The Future of Non-Refoulement in International Refugee Law?

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- *Non-refoulement* is a peremptory norm of international law.
  - fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.
  - Articles 33(1) and 33(2) of the 1951 Convention relating to the Status of Refugees
  - All asylum-seekers are protected by the principle of non-refoulement

- **When does the principle of non-refoulement not apply?**
  - when refugee status is not needed or no longer required
  - *Article 1F*, the so-called Exclusion Clauses (those who are not deserving of refugee status)
  - *Article 33 (2)* – a danger to the country – security threat

- **Limitations of the principle of non-refoulement**
  - Article 1F and Article 33(2) and their distinctions.

- **Some leading jurisprudence in the field:**
  - Suresh (Canada), Sale (US), MV Tampa and the “Pacific Solution” (Australia)

- **Concluding Reflections on the Future of Non-Refoulement**
  - Given the current circumstances in the world today and the foreseeable future, that is, with the extent and intensity of war and protracted armed conflict, the threat of terrorism, the general level of feelings of insecurity, and the realpolitik, further constraints and restrictions will continue and likely to grow over the next 25 years.
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*Non-Refoulement* is considered to be the cornerstone of the international refugee protection regime.

This principle in international refugee law applies independently of any formal determination of refugee status by States.

“Refugee law imposes a clear and firm obligation on States: under the principle of non-refoulement no refugee should be returned to any country where he or she is likely to face persecution.”


The principle of *non-refoulement* applies as soon as an asylum seeker claims protection.

The principle of *non-refoulement* predates the 1951 Convention relating to the Status of Refugees.
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Guy Goodwin-Gill stated, in his opening keynote address, that the non-refoulement principle is now part of customary international law. It is *jus cogens* and a *peremptory norm of international law*. No one can be sent to a country where they may face a risk of persecution.


1951 Convention relating to the Status of Refugees, Article 33 (1)
Prohibition of Expulsion or Return (“Refoulement”)

1. 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.

Article 33(1) is qualified by Article 33(2) that states:
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*Article 33 (2)*
The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The principle of non-refoulement applies to refugees, both to those who are granted refugee status and those who have yet to be determined and are merely asylum-seekers. All asylum-seekers are covered by the principle of non-refoulement, albeit some only on a temporary basis, that is, those who are determined not to be refugees.

States may send an individual to a third State, provided steps are taken to assure that the person would not be at risk of persecution if sent to that third State.

Some States are resorting to these types of measures to avoid seemingly their obligation of providing refugee protection to bona fide refugees; for example, US (Haitians), Australia, the EU (in its agreement with Turkey), and others.
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Since the recognition of refugee status is declaratory of the asylum-seeker’s existing status as a refugee and not by virtue of a State recognition of the person’s status (Paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees), all asylum-seekers are protected by the principle of non-refoulement until their claims are decided and they are determined not to have refugee status.

This was reinforced here in the UK with several judgements:

R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening) [1988] AC 958.

Regina v. The Secretary of State for the Home Department, Immigration Appeals Tribunal Ex Parte Anthypillai Francis Robinson [1997] EWCA Civ 4001.
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*When does the principle of non-refoulement not apply?*

The principle of *non-refoulement* does not apply when the asylum-seeker falls within the provisions of Article 1(C), (D), and (E); that is, in those instances where refugee status is not needed or is no longer required.

This also applies to those asylum-seekers that fall under Article 1F, the so-called exclusion clauses, although these persons may have a well-founded fear of persecution on one or more of the five grounds they are excluded from refugee protection.

**Article 1F** - The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a *crime against peace, a war crime, or a crime against humanity*, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of *acts contrary to the purposes and principles of the United Nations*.
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To Recapitulate:

Article 33 states that no State “shall expel or return (‘refoule’) a refugee in any manner whatsoever to the frontiers of territories” where the person’s life or freedom would be threatened on account of any of the Refugee Convention grounds.

The 1933 League of Nations’ Convention relating to the International Status of Refugees limited the return to that individual’s country of origin. The 1951 Convention’s Article 33 extends this prohibition to any country in which the individual may be at risk.

Notwithstanding Article 14 of the 1948 Universal Declaration of Human Rights or Article 18 of the 2000 Charter of Fundamental Rights of the European Union there is no right to asylum per se.

The 1951 Convention does not deny the competence of each State to decide who should be admitted to its borders. However, it prohibits the return of someone to any State where there are reasonable grounds to suspect that the person will face persecution.
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The well established principle of non-refoulement in the international and regional instruments:

This is further reiterated in Article 3 of the 1967 United Nations Declaration on Territorial Asylum.

(1) No person [seeking asylum from persecution] 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.

(2) Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

The principle of non-refoulement is also found in the regional refugee rights instruments: Article II of the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa; Section III of the 1984 Cartagena Declaration on Refugees; Article III of the 1966 Bangkok Principles on the Status and Treatment of Refugees; Article 21 of the 2011 EU Council Directive on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of protection granted.
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The Limitations to the Principle of Non-Refoulement

The Distinctions between Article 1F and Article 33(2)

As noted, States may make exceptions to the principle of non-refoulement under certain circumstances: Article 1F, that is, the commission of heinous crimes such as war crimes, crimes against humanity, crimes against peace; the person has committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee; and, being guilty of acts contrary to the purposes and principles of the UN.

