of origin and has stressed the importance for States to ensure that refugees are given protection according to the principle of asylum and non-refoulement. In the later Resolutions the principles of "asylum and non-refoulement" are mentioned in the plural thus giving a clear impression that the principle of non-refoulement is perceived as an autonomous principle separate from asylum. Thus in Resolution 37/95 of 18th December 1982, the Assembly reaffirmed the fundamental nature of the High Commissioner's function to provide international protection and the need for Governments to co-operate fully with him to facilitate the effective exercise of this essential function, in particular by acceding to and fully implementing the relevant international and regional instruments and scrupulously observing the principles of asylum and non-refoulement. Similar wording was employed in the Resolutions adopted from 1983 to 1988.[3]

44. In Resolution 44/137 of 15 December 1989 the Assembly called upon all States to refrain from measures which jeopardize the institution of asylum, in particular the return or expulsion of refugees and asylum-seekers contrary to fundamental prohibitions against these practices. Similar wording was used in Resolution 45/140 of 14 December 1990, in Resolution 46/106 of 16 December 1991 and in Resolution 47/105 of 16 December 1992. In Resolution 48/116 of 21 December 1993, the General Assembly called upon "all States to uphold asylum as an indispensable instrument for the international protection of refugees, and to respect scrupulously the fundamental principle of non-refoulement".

45. In Resolution 36/125 adopted on 19 December 1981, the General Assembly urged Governments to facilitate the High Commissioner's efforts in the field of international protection inter alia by protecting asylum-seekers in situations of large-scale influx as endorsed by the Executive Committee at its thirty-second session. As has been seen, the Executive Committee in Conclusion No. 22 [XXXII] on the Protection of Asylum-seekers in Situations of Large-Scale Influx adopted at its Thirty-second session in 1981 stated that in all cases of large-scale influx the fundamental principle of non-refoulement including non-resection at the frontier must be scrupulously observed.

46. Finally as already mentioned the fundamental character of the principle of non-refoulement is reflected in the United Nations Declaration on Territorial Asylum adopted by the General Assembly on 14 December 1967.

Conclusions

(1) The principle of non-refoulement has received widespread acceptance and its fundamental character has been fully recognized.

(2) The principle of non-refoulement has been incorporated in international treaties following a tradition going back to the period of the League of Nations.

(3) The principle has in particular been incorporated in the 1951 United Nations Refugee Convention and the 1967 Protocol to which 125 States are now parties. It has also been incorporated in the OAU Convention of 10 September 1969 governing the specific aspects of refugee problems in Africa to which 42 States are now parties and in the American Convention on Human Rights of 22 November 1969 to which 24 States are now parties.

(4) The incorporation of the principle in treaties to which numerous States in different areas of the world are parties has given the principle the character of a rule of international customary law. This view is supported by the reaffirmation of the principle in the United Nations Declaration on Territorial Asylum, in Conclusions by the Executive Committee of the High Commissioner's Programme, and in resolutions of the United Nations General Assembly.

(5) The principle of non-refoulement includes non-rejection at the frontier, if rejection would result in an individual being forcibly returned to a country of persecution.

(6) The principle of non-refoulement, including non-rejection at the frontier, has also been accepted in the practice of States and its fundamental nature has not been seriously questioned.

(7) In view of the above, UNHCR considers that the principle of non-refoulement has acquired a normative character and constitutes a rule of international customary law.

UNHCR, 31 January 1994

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[1] It is recalled that in the 1951 Convention as finally adopted, these issues are dealt with in two separate Articles, Article 33 (non-refoulement) and Article 32 (Expulsion).

[2] The Executive Committee voiced its concern regarding the refoulement of refugees in similar terms in 1986 (Conclusion No. 41 (XXXVII)1, 1987 (violation of the principle of non-refoulement) (Conclusion No. 46 (XXXVIII)], 1988 (Conclusion No. 50 (XXXIX)], 1989 (Conclusion No. 55 (XL)], 1990 (Conclusion No. 61 (XLI)].

[3] Resolution 38/121 of 16 December 1983; Resolution 39/140 of 14 December 1984; Resolution 40/118 of 13 December 1985; Resolution 41/124 of 4 December 1986; Resolution 42/109 of 7 December 1987; and Resolution 43/117 of 8 December 1988.