

Refugee Law Class 6

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1951 Convention on 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 judgement of a particularly serious crime, constitutes a danger to the community of that country.

1951 Convention on the Status of Refugees

Article 31. Refugees unlawfully in the country of refuge

- 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
- 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

1951 Convention on the Status of Refugees

Article 32. Expulsion

- 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
- 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
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- 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Lauterpacht and Bethlehem

Non-Refoulement in Refugee Law

- Applies to all States and entities or persons exercising governmental authority (established as customary law, some say jus cogens)
- Applies within and outside of the territory
- Precludes acts (including non-admittance at the frontier) that would expose refugee to
 - 1) A threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion
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 - 2) A real risk of persecution or other pertinent threat (ECHR)
 - 3) A threat to life, physical integrity or liberty (American Convention on HR, Cartagena Declaration, OAU Refugee Convention, Asian-African Refugee Principles-generalized violence, etc.)

Lauterpacht & Bethlehem/Hathaway Non-Refoulement in Refugee Law

- **Precludes:**
- **Chain refoulement (First country of arrival, safe third country, safe country of origin)**
- **Indirect refoulement**
- **Non-admittance at the frontier**
- **St. Louis German Jews denied entry by USA, Canada, and Latin American States (returned to die in Nazi camps)**
- **Push back of Vietnamese refugees, Haitians, Africans, Mexicans (closing of borders, fences, walls, international zones), visa requirements**
- **Proof- establish to a reasonable degree taking into account all relevant facts (not probability or certainty)**

UNHCR Note on Non-Refoulement

- The possibility for an asylum applicant to lodge an appeal with suspensive effect or its equivalent before a removal decision is implemented is an important principle that should guide all asylum procedures, especially summary procedures. This would minimise the risk of erroneous decisions, and, therefore, that of non-refoulement, without necessarily having an adverse effect on the length of accelerated procedures.

UNHCR Note on Non-Refoulement

Accelerated procedures for manifestly unfounded claims cannot be applied in cases where the possibility of an internal flight alternative is to be established, or when one of the exclusion clauses of the 1951 Cases raising such issues can never, in our view, be regarded as manifestly unfounded.

Also, the Member States may, according to this resolution, consider asylum applications under accelerated procedures in case of deliberate deception or abuse of the asylum procedure. It is UNHCR's view, in line with Executive Committee Conclusion No. 58, that asylum applicants should cooperate with the authorities and not provide them with misleading information. Automatic recourse to accelerated procedures in all cases of this kind could lead to inequitable results and may, therefore, not be the most appropriate arrangement. The mere fact of having made false statements to the authorities does not in itself necessarily impair an asylum application and make it manifestly unfounded.

As can be seen, a combination of these standards of, on the one hand, the denial of suspensive effect in the appeal procedure, and on the other a widening of what constitutes a manifestly unfounded application increases the risk of genuine claims being rejected, and of applicants being deported before errors have been rectified, eventually resulting in refoulement.

UNHCR Note on Non-Refoulement

- With regard to the Resolution on Host Third Countries UNHCR attaches great importance to a proper assessment of the situation in the country concerned before an asylum applicant is sent there, which is appropriately reflected in this resolution. UNHCR strongly recommends that the agreement of the host third country be obtained before an asylum applicant is sent to that country in order to avoid the risk of so-called orbit cases and refoulement.

UNHCR Note on Non-Refoulement

- In UNHCR's view, the proper application of the safe third country concept requires identifying a country that will actually accept responsibility for examining the asylum request and hence ensure that refugees and asylum-seekers receive 'somewhere' the protection they require.

UNHCR Note on Non-Refoulement

- The person concerned may find himself in a State which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments, has not established a formal procedure for determining refugee status.
- In situations of this kind it is essential that the principle of non-refoulement be scrupulously observed even though the person concerned has not - or has not yet - been formally documented as a refugee. Again, this flows from the fact that, first, the recognition of a person as a refugee, whether under UNHCR's mandate or under the 1951 Convention or the 1967 Protocol, is declaratory in nature, and, second, that the principle of non-refoulement is a norm of customary international law.

UNHCR Note on Non-Refoulement

- The need to provide international protection to persons fleeing armed conflict and civil strife, whether or not they come within the terms of the 1951 Convention definition, is generally accepted in practice by States as a humanitarian responsibility. The protection accorded in these countries to persons who are not deemed to be refugees under the 1951 Convention is normally granted as a humanitarian act, or as a duty under national law (including constitutional provisions). Refer to human rights conventions

UNHCR Note on Non-Refoulement

- Mass influxes and the concept of temporary protection:
- The concept of temporary protection has been defined as a means, in situations of large-scale influx and in view of the impracticality of conducting individual refugee status determination procedures, for providing protection to groups or categories of persons who are in need of international protection.
- It is primarily conceived as an emergency protection measure of short duration in response to large-scale influxes, guaranteeing admission to safety, protection from non-refoulement and respect for an appropriate standard of treatment. While the practice of granting temporary refuge, or asylum, on a temporary basis to refugees has often been employed in situations of large-scale influx in various regions, UNHCR first formally recommended the granting of temporary protection to persons fleeing the conflict and human rights abuses in the former Yugoslavia.

