

A CONSIDERATION ON LEGALITY OF BORDER BARRIERS: THE PRINCIPLE OF NON-REFOULEMENT AND IT'S EXTRA-TERRITORIAL EFFECT

*Sınır Engellerinin Hukukiliği Üzerine Bir Değerlendirme:
Geri Göndermeme İlkesi ve Ülke Dışı Etkisi*

Beyza ÖZTURANLI ŞANDA*
Nasih Sarp ERGÜVEN **

Is a good neighbor, from a neighboring country?

Is a good neighbor, someone who has a “Close the Borders” sticker on his car?

Is a good neighbor, a stranger you don't fear?

A good neighbor, 15th Istanbul Biennial

ÖZ

Devletlerin, başta güvenlik olmak üzere pek çok gerekçeye dayanarak sınırlarına duvar ve benzer yapılar inşa etmeleri genel bir uygulamadır. Uluslararası mülteci hukukunun bir parçası olan ve 1951 Birleşmiş Milletler Mültecilerin Hukuki Statüsüne İlişkin Sözleşme ile de düzenlenen geri göndermeme ilkesinin, sadece mülteci statüsü kazanan kişiler için değil, zulme uğrayacağından haklı sebeplerle korkan ve sığınma arayan herkes bakımından geçerli olacak şekilde ve ülke dışına çıkarma, iade etme, nakletme

Makalenin Geliş Tarihi: 28.10.2019, **Makalenin Kabul Tarihi:** 04.03.2020

* Dr. Öğretim Üyesi, Bartın Üniversitesi İktisadi ve İdari Bilimler Fakültesi Siyaset Bilimi ve Kamu Yönetimi Bölümü, E-posta: bozturanli@bartin.edu.tr, ORCID: 0000-0003-4184-5563

** Dr., Ankara Üniversitesi Hukuk Fakültesi Milletlerarası Hukuk Anabilim Dalı Öğretim Elemanı, E-posta: erguven@law.ankara.edu.tr, ORCID: 0000-0003-4610-2515

ve sınırda reddetme gibi her türlü sınır dışı fiillerini de içine alacak biçimde yorumlanması, uluslararası hukuk ve insancıl hukuk alanındaki gelişmelerden kaynaklanan bir gerekliliktir.

Dünyanın çeşitli bölgelerindeki iç savaşlar, başarısız devletler, kuraklık ve iklim değişikliği gibi nedenlerden kaynaklanan kitlesel insan hareketliliğini engellemek amacıyla Balkan devletleri tarafından tamamlanan muhtelif sınır duvarları ve telleri ile buna ilişkin faaliyetler, geri göndermeme ilkesinin ülke dışı bir etkisinin olup olamayacağı sorununu gündeme getirmektedir. Sınır politikaları, devletlerin egemenliklerinin bir sonucudur; ancak sınırların korunması çerçevesinde alınan bu tedbirler, devletin uluslararası hukuktan kaynaklanan yükümlülükleri ihlal etmesiyle sonuçlanmaktadır.

Anahtar Kelimeler: Uluslararası Mülteci Hukuku, Geri Göndermeme İlkesi, Devlet Egemenliği, Etkin Kontrol, Sınır Politikaları.

ABSTRACT

It is a common practice for states to build walls and similar structures on their borders primarily for security but also for a variety of reasons. The fact that the principle of non-refoulement as part of customary international law and regulated by the 1951 Convention Relating to the Status of Refugees is deemed valid not only for those who gain the status of refugee but also for everyone who seeks asylum and that it is interpreted in a way to cover all kinds of deportation acts such as expulsion, return, transfer or rejection on the border for those who have a well-founded fear of being persecuted is a requirement of the developments in both international law and humanitarian law.

Various border walls and fences completed by Balkan states with the purpose of preventing mass population movement arising from reasons such as civil wars, failed states, drought and climate change in different parts of the world and relevant activities bring into question of whether the principle of non-refoulement has an extra territorial effect or not. The border policies of states are the result of their sovereignty; however, current precautions taken within the framework of the protection of borders can result in the state's violation of the obligations arising from international law.

Key Words: International Refugee Law, Non-Refoulement, State Sovereignty, Effective Control, Border Policies

Introduction

Since the 1970's, a serious increase has been observed in the number of asylum seekers who have reached the territories of developed states. This number was 672.000 in the 1990's.¹ there was a serious decline at the beginning of the 2000's, and this number regressed to 200.000 in 2006; however, it was 431.000 in 2013, 627.000 in 2014 and 1,3 million for the years 2015-2016.² After 2011, when population mobility started to increase rapidly, many developed states, especially the European states, began practices to prevent potential refugees from reaching their territories and adopted national regulations and international instruments.

For a long time, states have been carrying out strict border policies such as building walls and fences along their borders based on different reasons. The walls between India-Pakistan, Saudi Arabia-Yemen, Democratic People's Republic of Korea-South Korea, India Bangladesh, People's Republic of China-Pakistan, Pakistan-Afghanistan, Thailand-Malaysia, Uzbekistan-Kyrgyzstan and Iraq-Kuwait are the main examples. The US-Mexico wall, which is partly made up of fences and is on the agenda for full construction, can be added to the list. The wall built by Israel in the occupied Palestinian territories differs from other examples due to the status of the region and due to its referral to the International Court of Justice by way of an advisory opinion.³ Currently, particularly the structures built by states on their borders to prevent massive population mobility and those that have begun to appear in Europe together with their similar practices and regulations neither perform the fair sharing of the responsibility for refugees between states nor protect the rights of refugees or asylum seekers.

The given aspects connote serious questions about the 1951 Convention Relating to the Status of Refugees⁴ and the Protocol Relating to the Status of

¹ UNHCR, THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 36 (2006), available at <https://www.unhcr.org/publications/sowr/4a4dc1a89/state-worlds-refugees-2006-human-displacement-new-millennium.html>

² For the data extracted on 13 March 2017, see EUROSTAT, Asylum Statistics, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics

³ Barry A. Feinstein, Justud Reid Weiner, Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation, 37 GEO. WASH. INT'L. L. REV. 318-346 (2005).

⁴ Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force 22th April 1954 (hereinafter 1951 Convention).

Refugees (1967)⁵ and other human rights documents together with the obligations of refugees about their rights arising from customary law and the liabilities to be incurred due to the infringement of these obligations. One important question that needs to be answered here is the legality of these practices, conducted under the cover of national security, against Article 33 of the 1951 Convention, in other words, whether the principle of non-refoulement possesses an extraterritorial effect. However, first, it is required to analyze the scope of the principle of non-refoulement to respond to these questions.

I. Which situations are covered by the principle of non-refoulement?

Article 33 of the 1951 Convention contains the principle of non-refoulement, which may not be the subject of a reservation and is required to be applied in emergency situations and to include every individual who fits the definition in Article 1/A of the Convention.⁶ According to this principle,

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

Concerning the descriptive attribute of the status of refugee,⁷ this principle can be stated to include individuals waiting for their legal status to be determined. The exception in the second paragraph,

‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

⁵ Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force 4th October 1967 (hereinafter 1967 Protocol).

