The Principle of Non-Refoulement

Safeguarding the Right of Protection of Migrants

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In this article, **Martina Calleja** delves into detail on the legal and customary principle of non-refoulement. This principle is explored from an international, EU and Human Rights perspective together as an obligation on a State receiving immigrants. This article shows how the principle of non-refoulement is a safeguard for migrants.

TAGS: International law; Human Rights; Refugees

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1. Introduction

Illegal migration is a contemporary issue that continues to grow through the years, which is not only present in the Mediterranean Sea, but all over the world. This phenomenon is a very sensitive and complex one, as although it imposes heavy burdens on the receiving countries, it has a greater effect on the migrants themselves as through their journey they encounter life or death matters. Migration imposes several heavy responsibilities on the countries involved. Some of these responsibilities include the right to rescue at sea[1], the principle of non-refoulement, the responsibility of search and rescue, and the right to enter the closest port. Other obligations are to treat the refugees with dignity and respect and to protect them from any inherent dangers. These are all complex matters which several cases, jurisdiction and customary law define and explain these rights of the migrants and the responsibilities of the countries. This article will delve into the principle of non-refoulement, which is a crucial safeguard for migrants' lives and an obligation on the receiving State.

2. International legislation

The principle of non-refoulement is the cornerstone in international law which provides protection to refugees and asylum seekers. This principle prohibits receiving countries from returning refugees who are seeking protection to their original country where they would be in high risk of danger or persecution.[2] This danger is usually based on 'race, religion, nationality, membership of a particular social group or political opinion'.[3]

The prohibition of refoulement is found in the 1951 Refugee Convention, Article 33(1) which states:

> *[n]o 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.*

An *ad hoc* Committee was formed on the basis of the draft Convention that adopted Article 28 which had the same essence as Article 33(1) of the 1951 Refugee Convention. This committee commented that this Convention made

[1] Efthymios D. Papastavridi, 'Is there a Right to be Rescued at Sea? A Skeptical View' [2014] QIL, Zoom-in 4 17.
[2] Seline Trevisanut, 'International Law and Practice: The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27(3) Leiden Journal of International Law 661.
[3] 1951 Refugee Convention, Article 33(1).

a step further than the Convention of 1933. The 1951 Convention stated that refugees are not only meant to be protected from the country of origin but, are also not to be sent to any other country which would refoule them back to their origin country or any other country which would lift the refugees' freedom.[4] Although an exception to this was presented in the case by case situation of a refugee if he would 'invite disorder' to the country or is a 'criminal.'[5] This has another exception rendered to it, that being that the refugee is not in any serious danger in his country of origin. This was introduced by the Conference of Plenipotentiaries, where there were two amendments. The first was an addition to the article which continued to state that a refugee should not be sent back to the country of origin where 'he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered.'[6] The second amendment was the added exception which stated:

> *By way of exception, however, such measures shall be permitted in cases where the presence of a refugee in the territory of a Contracting State would constitute a danger to national security or public order.*[7]

The principle of non-refoulement is also protected by International Human Rights Law, as the prohibition of torture and of the right to life. Such migrations are usually caused by violations of human rights. The right for one to leave his own country is an inherent right in the Universal Declaration of Human Rights (UDHR) which is found in Article 13(2)[8]. Another inherent right found in Article 14 of this Declaration states that 'everyone has the right to seek and enjoy in other countries asylum from persecution.' Here, a refugee does not have the right to enter another country but the right that is protected here is that of the 'right to request' for asylum. This right is protected by the principle of non-refoulement.

Non-refoulement is present in Article 3 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. This holds that:

> *[n]o 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.*

Article 7 of this Convention reinforces the non-refoulement principle. This article was interpreted by the UN Human Rights Committee to go hand in hand with Article 6 on protecting the right to life and that this gives the ultimate legislative protection to the refugees. It was interpreted that the State is not to expose any individuals to any danger of them being tortured or to

[4] *Travaux préparatoires* of the 1951 Convention.
[5] ibid., 234.
[6] ibid.
[7] ibid.,235.
[8] Alfred de Zayas, 'Migration and Human Rights' (1994) 62 Nordic Journal of International Law 243, 245.

situations where they are subject to 'cruel or inhuman or degrading treatment of punishment upon return to another country by way of their extradition, expulsion or refoulement'.[9]

3. Customary international law

International custom is the 'evidence of a general practice accepted as law'[10]. Customary law is a source of law that helps States reach a decision when international disputes arise. A rule can rise to the level of customary international law when it endows two elements: the consistent practice of such rule by the State, and *opinio juris*. *Opinio juris* is the 'understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.'[11] This shows that even if there is a principle which is not endowed in a treaty, it is still binding as customary law is as binding as any treaty.

