

The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell

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Abstract

The article first gives an overview of the formation and the evolution of the principle of *non-refoulement* under international law. The different meanings of the concept in the asylum and human rights contexts are then discussed and compared, with due regard to the convergences that arose in the course of legal developments. In doing so, this short piece also draws attention to certain controversial issues and blurred lines, which have surfaced through the practical application of the prohibition of *refoulement*. Identifying the contours of the concept and clarifying its content and its effects may help in appreciating the implications that stem, in the current extraordinary times of migratory movements, from the fundamental humanitarian legal principles of which the imperative of *non-refoulement* forms part.

Keywords: non-refoulement, asylum, refugee law, human rights, judicial practice

Historical development: the asylum context

The principle of *non-refoulement*, meaning “forbidding to send back,” first appeared as a requirement in history in the work of international societies of international lawyers. At the 1892 Geneva Session of the *Institut de Droit International* (Institute of International Law) it was formulated that a refugee should not by way of expulsion be delivered up to another State that sought him unless the guarantee conditions set forth with respect to extradition were duly observed (*Règles internationales sur l'admission et l'expulsion des étrangers* 1892, Article 16).

Later on, with a view to the growing international tension in the period between the two World Wars, the principle of *non-refoulement* explicitly appeared in an increasing number of international conventions, stipulating that refugees must not be returned to their countries of origin [e.g. in the context of Russian and Armenian refugees; the

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conventions signed in 1936-38 with reference to refugees from Germany also contained similar restrictions on *refoulement*] (Tóth, 1994: 35; Goodwin-Gill & McAdam, 2007: 202-203).

After World War II it was the foundation of the United Nations (UN) that gave a new impetus to the consolidation of this principle in international law. Millions of people were seeking refuge at the time from the clashes and horrors of the six-year cataclysm, looking for the opportunity of settlement in an ultimate host country. In that period, the first context of application where the prohibition of *refoulement* became universal was the field of humanitarian international law: it was formulated in Article 45 of the *1949 Geneva Convention relative to the Protection of Civilians Persons in Time of War* according to which “in no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs.”

The principle of *non-refoulement*, granting broader protection, gained generally recognised, positive legal reinforcement at the universal level by virtue of Article 33 of the *1951 Geneva Convention relating to the Status of Refugees*, which stipulates 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.”

Thus, in the beginning, the principle of *non-refoulement* was closely related to the field of international refugee law as *lex specialis*. The enforcement of this international legal principle protected those fleeing persecution. It required unconditional implementation, as reflected by the fact that no reservations may be made to Article 33 of the *1951 Geneva Convention*. Nevertheless, the implementation of this clear obligation faced various difficulties. For instance, certain States allowed only formally recognised refugees, but not asylum seekers, to invoke the principle of *non-refoulement*; while several States have failed to operate a meaningful and efficient refugee status determination procedure until today (Tóth, 1994: 35).

It is partly due to the latter issue that the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR ExCom) has, since 1977, reinforced the significance and the universally accepted character of *non-refoulement* by the international community as a basic humanitarian principle several times, and has also

elaborated more on its contents and conditions of application in detail. Although as regards their normative force these are non-binding (soft law) documents, in many respects they reflect international customary law, established or in formation (see also: Goodwin-Gill & McAdam, 2007: 217). A UNHCR ExCom conclusion adopted in 1977 stipulated, for example, that the implementation of the principle of *non-refoulement* did not require the formal recognition of refugee status, while the ExCom conclusions passed in 1980 pointed out the need to consider the prohibition of *refoulement* as an obstacle to extradition and reinforced that the requirement of *non-refoulement* was to be strictly observed even in the case of the mass influx of refugees; later on, the UNHCR ExCom conclusions passed in 1981 and 2004 made it clear furthermore that the principle of *non-refoulement* also included non-rejection at frontiers (adding that access to fair and effective asylum procedures should also be ensured).

The principle of *non-refoulement* and human rights law

At the universal level, the development of the international protection of human rights later broadened the scope of the application of *non-refoulement*, whereby the principle grew beyond the narrow framework of international refugee law. Indirectly, the principle of *non-refoulement* can be already inferred from Article 7 of the 1966 *International Covenant on Civil and Political Rights* (ICCPR) banning torture, through the extraterritorial interpretation of the prohibition of torture (i.e. a State indirectly commits torture by transferring the person concerned to a country where s/he is tortured or subjected to cruel, inhuman or degrading treatment or punishment). This was the interpretation that the Human Rights Committee monitoring the implementation of the Covenant assigned to the article concerned in their General Comments No. 20 (1992) and No. 31 (2004) as well [see also: Betlehem & Lauterpacht, 2003: 92; Goodwin-Gill & McAdam, 2007: 209].

