THE CHANGING TRENDS: THE WIDER INTERPRETATION OF THE PRINCIPLE OF 'NON REFOULEMENT' IN THE CASE OF HIRSI JAMAA ET AL V ITALY

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ABSTRACT

The pace with which the world moves is so tremendously fast, it is easy to forget about those who cannot keep up. The last decade alone has seen more migration than the entire century that preceded it. The issues of migration and the violation of those vulnerable groups of people have become one of the most debated topics in various legal fields. The principle of "non-refoulement" has become one of the most discussed tool in the field of refugee law. However, due to recent development, we may find its use in other fields than the convention refugee law. It is for this purpose that this paper will attempt to analyse and hopefully, lead to a new and fruitful discussion that might, somehow, help with the effort to provide protection to those who sorely need it.

KEYWORDS: NON-REFOULEMENT – REFUGEE STATUS – CLIMATE CHANGE- INTERNATIONAL LAW – PROTECTION

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1. Introduction

The notion of the right to life has long been the staple of human rights law. The Universal Declaration of Human Rights (UDHR), one of the most important human rights documents published in recent history, clearly states that the rights to life, liberty and security of person are the rights all human beings are entitled to enjoy.[2] Though the Declaration in itself is not legally binding, various international conventions and treaties recognize and uphold the right to life, as stated in the Declaration, as one of the most important and fundamental. For instance, the International Covenant on Civil and Political Rights (ICCPR) accepts that the right to life is one of the most sacred of rights of which none shall be arbitrarily deprived.[3] Likewise, the European Convention on Human Rights (ECHR), adopted by the Council of Europe in 1950, stipulates that the right to life is protected by law.[4]

The principle of 'non-refoulement' is a principle that prohibits the expulsion of victims of persecution to the place where they might again be subjected to similar treatments. This principle is enshrined in many important treaties such as Convention Relating to the Status of Refugee[5], Convention against Torture and

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2 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art3.

3 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6.

4 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 2.

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

Other Cruel, Inhuman or Degrading Treatment or Punishment[6], Charter of Fundamental Rights of the European Union[7], American Convention on Human Rights[8], African Charter of Human Rights and People's Rights[9] and United Nations International Convention for the Protection of All Persons from Enforced Disappearance[10], among others.

Due to recent developments in the wake of the Arab Spring, the influx of people fleeing violence into Europe has surged to an unprecedented and unforeseen level. However, the migration in itself is hardly new to the region. Even so, one must bear in mind the differences between the terms 'refugees' and 'migrants', for each status grants different rights and legal protection. The term 'refugees' applies, according to the Convention Relating to the Status of Refugees, to those who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[11]

On the other hand, the definition of the term 'migrant' is a broader one. According to the Glossary on Migration by the International Organization for Migration, the term 'migrants 'encompasses all cases where the decision to migrate is taken freely by the individual concerned for reasons of 'personal convenience' and without intervention of an external compelling factor. Furthermore, the term also applies to family members who migrate in order to seek a better standard of living.[12]

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

7 Charter of Fundamental Rights of the European Union art 19.

8 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 *U.N.T.S.* 123 (Pact of San José) art 22 § 8.

9 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 12 § 3.

10 UN International Convention for the protection of all persons from enforced disappearance (adopted 12 January 2007, entered in force 23 December 2010) 275 UNTS (ICCPED) art 16§1.

11 *Ibid*.n4 art 1A(2).