The case ***OC-18/03***[12] was the first case that recognised the significance of international human rights development. The international tribunal recognised for the first time the non-discrimination as a *jus cogens* norm 'imposing obligations *erga omnes* on States'.[13] Thus, even if the State was not a party to such a Human Rights Declaration, the State was still bound by it. This case was a development to give equal protection to migrants[14] who are illegally residing in the host country equal protection under the law as those who are residing legally[15]. It also provided that no matter their nationality or social origins, they are still protected by human rights.[16]

The case ***C, KMF and BF v Director of Immigration, Secretary for Security***, portrays that Article 33 of the Refugee Convention does not emphasise anything about the process of letting a refugee enter the host country. The Hong Kong Director was faced with the problem of having migrants being recognised as refugees in the host country's territory. Kay Hailbronner[17] expresses that the States were unwilling to draft anything about the admission of refugees into the State territory, but once refugees have entered the State, the principle of non-refoulement kicks in as this is international customary law and is binding on all international States. The principle of non-refoulement has reached to be a peremptory norm of

[9] UN, Human Rights Committee 1992 <https://www.refworld.org/docid/453883fb0.html> para 9.
[10] Article 38(1)(b) of the Statute of the International Court of Justice.
[11] 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 <https://www.unhcr.org/4d9486929.pdf>.
[12] Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, 'Juridical Condition and Rights of Undocumented Migrants'.
[13] Sarah H. Cleveland, 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03' (2005) 99 American Journal of International Law 460.
[14] UNGA, 'Protection of Migrants' Res. 166 (24 February 2000) A/RES/54/166 para 4.
[15] UNGA, The Convention, Res. 158 (18 December 1990) A/RES/54/158.
[16] Human Rights Committee, General Comment 15, 'The Position of Aliens Under the Covenant' (Twenty-seventh Session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, paras. 1-2, UN Doc. HRI\GEN\l\Rev. I at 18 (1994).
[17] Kay Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Thinking?' (1986) 26(4) Virginia Journal of International Law 857.

customary international law and States are bound by it.

4. The principle of non-refoulement in EU law

The principle of non-refoulement is set out in Article 78(1) TFEU where it states that a 'common policy on asylum' is to be developed to protect refugees, who are mainly third-country nationals, and in accordance with the non-refoulement principle. Sub-article 2 continues to state that a common asylum system is to be set up for the EU. This system is to be uniform through the EU and must contain a '*status of asylum for nationals of third-countries*'[18], '*subsidiary protection*'[19] for those in need of international protection, '*temporary protection*'[20] and procedures for granting and withdrawing asylum for third-country nationals[21], criteria to determine which '*Member State is responsible for considering as application for asylum or subsidiary protection*'[22], 'the standards for conditions of the asylum seeker' [23]and partnership with third countries to manage such flows[24].

The EU charter of fundamental rights has several articles that support the principle of non-refoulement. Article 4 provides that '*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*.' This is followed by Article 18 which provides the right to asylum which is to respect the rules set out in the Geneva Convention 1951. Collective expulsions, removals or extraditions to places where a persons would be in high risk of '*death penalty, torture or other inhuman or degrading treatment or punishment*' is prohibited. This is found in Article 19. These articles are binding on all EU Member States.[25]

'*The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted*' so as to maintain the principle of non-refoulement. This was stated in the joined cases of ***C-411/10*** and ***C-493/10***.[26]

A returning State can be found guilty for returning a refugee back to his country of origin where a high risk of torture, degrading treatment or punishment would be present upon the extradition of the person. This is also found in Article 3 of the ECtHR. If a Contracting Party extradites a person where there is real risk of humiliation, degrading and ill-treatment and punishment, it would be held liable and in breach of Article 3. This was the