A further prominent step in this direction was taken when the 1984 *United Nations Convention against Torture* (CAT) formulated the *non-refoulement* obligation explicitly, in a general human rights context. Article 3 of the CAT prescribes it as a general rule that no State shall expel, return 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. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant

considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violation of human rights.”

It should be noted that the principle of *non-refoulement* deriving from the ICCPR has a broader scope of application than the provision laid down in the CAT since the former extends the ban beyond torture to cruel, inhuman and other degrading treatment or punishment as well. The UN itself has reinforced the embeddedness of the principle of *non-refoulement* into the international human rights protection system and its recognition in general international law several times (cf. e.g. the growing number of resolutions by the General Assembly in this field since the 1980s; the UNHCR ExCom themselves have pointed out the fact that this very legal principle has grown into a human rights requirement beyond refugee law).

Looking at the regional level, the principle of *non-refoulement* also appears in binding international legal instruments (international treaties). On the African continent, in the context of refugee law, Article II (3) of the *1969 Addis-Ababa Convention* governing the specific aspects of refugee problems in Africa offers a definition somewhat different from those above (threatening life, physical integrity or liberty is formulated as constituting the obstacle to return, to rejection at the frontier, and to expulsion), while *non-refoulement* is included in Article 22 (8) of the *1969 American Convention on Human Rights* as a purely human rights obligation. The latter general concept of *non-refoulement* protecting all foreigners is, as regards the reasons serving as the basis of protection, greatly akin to the original definition in the *1951 Geneva Convention relating to the Status of Refugees* (i.e. *refoulement*, to a country where the right of the person concerned to life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, is prohibited).

Moreover, in Latin America, the *1984 Cartagena Declaration*, reiterating the significance of the principle of *non-refoulement*, gave emphasis to this principle as a cornerstone of the international protection of refugees, which should be observed therefore as a rule of *jus cogens* (para. III. 5). Considering that, in its judgment of 2012 rendered in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), the International Court of Justice acknowledged the *jus cogens* character of the prohibition of torture, one can assign the same status to the requirement of the unconditional enforcement of *non-refoulement*, as it is by its logic closely related to the former as well (as is its extraterritorial emanation).

In addition, the general prohibition of *refoulement* implicitly follows from Article 3 of the 1950 *European Convention on Human Rights* (ECHR) declaring the prohibition of torture as an absolute right, thanks to the solid case-law of the Strasbourg Court interpreting and construing the prohibition of torture to be of an extraterritorial nature. The European Court of Human Rights (ECtHR) ruled that both extradition (see e.g. application No. 14038/88, *Soering v United Kingdom*) and expulsion (see e.g. application No. 22414/93, *Chahal v United Kingdom*) violated Article 3 of the Convention banning torture if there were reasonable grounds to assume actual danger that the person concerned would be subjected to torture or inhuman or other degrading treatment or punishment in the receiving State.

Within regional frameworks, *non-refoulement* is also expressed in multilateral conventions on extradition and therefore it may not be violated even as a result of an extradition procedure. Extradition as an instrument of criminal procedural law shall not be granted for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion [e.g. Article 3 (2) of the 1957 *European Convention on Extradition*; or Article 4 (5) of the 1981 *Inter-American Convention on Extradition*] (see also: Betlehem & Lauterpacht, 2003: 93; Goodwin-Gill & McAdam, 2007: 258).

With reference to regional soft law norms, the Member States of the Council of Europe undertook, in *Resolution (67) of the Committee of Ministers of the Council of Europe*, not to subject anyone to refusal of admission at the frontier, to rejection, or to expulsion, or to compel one to return to a territory where he would be in danger of persecution. The Committee of Ministers later reinforced this commitment several times (e.g. in 1984 and 1998).

In the law of the European Union, the *EU Charter of Fundamental Rights*, elevated to the level of primary EU law as of 1 December 2009, contains a specific provision for *non-refoulement*. This fundamental principle enshrined in Article 19 (2) of the Charter – actually codifying the case law of the ECtHR – rules with reference to everyone, i.e. covering the broadest possible range of persons:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment.”