12 International Organization for Migration, *Glossary on Migration* 34 (2006).

2. The summary of the case of *Hirsi Jamaa et. al v. Italy*

In the case of *Hirsi Jamaa et. al v. Italy*, which was submitted to the European Court of Human Rights in 2009, the vessels transporting 200 people, with 24 Eritrean and Somalian migrants among them, departed from Libya with the goal of reaching Italy. On 6 May 2009, the vessels were intercepted by Italian Revenue Police (*Guardia di finanza*) and the Coastguard 35 nautical miles south of Agrigento, and therefore within the maritime search and rescue region under the responsibility of Malta. The migrants were transferred onto Italian vessels and shipped back to Tripoli, Libya. The migrants stated that, during the ten-hour voyage, the Italian authorities did not inform them of their destination and took no step in identifying them. Furthermore, the Italian personnel searched and confiscated the migrants' properties, including their documents and personal belongings. Upon arrival at the Port of Tripoli, the migrants were forced to leave to the Italian vessels and handed over to the Libyan authorities.

According to the statement by the Italian Minister of Interior on 7 May 2009, the interception of vessels on high sea and the transfer of the migrants to the Libyan authorities were in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009. The aforementioned agreement was established to combat the rise of clandestine immigration into Italy.[13]

The migrants, hereafter referred to as 'the applicants', stated that two of them had died under unknown circumstances shortly after their transfer to Libyan authorities. The applicants' legal representatives had maintained contact with the applicants from 2009 to 2011. During that period of time, 14 applicants were granted refugee status by the United Nations High Commissioner for Refugees (UNHCR) in Tripoli. In February 2011, violence broke out in Libya. Consequently, the quality of contact between the applicants and their legal representatives deteriorated. The legal representatives were able to keep in contact with six of the applicants, four of whom lived in Benin, Malta or Switzerland. Another applicant was in a refugee camp in Tunisia while another applicant was granted refugee status after he had clandestinely returned to Italy in June 2011. Other applicants were awaiting response to their request for international protection.

The Court unanimously declared that there had been violations the applicant's rights due to the possibility of the fact that the applicants would be exposed to the risk of being subjected to ill-treatment in Libya and, subsequently, the risk of being repatriated to Somalia and Eritrea, where the rights of the applicants would further be threatened. Additionally, the Court also rejected the Italian

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13 *Hirsi Jamaa et. al v Italy* App no 27765/09 (ECHR, 23 February 2012).

Government's preliminary objection regarding the applicant's lack of victim or refugee status.

3. Analysis of the applications of the principle of 'non-refoulement' and examples

Regarding the Court application of the principle of 'non-refoulement', although enshrined in the Convention Relating to the Status of Refugee, it should not, and in fact does not, apply only to the refugees. Though the Court chose to apply the principle in this case, it was not the first time the Court had done so. In this instance, the Court did not create a new precedent, rather it had enforced an already existing norm. However, this is not to say that such action was not remarkable. The facts in this circumstance were significantly different from any that had happened before and the nature of this case should be further inspected.

3.1 The Court *partially* enforced an established norm with regards to the *status* of the victim.

This section will detail the Court's approach in the case of *Hirsi Jamaa et. al v. Italy.* In this first regard, the decision is the more conservative one. Though the decision by the Court might seem new, it was in no way unprecedented. Indeed, there are two notable cases that would prove that there is no requirement of refugee status in its application.

3.1.1 Soering v. UK

In the case of *Soering v. UK*, the principle of non-refoulement had been invoked in the judgment of the European Court of Human Rights to prevent extradition of Soering, a German national convicted of a capital offence, to the United States where he would surely be sentenced to death for his crime. The Court found that the extradition of Soering by the British authorities came into conflict with Article 3 of the European Convention of Human Rights regarding the prohibition of torture.[14]Thus, the extradition, the expulsion or the transfer of a person to the place where that person might face ill-treatment that could threaten his right to life cannot be implemented.[15]

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14 *Ibid*, *Concurring Opinion by Judge Pinto De Albuquerque*.

15 *Soering v UK* App no 14038/88 (ECHR, 07 July 1989).