UNHCR Note on Non-Refoulement

- Since the purpose of the principle of non-refoulement is to ensure that refugees are protected against forcible return to situations of danger it applies both within a State's territory and to rejection at its borders. It also applies outside the territory of States. In essence, it is applicable wherever States act.
- It has been argued that the principle of non-refoulement is not binding on a State outside its own national territory, so that a Government may return refugees directly to persecution provided they have not yet reached or crossed its borders. This claim is clearly inconsistent with the purpose, and is contrary to the spirit, of the 1951 Convention and its 1967 Protocol, as well as of international refugee law generally. No such territorial limitation applies, for instance, to UNHCR's mandate to provide international protection to refugees. In fact, UNHCR's position on interdiction-at-sea is that this is inconsistent with the international refugee protection regime, especially since, among those leaving, there may be people who have concerns about their physical security and safety. There must be a possibility for these people to reach safety and have their protection needs assessed and met. Interdiction and compulsory return preclude this.

UNHCR Note on Non-Refoulement

- Measures of refoulement are various and include expulsion/deportation orders against refugees, return of refugees to countries of origin or unsafe third countries, electrified fences to prevent entry, non-admission of stowaway asylum-seekers and push-offs of boat arrivals or interdictions on the high seas.
- Whenever refugees - or asylum-seekers who may be refugees - are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of non-refoulement has been violated.
- Furthermore, having regard to the nature and purpose of the principle, it also applies to extradition. Indeed, the protection of a refugee cannot be regarded as complete unless he or she is also protected against extradition to a country where he or she has reason to fear persecution. Insofar as their actual wording is concerned, statements of the principle of non-refoulement figuring in various international instruments are wide enough to cover extradition. This applies in particular as regards the wording of Article 33 (1) of the 1951 Convention. Most extradition conventions also foresee a safeguard against extradition to countries of persecution

Non-Refoulement Exception in Refugee Law

- Subject to exception on grounds of national security and public safety-
- This refers to conviction for serious crime committed in the country of refuge or elsewhere **after** admission as a refugee-
- (Exclusion Clause Art. 1F applies to acts **before** entry)

Non-Refoulement Exception in Refugee Law

- The refugee is danger to the community of the country: working for overthrow of gov't, espionage, sabotage of military installations, terrorist activities
- Conviction by final judgment of a particularly serious crime- rape, murder, armed robbery, arson, etc.
- Nature & circumstances of crime
- Date of crime
- Evidence of recidivism
- Mitigating circumstances

Non-Refoulement Exception in Refugee Law

- Right to **due process of law** for assessment of exception to non-refoulement
- Apply restriction **restrictively** and with caution
- Consider use of **safe third country**
- Must have **reasonable grounds** for determining refugee to be a danger to security- must have **evidence**
- Must be a **real connection** between the individual, the prospective danger to the security of the country and the alleviation of the danger upon refoulement.

Non-Refoulement Exception in Refugee Law

- Proportionality
- Consider:
 - Seriousness of danger posed to the security of the country
 - Likelihood of that danger being realized and its imminence
 - Whether danger to security will be eliminated by removal of person

Non-Refoulement in Human Rights

- Freedom from torture- **jus cogens**
- Human rights override in cases where there is a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment or other non-derogable rights (No exception)
- Substantial grounds for believing that there is a real risk of torture or cruel, inhuman or degrading treatment or punishment (CAT)

Lauterpacht & Bethlehem Non-Refoulement & Human Rights

- CAT + HRC + ECHR= No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where **substantial grounds** can be shown for believing that they would face a **real risk** of being subjected to torture, cruel, inhuman or degrading treatment or punishment.
- **This principle allows of no limitation or exception**

Prohibition of Collective Expulsion, See ASIL Insight by Jaya Ramji-Nogales

- Article 4 of Protocol 4 of the European Convention on Human Rights: “Collective expulsion of aliens is prohibited”
- See *Affaire Khlaifia et autres c. Italie*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-115507>
- *Hirsi Jamaa v. Italy*, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-109231>.
- *Georgia v. Russia (I)*, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-145546>
- *Affaire Sharifi et autres c. Italie et Grèce*, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-147287>



Convention Against Torture Article 1

- 1. For the purposes of this Convention, the term "torture" means any act by which **severe pain or suffering, whether physical or mental, is intentionally inflicted** on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, **or for any reason based on discrimination of any kind**, when such pain or suffering is inflicted by or at the instigation of or with the consent or **acquiescence of a public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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 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 violations of human rights.