Within secondary EU law, the *recast Qualification Directive* (2011/95/EU) formulates the requirement of *non-refoulement* specifically in the asylum (international protection) context (Article 21), while in the *Return Directive* (2008/115/EC) it appears as a horizontal human rights guarantee with reference to illegally staying third-country nationals (Article 5). In substance, these provisions do not provide for more than restating the international legal obligations of the Member States existing in any case, but the *non-refoulement* thus reproduced and made part of the EU law has progressed to a substantial legal principle within Member States that can be efficiently enforced (i.a. by the Court of Justice of the European Union) and which carries the structural principles of EU law (direct applicability, direct effect and primacy). In other words, in Europe, in addition to and parallel with the ECHR and the Strasbourg case-law, the judicial protection mechanism of the EU may also ensure taking measures against government acts violating the principle of *non-refoulement* (e.g. by providing effective legal remedies before the EU Court against such acts).

Summing up the above, by today the principle of *non-refoulement* has become more than the cornerstone of asylum (international protection), since, having grown beyond this, it has been reinforced as a general human rights requirement both at the universal and regional levels. Based on the above it can be established that this protection covers all individuals who have left their homeland for substantial fear of persecution for reasons specified by the 1951 Geneva Convention, as well as those in the case of whom it can be reasonably assumed that they would be subjected to torture or inhuman or other degrading treatment or punishment if forced to return to a particular country. This legal principle of customary nature (for an opposite view, see Hathaway, 2005: 363-370) – which, many believe, can be qualified as a *jus cogens* rule per se (Allain, 2001: 533-558; Farmer, 2008: 1-38) – must be observed from the moment that the person concerned *intends* to enter the border of another country, i.e. it does not only protect those already staying in the territory of a particular country from being removed. Moreover, due to the way international law has evolved, the extraterritorial application of the *non-refoulement* principle has become accepted. In other words, the principle must be enforced even if the act of the State takes place outside the territory of the State in the narrow sense, e.g. in airport transit zones (cf. the ECtHR judgement in *Amuur v France* – application No. 19776/92), in areas qualifying as international zones or even on the open sea (cf. the ECtHR judgement in *Hirsi et al v Italy* in 2012 – application No. 27765/09).

A unique situation arises when *refoulement* takes place only indirectly: although the country concerned sends the person in question only to a “transit country,” the latter may send the individual back to the country where s/he may then be subjected to torture or cruel, inhuman or other degrading treatment or punishment (this is referred to as “indirect” or “chain” *refoulement*). According to the relevant ECtHR jurisprudence, if someone is sent back to his/her country of origin indirectly, this may raise the responsibility of the first country because it can be expected of the State to make sure if the “transit” country provides efficient guarantee against arbitrary *refoulement*. Some authors criticise the concept of “indirect” or “chain” *refoulement* since the act of the first State in itself does not *per se* realise *refoulement* violating international law. All this certainly does not mean, however, that this act does not violate international law (e.g. by violating the right to private and family life by itself if well-integrated families are torn apart due to the expulsion of a family member, not meeting the proportionality test) or that the responsibility of the first State cannot be established.

Debated issues

There are as yet some unclear questions with regard to the essence of the principle of *non-refoulement*, by now over one-hundred-years-old. One of these questions concerns the personal scope governed by the principle [scope *ratione personae*] (Goodwin-Gill & McAdam, 2007: 205). In the international refugee law context, as formulated by the *1951 Geneva Convention*, it is refugees (those who meet the definition of refugee formulated by the Convention) who are eligible for this protection, i.e. the right to stay in the host State’s territory. The UNHCR ExCom Conclusion passed in 1977 assigned a broadening interpretation to this: according to the Committee’s position the *non-refoulement* principle can be applied to asylum seekers as well. In this respect it is totally indifferent whether the asylum seeker is staying in the territory of the host country lawfully or unlawfully, or what migratory or other legal status s/he has otherwise (it also flows from the requirement to implement the *1951 Geneva Convention* in good faith (Hathaway 2005, 303-304).

In the *human rights context* the personal scope of the principle is straightforward stemming from the *1984 Convention against Torture*. The latter can be regarded as a universal instrument, and the regional human rights codifications all use general subjects (“someone,” “no one”) in their formulation, so the subject of protection is the ‘individual’

without any restrictions, which includes, beyond the totality of foreigners, the State's own citizens as well.

Another, more frequently disputed key issue is the range and permissibility of *exceptions* from the prohibition of *non-refoulement* – a prohibition of fundamental character (Goodwin-Gill & McAdam, 2007: 234-244; Kugelmann, 2010: para. 34). In the asylum context, the *1951 Geneva Convention* does not create absolute protection from *refoulement*. Under Article 33 (2) of the Convention

“[t]he 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 or she is or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

At the same time, contrary to this universal normative framework, the *1969 Addis-Ababa Convention* recognises no exception from the principle of *non-refoulement*.

