THE RIGHT TO SEEK AND ENJOY ASYLUM UNDER SIEGE

NATIONAL SECURITY AND THE PROHIBITION OF REFOULEMENT

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INTRODUCTION

Ground Zero reminds us of the horrible attacks on the Twin Towers in New York on September 11, 2001. The repercussions, most notably in the field of security measures, are felt throughout the world ever since. Human rights protection, for example in the field of asylum, is under pressure. Immediately after the September 2001 attacks the UN Security Council adopted resolution 1373[1]. States were called upon to

"(f) take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts; (g) ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extraditing of alleged terrorists".

The prohibition of refoulement – or obligation of non-refoulement - was not mentioned in this resolution. In an article we wrote in 2003 we expressed our fear that the prohibition of refoulement could erode due to the pressure of States to give prevalence to security issues above human rights principles[2]. The attack in Madrid, on March 11 2004, on the railway station Atocha, worsened the situation as did the July, 7 bombings in the London Underground in 2005. Although no bloody attacks have occurred in Western Europe since, the measures are still in force and the pressure on human rights supervisory bodies to curtail the right to seek and enjoy asylum is still there. Most recently the International Commission of Jurists (ICJ) presented the findings of a worldwide inquiry by a panel of some of the most prominent jurists into the impact of counter-terrorism laws on human rights at the United Nations in New York[3]. The report of the ICJ's Eminent Jurists Panel concludes that many governments have confronted the threat of terrorism with ill-conceived measures that have undermined cherished values and resulted in serious violations of human rights.

There are reasons to be cautious. The concerns States have regarding their national security may be valid and legitimate. In May 2007 three suspected terrorists were arrested in Germany. The Islamic Jihad Union was said to have planned an attack with more explosive power than those used in Madrid in 2004. In 2009, comments in journals argued that Al Qaeda would misuse the worldwide economic crisis to further destabilize western countries with attacks[4].

Meanwhile the United Nations Security Council Resolution 1373 was reaffirmed by Resolution 1624 of September 14, 2005[5]. The resolution contains several clauses making reference to exclusion from international protection, but acknowledges – contrary to Resolution 1373 – the non refoulement obligation of States under the 1951 Convention relating to the status of Refugees (*Refugee Convention*), together with its Protocol adopted on 31 January 1967. Also, the UN Security Council stresses that States must ensure that any measure taken to combat terrorism must comply with their obligations under international human rights and refugee law[6]. Human rights are not out of sight. Importantly, the obligation of non-refoulement is not only encompassed in the *Refugee Convention* (Article 33) but also in other human rights treaties, most notably, the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and regional human rights conventions such as the *European Convention on Human rights* (ECHR).

→| ON FOCUS

"Be the change you will like to see in the world."

GANDHI

In this article we will focus on the prohibition of refoulement as entailed in the four mentioned treaties. We will briefly point at the absolute character of the prohibition, on the need to be prudent in using measures to circumvent the prohibition of refoulement to combat terrorism, in particular measures aimed at preventing aliens to reach a State's territory, the use of diplomatic assurances and the listing of persons and organizations as being engaged in terrorist activities.

THE ABSOLUTE CHARACTER OF THE PROHIBITION OF REFOULEMENT

The prohibition of refoulement is the cornerstone of international refugee and asylum law. In the most broadest and general terms it protects people from being removed to a country where they are at risk of being subjected to serious human rights violations. As a result the prohibition of refoulement provides an opportunity for people to obtain protection from serious harm in a country other than their own.

