

The Origins of the Non-Refoulement Principle and Refugee Admission Considerations in the Refugee Protection Framework

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Abstract

The principle of non-refoulement is the backbone of international refugee protection. This principle is often used as a foundation for refugees in the hope that the countries to which refugees come can accept and provide protection for them. However, there are still attitudes and legal products from countries that are not in line with the purpose of this non-refoulement principle. This is believed to be due to countries' lack of understanding of the principle. In this regard, this article will discuss the origins of the regulation of the principle of non-refoulement, such as the main idea that gave rise to the international refugee protection regime. In addition, this article will also provide some insights that can be taken into consideration for a country to accept refugees in its territory. The aim is that countries can have a full understanding of why refugees need to be given protection, and what can be done to overcome refugee problems.

Keywords: Non-Refoulement, Refugee Protection, Refugee Admission.



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INTRODUCTION

The refugee issue is one of the biggest challenges facing the world today. There is no effective permanent solution to solve the refugee problem. This is because the issue is very complex, including how a recipient country fulfills the human rights of refugees. The condition of refugees is further exacerbated if the receiving country is not the refugee's destination country - with security, and economic considerations - which is also not a state party to the 1951 Geneva Convention on the Status of Refugees and/or the 1967 New York Protocol. There are many considerations that make countries dilemma whether to accept or reject refugees, due to the emergence of various turmoil in certain areas. Indonesia is a country that experienced this dilemma when it wanted to provide protection to Rohingya refugees. Based on data obtained from the *United Nations High Commissioner for Refugees*(UNHCR) as of December 10, 2023, the total number of refugees entering Aceh since mid-November 2023 has reached 1,543 people. The arrival of Rohingya refugees to Aceh was colored by the negative sentiments of the Indonesian people, even hate narratives and hoaxes about Rohingya were also circulating on social media. Calls to reject the refugees are increasingly emerging. Despite the diverse responses of the Indonesian people towards Rohingya refugees, there are several things that need to be noted, which are as follows:

1. Indonesia is not a Convention state, so it is not bound by the provisions in the 1951 Geneva Convention and/or the 1967 New York Protocol.
2. The above is excluded for the application of the principle of *non refoulement* because this principle is believed to be a *jus cogens* norm that cannot be deviated from, and customary international law, so it is very difficult for a state to make the first point as a reason for refusing refugees. Nevertheless, in practice, there are still some countries that violate the principle of *non-refoulement*.

This article will not focus on the Rohingya refugee case, but will discuss the thinking behind refugee protection through the principle of *non-refoulement* by tracing the regulation of this principle in several international legal instruments, and the things that need to be considered in accepting refugees in a country's territory.

The Beginning of the Non-Refoulement Principle

The principle of *non-refoulement* is known and recognized as the backbone of international protection of refugees. In other words, this principle is very important for refugees because it is the entry point for refugees to access the rights guaranteed by international legal instruments. However, in practice in many countries it is found that the principle of *non-refoulement* is denied for various reasons. In relation to that, the following section examines in detail to find answers to these problems.

Session de Genève - 1892

The term '*non-refoulement*' comes from the French word '*refouler*' which means *to return or send back (to drive back)*. The principle can literally be interpreted as the principle of *forbidding to send back*. The principle first emerged at the initiative of the *international societies of international lawyers* who produced an international regulation on the reception and expulsion of foreigners in 1892. Another name for the regulation is *Règles Internationales sur l'admission et l'expulsion des étrangers*. The International Regulations on the Admission and Expulsion of Foreigners were produced with some consideration that although states have sovereignty over their territories (thus the right to recognize or not recognize the existence of foreigners or only recognize them under certain conditions), countries in the world, based on humanitarian principles, are obliged to exercise this right by respecting the rights and freedoms of foreigners who wish to enter their territory. Or in other words, the rights of the state also need to be balanced with the principles of humanity and justice by taking into account the security of the state, and the rights of foreigners. With these considerations in mind, this regulation formulates several principles that can be used as a reference for every legal action in the future.

One of the principles stipulated in the regulation is the principle of *non refoulement*. This principle can be found in Article 16 which states as follows: *L'expulsé réfugié sur un territoire pour se soustraire à des poursuites au pénal, ne peut être livré, par voie détournée, à l'Etat poursuivant, sans que les conditions posées en matière d'extradition aient été dûment observées*. If loosely translated, the provisions of Article 16 above are interpreted as follows: Refugees expelled in a territory to avoid criminal prosecution, cannot be sent, by way of transfer, to the State Prosecutor, without the conditions posed in the extradition matter having been duly observed. The above provision requires that a state to which a refugee is admitted cannot repatriate the refugee to the territory of his or her home state unless the guarantees established in connection with extradition have been duly complied with. Although this provision does not use the term '*non-refoulement*', the basic concept of the provision is essentially the same as the principle of *non-refoulement* recognized in current International Refugee Law.