[18] TFEU, 78(2a).
[19] ibid., 78(2b).
[20] ibid., 78 (2c).
[21] ibid., 78(2d)
[22] ibid., 78(2e).
[23] ibid., 78(2f).
[24] ibid., 78(2g).
[25] Charter of Fundamental Rights of the European Union, Article 51.
[26] *N. S. v Secretary of State for the Home Department* and *M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, para. 75, 7.

position of the court in ***Soering v The United Kingdom***[27] where the Court held that the '*death-row phenomena*' would be a breach to Article 3. Article 3 ECHR also applies to interception on the high seas. This was stated by the Court in ***Hirsi Jamaa and others v Italy***[28]. The prohibition of refoulement kicks in.

This principle is also reflected widely in EU secondary law. The Qualification Directive, Article 21, provides that a person who needs international protection is not to be sent back to his country where there is risk of persecution or serious harm. This Directive also provides protection for persons who do not have the criteria to be recognised as refugees under the 1951 Convention but are nonetheless still protected.[29] This Directive includes the death penalty, execution, torture and inhuman degrading treatment or punishment as 'serious harm'.[30] In ***Elgafaji v the Netherlands***[31], it was stated that in a situation of armed conflict, whether be it international or civil, '*a serious and individual threat to a civilian's life or person by reasons of indiscriminate violence*' also amounts to serious harm.

Asylum seekers are also offered the protection this principle provides. In fact, Article 9 of the Asylum Procedures Directive[32] allows people who are waiting for a decision regarding their asylum request to stay in the Member State. Asylum should also be provided at borders. The guards have a duty that when a refugee, asylum seeker or a stateless person, is at their border, to inform the person about such asylum procedures[33]. The principle of non-refoulement is also present in Articles 35 and 38 where the concept of first country of asylum and the concept of third safe country are contained. These concepts offer protection to refugees.

The prohibition of refoulement is found in Article 5 of the Return Directive (2008/115/EC) and which applies to all migrants in an irregular situation. As per Article 4(4) of the Directive, the principle of non-refoulement binds the Member States to adhere to such principle when there are persons who were stopped at a boarder or stopped by the authorities due to their irregular border crossing.

5. Non-refoulement under Human rights

As previously discussed, Article 3 of the Convention Against Torture protects the refugees from being returned to a country where a person is being exposed to real risk of danger to one's life and who are in danger of becoming victims of torture. This article provides the protection of persons where there are foreseeable consequences waiting for such refugees and there is '*the*

[27] *Soering v The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) paras 80-83,91.
[28] *Hirsi Jamaa and others v Italy* App no 27765/09 (ECtHR, 23 February 2012).
[29] Article 15 of the Qualification Directive (2011/95/EU).
[30] ibid.
[31] C-465/07 Meki Elgafaji et v. Staatssecretaris van Justitie [2009] ECLI:EU:C:2009:94.
[32] 2013/32/EU.
[33] Article 8 Asylum Procedure Directive.

serious and irreparable nature of the alleged risk.'[34] This article, in addition to Article 33 of the 1951 Convention adds the protection of persons not only from being refouled and expelled but also from 'extradition.'[35] Herman Burgers and Hans Danelius, the drafters of the Convention of Torture, state that Article 3 is an exception which the principle of non-refoulement provides to other extradition conventions which are ratified.

Torture is defined as twofold in Article 1 of the Torture Convention: physical torture and mental torture. In the case ***Soering v UK***, it was held that punishment is not to be taken in its own light but to be seen in context of the treatment, the way that it was to be executed, the length of time and the physical and mental effects that it would have on the victim. The case was based on the 'death-row phenomenon' and whether the extradition of the fugitive would be in breach of Article 3. The Court held that this is 'inhuman' treatment as it was premeditated, held for hours straight, and the Court stated that it holds physical and mental effects on him. It was also held that this is 'degrading' treatment and meant to humiliate him with the goal to break the person either physically, mentally or morally. The death penalty *per se* does not breach Article 3 but should be considered as '*inhuman and degrading punishment*'.[36]

Article 3(1) provides that for one to see if a person would be subjected to torture on return to the country of origin, there must be substantial grounds. This was stated in ***Ismail Alan v Switzerland***[37]. Article 3(2) provides that where a country practices a '*gross, flagrant or mass violations of human rights*', this pattern should be considered. David Weissbrodt[38] states that if this is proven, this may not be in breach of Article 3. On the other hand, if there is no proof that the country practices such violations of Human Rights, if one proves that he, as an individual, is in danger of such torture, this may in fact give rise to Article 3.

