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Principles of International Refugee Law

2. *Non-refoulement*

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Non-refoulement – The nature and sources of the rule

- *Non-refoulement* as a treaty rule
- *Non-refoulement* as a rule of customary international law
- Protection against the *risk* of harm

Non-refoulement – Origins and evolution

- **Treaties**
- **Declarations and soft law**
- **State practice**

Non-refoulement – Issues arising

- Personal scope
- Territorial scope
- Acts and omissions
- Refugees
- Human rights protection
- Exceptions

Non-refoulement – the range of State activity

- Visas
- Carrier sanctions
- Extraterritorial airport checks
- Interception at sea
- Diplomatic assurances

1933 Convention relating to the International Protection of Refugees

Article 3

The parties agreed not to remove resident refugees or keep them from their territory,

‘by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*)’, and ‘in any case not to refuse entry to refugees at the frontiers of their countries of origin’

Non-refoulement and the United Nations

- UNGA resolution 8(I), 12 February 1946
 - ▶ ... no refugees... who have finally and definitely, in complete freedom, and after receiving full knowledge of the facts, including information from the governments of their countries of origin, expressed valid objections to returning to their countries of origin... shall be compelled to return...

1951 Convention relating to the Status of Refugees

Article 33 – 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.
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.

Non-refoulement – Evolution and development

1967 Declaration on Territorial Asylum

Article 3

The General Assembly, recommends that States be guided by the principle that no one entitled to seek asylum,

‘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’

1969 AU/OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

Article II(3)

‘No person shall be subjected... 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.’

Declarations of States

- Council of Europe Committee of Ministers
 - Res. (67) 14 on Asylum to Persons in Danger of Persecution, adopted 29 June 1967
- UNHCR Executive Committee Conclusion No. 6 (XXVIII), 1977 – *Non-refoulement*
- UNHCR Executive Committee Conclusion No. 22 (XXXII), 1981 – Protection of Asylum Seekers in Situations of Large-scale Influx
- Cartagena Declaration 1984 – a rule of *jus cogens*

From the statements of States to the practice of States...

- Turkey and Iraq
- USA and Haiti
- Tanzania and Rwanda
- Bangladesh and Myanmar
- Interception, interdiction and extraterritorial measures of control
 - Cf. *FRONTEX*
 - *Roma Rights* case (UK)
 - *The Marine I* Case

Customary international law

Custom – international custom, as evidence of a general practice accepted as law

- A general (widespread and representative) practice of States
- *Opinio juris*
- Acquiescence/tacit consent
- Objection
- ‘Declaratory’ resolutions
- Treaties as a ‘source’ of customary international law
 - *North Sea Continental Shelf Cases*
 - *Nicaragua Case*

Non-refoulement and human rights

Non-refoulement and human rights

The prohibition of torture

- Article 5, Universal Declaration of Human Rights 1948
- Common Article 3, 1949 Geneva Conventions; Article 75, Additional Protocol I 1977
- Article 3, European Convention on Human Rights 1950
- Article 7, International Covenant on Civil and Political Rights 1966
- Article 3, Convention against Torture 1984

1984 Convention against Torture

Article 3

1. 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.
2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence of a **consistent pattern of gross, flagrant or mass violations of human rights**.

The EU and subsidiary protection

Qualification Directive 2004, Articles 2, 15

- Member States **shall grant** subsidiary protection status... to 'non-Convention refugees' where 'substantial grounds' to believe that, if returned, the person concerned would face a '**real risk of suffering serious harm**', namely
 - (a) **death penalty or execution; or**
 - (b) **torture or inhuman or degrading treatment or punishment; or**
 - (c) **serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.**

Non-refoulement and the European Court of Human Rights

▪ The foreseeability of irreparable harm

- *Soering v United Kingdom* (1986)
 - 'Insofar as any liability under the Convention is or may be incurred, it is liability incurred by the... Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'
- *Saadi v Italy* (2008)
- *Al-Saadoon v United Kingdom* (Jurisdiction, 2009; Merits, 2010)

▪ The inherent obligation

- *Soering v United Kingdom* (1986)
 - Cf. **The prohibition of torture/the prevention of torture**

Non-refoulement and general international law

- *Corfu Channel Case*, [1949] ICJ Reports 4
 - '... elementary considerations of humanity, even more exacting in peace than in war...'
- *Barcelona Traction Light and Power Company Limited Case*, [1971] ICJ Reports 3
 - '... the principles and rules concerning the basic rights of the human person...', which are owed to the international community at large
- *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226
 - '... intransgressible principles of international customary law'
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136
 - '... obligations which are essentially of an *erga omnes* character'
- *Application of the International Convention for the Elimination of All Forms of Racial Discrimination* (Provisional Measures), [2008] ICJ Reports 353
 - the 'irreparable' prejudice that could result from violation of 'the right to security of the person and protection by the State against violence or bodily harm...'