The prohibition of refoulement is formulated in and developed under various treaties. Article 33 *Refugee Convention* and Article 3 CAT contain an explicitly formulated prohibition of refoulement. Under the ICCPR and the ECHR prohibitions of refoulement have been developed under the general prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment entailed in Article 7 ICCPR and Article 3 ECHR. The prohibitions of refoulement contained in and developed under Article 3 CAT, Article 7 ICCPR and Article 3 ECHR are absolute. Under no circumstances or for no reason can the application and implementation of the prohibition be restricted, limited or suspended. Even in times of public emergency or armed conflict a State cannot derogate from this prohibition[7]. The absolute character of the prohibition of refoulement has been acknowledged by the supervisory bodies of the said treaties, i.e. the Human Rights Committee (HRC), the Committee against Torture (ComAT) and the European Court of Human Rights (ECtHR)[8]. States are not allowed to balance the interests of the State with the rights of the individual if there is a risk of torture or ill treatment taking place upon return. As a result no one can be removed by a State because he has committed serious criminal offences or because he poses a threat to the national security of the State or its people if such a risk exists. Conversely Article 33 of the *Refugee Convention* is not absolute. The second paragraph of Article 33 explicitly allows States to expel persons deemed to be a threat to the community or national security. In this regard the reference made by the UN Security Council in Resolution 1624 to the *Refugee Convention* is remarkable. Instead of a general reference to international human rights, refugee and humanitarian law a specific reference to the prohibitions of refoulement contained in and developed under CAT and ICCPR would have been more appropriate. The absolute character of the prohibitions of refoulement contained in ICCPR, CAT and ECHR has important consequences for refugees. While a refugee may be removed under the *Refugee Convention* for reasons of national security he may not be removed in accordance with other prohibitions of refoulement when there is a risk of serious human rights violations.

PREVENTING ALIENS FROM LEAVING AND ARRIVING

States confronted with the absolute character of the prohibitions of refoulement may try to prevent these prohibitions of refoulement to be applicable in the first place by preventing aliens from reaching their territory or even preventing them leaving their country of origin. More broadly, industrialized countries try to impede migrants, refugees included, from departing their region of origin altogether. People who are in need of protection are confronted increasingly with obstacles in their search for protection. They may have difficulty in leaving their country and seeking protection elsewhere and often leave in an irregular manner in mixed flows of refugees and migrants. As a result States increasingly take migration control measures whereby there is a development of pushing the line further. Where it initially started with strict border controls, it has now gone as far as industrialized countries patrolling the shores and territorial waters of asylum producing countries, signing agreements with third countries on the reception of migrants and posting immigration liaison officers (ILO's) at foreign airports. So far such measures have hardly been challenged in a court of law. In fact, they are difficult if not impossible to challenge by individuals but may have a significant impact on the individuals' ability to seek protection elsewhere[9]. Certainly, more legal clarity on the legitimacy of these measures is needed. In addition, industrialized nations have adopted measures such as visa requirements followed by the sharing of passenger lists and sanctioned by carrier sanctions[10].

As a result it has become increasingly difficult for people to leave their own country. Technically speaking this may not be in breach of the *Refugee Convention*. The Convention, including the right to be protected from refoulement, only applies to refugees, being outside their country of origin. But to limit the possibility to leave one's country is at odds with applying the *Refugee Convention* in good faith and with its object and purpose. The prohibition of refoulement contained in Article 3 CAT and the ones developed under Article 3 ECHR and Article 7 ICCPR do not contain a territorial limitation such as the one in the *Refugee Convention*. Measures taken by (the authorities of) a possible asylum State may be in breach of the prohibition of refoulement if and when these measures directly affect the person concerned and his right to be protected from refoulement.

Furthermore, when people have been able to leave their country they are increasingly confronted with pre-entry procedures creating barriers to apply for asylum. And, when they are successful in reaching and entering Western countries in many cases their asylum request is dealt with in a so called accelerated procedure.

DIPLOMATIC ASSURANCES

States confronted with the absolute character of the prohibition of refoulement may try to circumvent their obligations and remove aliens from their territory making use of so called diplomatic assurances. States which want to remove aliens from their territory may request diplomatic assurances from the country to which the alien is removed in order to have his safety guaranteed. Seeking diplomatic assurances has been a practice of States in the field of extradition.

States, for example, sought to reduce the risk of imposition and/or execution of the death penalty[11]. In general seeking diplomatic assurances in extradition is widely accepted. It can be an effective tool to prevent an alien being subjected to serious human rights violations like the death penalty. But now, this practice is increasingly applied in asylum cases. Usually, diplomatic assurances are sought on an individual basis and relate directly to the individual concerned. There is however a recent development of using diplomatic assurances as general clauses concerning the treatment of deportees in bilateral agreements[12]. The legitimacy of diplomatic assurances depends on their ability to reduce the risk to a negligible level and effectively guarantee the person's safety. In asylum cases that is difficult, if not impossible, to achieve. The irony of diplomatic assurances in asylum cases "lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment"[13]. Outside the context of extradition and possible imposition of the death penalty the use of diplomatic assurances is difficult to value. They do not have a clear legal status and there is often no State authority which has the actual power to prevent serious human rights violations from occurring. Also, it is extremely difficult to monitor the treatment meted out to returnees. Furthermore, contrary to the extradition context there is no accountability mechanism or redress possibility available in the event of non-compliance. Moreover, the serious human rights violations from which a person has a right to be protected will often be irreparable. Neither the Committee against Torture, the Human Rights Committee nor the European Court of Human Rights do unequivocally reject the use of diplomatic assurances in asylum cases but have expressed concern about their use and have made clear that States should not rely on assurances coming from States which systematically violate their human rights obligations[14].