In the human rights context, the 1984 Convention against Torture, just like, at the regional level, the American Convention on Human Rights and the ECHR, as well as the Strasbourg case law based on Article 3 of the latter, formulate an absolute ban without exceptions, which is an obstacle even to removing *persona non grata* or dangerous individuals. The *EU Charter of Fundamental Rights* has adopted the same approach.

In view of the above the question may arise: Did the principle of *non-refoulement*, interpreted as a human rights guarantee in the broad sense, not make the exceptions specified under Article 33 (2) of the Geneva Convention of 1951 superfluous?

It may be argued that if an asylum seeker was returnable under the quoted provision of the Geneva Convention, but the imperative of the comprehensive, human-rights-driven principle of *non-refoulement* prevented the expulsion of the person concerned from the territory of the given country, the logical result would be that the person would keep his/her refugee status and would be practically impossible to send back. If, on the other hand, the individual in question fell under the scope of the excluding clause (Article 1 F) of the Geneva Convention, he would not be given conventional refugee status in any case but, considering the legal obstacle to expulsion, he would be allowed to continue to stay in the country concerned in a kind of “tolerated” status.

Judicial practice

The principle of *non-refoulement* frequently comes up in the case law of regional human rights courts, and these decisions have greatly contributed to unfolding the scope and contents as well as highlighting the respective aspects of the principle. At the forefront of all this has been the European Court of Human Rights which, with its abundant jurisprudence starting with the *Soering Case (1989)*, has played a very active role in shaping the set of criteria related to the *non-refoulement* principle (considering the essential elements of the principle; significantly lowering e.g. the level of individualisation; increasingly focusing on the protection of the individual; and meaningfully and strictly controlling the application of legal concepts called upon by the States such as “safe third country” or “internal flight alternative”).

The issue of *non-refoulement* has also come up in the case law of the *Inter-American Court of Human Rights*, even though the number of such cases has been by orders of magnitude lower (consider e.g. the judgement in *Caso Familia Pacheco Tineo v Estado Plurinacional de Bolivia* in 2013).

Before the *Court of Justice of the European Union (CJEU)* there have not really been any cases, with the exception of a few references, where the meaning of *non-refoulement*, the nature of protection, or the scope of application, etc. were meaningfully dealt with.

A recent CJEU judgement contains explicit reference to the pertinent provision of the EU Charter. It assimilated the ramifications of the prohibition of *non-refoulement* under EU law with those stemming from the case law of the ECtHR (*Tall – C-239/14*). At the same time, everything is given as regards both competence and positive law to make the CJEU active in this field as well.

It suffices to think of Article 19 (2) of the EU Charter, as well as the newly codified asylum *acquis* constituting the second generation of the Common European Asylum System, and the EU’s foreseen accession to the European Convention on Human Rights in the future.

Beyond the international (regional) level, it is noteworthy that there exists massive case law with regard to the *non-refoulement* principle also before national courts. The latter have mutually affected the judicial practice of one another as well as the development of the contents of the principle (e.g. British, Australian, Canadian, French, German, Italian and US court verdicts).

Finally, mention must be made of the benchmark and often-referenced practice of *quasi-judicial bodies* (the so-called “treaty bodies”) set up for the control of certain human rights conventions and the monitoring of the implementation of their contents (e.g. the Human Rights Committee, the Committee against Torture, etc.). Although they cannot render legally binding decisions, their quasi-case law enjoys a highly authoritative force, and States usually follow these recommendations to maintain their credibility in the international human rights arena.

Conclusion

This short piece sketched out the formation and the evolution of the principle of *non-refoulement* under international law in order to highlight the logic behind its existence and the need for further extending and refining its scope. After its inception in the asylum context, and its subsequent infiltration into and establishment within international human rights law, convergences could be witnessed in the course of later developments regarding the content of the *non-refoulement* principle. Nevertheless, there still exist certain controversial issues and blurred lines, which have surfaced through the practical application of the prohibition of *refoulement*, and are rooted in the sometimes eclectic State practice. This leaves some questions unresolved.

The blossoming judicial application of the principle, especially in regional settings, is a promising sign. It also contributes to the strengthening of the international rule of law in relation to this essential, non-transgressable universal human right.

As to just how essential continuous reflection and the jurisprudential shaping and refinement of the principle of *non-refoulement* may be, in adapting to new circumstances and challenges, to answer the question, we may borrow Pirjola’s vigorous words (2007: 656): “[o]pen concepts will always receive meaning and content, and from the perspective of people applying for protection, the content given to *non-refoulement* can be a question of life and death.”

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