⁶ The Principle of non-refoulement was first formulated in the 1933 Convention Relating to the International Status of Refugees and recognized in the 1951 Convention Relating to the International Status of Refugees, 28 October 1933, CLIX L.N.T.S. 3663.

⁷ UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 28 (1992), available at <http://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* 6 (2007), available at <http://www.refworld.org/docid/45f17a1a4.html>.

indicates the impact of scholars – who make a narrow interpretation of the principle of non-refoulement itself – on preparatory studies.⁸ Aside from the exceptions in which Article 33/2 was broadly interpreted following the 9/11 terrorist attacks,⁹ the cases where fundamental rights and freedoms are restricted and similar exceptions in the documents related to the fundamental rights and freedoms should be interpreted narrowly based on internal disturbances or security concerns.¹⁰ However, the national security assessments of states prevail over humanistic considerations in practice; in particular, the states on the Balkan route resort to precautions such as enclosing territory with electrified fences, building walls or pushing back at the borders to prevent individuals from reaching the state's territory.¹¹ It is not possible for people who are rejected at the border to have access to basic vital needs such as water, food and heating or to opportunities to provide information about their status while under threat.¹²

⁸ AGNES HURTWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 175 (2009). For the narrow interpretation of the Article 33 see ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW VOL. II 179 (1972).

⁹ According to the Advisory Opinion of UNHCR; “The threat to security exception to States’ non-refoulement obligations, like any exception to human rights guarantees, must be interpreted restrictively and with full respect to the principle of proportionality... while states clearly maintain a margin of discretion in applying the exceptions to article 33(1), this margin of appreciation is not unlimited”. UNHCR, *Advisory Opinion on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention* 1, 4 (2006), available at <http://www.refworld.org/docid/43de2da94.html>.

¹⁰ Franz Matscher, *Methods of Interpretation of the Convention*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 64-66 (Ronald St. J Macdonald, Franz Matscher, Herbert Petzold eds., 1993); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 412 (2005).

¹¹ Volker Türk, *Security and International Refugee Protection – UNHCR's Perspective*, available at <http://www.unhcr.org/573e8e987.pdf>; U.N. GAOR, NOTE ON INTERNATIONAL PROTECTION 17 (2016), available at <http://www.refworld.org/docid/595e1f684.html>.

¹² AMNESTY INT’L, EUROPE’S BORDERLANDS: VIOLATIONS AGAINST REFUGEES AND MIGRANTS IN MACEDONIA, SERBIA AND HUNGARY (2017), available at https://www.amnestyusa.org/files/ser-mac_migration_report_final.compressed.pdf; ECCHR, *Case Report, Push-backs at the Greek-Macedonian Border Violating Human Rights* (2016), available at https://www.proasyl.de/wp-content/uploads/2016/09/CaseReport_Idomeni_ECtHR_20160914.pdf; Preethi Nallu, *Europe’s Outsourced Refugees, Europe’s Refugee Frontier: Pushbacks and Border Closures in Serbia*, REFUGEES DEEPLY, 24th March 2017, available at <https://www.newsdeeply.com/refugees/articles/2017/03/24/europes-refugee-frontier-push-backs-and-borderclosures-in-serbia-2>; HRW, *Bulgaria: Pushbacks, Abuse at Borders, Halt*

Regarding the 1951 Convention, it can be said that although it is not clearly expressed in the Convention, the perception that the principle of non-refoulement and the process of expulsion included in the scope of the protection of Article 33 were devoted to refugees crossing the border of the mentioned state's territory was prevailing after World War II and during the Cold War.¹³ However, there is a current consensus that such a restriction is out of question, at least theoretically,¹⁴ as mentioned below.

Traditionally, the principle of non-refoulement¹⁵ does not *ipso facto* entail a right of the individual to be granted asylum in a particular state. Nevertheless, when states are not ready to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in the removal of asylum seekers, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.¹⁶ The solution to be found should comply with the provisions of the 1951 Convention and 1967 Protocol, and the people who are in need of international protection should be provided access to fair and effective asylum procedures. While Article 33 designates that a person should not be sent to a state where s/he may be at risk of persecution, a particular territorial restriction is not set.¹⁷

In the second paragraph of Article 33, the provision constituting the exception to the principle of non-refoulement does not affect the state's unexceptional obligation of non-refoulement in the context of international human rights law,¹⁸ as the principle of non-refoulement is a nonderogable right

Summary Returns, Beatings, Robbery of Asylum Seekers, 20th January 2016, available at <https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders>.

¹³ NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES; ITS HISTORY, CONTENTS AND INTERPRETATION; A COMMENTARY 138 (1953); *See also* GRAHL-MADSEN, *supra* note 8, at 179.

¹⁴ ANN VIBEKE EGGLI, MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW 156 (2001); ROBERTA MUNCIANU, FRONTEX AND NON-REFOULEMENT: THE INTERNATIONAL RESPONSIBILITY OF THE EU 142-143 (2016); UNHCR (2007), *supra* note 7, at 7; CORNELIS WOLFRAM WOUTERS, INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT 49-51 (2009); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 337-340 (2005).

¹⁵ UNHCR (2007), *supra* note 7, at 8; U.N. GAOR, *supra* note 11, at 24.

¹⁶ Such as sending asylum seekers to the third safe countries, taking them under the secondary protection or refugee status.

¹⁷ UNHCR (2007), *supra* note 7, at 9.

¹⁸ *Id.* at 11.

in the frame of international refugee law without any restriction.¹⁹ The principle of non-refoulement is involved in many human rights and antiterrorism agreements and declarations directly²⁰ or as a means of broad interpretation.²¹

The meaning of “refoulement” (refoulé) also gives clue about the scope of the principle of non-refoulement. First, the principle of “refoulement” differs from the formal expulsion procedure forcing a foreigner residing lawfully in a country to leave the country on the grounds of national security or public order.²² Having similar meaning, deportation indicates that a state’s unilateral

¹⁹ According to Article 42/1 of the 1951 Convention, no reservation is permitted for Article 33.

²⁰ Article 3 of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85; Article 2/3 of 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa 1001 U.N.T.S. 45; Article 22/8 of 1969 American Convention on Human Rights 1144 U.N.T.S. 123; Section III/5 of 1984 Cartagena Declaration on Refugees, 1 *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, 1196; Article 2/3 of Declaration on Territorial Asylum, U.N. GAOR, A/RES/2312(XXII); Article 3(2) of the 1957 European Convention on Extradition, E.T.S. No. 24; Article 4(5) of the 1981 Inter-American Convention on Extradition, O.A.S.T.S. No. 60; Article 9(1) of the 1979 International Convention against the Taking of Hostages, 1316 U.N.T.S. 205; Article 12 of the 1997 International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249; Article 15 of the 1999 International Convention for the Suppression of the Financing of Terrorism, 39 I.L.M. 270; Article 5 of the 1977 European Convention on the Suppression of Terrorism, E.T.S. No. 90, 1137 U.N.T.S. 93; Article 14 of the 2002 Inter-American Convention against Terrorism, 42 I.L.M. 19.