LISTING PERSONS AND ORGANIZATIONS AS ENGAGED IN TERRORIST ACTIVITIES

Before and since the War on terror was proclaimed by the former President of the United States, use of UN and EU terrorist lists has been made[15]. Persons and organizations placed on these lists encounter difficulties in their daily life. They cannot dispose themselves of the funds in their bank account and face difficulties when travelling abroad. When asking for asylum, listed persons and persons affiliated to listed organizations may be considered by States to be excludable from international asylum protection, based on Article 1F of the *Refugee Convention*. It may be considered that, when listed, there are serious reasons for considering that these persons have been guilty of very serious crimes and do not deserve protection as refugees. The lists of individuals or organizations suspected of involvement in terrorism is a counter-terrorism preventive measure aiming to address national security concerns and is not meant to determine who is and who is not deserving of refugee protection. The lists have become increasingly important since 2001. The ICJ's Eminent Jurist Panel mentions another regional listing on religious groups deemed "extremist" within the Shanghai Cooperation Agreement[16].

The names on the lists overlap, meaning that organizations and individuals on one list soon find themselves on a number of different lists. Being placed on more than one list augments the difficulty of a legal challenge. Although identifying and freezing the assets of persons, groups, and organizations involved in terrorism is acceptable in order to effectively combat terrorism, the fact listing is almost impossible to be challenged clarifies that any listing process is undertaken without due regard to effective safeguards and eventual remedies. Because of the use of secret information of intelligence institutions, asylum seekers will not be able to challenge the information or to rebut the accusations of being linked to terrorist activities. With regard to Canada, the Human Rights Committee noted with concern the provisions regarding non-disclosure of information, and concluded that they do not fully abide by the requirements of Article 14 of the ICCPR[17]. In the Netherlands the alien confronted with conclusions drawn in a report of the intelligence service will not be allowed to examine the background materials. Also the Immigration Service (IND) has just to accept the information provided by the intelligence service. The impossibility to scrutinize the information is deemed by the Dutch Council of State *[Raad van State]* not to be at variance with the jurisprudence of the European Court on Human Rights[18].

Once on the list it will be difficult to be removed from the list. But here too the international courts have started to halt the almighty States. In a decision of 11 July 2007, in the case of *Jose Maria Sison v Council of the European Union*, the European Court of Justice annulled the decision to put on the list the person concerned[19]. Individuals and entities placed on UN lists of suspected terrorists have still no effective means to challenge this decision. If, as described above, these persons and organisations are also put on regional lists such as the EU list these persons have no redress. The European Court of Justice then will declare the Court not competent to judge the legitimacy of being placed on the UN list. The Dutch Government has stated to stress the UN Sanction Committee to address the problem individuals and organizations face because they do not have a real chance to challenge the listing[20].

People in need of international protection face difficulties in their search and enjoyment of asylum protection and protection from refoulement in particular. As outlined above this is due to a variety of reasons many of which are based on national security concerns. Since 2001 national security issues have become more and more prevalent in migration matters resulting in, for example, migration control measures, a search for balancing the risks and the use of diplomatic assurances. Supervisory bodies of international human rights treaties have upheld the absolute character of the prohibition of refoulement. Although acknowledging the interests of States to secure the safety of its citizens and the difficulty in combating terrorism this will not be realized by preventing aliens from coming, by relying on ineffective diplomatic assurances when sending aliens back, or by simply making non-transparent and unchallengeable lists of terrorists and terrorist organisations.

In spite of the risks States try to find ways to return people in a speedy way, not giving them time to appeal the decision to expel or to return. Often this is contrary to the explicit and binding requests of international supervisory bodies to halt the deportation while a case is pending before them. Recently Italy has sent back persons to Tunisia while the European Court of Human Rights had issued an interim measure not to do so[21].