European Convention on Human Rights Article 3

- No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

International Covenant on Civil and Political Rights, Article 7

- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Convention Governing the Specific Aspects of Refugee Problems in Africa

- 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.

American Convention on Human Rights

- 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.

Torture, cruel, inhuman and degrading treatment (offence to human dignity)

- Holding detainees in painful and/or stressful conditions
- Deprivation of sleep, light or food for prolonged periods
- Prolonged denial of sufficient hygiene or medical assistance
- Hanging from the air and jet spraying with cold water
- Solitary Confinement
- Prolonged total isolation and sensory deprivation (can result in serious psychological problems and suicide)
- Stripping detainees naked
- Threatening detainees with dogs
- Administration of drugs, e.g. to cause vomiting, asphyxia by paralyzing the respiratory muscles, neuroleptics to make the subject apathetic

Torture, Cruel, Inhuman and Degrading Treatment (offence to human dignity)

- Humiliating sexual harassment
- Rape or other form of sexual violence
- Insertion of objects into the orifices of the body (tearing of perineum)
- Sexual mutilation
- Forced Abortion/Forced Miscarriage
- Virginity testing
- Domestic Abuse
- Excessive physical abuse
- Beating- blows to the feet, blows with rifle butt or bludgeons, lashing that causes wounds, internal bleeding, fractures, cranial traumatism

Torture, cruel, inhuman and degrading treatment

- Falanga hitting the feet with a stick or metal instrument that provokes a long term syndrome (insensitivity of the soles of the feet without apparent wounds on the feet)
- Extraction of nails or teeth
- Burns (cigarette, electrical, wax, boiling oil, ignited cotton mixed with petrol placed between toes)
- Parilla- attachment of the prisoner to a grill of burning coal
- Amputation
- Caning or flogging
- Deprivation of clothing

Torture, cruel, inhuman and degrading treatment

- Exposure to extreme heat or cold
- Exposure to excessive noise and light
- Blindfolding and Hooding
- Asphyxiation by placing bags over the head (with or without gas)
- Suffocation by near drowning in water (submarine)
- Plugging the nose with limestone
- Electric shock to any part of the body
- Suspension by feet, hands, testicles, knees, hands and ankles tied together and person hangs from iron bars until he faints

Cruel and Inhuman Treatment

- Is treatment in accord with public standards of decency and propriety?
- Is it unnecessary because there are adequate alternatives?
- Can treatment be applied on a rational basis with ascertainable standards?
- Is treatment only applied to a minority?
- Is it applied arbitrarily?
- Does treatment have any value in terms of reformation, rehabilitation, deterrence or retribution?
- Does treatment shock the general conscience?
- Is treatment degrading to human dignity?
- Does it cause mental or physical suffering?
- Is humiliation endured beyond link to legitimate punishment?
- Is there excessive anguish in anticipation to punishment?

Degrading treatment

- Consider Age, Gender, Culture, psychological characteristics of the person
- European Court of Human Rights:
- Degrading treatment humiliates or debases an individual showing a lack of respect for or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.

Michelle Foster Right to Health and Persecution

- Applicant may not establish a refugee claim merely on the basis that medical treatment he or she could or is receiving in the asylum state is superior to that available in the country of origin.
- States have a core obligation to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalized groups. Example: Denial of health care on religious grounds, disability, HIV/AIDS. Or consider discriminatory allocation of resources.
- Systematic denial of medical services to those with HIV/AIDS amounts to a de facto death sentence.
- The denial of medical treatment, particularly in the context that a person suffers from a life threatening illness is itself sufficient to found a claim for persecution.
- Denial of access to medical facilities of itself is such a denial of fundamental human rights that it amounts to persecution.
- Take into consideration social stigma, ostracism, poverty, lack of family support and money to access treatment.
- Consider isolation of HIV patients, dispossession of property of HIV children, irregular treatment (such as electro-shock of lesbians)

James Hathaway

- Refugees are subject to torture and degrading treatment by state officials, police, border guards, etc.:
- Rape
- Beating/whipping
- Sexual exploitation
- Prolonged detention

James Hathaway

- Refugees are entitled to enter and remain in territory
- Should not be arbitrarily detained or penalized
- Entitled to essential security and economic subsistence needs
- Human dignity ought to be respected: respect for property, preservation of family unity, freedom of religion, thought, primary education to refugee children
- Documentation of identity and status
- Remedy to enforce rights