²¹ In case of any violation of non-refoulement principle by returning refugees with a well-founded fear to persecution to the countries where their life, freedom or personal integrity are in danger, Eur. Ct. H.R. finds it as a violation of Articles of 2 or 3 of the Convention by a broad interpretation of mentioned articles. See the Case of Soering v. U.K., App. No. 14038/88, Eur. Ct. H.R. 99-111 (1989); M.S.S. v. Belgium & Greece, App. No. 30696/09, Eur. Ct. H.R. 344-360 (2011); Babajanov v. Turkey, App. No. 49867/08, Eur. Ct. H.R. 41-49 (2016); J.K. and Others v. Sweden, App. No. 59166/12, Eur. Ct. H.R. 77-123 (2016); Judgments of the Eur. Ct. H.R. cited in this article are available at <http://hudoc.echr.coe.int>. European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, 213 U.N.T.S. 222; Also Human Rights Committee’s interpretation related to the Articles 6 and 7 of 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, embraces the non-refoulement obligation as “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”. HRC, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* 9 (1992), available at <http://www.refworld.org/docid/453883fb0.html>.

²² GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 262 (3th ed. 2007); HURTWITZ, *supra* note 8, at 174.

act of ordering a person to leave its territory includes forcefully removing him or her if necessary,²³ which is mostly described in national legislation terminology. According to a UN Working Report on Statelessness that has adopted a broader definition and does not discriminate between whether the person is in the country legally or illegally, expulsion is a formal disposal requiring the departure of the aforesaid person from the country.²⁴ When the broad definition is adopted, exclusion or deportation would include all kinds of returns by force, and it can be further stated that exclusion or deportation include measures restricting the entrance of people into a country and affecting the acceptance or rejection of people at the frontier.²⁵

While considering the meanings of the words “expel”, “return” and “refoulement” in Article 33, as Mungianu purports, these terms should also be interpreted by the provision in Article 31/1 of the Vienna Convention on the Law of Treaties, as “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose”²⁶ As articles of 31 and 32 of the Vienna Convention on the Law of Treaties related to interpretation also reflect customary law, it should also be applied to the 1951 Convention even though it is dated before 1969.²⁷ In full compliance with Article 31, regarding the ordinary meaning of the word “expel”, it implies “forcing somebody to leave country”.²⁸ In this case, the individual must have entered the territory of the state where s/he wants to seek asylum and be forced to leave by state authority.

²³ Walter Kälin, *Aliens, Expulsion and Deportation*, MPEPIL, (2010).

²⁴ UN, *A Study of Statelessness* 49 (1949), available at <http://www.refworld.org/pdfid/3ae68c2d0.pdf>.

²⁵ EGGLI, *supra* note 14, at 155.

²⁶ MUNGIANU, *supra* note 14, at 142; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

²⁷ The retroactive character of Articles 31 and 32 was confirmed by the International Court of Justice (ICJ) in the Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment 48; also by the Seabed Disputes Chamber of the International Tribunal for the Law of Sea (ITLOS) in the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No.17, Advisory Opinion of 1 February 2011, 57 available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf; and by the ECt.H.R. in the Decision of Golder v. UK, App. No. 4451/70, Eur. Ct. H.R. 29 (1975). Judgments of the ICJ cited in this article are available at <http://www.icj-cij.org/en/cases>.

²⁸ Oxford English Dictionary, available at www.oed.com.

However, we can not make the same conclusion for the word “return”, which means “going back to a place”.²⁹ “Return” should be interpreted more broadly than the word “expel”, and it is not necessary for an individual to be physically present in the territory of a state where s/he seeks asylum.³⁰ While the ordinary meaning of “return” is indicated as “go back”, “exchange” and “put back”,³¹ the English equivalent of “refouler” is “to push back” and “repress”.³² That means that the term of refoulement in the text of the treaty encompasses the situation of “return”.³³ Concluding that these words in the preparation of the treaty involve refugees who have entered into the territory of a state party contradicts the rules of the Vienna Convention on the Law of Treaties about interpretation. With this meaning, the word “refoulement” absolutely includes “returns” in the frontier area.³⁴

II. Territorial effect of the principle of non-refoulement

As seen above, the conceptual analysis of Article 33/1 does not limit the area where the principle of non-refoulement is applicable to within a state’s territory. Likewise, article 33/1 of the 1951 Convention establishes an obligation not to return a refugee or asylum-seeker to a country where s/he would be at risk of persecution or other serious harm with a wording of “any manner whatsoever” which might give an opinion about the territorial effect

²⁹ Oxford English Dictionary, available at www.oed.com.

³⁰ MUNGIANU, *supra* note 14, at 142; WOUTERS, *supra* note 14, at 50-51; See Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT’L J. REFUGEE L. 553, (2005).

³¹ Cambridge Dictionary, available at <http://dictionary.cambridge.org/dictionary/english/return?fall backFrom=british-grammar>.

³² Cambridge Dictionary, available at <http://dictionary.cambridge.org/dictionary/french-english/refouler>.

³³ UNHCR, *The Refugee Convention, 1951, The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* 9 (1990), available at <http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>. The term “refoulement” parenthetically had been recorded as “return”. During the *travaux préparatoires* of the 1951 Convention “... The President suggested that in accordance with the practice followed in previous Convention, the French word ‘refoulement’ (‘refouler’ in verbal uses) should be included in brackets and between inverted commas after the English word ‘return’ wherever the latter occurred in the text”. available at <http://www.unhcr.org/protection/travaux/3ae68ceb4/conference-plenipotentiaries-status-refugees-statelesspersons-summary.html>. See also UNHCR (2007), *supra* note 7, at 27.

³⁴ WOUTERS, *supra* note 14, at 137-138; MUNGIANU, *supra* note 14, at 144; GOODWIN-GILL & MCADAM, *supra* note 22, at 257; HATHAWAY, *supra* note 14, at 340; EGGLI, *supra* note 14, at 156.

of the principle of non-refoulement and whether such a territorial effect would contain the regions near the borders of states.³⁵ More evidence is the provision of Article 33/2 that permits exceptions to the principle of non-refoulement only when

‘... a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’.

Of course, it is a deliberate choice to mention the territory of the state in particular, as is mentioned here and it indicates the intention of those who drafted the treaty not to make territorial restrictions for the first paragraph.³⁶ Likewise, there are some territorial restrictions in other provisions of the treaty (for example, the rights of refugees).³⁷

The very basic provision of Article 26 of the Vienna Convention on the Law of Treaties requires that every treaty in force is binding upon the parties to it and must be performed in good faith. Besides, the necessity to interpret the principle of non-refoulement broadly in a way to cover borders and the area nearby is supported by the requirement that the subject and purpose of the treaty must be taken into account. In the “Preamble” containing the subject and purpose of the 1951 Convention, the social and humanistic characteristics of the provisions of the treaty have been emphasized, and it is stated that the purpose is to ensure that refugees benefit from their fundamental rights and freedoms as comprehensively as possible.³⁸

³⁵ See also GOODWIN-GILL & MCADAM, *supra* note 22, at 246; HURTWITZ, *supra* note 8, at 176.