The Committee, in some cases, took into consideration if States were party to the Convention. In ***Khan v Canada***[39], Pakistan was not a party to the Convention. Khan's forced return would result in subjecting him to danger of torture and would remove his possibility of applying for protection. In ***Alan v Switzerland***[40], '*Turkey's status as a party did not in itself justify the*

[34] *Soering* (n 27), para 90.
[35] David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulment: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1366&context=faculty_articles> pg 7.
[36] *Soering* (n 27), para 101.
[37] Committee Against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (1996).
[38] David Weissbrodt, Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 Buffalo Human Rights Law Review 1.
[39] *Tahir Hussain Khan v Canada*, Committee Against Torture, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995).
[40] *Ismail Alan v Switzerland*, Committee Against Torture, Communication No. 21/1995, U.N. Doc. CAT/C/16/D/21/1995 (1996).

applicant's expulsion to that country, because torture was still systematically practiced in Turkey.'[41]

This principle is complemented by Article 6 of the ICCPR, the right to life, and Article 7 of the ICCPR, which provides the right against '*torture or to cruel, inhuman or degrading treatment or punishment*'. Thus, where the person faces a real risk 'of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment'[42], the principle of non-refoulement extends to the persons who are either within the territory or under the jurisdiction of the State. It also applies to the country to which one is being returned to. This principle applies at all times especially during times of terrorism and war.

The principle of non-refoulement does not bind itself within jurisdictions or the territory of the host State but it even comes into play on the high seas.[43] When there are persons who are in distress on the high seas, ships and shipmasters have the obligation to rescue these people and disembark these rescued people to a place of safety.[44] If seafarers either delay or prevent the rescue of people in distress at sea, this could rise in violation of the principle of non-refoulement, especially where there are people who are in need of international protection. Thus this principle also arises on the high seas out of any State territory.[45] Saving lives at sea is not optional but the obligation of the State.[46]

Furthermore, the threshold of human rights of refugees is far beyond the territory of the country and that every person is entitled to his human rights and dignity. Jurisdiction as developed in international human rights law 'is not a threshold requirement for the applicability of EU human rights law'[47]. The only thing that binds Member States is that when they are acting outside their territory they have to abide by EU obligations but the obligations that a State is to abide by human rights goes beyond territoriality.

The principle of non-refoulement has found its way into *jus cogens*, which extends itself throughout the international community. Apart from this, this principle is also being protected by the human rights law which is present to protect refugees both on the high seas and in extraterritorial jurisdiction. This principle is also triggered when a person is moved from one jurisdiction to another.

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[41] See (n 35).
[42] 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 <https://www.unhcr.org/4d9486929.pdf>
[43] *Hirsi Jamaa* (n 28).
[44] Article 92 (Status of ships), Article 94 (duties of the Flag State), Article 98 (duty to render assistance) of the UNCLOS.
[45] *Hirsi Jamaa* (n 28).
[46] Evelyn Blackwell, 'Saving lives at sea is not optional': EU chief calls for unity amid warnings migration crisis is not over (*World Newsera*, 16 September 2020) <https://worldnewsera.com/news/world-news/europe/saving-lives-at-sea-is-not-optional-eu-chief-calls-for-unity-amid-warnings-migration-crisis-is-not-over/>

[47] Violeta Moreno-Lax and Cathryn Costello (2014), p. 1662.

In ***Bankovich and Others v Belgium and Others***[48] the Court held that there are four instances, which are not exhaustive, when an act which is performed outside a State's jurisdiction can trigger jurisdiction. These instances are in cases of: i) expulsion or extradition, ii) when the State's authorities act extraterritorially or have effects outside their jurisdiction, iii) during military operations and acts outside the national territory and iv) on vessels or crafts which are either registered with or fly the flag of such State. The principle is also triggered in these instances.