3.1.2 MSS v. Belgium and Greece

Another instance of similar nature is the case of *MSS v. Belgium and Greece*. In this case, the European Court of Human Rights specifically recognized asylum seekers as a vulnerable group.[16]

MSS, an Afghan national who had escaped a murder attempt from the Taliban, entered the European Union through Greece in 2009. On 10th February 2009, he arrived in Belgium where he applied for asylum. The Belgian Aliens Office, complying with the Dublin II Regulation, filed a request for the Greek authorities to take charge of MSS' asylum application since Greece was his country of arrival in the Union. The United Nations High Commissioner for Refugees criticized the Belgian Aliens Office for its deficiency in processing the asylum application. United Nations High Commissioner for Refugees also noted the appalling condition of the detention facilities in Greece and strongly urged the Belgian Aliens Office to suspend the transfer of aliens to Greece. In May 2009, the Alien Office nevertheless ordered the transfer of MSS to Greece, an action MSS strongly objected. As previously stated, the condition of the facilities was appalling at best. MSS also raised concern over his fear of being repatriated back to Afghanistan, where he would surely face retaliation from the Taliban. Upon his arrival in Greece, he was detained for 3 days in a detention building. His report stated that he was detained with 20 other detainees, with restricted access to food, drinking water and toilet facilities. Furthermore, he stated that the detainees were forced to sleep on dirty mattresses, drink water from the toilets and they were not allowed out in the open air. He was subsequently released with an asylum seeker's card, however he could not find subsistence and was forced to live in the street. He later attempted to leave Greece with a false identity card and was arrested and detained at the same facility for a week, where he alleged he was beaten by police officers.[17]

The Court found that there had been violation of MSS' rights, including his protection from ill-treatment. Owing to his status as asylum seeker, the condition of his detention and the treatment he received during detention, MSS, as already vulnerable as he was, would be particularly susceptible to the violation committed against him. Consequently, the Court hold that Belgium and Greece had indeed violated MSS' rights, particularly by sending MSS to Greece where he would be subjected to ill-treatments.

These two cases are merely two examples among many of how the status of the victim in question is not an essential part in the application of the principle of

16 *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

17 *ibid* n. 15.

non-refoulement. In the case of *Soering v. UK*, the Court relied on the notion that the transfer of a person convicted of a capital offence to the country of his execution could not be undertaken as it would come into conflict with an already established norm, and in *MSS v. Belgium and Greece*, the Court declared that asylum seekers are especially vulnerable to the violation, including the expulsion to the place where one might be subjected to ill-treatment. Further inspection into the case of *Hirsi Jamaa et. al v. Italy* reveals that the applicants in the case are not refugees but migrants. The only main difference is the fact that the two aforementioned cases were cases raised by a person, while in the case of *Hirsi Jamaa et al. v. Italy*, the applicants submitted the case collectively as a group.

3.2 The Court also chose to establish a new practice regarding that application and the status of victim.

Another notable feature in the case of *Hirsi Jamaa et al. v. Italy* is also a matter of the status of the applicants. Though it is established that they were not refugees at the time of the incident; they were not refugees nor were they directly persecuted as established under Article 1 of Convention Relating to the Status of Refugees.[18] Instead, the Court relied on the fact that, regardless of their status, the applicants shared the same needs of protection as the refugees and/or other vulnerable groups of people.[19]Furthermore, according to the concurring opinion of Judge Pinto De Albuquerque, the acts of establishing the terms '*de facto refugees*' and '*de jure refugees*' were incorrect since both clearly need international protection and it is unreasonable to treat '*de jure refugees*' better than '*de facto refugees*' and/or vice versa. This comment also corroborated his statement regarding the people's needs of international protection. Judge Pinto De Albuquerque further stated that the status of refugees is merely declaratory; one does not become refugee by recognition, but one is recognized because one is a refugee. Consequently, the principle of non-refoulement should apply to people in need of international protection, regardless of their status.[20]

The Court had, to some degree, established a practice that seeks to change the conventional application and understanding of the principle. Instead of focusing solely on the persecuted refugees, the Court seemingly chose to embrace the fact that vulnerable groups of people require attention and international protection, regardless of their status. By the merit of various precedents, this is not the first time the European Court of Human Rights had decided to make a bold move in the area where the interpretation of application of a principle is still obscure. It is, however, remarkable that by continuing to establish new practices while

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18 *ibid* n. 10.

