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The principle of non-refoulement. What is its standing in international law? What purpose does it serve in refugee law and protection?

The word non-refoulement derives from the French refouler, which means to drive back or to repel. Non-refoulement is a principle of customary international law prohibiting the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons. This law institute is often regarded as one of the most important principles of refugee and immigration law.

(a) **Definition of the principle of non-refoulement**:

The word *non-refoulement* derives from the French *refouler*, which means to drive back or to repel. **Non-refoulement** is a principle of customary international law prohibiting the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons. This law institute is often regarded as one of the most important principles of refugee and immigration law.

Since the principle of non-refoulement has evolved into a norm of customary international law, states are bound by it whether or not they are party to the Convention relating to the Status of Refugees (following as “1951 Convention”).

This principle is also a part of so-called ***jus cogens*** (it is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted).

Thus (as a part of **customary and treaty law**), all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, which is the cornerstone of international protection *(in An Introduction to*

International Protection, UNHCR). It is embodied in ***Article 33 (1) of the 1951 Convention***.

The principle of non-refoulement as contained in the 1951 Convention is not an unqualified principle. There are three ***exceptions to it***.

First, the benefit of the principle may not be claimed by a refugee who may pose a danger to the security of the country in which he or she is present.

Second, the principle does not apply to a person who, having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.

Third, the benefit of the convention is to be denied to any person suspected of committing a crime against peace, a war crime, or a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principle of the United Nations (***Articles 33 (2) and 1 (F) of the 1951 Convention***).

There are ***two conceptions*** of this principle of non-refoulement: the ***narrow*** one (after admission of this principle) and the current ***broader*** one (***including rejection at the frontier***), more on this conception in the following text.

(b) **What is the standing of the principle of non-refoulement in international law?**

We could answer this question with the help of illustrating the regulation of the principle of non-refoulement in international law. **Non-refoulement has been defined in a number of international refugee instruments, both at universal and regional** levels. In the following text I would like to briefly mention some of the most important documents in this matter:

At **universal level** the most important provision in this respect is the above mentioned **Article 33 (1) of the 1951 Convention relating to the Status of Refugees** (1951 Convention), which states that: "*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*."

This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted. It is also an obligation under the **1967 Protocol** by virtue of Article I (1) of that instrument. Unlike some provisions of the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State. As to the *words* "*where his life or freedom would be threatened*", it appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1 A (2). The different wording was introduced for another reason, namely to make it clear that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.

The 1951 Convention and its **1967 Protocol** are the core of international refugee law, they are the only universal treaties that define a specific legal regime for those in need of international protection. But there are other universal documents regarding the non-refoulement principle as described below.

At universal level, mention should also be made of Article 3 (1) of the **UN Declaration on Territorial Asylum** unanimously adopted by the General Assembly in 1967 [res. 2312 (XXII)], "*No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution*."

I would say that the 1951 Convention was only the first example of non-refoulement being enshrined in international law. ***Subsequently numerous treaties and conventions, dealing either directly or indirectly with the rights of refugees, have repeated the principle***. In some cases it has been a direct transfer of the wording of the Convention, while in others the principle has been somewhat broadened. As the issues of human rights and regional organisation continue to gain strength in international discussions, these instruments will become increasingly important.

Article 13 of the **International Covenant on Civil and Political Rights (ICCPR)** states that anyone who is lawfully within the territory of a state shall not be expelled from that state without due process. However, this rule does not have to be followed if national security is at stake. The article does not mention refugees specifically, and only refers to aliens 'lawfully' within a state. Therefore the article's application is somewhat limited. It is important, though, in that it specifies what action must be taken before anyone can be forcibly expelled. Article 7 of the ICCPR is also relevant as it protects against torture. The Human Rights Committee has taken this provision into account when dealing with cases of expulsion and extradition.