Era Fridtjof Nansen

After the *Session de Genève - 1892*, which became the momentum for the *Règles Internationales sur l'admission et l'expulsion des étrangers*, the principle of *non-refoulement* is surprisingly regulated in various legal products, both at the international level such as conventions, and regionally. This phenomenon emerged as problems arose as a result of World War I and World War II. These include the revolution in Russia and the collapse of the Ottoman

Empire, which led to massive displacement in 1920. No less than 1.5 million Russians were forced to flee to other countries in Europe. Not only in Russia, there were also refugees in Armenia in 1924, and in 1928 there was the problem of Assyrian, Assyro-Chaldean, Syrian, Kurdish and Turkish refugees. The refugees mentioned above occurred at a time when the League of Nations was in control of the countries of the world. Therefore, the League of Nations responsively provided protection and assistance in solving the refugee problem. The first step taken by the League of Nations at that time was to appoint Fridtjof Nansen as the first person to serve on the High Commissioner for Refugees.

The League of Nations asked Nansen to direct the repatriation of prisoners of war. When he undertook this task in May 1920, he calculated that there were still 300,000 prisoners of war on Soviet territory. The Soviets would not cooperate with the League of Nations, which they considered to have deceived them, but were willing to work with Nansen unofficially. Nansen had traveled extensively in Russia and had written about his concerns for the Russian people which helped him gain the confidence of the Bolsheviks. He used his personal prestige to raise the necessary funds and to coordinate the work of organizations such as the International Red Cross and the YMCA. Nansen successfully organized a series of prisoner exchanges. His efficiency in the repatriation of prisoners of war and his work with Soviet officials made Nansen the High Commissioner for Refugees. The concept of the principle of *non-refoulement* became known in the early 18th to mid-19th centuries. However, at that time, the term '*non-refoulement*' had not yet been used, but only the concepts of *asylum*, and the principle of non extradition aimed at *political offenders* were known and applied. The term '*refoulement*' first appeared in 1933 when the League of Nations adopted the *Convention Relating to the International Status of Refugees* on October 28.

This can be found in Article 3 which states as follows: ***Each of the Contracting Parties undertakes not to remove or keep from its territory by the application of police measures, such as expulsions or non admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another country.*** Under the provisions of Article 3 of the Convention, parties to the Convention agree not to remove or safeguard their territory by implementing policies such as expulsion or banning entry to borders for refugees who have been authorized to stay there regularly. This may be applied where there are compelling reasons such as national security or public order. The parties pledge that under no circumstances will they deny refugees entry at the borders of their countries of origin. While states can refuse refugees entry for reasons of national security or public order, it cannot be done arbitrarily.

States must implement such internal measures as they deem necessary for such refugees to ensure that they have received - either at their request, or through the intervention of the specific agency dealing with them - the necessary authorizations and visas that will allow them to continue their journey to another country. *Non-refoulement* needs to be distinguished from *expulsion* or *deportation* or *forced removal*. As explained by Riyanto in his article entitled "*The Refoulement Principle and Its Relevance in the International Law System*", expulsion or deportation is carried out when a foreign national is proven to have committed an act against the interests of the receiving state, or the person concerned is a criminal in a country and

escapes from the judicial process in that country. Meanwhile, the principle of *non-refoulement* only applies to refugees and asylum seekers.

Post World War II

Non-refoulement is considered a fundamental principle of international refugee law.²² It existed as a prominent legal concept for over fifty years before being codified during the post-World War II period.²³ *non-refoulement* was formally codified in the 1951 Geneva Convention Relating to the Status of Refugees, specifically in Article 33 which states that:

1. *No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of the 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.*

The above provision of Article 33 of the 1951 Geneva Convention makes it clear that the 1951 Geneva Convention does not entitle any state to expel or return refugees to the frontiers of territories where their life and freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, in any manner whatsoever. However, this is excluded where there are sufficiently compelling reasons for that state to consider that the refugee concerned constitutes a threat to the security of the state in which he or she is located, or a danger to the society of that state following a conviction by a final judicial decision of a particularly serious criminal offense.