The quest to reconcile the real interest of States to secure safety and the risks of persons being tortured upon return has not ended yet.

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[1] UN SC res. 1373(2001), 28 September 2001.

[2] Bruin, R. - Wouters, K., "Terrorism and the Non derogability of Non refoulement", in *International Journal of Refugee Law* (2003), 15: 5-29.

[3] International Commission of Jurists, "Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights", Geneva, 2009, available at http//www.icj.org.

[4] See for example: *De Pers*, 27 April 2009, "Al Qaeda spint garen bij crisis". In this article it is stated that the first coming attack will be in Europe.

[5] UN SC res. 1624(2005), 14 September 2005.

[6] *Ibid.*, para. 4.

[7] Article 4 ICCPR and article 15 ECHR.

[8] HRC, *Ahani v Canada*, 15 June 2004, Communication No. 1051/2002, para. 10.10; CAT, *Dadar v Canada*, 5 December 2005, Communication No. 258/2004, para. 4.4 and 8.8; ECtHR, *Saadi v Italy*, 28 February 2008, Appl. No. 37201/06, para. 138.

[9] The only cases we know of are the Prague airport case in the UK concerning British ILO's stationed at Prague airport in the Czech Republic, *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, House of Lords, 9 December 2004, www.unhcr.org/refworld/docid/41c17ebf4.html, case also published in *International Journal of Refugee Law* (2005): 217-270 and the Marine I case dealt with by ComAT, *J.H.A. v Spain*, 21 November 2008, Communication No. 323/2007.

[10] Hathaway, J. C., *The Rights of Refugees under International Law*, Cambridge: Cambridge UP, 2005: 291-292.

[11] For example, ECtHR, *Soering v United Kingdom*, 7 July 1989, Appl. No. 14038/88. ECtHR, *Nivette v France*, 3 July 2001, Appl. No. 44190/98 (admissibility decision). ECtHR, *Einhorn v France*, 16 October 2001, Appl. No. 71555/01 (admissibility decision).

[12] For example in August 2005 the United Kingdom signed a Memorandum of Understanding with Jordan regulating the deportation of people that contains a general remark that the UK and Jordan will comply with their human rights obligations.

[13] Report by Mr. Alvaro Gil-Robes, Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Comm DH (2004) 13, para. 19. Report by Prof. Manfred Nowak as the United Nations Special Rapporteur on the question of torture in 2005, UN doc. E/CN.4/2006/6, 23 December 2005, para. 31 (b).

[14] Wouters, K., *International Legal Standards for the Protection from Refoulement*, Antwerpen [etc.]: Intersentia 2009: 301-302, 402, 499, 560.

[15] See the UN Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them, last updated 20 April 2009, available at http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf; and EU Common position 2001/931/CFSP on the application of specific measures to combat terrorism. A new list was published on 22 December 2007 (OJ L 340: 109). The list includes 54 persons and 48 groups and entities. Of these, 35 persons and 30 groups and entities are subject to restrictive measures (freezing of assets) pursuant to Council Regulation (EC) No. 2580/2.

[16] International Commission of Jurists, 'Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights', Geneva, 2009: 114.

[17] See HRC, *Concluding Observations on Canada*, UN Doc. CCPR/C/CAN/CO/5 (2005), 20 April 2006, para. 13.

[18] Council of State 14 April 2009, 200802086/1.

[19] ECJ judgment 11 July 2007, case T-47/03, *Official Journal of the European Union*, 25 August 2007, C 199/27.

[20] Documents of Parliament, 28 764 N, dated November 13 2008 entailing a letter of the minister of Foreign Affairs dated November 11 2008.

[21] ECtHR, *Ben Khemais v Italy*, 24 februari 2009, Appl. No. 246/07 (admissibility decision), referring to Resolution 1433 (2005) of the Council of Europe. See also eight other cases before the ECtHR against Italy decided on 24 March 2009: Ben Salah (38128/06); Bouyahia (46792/06); C.B.Z. (44006/06); Hamraoui (16201/07); O (37257/06); Soltana (37336/06), Darraji (11549/05) and Abdelheidi (2638/07). ▣

From wrong to wrong the exasperated spirit
Proceeds, unless restored by the refining fire
Where you must move in measure, like a dancer.

T.S. ELIOT