The relationship between torture and refugees is even more relevant when the **Convention Against Torture and Other Cruel**, **Inhuman or Degrading Treatment or Punishment** is considered. Article 3 (1) of this Convention provides that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. This article also provides that authorities must look at whether there is a consistent pattern of serious human rights violations in the country in question. As one writer has pointed out, any state returning refugees to a state where torture is being practiced would become an accomplice to the crime of torture. Article 3 (1) provides broader protection than the 1951 Convention in that it is an absolute right, however, its effect is restricted in that it only applies to situations involving torture.

As I mentioned at the beginning of this article other important documents regarding the non-refoulement principle are the documents **at regional level**.

Firstly, I would like to mention the **OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969** which gives expression in binding form to a number of important principles relating to asylum, including the principle of non-refoulement. According to Article II (3): "*No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.*"

Another regional agreement dealing with refugees is the **American Convention on Human Rights**, which in Article 22(8) addresses non-refoulement. The article states that: "*in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions*" .

Article III (3) of the Principles concerning the **Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966**, states that:"*No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.*"

In addition to the statements in the above international instruments, the principle of *non-refoulement has* ***also found expression in the constitutions and/or ordinary legislation of a number of state****s*.

Europe has also been a source of important agreements regarding refugees. Article 3 of the **European Convention on Human Rights** prohibits torture or other cruel, inhumane or degrading treatment, and therefore provides similar protection for refugees as the Torture Convention. However, the European Convention differs in some respects. The European Commission on Human Rights has used Article 3 in order to deal with the non-refoulement issue, which is not itself specifically mentioned in the Convention. Also, the right which the Convention creates (to be protected from torture) is absolute and non-derogable, as is the right to be protected from refoulement in the OAU Convention.

(c) **What purpose does the principle of non-refoulement serve in refugee law and protection?**

As I stated above the principle of ***non-refoulement*** is the cornerstone of asylum and international refugee law. The purpose of the principle of non-refoulement is to serve the protection of refugees. Following from the right to seek and enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle of non-refoulement reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.

The most essential component of refugee status and of asylum is protection against return to a country where a person has reason to fear persecution and danger. This protection has found expression in the principle of *non-refoulement*.

(d) **What is persecution?**

Even though the ***risk of persecution*** is central to the refugee definition, "***persecution***" ***itself is not defined in the 1951 Convention***. Articles 31 and 33 of **1951 Convention** refer to those whose life or freedom "was" or "would be" threatened, so clearly it includes the threat of death, or the threat of torture, or cruel, inhuman or degrading treatment or punishment (**in Goodwin-Gill,** http://untreaty.un.org/). A comprehensive analysis today will require the general notion to be related to developments within the broad field of human rights (cf. ***1984 Convention against Torture, article 7; 1966 International Covenant on Civil and Political Rights, article 3; 1950 European Convention on Human Rights, article 6; 1969 American Convention on Human Rights, article 5; 1981 African Charter of Human and Peoples' Rights***). The persecuted clearly do not enjoy the protection of their country of origin, while evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution and to the well-foundedness of any fear (*I see in this point the principal problems to the refugee see my answer in section (d) of this question*).

Persecution is normally related to action by the authorities of a country, but it may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.

Persecution ***must be distinguished from punishment*** for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees.

(e) **Does the principle of non-refoulement apply to asylum seekers as well as refugees?**

Since this principle has become a part of customary international law, it is binding on all countries. As it was mentioned above the international documents dealing with the principle of non-refoulement do not make a precise distinction between a refugee and an asylum seeker. Nevertheless, ***the following persons are protected under this principle***: refugees, persons in refugee-like situation, asylum seekers and potential torture victims. That means that the principle of non-refoulement is applicable to any refugee, asylum seeker or alien who needs some form of shelter from the state under whose control he/she is.

An important issue concerning the application of the principle of non-refoulement is whether it applies only to ***a person inside the territory of a state or whether it includes the right to be admitted***. This issue is closely connected with the two conceptions of the principle of non-refoulement (the narrow one and the broader one). There was consensus in this regard among the states negotiating the 1951 Convention. According to some experts, the intention of the drafters was to make the protection available ***only to a person already inside the territory of a member state*** (in Grahl**-Madsen 1997**, 229).