Regulation of the Non-Refoulement Principle in the Human Rights regime

International Human Rights Law has made *non-refoulement* an integral component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, as enshrined in Article 7 of the *International Covenant on Civil and Political Rights*. The United Nations Human Rights Committee which monitors the implementation of the International Covenant on Civil and Political Rights has interpreted Article 7 as aiming to protect both the dignity and the physical and mental integrity of the individual. This implies that all torture and other forms of ill-treatment are also prohibited. In this regard, the United Nations Human Rights Committee expresses its views as follows: *States Parties must not expose individuals to the danger of torture or cruel or inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*

The principle of *non-refoulement* is also explicitly set out in Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which states that no state party to the present *Convention* shall expel, *refouler* or extradite any person to another state where there are substantial grounds for suspecting that such person is in danger of being subjected to torture. The principle of *non-refoulement* is not only binding on states that are parties to the Convention or other international treaties, because after all this principle has been considered as a provision of International Customary Law, and it is binding on all countries in the world- regardless of the factor of participation in international conventions.

Table 1. Scope of the Non-Refoulement Principle in Refugee Law and International Human Rights Law

Legal Basis	Ban	Type of Violation	Intended subject
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1951 Geneva Convention Relating to the Status of Refugees, Article 33	<i>Prohibition of refoulement</i>	Persecution	Refugee - regardless of formal recognition as a refugee as long as the person is outside their country of origin.
Convention against Torture, Article 3	<i>Prohibition of refoulement</i>	Torture	Any person under the jurisdiction of a state
International Covenant on Civil and	<i>Prohibition of subjecting</i>	Torture, inhuman or degrading	Any person under the jurisdiction of a state
Political Rights, Article 7	<i>individuals to specified acts</i>	treatment or punishment	

As shown in Table 1 above, the scope and material content of the principle of *non-refoulement* is reflected in various international instruments. Overall, however, International Refugee Law and Human Rights Law prohibit returns that may pose a risk of persecution and torture, inhuman or degrading treatment or punishment. The principle of *non-refoulement* institutionalized in the 1951 Geneva Convention covers not only recognized refugees but also asylum seekers awaiting status determination. Moreover, this principle prohibits the return of a person to a country where he or she would face a serious risk of persecution or harm as a result of direct or indirect refusal. By direct refusal, we mean when a refugee or asylum seeker enters a country's border, and the country returns them to their home territory where the individual's safety would be at risk. Whereas indirect refusal occurs when a refugee or asylum seeker is admitted to a country but not with the intention of settling or receiving protection, but rather transferring him or her to the territory of another country where the individual's safety would be at risk as a result of the transfer. In addition to the three legal products mentioned above, the principle of *non refoulement* is also regulated in several international legal instruments. In fact, it has emerged and been practiced by countries since World War I. The legal instruments in question include the following:

1. *Geneva Conventions relative to the Protection of Civilian Persons in Time of War of August 12, 1949* (Geneva Convention IV 1949). Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War states that protected persons shall not be surrendered to a state not party to the Convention. It further explains that the protected person shall under no circumstances be transferred to a country where he has reason to fear that he will be persecuted because of his political opinions or religious beliefs.
2. *Bangkok Principles on the Status and Treatment of Refugees* (Bangkok Principles 1966). The Bangkok Principles were drafted by the *Asian-African Legal Consultative Committee* (AALCC) on December 31, 1966. In the Principles, the provision on *non-refoulement* is set out in Article 3 under the same title. The provision basically contains the same thing as the principle of *non-refoulement* institutionalized in Article 33 of the 1951 Geneva Convention. However, what distinguishes this provision from Article 33 of the 1951 Geneva Convention is the guarantee of temporary asylum for asylum seekers before they seek asylum in another country.
3. *The Declaration on Territorial Asylum* 1967. On December 14, 1967 the UN General Assembly adopted a Resolution at its 1631st *plenary meeting* on the Declaration on Territorial Asylum. The declaration reaffirmed that the granting of asylum is a peaceful and humanitarian act which cannot be considered as an unfriendly act by any other state. Because in principle it takes into account the objectives stated in the UN Charter, namely to maintain international peace and security; to develop friendly relations between countries and to resolve international problems; and to promote respect for human rights and fundamental freedoms for all people regardless of race, sex, language or religion. With respect to respect for human

rights and individual freedoms, Article 3 states that no one shall be subjected to measures such as refusal at a border or if he has entered a territory where he seeks asylum to expulsion or return to a country where he may be persecuted. The Declaration recommends that UN member states respect these provisions.