19 *ibid* n. 13.

20 *ibid* n. 13.

retaining and upholding the prior practices established, the Court is shaping the norm that could and would certainly be applied in the foreseeable future.

4. The reasoning behind the applications

The evidence of protection against torture and inhumane treatment which characterises the United Nations Convention against Torture in these cases are clear. The Court stated the purpose of the principle by mentioning the statement by the UNHCR which stated that

> [I]nternational human rights law has established non-refoulement as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to refoule is also recognized as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined.[21]

The Court also noted in a statement that the interpretation of the principle by the Court means that the States must refrain from returning a person, whether directly or indirectly, to a place where there is a real risk of torture or inhuman or degrading treatment.[22] The lack of protection in this case resulted in deaths of some of the detainees. The elements of violation are clear and the Court also noted the conditions and risks of violation in the event of enforced returning of the detainees to Libya, where the internal conflicts raged, and subsequently, Eritrea and Somalia.[23]

These elements mirror the statement made by Judge Pinto De Albuquerque and correspond with the spirit of the laws and the nature of the principle as an instrument that emphasizes the preservation of life and protection from torture and other forms of violation, regardless of the status. The Court chose not only to follow the precedents established as stated in the previous points but also to follow to the practical approach to prioritise and ensure the safety of persons and protection from any inhumane treatment.

5. Wider applications of the principle of 'non-refoulement' outside of conventional refugee-related situations.

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21 *ibid* n. 12 para 23.

22 *ibid* n. 12 para 34.

23 *ibid* n. 12 para 43.

The remarkable effort by the European Court of Human Rights to extend help and assistance to those vulnerable and susceptible to violation is commendable. Hereafter, the wider application of the principle of non-refoulement will be discussed.

The principle of non-refoulement can be applied and implemented as an instrument and as protection, as far as human rights are concerned. Indeed, there are many instances outside of the traditionally-interpreted doctrine regarding the application of the principle where it might be implemented with great effect. For instance, the application of non-refoulement as an additional layer of the protection enjoyed by migrant workers and/or stateless persons. Another possible instance where the principle could be implemented is in the event of environmental disasters.

Due to recent change in global climate, new group of migrants will emerge to rival the 'conventional' refugees and asylum seekers. These so-called 'environmental migrants' and 'climate refugees' lack protection under international law; they are neither refugees nor migrants. They are forced to move and relocate, not by war or political turmoil, but by the force of nature and climate change. Though they enjoy the protection under human rights law, no other legal instruments are yet available to offer them any meaningful protection they sorely need. The terms 'environmental migrants' and 'climate refugees' do not exist as legal terms, however these terms are the closet that can be applied to the people who are forced to leave their habitat, whether temporarily or permanently, due to both the direct physical impact and the effects in term of socio-economic of climate change.[24]

A case in point is the case of Tuvalu. Tuvalu is a small island nation in the Pacific Ocean affected by the climate change phenomena, specifically El Niño and La Niña. According to Tuvalu's report to United Nations General Assembly 64th Session, Tuvalu could lose its nationhood as a result from the rising sea level. Furthermore, due to the effect of climate change, Tuvaluans would eventually be forced to evacuate the island and seek a new place to settle.[25] Another important example is the island nation of Kiribati, another island nation in the Pacific Ocean. Kiribati also suffers from the effect of global warming and rising sea level.

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24 Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press 2012) 3.

25 'Tuvalu's Views on the Possible Security Implications of Climate Change to be included in the report of the UN Secretary General to the UN General Assembly 64th Session', available at: <http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/Tuvalu_CCIS.pdf>accessed 24 November 2013.