³⁶ *Id.* at 28. During the *travaux préparatoires* of the 1951 Convention, The United States’ representative of the Ad Hoc Committee on Statelessness and Related Problems gave his opinion that “closing the frontier of a refugee who asked admittance, or turning him right after he had crossed the border, or expelling him in spite of admission of residence in the territory are the same issues. Main concern might be, whether or not the refugee is forced be turned back to a country where his life or freedom could be threatened”, ESCOR, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons- Memorandum by the Secretary General Comments on Article 24 of the Preliminary Draft 3* (1950), available at <http://www.refworld.org/docid/3ae68c280.html>.

³⁷ HATHAWAY, *supra* note 14, at 260-270.

³⁸ MUNGIANU, *supra* note 14, at 144. The Article 31/2 of the Vienna Convention also requires attention to

“...the whole text, including its preamble and annexes, any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”.

According to Article 31/3 of the Vienna Convention on the Law of Treaties concerning to the interpretation of treaties, any subsequent agreement between parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the the treaty that establishes the agreement of the parties regarding its interpretation, and any relevant rules of international law applicable in the relations between the parties must be addressed when interpreting international treaties. From this point of view, limiting the territorial scope of the Article 33/1 of the 1951 Convention to the territory of the state will conflict with the subsequent state practice and relevant and applicable rules of international law. Although the procedure of expulsion is a concept under national law, international treaties on human rights, various human rights committees monitoring the practices of member states and the decisions of international courts must be taken into consideration in the drawing of the territorial application of the principle of non-refoulement.

According to the opinion of the UN Human Rights Committee on the characteristics of the legal obligations of the contracting states to the International Covenant on Civil and Political Rights, the rights provided by the Covenant make any contracting state responsible to persons who may be within its territory and to all persons subject to its jurisdiction. In other words, these rights must be respected and ensured for anyone within the jurisdiction or effective control of a contracting state, even if an individual is not situated within the state's territory.³⁹ In determining the human rights obligations of a state with respect to a particular person, the decisive criterion is not whether that person is under the state's territorial jurisdiction or within a territory under *de jure* control of the state, but rather whether or not s/he is subject to that state's effective authority and control.⁴⁰

According to the ICJ evaluating the provisions of the International Covenant on Civil and Political Rights, jurisdiction of the state, although primarily territorial, might go beyond the contracting state's territory when the subject and purpose of the Covenant and the obligations of parties are considered.⁴¹

³⁹ UN HUMAN RIGHTS COMMITTEE, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Human Rights Committee, General Comment 31* 10 (2004),

⁴⁰ UNHCR (2007), *supra* note 7, at 35. See also IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 431-438 (2003).

⁴¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. 109.

Similarly, the European Court of Human Rights indicated in the well-known *Loizidou* decision that the state obligations in the Convention could go beyond the territory of the contracting states.⁴² According to the Court, the authority of the state is basically restricted to its territory under the doctrine of international public law; however, this authority can go beyond its territory in the event that a state has effective control over a certain region and its residents through performing governmental activities following military intervention based on the consent, invitation or connivance of the state of the related region, such that the activities are conducted by a formal government.⁴³

As can be observed and indicated by the subsequent treaties and practices of states and the decisions of committees and rulings, the narrow interpretation of the principle of non-refoulement contradicts both the ordinary meanings of the terms of the provision in the 1951 Convention and 1967 Protocol and the subject and purpose of the international treaties on human rights. The decisive criterion considered in determining the liability of a state is not whether the relevant person is on the state's territory but rather whether the person comes within the effective control and authority of that state.⁴⁴ For this very reason, campaigns or deterrence policies conducted within the potential refugee countries may not breach the obligations of states under the 1951 Convention. In fact, regarding the doctrinal developments interpreting the 1951 Convention and state practices, the measures aiming to keep individuals – who may apply for asylum – in the countries or regions of origin, visa requirements or carrier sanctions would not amount to a breach of the obligations arising from refugee law.⁴⁵ It is at least not possible to allege a breach of the international obligations of states based on the measures they have taken that are directed to the potential refugees beyond the destination country.⁴⁶

⁴² *Loizidou v. Turkey* (Preliminary Objections), App. No. 15318/89, Eur. Ct. H.R. 62 (1995); *Hirsi Jamaa and Others v. Italy*, App. No. 27765/09, Eur. Ct. H.R. 196-206 (2012); *Othman (Abu Qatada) v. UK*, App. No. 8139/09, Eur. Ct. H.R. 258-285 (2012).

⁴³ *Issa and Ors v. Turkey*, App. No. 3821/96, Eur. Ct. H.R. 81 (2004); *Al-Skeini v United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. 127 (2011); *See also* Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857-884 (2012).

⁴⁴ UNHCR (2007), *supra* note 7, at 43.

⁴⁵ EGGLI, *supra* note 14, at 167; Thomas Gammeltoft-Hansen, *Private Actor Involvement in Migration Management in THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* 537 (2017).

⁴⁶ EGGLI, *supra* note 14, at 167. For detailed explanations about carrier sanctions related to international refugee law *see also* Jessica Schechinger (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017) 527-555.

Briefly, it can be said that the terms used in the 1951 Convention and their lexical meanings, basic interpretation principles and the principle of *pacta sunt servanda* necessitate the broad interpretation of non-refoulement and ascertain the fact that the protection of the non-refoulement encompasses the regions near the borders. Refugees cannot be returned to any country where s/he would be in risk of persecution under the principle of non-refoulement which applies wherever a state exercises jurisdiction, (including at the frontier, on the high seas or the territory of another state).⁴⁷

III. Legality of states' border barriers and responsibility

Long before European states' border practices, the Supreme Court of the United States adjudicated that the principle of non-refoulement could not be applied out of the territory of a state in the case of *Sale v. Haitian Centers Council for the Haitian asylum seekers* who were rejected by the US Navy on the high seas without receiving any application for asylum procedure.⁴⁸ The decision has been highly criticized in the literature, and it has flouted the state obligations related to human rights that should be applied in territories under the authority of the state, including the frontier region, high seas or the territory of

⁴⁷ UNHCR (2007), *supra* note 7, at 23-24.