6. State responsibility for breach of principle

There are two ways that a State can breach the principle of non-refoulement.

1. Through independent State responsibility
2. Through derived responsibility.

Derived responsibility flows from an international wrongful act which was committed by a third-country. This is derived from the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts. These Articles have come to be accepted as customary law of State responsibility, having authoritative formulation on international law in relation to the responsibility a State carries.

Article 2 states that there are two elements of an internationally wrongful act of a State, which could either be through action of omission; the first being the act which is 'attributable to the State under international law' and the second being that 'constitutes a breach of an international obligation of the State'. The first element of attribution may be either objective or subjective. This article does not lay down any general rule but sets a 'degree of fault, culpability or negligence'.[49] The second element goes beyond any written obligation but steps into the realm of customary international law which the State has to abide by. The principle of non-refoulement falls under this article.

A State is prohibited from aiding or assisting another State to commit a wrongful act both through 'circumstances of the internationally wrongful act' and where the act is 'internationally wrongful if committed by that State.'[50] This usually takes place where a State is collaborating with another or a group of States are working together to circumvent their obligations. It is said that in the case of refugees where there is a close connection between the destination State and the State where the refugees are transiting from, 'it will be easier to argue that there is a sufficiently close causal link between the destination State's assistance and the human rights violations in the transit State.'[51] Aust holds that for a State to be complicit in committing a wrongful

[48] *Banković and Others v Belgium* and Others App No 52207/99 (ECtHR, 12 December 2001) paras 68-73.
[49] Articles on Responsibility of States for Internationally Wrongful Acts, Article 34.
[50] Articles on Responsibility of States for Internationally Wrongful Acts, Article 16.
[51] Annick Pijnenburg, 'Containment Instead of *Refoulement*: Shifting State Responsibility in the Age of Cooperative

act, it does not need to wish for a particular outcome but what is relevant is that the State must have the intention to contribute to this commission. He also holds that international human rights law could be set out as a due diligence standard.[52] This article can also be seen to meet human rights as there would be knowledge on behalf of the State that the refugees are being exposed to the risk of harm.

In ***Soering v UK*** , the ECtHR found that a State can be held responsible if it is found that the State knew there was a high risk of real danger and exposure to torment which could even result in the death of the refugees and the State sent them back to their country of origin. In ***Hirsi***, the ECtHR explained that the existence of a risk of '*ill-treatment in the third-country must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of removal*'.[53]

In the 'Access to Protection: A Human Right' report regarding migration in Malta, it was highlighted that this principle applies no matter if the refugees were rescued or intercepted or whether this act was carried out by officials of the State or by private individuals. It also highlights Malta's obligation to not violate this principle with emphasis on the ***MV Salamis*** case where 'push-backs' of migrants were involved.[54] This was considered to amount to *de facto* refoulement and is a violation of the State's international obligations.[55]

7. Conclusion

In conclusion, the principle of non-refoulement is there to protect those who are in need of protection from their country of origin and is put in place to safeguard their life and their physical and mental self. Not only is it enshrined in international and EU treaties but it has arisen to be *opinio juris*. This shows that even if a State is not party to a treaty, it still needs to abide by this principle. Non-refoulement is also enshrined in human rights law which not only obliges the State to protect the refugees but also endows the refugees with the right to be protected. Furthermore, this article discussed that this principle is not bound by the territory or jurisdiction of the State but is also triggered in the search and rescue areas and the high seas.

Migration Control?' (2020) 20(2) Human Rights Law Review 306, 329.

[52] Helmut Phillip Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 99–100.

[53] *Hirsi Jamaa* (n 28) para. 121.

[54]Jean-Pierre Gauci, Patricia Mallia, 'Irregular migration and the international obligation of non-refoulement: the case of *MV Salamis* from a Maltese perspective' (2014) 20(1) The Journal of International Maritime Law 50.

[55] 56/2007/1 *Hassan Abdulle Abdul Hakim et vs Ministru tal-Ġustizzja u Intern et*, (Constitutional Court) 28 June 2013 (violation of Article 3 ECHR was found); 6/2008/1 *Sahan Dilek et vs Ministru tal-Ġustizzja u l-Affarijiet Interni et* (Constitutional Court) 22 February 2013.


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