Article 33(2) does permit exceptions to the application of the principle of non-refoulement. The non-refoulement provisions, under Article 33(2), cannot be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 1F looks at the past conduct of the refugee claimant. While Article 33(2) looks at the present and future conduct of the refugee that would militate against their continued presence of the person in the host country.
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Article 1F deals with those persons who have yet to be determined Convention refugees, whereas Article 33(2) deals with those persons who have been recognized as refugees but are deemed to be a risk to the community of the host country.

Naturally, if an asylum-seeker or a person who has been determined to be a Convention refugee commits a serious crime then they would be subject to prosecution under the criminal law of their host State.

Those who are deemed to be excluded under Article 1F(a) for a crime against humanity may be subject to prosecution under international criminal law or the domestic law of their home state. If there is an outstanding indictment against the person by the International Criminal Court (ICC) then they would be subject to removal to stand trial.

It is exceedingly expensive to prosecute someone either under domestic law or international criminal law and, often, with no guarantee of securing a conviction. The rules of evidence and the standard of proof for criminal law and practice are different than refugee law.

-- Standard of Proof: “beyond a reasonable doubt” v. “balance of probabilities”
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Leading Jurisprudence

*Suresh v. Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3*

Suresh, a Sri Lankan national, was ordered deported from Canada because he was deemed to be a security risk. The Canadian Security Intelligence Service (CSIS) claimed that he was a Liberation Tigers of Tamil Eelam (LTTE) fundraiser and supporter.

The Federal Court ruled that those falling within the exception of Article 33(2) could be removed, not withstanding the likelihood of torture, but only in limited situations.

In a unanimous decision the Supreme Court of Canada, the Justices stated that the ambit of Article 33(2) has become restricted with the 1984 Convention Against Torture and Other Cruel, Degrading Treatment and Punishment and the absolute prohibition on torture.

Nevertheless, the Supreme Court of Canada ruled that persons who face a substantial risk of torture may still be deported in exceptional cases. The Court was seeking to balance the likelihood of torture with combating terrorism.

For Canada, Article 33(2) establishes an exception to the non-refoulement principle under very limited situations even when there may be a risk of torture.
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This case involved the US actions of interdicting Haitians as they tried to reach the US shore and it resulted in the Sale case before the Supreme Court. The US Government argued before the Court that non-refoulement applies only to refugees once they have been admitted to a territory. Hence, the US argument denied the extra-territorial application of Article 33(1).

The Supreme Court accepted the arguments of the US Government and held that the principle of non-refoulement only applied once the person had gained entry into the US.

This judgement was soundly criticized as being a clear violation of international law. The opposing argument to the US Supreme Court’s judgement being, of course, that the non-refoulement principle is not so much about the admission to a State, but, about returning refugees to where their lives and freedom may be at risk.
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**MV Tampa and the “Pacific Solution” of Australia**

In August 2001, the Howard Government of Australia refused permission of the Norwegian freighter *MV Tampa* that was carrying 438 rescued refugees from entering Australian waters. This triggered an controversy before the Australian federal election and a diplomatic dispute between Australia and Norway.

The Norwegian Captain of the *Tampa*, disobeyed the Australian authorities and took his ship into territorial waters just off the coast of Christmas Island. Some of the refugees were taken to New Zealand and the rest were taken to the island of Nauru, which was not a signatory to the *1951 Convention* at the time, where the asylum screening took place.

The Australian Government appeared to be influenced by the United States and its interdiction of Haitian nationals and the US Supreme Court’s judgement is *Sale*.

**Was Australia in compliance with the requirements of the 1951 Convention?** It was argued that access to asylum was still permitted whether in Nauru or New Zealand.
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Some Concluding Reflections on the Future of Non-Refoulement

-- The scope and content of the principle of non-refoulement is a treaty right that is derived from Article 33(1) of the 1951 Convention. It is a peremptory norm of international law. (Although it is still contested by some scholars as being a peremptory norm.)

-- There are a number of limitations to the principle of non-refoulement. It is not absolute, as noted, in both Article 1F and Article 33(2).

-- The US has clearly gone the furthest in limiting the geographic limitation of non-refoulement. By preventing people from landing in the US and not being able to make a claim for refugee status and, at the same time, these persons cannot avail themselves of the principle of non-refoulement. This is fundamentally wrong and contrary to international law.

-- Australia has not gone as far as the US in preventing “access to asylum” on their territories. They are processing refugee claims offshore. However, refugee claimants are living in remote refugee camps for protracted periods of time. This is clearly harsh and unusual treatment.

-- We have the EU-Turkey deal where asylum-seekers are being held in refugee settlement centres and then sent back to Turkey and not allowed to travel to Germany or other EU States to claim asylum.

-- Given the current climate, it is most probable that these types of approaches (US, Australia, EU and Turkey agreement) will continue to grow over the next 25 years. Non-refoulement will be challenged and the access to asylum will become more restrictive.