⁴⁸ *Sale v. Haitian Centers Council, Inc.* 509 U.S. 156-157 (1993). The decision of the United States Supreme Court is open to criticism. Right after the widespread violence that blew up in Haiti in 1991, Haitian asylum seekers tried to reach the coasts of the USA by boat. However, the coast guard retained the people coming from the high sea and transferred them to Guantanamo Bay after a while. It is under suspicion whether these people benefit from fundamental rights and freedoms under the administration of Guantanamo. However, according to US executive and judicial organs, Haitian people who settled in Guantanamo were out of the territorial jurisdiction of the USA and not entitled to the rights under the US Constitution. For detailed information, please see Robert J. Williams, *Sale v. Haitian Centers Council and its Aftermath: A Problematic Gap in International Immigrant Law*, 9 TEMP. INT'L & COMP. L.J. 55 (1995). Without taking into account the applications of asylum, transferring people to the Bay had been a common practice applied by President Clinton and George H. W. Bush. Haitian asylum seekers are still settled in an unknown status in Guantanamo Bay. Available at <https://www.hrw.org/news/2016/01/18/guantanamos-other-sordid-legacy>. Policies similar to interception at sea and settlement on Pacific islands without consideration of the asylum applications of asylum seekers have been applied by the government of Australia as well, available at <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>. Expansion of these policies renders meaningless the principle of non-refoulement. Regarding this issue, see also DANIEL GHEZELBASH, LESSONS IN EXCLUSION: INTERDICTION AND EXTRATERRITORIAL PROCESSING OF ASYLUM SEEKERS IN THE UNITED STATES AND AUSTRALIA, IN EXPLORING THE BOUNDARIES OF REFUGEE LAW 101 (2015)

another state, apart from the requirements of the principle of non-refoulement.⁴⁹ Unfortunately, this approach, which is called “interception” by the UNHCR, has continued with the similar practices of European states.⁵⁰

Following the intense civil wars in the 1990s, the practices of the states wearing out the principle of non-refoulement have reached worrying dimensions. Indeed, according to the findings of the UNHCR in that period, it was acknowledged that the activities of expulsion and refoulement are of many types, including repatriating asylum seekers or sending them to an unsafe third country by force, building electrified fences to prevent entrance into the country, rejecting asylum seekers stowing away to the country, preventing boats from berthing and interdiction at sea.⁵¹

⁴⁹ Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT’L J. REFUGEE L. 103-109 (1994); HURTWITZ, *supra* note 8, at 177; Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. REV. 850 (1993); MUNCIANU, *supra* note 14, at 184; MAARTEN DEN HEIJER, EUROPE AND EXTRATERRITORIAL ASYLUM 134 (2011); GOODWIN-GILL *supra* note 22, at 248; WOUTERS, *supra* note 14, at 54-55; Tilman Rodenhäuser, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, 26 INT’L J. REFUGEE L. 239 (2014).

⁵⁰ According to UNHCR, “... interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.” UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach* 10 (2000), available at <http://www.unhcr.org/4aa660c69.pdf>. For the detailed explanations about the subject see also HEIJER, *supra* at 223; VALSAMIS MITSILEGAS, THE CRIMINALISATION OF MIGRATION IN EUROPE CHALLENGES FOR HUMAN RIGHTS AND THE RULE OF LAW 6-10 (2015); Claire Inder, *International Refugee Law, ‘Hyper-Legalism’ and Migration Management: The Pacific Solution*, in THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 220-246 (Martin Geiger & Antoine Pécoud, eds., 2010); LEANNE WEBER & SHARON PICKERING, GLOBALIZATION AND BORDERS: DEATH AT THE GLOBAL FRONTIER 192-196 (2011). For the interdiction programs conducted by Italy see also Mariagiulia Giuffrè, *State Responsibility Beyond the Borders: What Legal Basis for Italy’s Push backs to Libya?*, 24 INT’L J. REFUGEE L. 692-704 (2012); Seline Travizanut, *The Principle of Non-Refoulement at the Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK Y.B.U.N. L. 224-226 (2008); Thomas Spijkerboer, *Moving Migrants, States, and Rights Human Rights and Border Deaths*, 7 L. & ETHICS HUM. RTS. 226 (2013).

⁵¹ According to statistics of the UNHCR, 9000 people stowed away by boats during 1986; between the years of 1987-1990, more than 40.000 people were intercepted from the land borders of the destination states. UNHCR, *Note sur la protection internationale (présentée par le Haut Commissaire)*, 14 (1990) available at <http://www.unhcr.org/fr/excom/excomrep/4b30a56be/note-protection-internationale-presen>

The most recent development on the subject has become a current issue with the completion of the border fence called “temporary security border closure” by Hungary on the Serbian border on 15th September 2015 and finishing its extension on the Hungarian border on 16th October 2016. The building of a second border line composed of thermal sensors, cameras and even electrified fences behind this first line started on 27th February 2017. Any foreign citizen detected in the region between the border line, which was completed in the same year, and the first line is sent to the place behind the first line. Such refoulement practices started before the completion of the relevant line, and a total of 19.219 people were sent to the other side of the border between 5th July and 31st December 2016. Meanwhile, a penalty of up to three years is imposed for climbing over the fences illegally and a penalty up to five years for harming the fence under the Hungarian Penal Code. Although an official structure is planned to consider the asylum applications within the scope of “transit zones” created along the line, the procedure carried out by the police officers, asylum officials and a court clerk is completed in eight days, and the objections are finalized within seven days.⁵² Such activities of states that prevent asylum-seekers from reaching their country and applying to asylum procedures afterwards through the measures taken and the elements built on their borders constitute a current challenge in terms of international refugee law.

Within the framework of the sovereignty of states, the national jurisdiction of states based on sovereignty and their obligations to perform with good faith the provisions of the treaties to which they are parties, particularly treaties on human rights, have always been in contradiction. This contradiction results in divergence between states and makes controversial the scope of the very basic rules of international law. To by-pass the obligations

tee-haut-commissaire.html. Another radical example of the rejection of potential refugees at the borders is the policy of the South African government, which put electrified fences along its border to prevent the asylum applications of people who fled from the civil war in Mozambique in 1986. For detailed information, see also HRW, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-seekers, and Refugees in South Africa* 29-35 (1998), available at <https://www.hrw.org/report/1998/03/01/prohibited-persons/abuse-undocumented-migrants-asylum-seekers-and-refugees-south>.

It could be asserted that since South Africa was not a party to the 1951 Convention by the date of 1986, the obligation of nonrefoulement was not binding to it. At this point, it is arguable whether the broad interpretation of the principle of nonrefoulement had a customary effect by the date of 1986. EGGLI, *supra* note 14, at 337.