But nowadays, it has come to be widely accepted by states that the principle of non-refoulement ***includes non-rejection at the frontier*** (in **Goodwin-Gill 1996**, 123-124). The 1967 United Nations Declaration on Territorial Asylum, albeit a nonbinding document, clearly states that no asylum seeker "*shall be subjected to measures such as rejection at the frontier*".

At regional level, the OAU Convention is categorical in this respect. It provides that no person shall be subjected to "*rejection at the frontier...which would compel him to return or to remain in a territory where his life, physical integrity or liberty would be threatened*".

Of course, there are still some ***special*** problematic ***groups of refugees*** such as refugees "***in orbit***", but also this group of refugees is under the protection of the non-refoulement principle. The only exceptions are the above mentioned Articles 33 (2) and 1 (F) of the 1951 Convention. But the principle of non-refoulement in respect of refugees or asylum seekers constitutes bedrock of promotion and protection of human rights. The principle is applicable to everyone who has a well-founded fear of persecution or in situations when there are substantial grounds for believing that a person would be in danger of personal security or life. Of course, it must be mentioned that ***not every asylum seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum seeker***.

(f) **Non-refoulement – its evolution in light of all relevant international instruments.**

Part of this issue is already addressed under section (b) of this article, but I would like to add a brief historical outline of this principle. The principle of non- refoulement gained ground after the ***First World War (1914-18)***.

The period was remarkable for the very large number of refugees who fled Russia after the revolution as well as Spain, Germany or the Ottoman Empire. The history of the principle of non-refoulement coincides with the increasing pressure to acknowledge the growing refugee problem in the twentieth century. The 1933 Refugee Convention marked the first time a multilateral international treaty contained a non-refoulement provision. The prohibition on refoulement, however, applied only to those refugees received as state-authorized arrivals. Subsequent to the 1933 Refugee Convention, the United Nations General Assembly established the United Nations High Commissioner for Refugees (the UNHCR).

In the **1933 Convention Relating to the International Status of Refugees**, Article 3 states that the contracting state-parties undertook not to remove resident refugees from their territory. Only eight states ratified the Convention.

The refugees from Nazi Germany in **1934-38** activated the European countries to abide by the legal principle of non-refoulement. It found expression in the 1936 Arrangement on the Status of Refugees among seven European states that "*No refugees shall be sent back across the frontier of the Reich (Nazi Germany)*". The need for protective principle of refoulement for refugees began to emerge solidly. There were many Conventions and Agreements where the principle of non-refoulement was recognised.

The ***1949 Geneva Convention on the Protection of Civilian Persons*** in Article 45 in part provides: "*Protected Persons shall not be transferred to a Power which is not a party to the Convention. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs*."

Following the Second World War a new era began for refugees. In February 1946 the United Nations expressly accepted that "refugees or displaced persons" who expressed "valid objections" to returning to their country of origin should not be compelled to do so by adopting a resolution in the UN General Assembly (Resolution 8(1) of 12 February 1946).

Finally the **1951 UN Refugee Convention in its Article 33** incorporated the principle of non-refoulement and states:"*No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion*."

What was very important was the change regarding the principle of non-refoulement by the ***1967 Protocol***, which ***removed the time and geographical limitation*** stipulated in the 1951 Convention, so after this protocol also those persons who became refugees after 1st of January 1951 were covered without any geographical limitation.

After the 1951 Convention there were other important documents at regional level, which I already mentioned above: ***the 1969 OAU (Organisation of African Unity) Convention Governing the Specific Aspects of Refugees, and the 1969 American Convention on Human Rights and the European Declarations and Conventions***.

Also the text of the ***Handbook on Procedures and Criteria for Determining Refugee Status*** and ***UNHCR Statute*** are very important in relation to this issue.