It is estimated that by the year 2100, the sea level would rise by 1.4 metres, effectively rendering the island uninhabitable.[26]

Though there are measures to assist in the rare cases of environmental disasters, they are too few in numbers and are not practiced as part of international legal instruments. For instance, the immigration programme for the Tuvaluans has been established by the New Zealand Government.[27] Other notable initiatives are the temporary protection mechanisms established to provide protection to those displaced by environmental disasters. However, the measures, such as those in the United States of America and various European countries, often require executive permission in order for the protection to be granted.[28]

Though the United Nations Framework Convention on Climate Change (UNFCC) was brought forward as a treaty to stabilize the worsening effect of global warming, the fact that no international legal instruments were introduced to address the issues of possibility of environmentally displaced persons renders the end result of the UNFCCC's goals quite dangerously unfulfilling. It is therefore a requirement that the international community pays heed to the plight suffered by island nations of the world and effectively devise a strategy in order to aid these nations in their survival.

The application of non-refoulement in the case of massive influx of environmental refugees such as in the case of total territorial loss would be admittedly extremely difficult. However, it is for this reason that central international organizations, possibly the United Nations Environment Program and the United Nations High Commissioner for Refugees, should take on more active roles in establishing the international legal instruments to aid the environmental refugees. Consequently, one must also consider the expense that would come with the application of principle. Nevertheless, one must bear in mind that the goal of non-refoulement is to prevent the violation of human rights and to protect the rights of those who cannot do so themselves. Therefore, it is in this regard that one might and could consider the implementation of non-refoulement as a possible measure in the events of environmental disaster.

6. Conclusion

The principle of non-refoulement has been increasingly invoked due to massive influx of people fleeing from the violence in the countries in Africa and the

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26 Kimberly Ketchoyian, 'ICE Case Studies Number 244: Kiribati and Sea Level Rise'<http://www. american.edu/ted/ice/kiribati.htm> accessed 29 November 2013.

27 *ibid* n. 21.

28 *ibid* n. 20, 100-103.

Mediterranean area into Europe. The political turmoil and internal conflicts in Egypt, Libya and Syria have brought about forced migration and refugee problems in the region. This is the traditional role for which the principle of non-refoulement was established: to provide protection for those who cannot protect themselves.

However, following the noble examples set by the European Court of Human Rights, the notion that only those persecuted are allowed protection might no longer rings true. Although, there are debates regarding the unconventional application of the principle of non-refoulement, the fact remains that the precedents have been established. It might seems irrelevant and far-fetched, but the application of the principle of non-refoulement might and could actually be implemented with regards to the so-called 'environmental migrants' ,'climate refugees' and other circumstances with great effect.

The question that remains is the status of the principle itself. The status of non-refoulement as an instrument under international law is still a debated topic. Regarding this subject, one needs to understand the intention and purpose of the principle in order to see the true meaning behind the words and phrases of the law. According to Professor Guy S. Goodwin-Gill, a professor of Public International Law at Oxford University, the principle of non-refoulement has, at the very least, been crystallized into a part of instruments under customary international law.[29] This statement also collaborates the application of the principle as a mean to prevent the torture and ill-treatment as the results of expulsion. Furthermore, the statement by Professor Guy S. Goodwin-Gill also mirrors the words by Judge Pinto De Albuquerque in his concurring opinion in the case of *Hirsi Jamaa et. al v. Italy* previously mentioned.

It is a possibility that the principle of non-refoulement might see its use as part of measures implemented to aid in the case of environmental disasters and other unforeseeable instances. The wider interpretation of the application established by the European Court of Human Rights might pave way for other principles that could also be applied in various other circumstances.

[29] Guy S. Goodwin-Gill, 'Refugees and Responsibility in the Twenty First Century: More Lessons Learned from the South Pacific' [2003] Pacific Rim Law & Policy Journal, 30.