⁵² Boldizsár Nagy, *Rolling Back the Rule of Law-Hungarian Border Policy and Practice*, Presentation at the International Conference: Borderline Decisions, University of Lucerne, 9 March 2017.

arising from the principle of non-refoulement (softening the provisions of the Convention), states resort to various bilateral refoulement treaties or memorandum of understandings on occasion.⁵³

The determination of migration policies is authority that must be regulated by the rule of law, similar to other issues under the jurisdiction of states. The changes in the migration policies of a state, such as enclosing the border with fences or building walls, inevitably effects the migration policies of other states. This interaction has such consequences that some states find support in the adoption of such rejection policies,⁵⁴ then attribute financial or legal responsibility to countries of transit or origin, nongovernmental organizations and to international organizations, while others undertake a burden of refugees over their capacity. These consequences point to a vicious cycle by which governments pattern each other, receive support and then set out to take more restrictive measures; in this case, the provisions of the Convention will be annulled in fact.⁵⁵

After the acceptance of the 1951 Convention, the concept of “liberty and security of the person” changed significantly with the effect of the developments in the law of human rights and evolved in parallel to the developments in the field of security of the individual, human rights and the responsibility of states. Likewise, refugees and asylum seekers who were send back based on the concerns of national security may demand protection in the case of the possibility of the persecution or torture.⁵⁶ However the concept of national security has enlarged considerably especially after the September 11 terrorist attacks. The risks leading states to have concerns about security have change from “existing” to “probable”. Dangers coming from unknown sources have been articulated into the political decision-making mechanisms.⁵⁷ In the absence of institutions and rules analyzing the reasons of these dangers, performing risk analyses, determining the subjective risk

⁵³ Guy S. Goodwin-Gill, *Current Challenges in Refugee Law*, in EXPLORING THE BOUNDARIES OF REFUGEE LAW: CURRENT PROTECTION CHALLENGES 10 (2015). Similarly, the UNHCR finds questionable the agreements foreseeing returning to Turkey people who arrived in or were intercepted en route to Greece regarding the provision of legal protection to asylum seekers and the requirement of individual examination of asylum applications. U.N. GAOR, *Note on International Protection* 19 (2016), available at <http://www.refworld.org/docid/57c8205f4.html>.

⁵⁴ GHEZELBASH, *supra* note 48, at 116.

⁵⁵ GHEZELBASH, *supra* note 48, at 117.

⁵⁶ Goodwin-Gill, *supra* at 15.

⁵⁷ Christopher Daase & Oliver Kessler, *Knowns and Unknowns in the War on Terror and the Political Construction of Danger*, 38 SECUR. DIALOGUE 427 (2007).

threshold and assessing the results under the auspices of the rule of law,⁵⁸ assessment on national security appear as the evasion of the rule of law.

Today, it is a fact that having looked at the gradually increasing human mobility between states and the rules and principles of international law such as the prohibition of the abuse of rights, *pacta sunt servanda* and good faith are gradually limiting the sovereignty of states and not permitting arbitrary treatment based on racist or inhuman approaches directed to individuals who are stateless or not able go back to any place. Rejecting this point of view will bring back “the right to the preservation of states” under the terms of sovereignty, independence or national authority, according to which it has always been unclear which actions are allowed.

The design and application of the programs of governmental immigration authorities such as interception and refoulement have some legal consequences. The principle of non-refoulement based on international refugee law and humanitarian law creates the same obligations for the states not only in their territory but also in regions near their frontiers under their effective control, and the violation of this principle result in damage by revoking the most basic rights of the rejected individuals. As appreciated by the European Court of Human Rights in its M.S.S. decision and as per the international rule of law, the obligation of a state is not confined to such a negative duty as not giving harm but also implies a positive duty such as ensuring effective protection in the territories under its jurisdiction and control.⁵⁹

Although the interception of irregular refugees at sea and their refoulement to the points of departure without reception of asylum applications are mostly the products of a political attitude, refoulement of the refugees intercepted to the points departure would be worrisome regarding the international law and humanistic considerations.⁶⁰ There is no option of voluntary repatriation for most of the people displaced in consequence of persecution, violations of human rights, civil wars or inter-state disputes. In this case, the international community must first address the reasons for this obligatory displacement and endeavor to provide the necessary protection if impossible because this subject concerns the collective interest of the

⁵⁸ Guy S. Goodwin-Gill, *Current Challenges in Refugee Law*, in EXPLORING THE BOUNDARIES OF REFUGEE LAW: CURRENT PROTECTION CHALLENGES 15 (2015).

⁵⁹ M.S.S. v. Belgium and Greece, App. No. 30696/09, Eur. Ct. H.R. 104 (2011).

⁶⁰ GHEZELBASH, *supra* note 48, at 93.

international community; in other words, the protection of these people concerns all states closely.⁶¹ In case of any violation of the international community's interests, it can be stated that these obligations have the characteristic of *erga omnes* and can be suggested by both the other contracting states to the Convention and the injured individuals.⁶²

Within the framework of the Draft Articles on the Responsibility of States in 2001 by the International Law Commission⁶³ codifying the international rule of law regarding the responsibility of states for internationally wrongful acts and known as customary rules in the field of liability law,⁶⁴ the responsibility of a state will arise from the violation of an obligation owed to another state or the international community as a whole.⁶⁵ Although traditional international law regards only the obligations arising from inter-state relations,⁶⁶ it is stated in the continuation of the Draft Articles that the liability of a state arising from the violation of an obligation owed to the international community can be invoked through the mechanism for the protection of regional human rights.⁶⁷ In this case, the party that evokes this

⁶¹ U.N. GAOR, *supra* note 53, at 61; HEIJER, *supra* note 49, at 26.

⁶² Iain Scobbie, *The Wall and International Humanitarian Law*, Presentation at the UN International Meeting on the Impact of the Construction of the Wall in the Occupied Palestinian Territory, on 15-16 April 2004; International Law Commission, Articles on the Responsibility of states for Internationally Wrongful Acts 2001, art. 42, 48, G.A. RES. 56/83, (Jan. 28, 2002), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83; See also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 254-276 (2002); Iain Scobbie, *The Invocation of Responsibility for the Breach of Obligations Under Peremptory Norms of General International Law*, 13 EUR. J. INT'L L. 1201 (2002).

⁶³ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2 Y.B. INT'L L. COMM'N, 2 (2001). The same approach formed the basis of the traditional law of treaties and underlay the 1969 Vienna Convention on the Law of Treaties as well.

⁶⁴ Rankin v. Islamic Republic of Iran, Award No. 326-10913-2, Iran-United States Claims Tribunal, 17 Iran-U.S. Cl. Trib. Rep. 141 (1987); Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States, ICSID, Case No. ARB(AF)/04/05, Award 116 (2007); Corn Products International Inc., v. The United Mexican States, ICSID, Case No. ARB(AF)/04/01, Decision on Responsibility 76 (2008); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID, Case No. ARB/05/22, Award 773, 774 (2008). See also UN, *Materials on The Responsibility of States for Internationally Wrongful Acts* 1-3 (2012).

⁶⁵ Draft Articles on Responsibility of States, art. 42.

⁶⁶ Which constitutes a reflection of the Vienna Convention on the Law of Treaties, art. 60.