(f) **Non-refoulement, its application by the United States**

Regarding the principle of non-refoulement in the United States it is necessary to mention at the beginning that the United States is not party (signatory) to the 1951 Convention but is party to the 1967 Protocol and adopted the principle of non-refoulement.

The standing and application of the principle of non-refoulement in the United States can be illustrated on the case Immigration and Naturalization Service v. ***Predrag Stevic*** and the case Immigration and Naturalization Service v Luz Marina ***Cardoza-Fonseca*** U.S. refugee legislation with this Article.

In 1968 the United States acceded to the United Nations Protocol Relating to the Status of Refugees. The Protocol bound the parties to comply with the substantive provisions of Article 2 through 34 of the Convention. The U.S. President and the Senate believed that the Protocol was

largely consistent with existing law.

In **1980** the United States adopted the Refugee Act. The principal motivation for the enactment of the ***Refugee Act of 1980*** was a desire to revise and regularize the procedures governing the admission of refugees into the United States. But there was a problem with the ***language in Article 243 and 208 of the Refugee Act of 1980 and Article 33 of the 1951 Convention***. This issue was discussed in the above mentioned cases regarding the deportation of refugee **Stevic** back to his home country and regarding the asylum of **Cardoza-Fonseca**.

It was decided in the cases that the domestic law was more generous than the Protocol. In the practice of the United States regarding the principle of non-refoulement we can recognize so-called "***Absolute State Sovereignty Approach***", the states following the absolute state sovereignty approach construe their non-refoulement obligation under the 1951 Convention as applicable only when a person seeking refugee status successfully makes it to their borders.

The U.S. approached non-refoulement in a similar manner by taking active steps to prevent refugees from reaching its borders. One of the most significant examples of this "***Absolute State Sovereignty Approach" is the U.S. practice regarding the Haitians***. The U.S. government ordered the Coast Guard to intercept vessels on the high seas containing Haitians attempting to immigrate to the United States and return them to Haiti.

The U.S. Supreme Court in Sale v. ***Haitian Centers Council*** ruled the correct textual interpretation of Article 33 did not prohibit the U.S. Coast Guard from intercepting Haitian refugees before they reached the border. Court began by noting that based on a plain textual reading, Article 33 cannot apply extraterritorially given the parallel use of the terms "expel or return," the interplay between Article 33 (1) and Article 33 (2), and the negotiating history of the 1951 Convention. The Supreme Court held "because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions towards aliens outside its own territory, it does not prohibit such actions [of preventing asylum seekers from reaching the border]."

This case argued that the United States was breaching its international law obligation of non-refoulement, which was enshrined in the 1980 Refugee Act, by intercepting ships from Haiti and summarily returning them without adequately screening to ascertain whether any of the asylum seekers had valid claims to refugee status. The Supreme Court, however, found in favour of the Federal Government, by reading the non-refoulement principle to only apply once an asylum seeker had entered the United States.

Various reforms have been made to the asylum system established by this legislation since 1980. They have taken place both via legislation and through the decisions of the Courts. ***Temporary protection (TP)***, for example, is becoming increasingly popular in the U.S. as a way to deal with asylum seekers. Also, in 1994 regulations were passed in an attempt to 'streamline' the asylum process, and make it easier to weed out bogus or frivolous claims. However, these reforms were not seen to be sufficient, hence the ***Illegal Immigration Reform and Immigrant Responsibility Act*** (IIRAIRA) was passed in 1996. This act was said to have made 'profound changes' in the law applicable to asylum seekers arriving in the U.S. Among these changes were the introduction of an expedited removal process, and numerical limitations placed on certain classes of refugees.

According to the latest information the new ***Refugee Protection Act of 2010*** is now being discussed in the U.S. which aims to improve existing laws and practices so that people fleeing persecution in their homelands are not turned away or otherwise mistreated while in the United States' hands (in http://www.asylumist.com/).

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