⁶⁷ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 48, para. 7. As it could be seen in the famous case of *Barcelona Traction* before the ICJ, the International Law Commission made a distinction between the

liability will determine which obligations arise from the commitments to the international community and which ones arise from the inter-state commitments. Although it is understood from the letter of the Draft Articles that this liability will be invoked by the states again, the provisions of the 1951 Convention contain obligations owed to the international community when considering that states are monitored by the mechanisms of the protection of human rights with the effect of the developments in the field of humanitarian law, as stated above.⁶⁸ The party to invoke the liability might be either an individual before the mechanisms of the protection of human rights or other contracting states to the 1951 Convention before the international courts.⁶⁹

Briefly the measures taken by states such as enclosing the border with electrified fences or building walls in areas under state authority contrary to the principle of non-refoulement in the 1951 Convention and the other treaties on fundamental rights and freedoms, result in damages by violation of the relevant legal texts and generate the international liability of the infringer state.

Conclusion

Currently, in the absence of a contrary agreement, states do not have obligations such as giving asylum or allowing entrance into their country; however, the principle of non-refoulement significantly affects the border policies of states within the framework of international refugee law and international law on human rights. For this reason, a doctrinally broad interpretation of the principle of non-refoulement, in a way that covers the rejection at the border of displaced people and those who failed to obtain refugee status within the Convention, and its transboundary effect have ensured the functionality and operability of this principle in terms of the displaced people who need protection. Actually, the border protection measures of states such as building a wall and enclosing the border with electrified fences with the anxiety of “national security” has extended this doctrinal interpretation.

“obligations owed to States” and “obligations owed to the international community as a whole”. Barcelona Traction (Belg. v. Spain), Judgment, 1970, I.C.J. para. 33.

⁶⁸ Sadako Ogata, *Foreword* in THE REFUGEE CONVENTION, 1951 THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR PAUL WEISS 4 (1990), available at <http://www.unhcr.org/4ca34be29.pdf>.

⁶⁹ Weiss, raises the concern of politically motivated acts or unilateral interventions by other states based on a spurious claim that a state has breached an obligation owed to the international community as a whole. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 American Journal of International Law 805.

The contemporary interpretation of the principle of non-refoulement in Article 33 of the 1951 Convention does not allow a narrow interpretation when the developments in the field of law on human rights are taken into account. Such a narrow interpretation also results in the violation of the mandatory norms of international law on human rights. Considering the border practices resorted to particularly by the states in Europe, adverse outcomes become striking. There is no restriction concerning states taking measures for border security within their territory to protect their territorial sovereignty under traditional international law. The portable wall that was built on the Syrian border of the Republic of Turkey to ensure border security against the conflicts and activities of terrorist organizations experienced in the statementioned, having sufficient transit points for a number of asylum-seekers, might be exemplified as an option. Nevertheless, it would not be an extreme approach to suggest that structures such as the border fences built by Balkan states, which aim to restrict the mass influx to the degree of removing people's right to seek asylum despite the absence of a threat coming from the territory of the other state across the border, violate international law.

The development of case law evolving to consider that the rights granted by the conventions on human rights to individuals should be applied not only in the territory of the contracting states but also in the places under their effective control appears to be very important as a sign of the extra-territorial effect of the principle of non-refoulement.

In this case, violation of the principle through the border protection measures such as building a wall and enclosing the border with electrified fences with the anxiety of "national security" would induce the responsibility of infringer state. Furthermore, the responsibility of state arising from the violation of the 1951 Convention or treaties on human rights can be invoked by an individual before the regional mechanisms of the human rights or other contracting states before the international courts.

Broad interpretation of the principle of non-refoulement is already supported by the decisions of European Court of Human Rights. However, the "universal" human rights system itself is still a problematic area, and the states that are part of the system inevitably perform their obligations arising from the international law on human rights based on different sources and various capacities. At this point, human rights theoreticians working in the relevant field must carry out academic studies that support standardization as much as possible and must not leave the development of international law on human rights completely to the course of the actual state.

Kaynakça**Kitaplar**

- Agnes Hurtwitz, **The Collective Responsibility of States to Protect Refugees**, Oxford, 2009.
- Ann Vibeke Eggli, **Mass Refugee Influx and The Limits of Public International Law**, Kluwer Law, New York, 2001.
- Atle Grahl-Madsen, **The Status of Refugees in International Law** Vol. II, Leiden: A. W. Sijthof, 1972.
- Cornelis Wolfram Wouters, **International Legal Standards for The Protection From Refoulement**, Intersentia, 2009.
- Daniel Ghezelbash, **Lessons in Exclusion: Interdiction And Extraterritorial Processing of Asylum Seekers in The United States and Australia**, in *Exploring The Boundaries of Refugee Law* Brill, 2015.
- Guy Goodwin-Gill & Jane Mcadam, **The Refugee in International Law**, 3th ed. Oxford University Press, 2007.
- Ian Brownlie, **Principles of Public International Law**, Oxford University Press, (2003).
- James Crawford, **The International Law Commission's Articles on State Responsibility: Introduction, Text And Commentaries**, Cambridge University Press, 2002.
- James C. Hathaway, **The Rights of Refugees Under International Law**, Cambridge University Press, Cambridge, 2005.
- Leanne Weber & Sharon Pickering, **Globalization And Borders: Death At The Global Frontier**, Palgrave Macmillan, 2011.
- Maarten Den Heijer, **Europe and Extraterritorial Asylum**, Bloomsbury, 2011.
- Manfred Nowak, **U.N. Covenant On Civil And Political Rights: Ccpr Commentary**, Kehl am. Rhein: Engel, 2005.
- Nehemiah Robinson, **Convention Relating to The Status of Refugees; Its History, Contents and Interpretation; A Commentary**, Institute of Jewish Affairs, New York, 1953.
- Roberta Mungianu, **Frontex and Non-Refoulement: The International Responsibility of The EU**, Cambridge University Press, Cambridge, 2016.
- Valsamis Mitsilegas, **The Criminalisation of Migration in Europe Challenges For Human Rights and The Rule of Law**, Springer, 2015.

Makaleler

- Barry A. Feinstein, Justud Reid Weiner, *Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation*, 37 GEO. WASH. INT'L. L. REV. 318-346 (2005).
- Boldizsár Nagy, *Rolling Back the Rule of Law-Hungarian Border Policy and Practice*, Presentation at the International Conference: Borderline Decisions, University of Lucerne, 9 March 2017.
- Christopher Daase & Oliver Kessler, *Knowns and Unknowns in the War on Terror and the Political Construction of Danger*, 38 SECUR. DIALOGUE 411-434 (2007).
- Claire Inder, *International Refugee Law, 'Hyper-Legalism' and Migration Management: The Pacific Solution*, in *The Politics of International Migration Management*, Martin Geiger & Antoine Pécoud (eds) 220-246 (2017)

- Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798-816 (2002).
- Franz Matscher, *Methods of Interpretation of the Convention*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 64-66 (Ronald St. J Macdonald, Franz Matscher, Herbert Petzold eds., 1993).
- Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?*, 17 INT'L J. REFUGEE L. 542-573, (2005).
- Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT'L J. REFUGEE L. 103-109 (1994).
- Guy S. Goodwin-Gill, *Current Challenges in Refugee Law*, in Exploring The Boundaries of Refugee Law: Current Protection Challenges, Brill, 2015.
- Iain Scobbie, *The Invocation of Responsibility for the Breach of Obligations Under Peremptory Norms of General International Law*, 13 EUR. J. INT'L L. 1201-1220 (2002).
- Iain Scobbie, *The Wall and International Humanitarian Law*, Presentation at the UN International Meeting on the Impact of the Construction of the Wall in the Occupied Palestinian Territory, on 15-16 April 2004.
- International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2 Y.B. INT'L L. COMM'N (2001).
- Mariagiulia Giuffrè, *State Responsibility Beyond the Borders; What Legal Basis for Italy's Push backs to Libya?*, 24 INT'L J. REFUGEE L. 692-704 (2012).
- Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. REV. 833-870 (1993).
- Robert J. Williams, *Sale v. Haitian Centers Council and its Aftermath: A Problematic Gap in International Immigrant Law*, 9 TEMP. INT'L & COMP. L.J. 55-82 (1995).
- Sadako Ogata, *Foreword* in UN High Commissioner for Refugees (UNHCR), The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis, 1990, available at <http://www.unhcr.org/4ca34be29.pdf>.
- Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857-884 (2012).
- Seline Travizanut, *The Principle of Non-Refoulement at the Sea and the Effectiveness of Asylum Protection*, 12 MAX PLANCK Y.B.U.N. L. 205-246- (2008).
- Tilman Rodenhäuser, *Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control*, 26 INT'L J. REFUGEE L. 223-247 (2014).
- Thomas Gammeltoft-Hansen, *Private Actor Involvement in Migration Management in The Practice of Shared Responsibility in International Law*, A Nollkaemper & I Plakokefalos (eds), 527-555 (2017).
- Thomas Spijkerboer, *Moving Migrants, States, and Rights Human Rights and Border Deaths*, 7 L. & ETHICS HUM. RTS. (2013).
- Volker Türk, *Security and International Refugee Protection – UNHCR's Perspective*, available at <http://www.unhcr.org/573c8e987.pdf>.
- Walter Kälin, *Aliens, Expulsion and Deportation*, MPEPIL, (2010).

Internet adresleri

- AMNESTY INT'L, EUROPE'S BORDERLANDS: VIOLATIONS AGAINST REFUGEES AND MIGRANTS IN MACEDONIA, SERBIA AND HUNGARY (2017), available at https://www.amnestyusa.org/files/ser-mac_migration_report_final.compressed.pdf
- ESCOR, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons- Memorandum by the Secretary General Comments on Article 24 of the Preliminary Draft 3* (1950), available at <http://www.refworld.org/docid/3ae68c280.html>.
- EUROSTAT, Asylum Statistics, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics
- HRW, *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-seekers, and Refugees in South Africa* 29-35 (1998), available at <https://www.hrw.org/report/1998/03/01/prohibited-persons/abuse-undocumented-migrants-asylum-seekers-and-refugees-south>.
- International Law Commission, Articles on the Responsibility of states for Internationally Wrongful Acts 2001, art. 42, 48, G.A. RES. 56/83, (Jan. 28, 2002), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83
- Preethi Nallu, *Europe's Outsourced Refugees, Europe's Refugee Frontier: Pushbacks and Border Closures in Serbia*, REFUGEES DEEPLY, 24th March 2017, available at <https://www.newsdeeply.com/refugees/articles/2017/03/24/europes-refugee-frontier-push-backs-and-borderclosures-in-serbia-2>
- ECCHR, *Case Report, Push-backs at the Greek-Macedonian Border Violating Human Rights* (2016), available at https://www.proasyl.de/wp-content/uploads/2016/09/CaseReport_Idomeni_ECtHR_20160914.pdf
- HRC, *General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* 9 (1992), available at <http://www.refworld.org/docid/453883fb0.html>.
- HRW, *Bulgaria: Pushbacks, Abuse at Borders, Halt Summary Returns, Beatings, Robbery of Asylum Seekers*, 20th January 2016, available at <https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders>.
- UN, *A Study of Statelessness* 49 (1949), available at <http://www.refworld.org/pdfid/3ae68c2d0.pdf>.
- UNHCR, *The Refugee Convention, 1951, The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* 9 (1990), available at <http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>.
- UN HUMAN RIGHTS COMMITTEE, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Human Rights Committee, General Comment 31*, (2004), available at <https://www.refworld.org/docid/478b26ae2.html>
- UNHCR, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach* 10 (2000), available at <http://www.unhcr.org/4aa660c69.pdf>.
- UNHCR, *Note sur la protection internationale (présentée par le Haut Commissaire)*, 14 (1990) available at <http://www.unhcr.org/fr/excom/excomrep/4b30a56be/note-protection-internationale-presentee-haut-commissaire.html>.
- UNHCR, *THE STATE OF THE WORLD'S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM* (2006), available at

<https://www.unhcr.org/publications/sowr/4a4dc1a89/state-worlds-refugees-2006-human-displacement-new-millennium.html>

UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992), *available at* <http://www.unhcr.org/excom/scip/3ae68cc04/note-determination-refugee-status-under-international-instruments.html>;

UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (2007), *available at* <http://www.refworld.org/docid/45f17a1a4.html>.

UNHCR, *Advisory Opinion on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention* 1, 4 (2006), *available at* <http://www.refworld.org/docid/43de2da94.html>.

U.N. GAOR, NOTE ON INTERNATIONAL PROTECTION (2016), *available at* <http://www.refworld.org/docid/595e1f684.html>.

Yargı Kararları

Case of Soering v. U.K, App. No. 14038/88, Eur. Ct. H.R. 99-111 (1989).

M.S.S. v. Belgium & Greece, App. No. 30696/09, Eur. Ct. H.R. 344-360 (2011).

Babajanov v. Turkey, App. No. 49867/08, Eur. Ct. H.R. 41-49 (2016).

Loizidou v. Turkey (Preliminary Objections), App. No. 15318/89, Eur. Ct. H.R. 62 (1995).

Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Eur. Ct. H.R. 196-206 (2012).

Othman (Abu Qatada) v. UK, App. No. 8139/09, Eur. Ct. H.R. 258-285 (2012).

Issa and Ors v. Turkey, App. No. 3821/96, Eur. Ct. H.R. 81 (2004).

Al-Skeini v United Kingdom, App. No. 55721/07, Eur. Ct. H.R. 127 (2011).

J.K. and Others v. Sweden, App. No. 59166/12, Eur. Ct. H.R. 77-123 (2016)

Sale v. Haitian Centers Council, Inc. 509 U.S. 156-157 (1993).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J. 109.

Rankin v. Islamic Republic of Iran, Award No. 326-10913-2, Iran-United States Claims Tribunal, 17 Iran-U.S. Cl. Trib. Rep. 141 (1987).

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. the United Mexican States, ICSID, Case No. ARB(AF)/04/05, Award 116 (2007).

Corn Products International Inc., v. The United Mexican States, ICSID, Case No. ARB(AF)/04/01 (2004).

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID, Case No. ARB/05/22, Award 773, 774 (2008).