4. *The 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa* (Organization of African Union Convention). The concept of *non-refoulement* is set out in Article 2 paragraph (3) of the Organization of African Union Convention which affirms that no one shall be subjected to measures such as refusal at the border, repatriation or expulsion by a Member State of the African Union, which would compel him to return to or remain in a territory where his life, physical integrity or freedom would be threatened by reason of persecution. Persecution means on the grounds of race, religion, nationality, membership of a particular social group or political opinion or who is forced to leave his/her country of origin or place of residence to seek protection from external aggression, occupation, foreign domination, or serious events disturbing public order. The above provision also refers to Article 1(1) and (2) of the Convention on the Organization of European Union. The article specifically talks about the definition of the word "Refugee". The definition of the word is as follows: *For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*
5. *The 1969 American Convention on Human Rights*. Article 22(8) affirms that: *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.* A foreign national cannot be deported or returned to a country under any circumstances, however, whether or not his or her country of origin while in that country his or her right to life or personal liberty is in danger of being violated by reason of his or her race, nationality, religion, social status or political opinion.
6. *The 1984 Cartagena Declaration*. This declaration was adopted by the Colloquium on International Refugee Protection in Central America, Mexico and Panama, held in Cartagena, Colombia from November 19 to 22, 1984. The Declaration reaffirms the meaning and importance of the principle of *non-refoulement* as the cornerstone of the international protection of refugees. Not only that, the Declaration also emphasizes that the principle of *non-refoulement* must be recognized and observed as a *jus cogens* norm that cannot be deviated from.

The inclusion of the *non-refoulement* principle in various instruments of International Law indicates that this principle is important. There is an urgency that is promoted to the world. Nehemiah Robinson, one of the delegates to the 1951 Geneva Convention Drafting Committee stated that *non-refoulement* is described as a principle that limits the sovereign right of a state

to return foreigners to their country of origin. The state is bound by this principle and guarantees that asylum seekers and refugees who come to a country for protection will not be expelled, even though the country may not necessarily grant refugee status to the asylum seeker. For refugees and asylum seekers, *non-refoulement* is a ticket to enter a country's borders because this principle can convince asylum seekers not to fear rejection or expulsion because it will not happen based on the principle of *non refoulement*. Along the same lines, Gregor Noll argues that the principle of *non refoulement* can be described as the right to cross administrative borders. It does not take into account whether or not the state is ready to receive asylum seekers or refugees. Asylum seekers or refugees who come to the territory of their country will still be allowed to enter.

Considerations to be taken into account in Refugee Admissions

States have the authority to control the entry, stay and expulsion of foreigners based on their obligations under international refugee law, human rights law and customary international law. Some of the measures taken include visa requirements, imposing sanctions on shipping and airline companies that carry undocumented foreigners, and/or intercepting individuals from entering border areas. This is both to reduce irregular migration, as well as for national security reasons. But it also prevents refugees in urgent need of international protection from reaching safety. Preventive measures aimed at controlling migration flows should not result in *refoulement* as affirmed in ExCom Conclusion No. 97 (LIV) 2003. The current refugee protection climate is considered less friendly or at least there are several challenges that make it so, including the political manipulation of refugee issues in countries of asylum, which is exacerbated by hostile press coverage that has led to increased xenophobic and anti-racial behavior, and even triggered violence against asylum seekers and refugees. Furthermore, industrialized countries' fears of the high costs of accepting refugees and the abuse of asylum procedures have also led to increasingly stringent national laws and their application with questionable validity. This is further exacerbated by the fear of some countries that the omission of international protection could serve as a cover for terrorists. Not to mention the protracted refugee situation where refugees live in limbo for years, dependent on external aid and unable to find lasting solutions to their plight.

Those who provide protection also face great challenges, especially in their efforts to:

1. Ensure that regional efforts to coordinate and harmonize asylum policies and responses are consistent with its obligations under international refugee law;
2. Protecting refugees in less secure environments, including maintaining the civil and humanitarian nature of asylum, especially in refugee camps;
3. Accepting greater international burdens and responsibilities, especially if the likelihood of repatriation in the near future is slim;
4. Promote understanding and effective use of the relationship between protecting individuals under international refugee law and protecting individuals under international human rights law.

UNHCR as an agency with authority in refugee protection is aware of these challenges. However, the actions that UNHCR can take are very limited. UNHCR cannot work alone but needs help from other parties. Cooperation between international organizations, as well as the government of a country is needed. For example, UNHCR does not have the authority to deal with immigration. Therefore, UNHCR cooperates with the International Organization for Migration (IOM) to ensure that international protection for refugees can still be provided

despite legal efforts to control the flow of people crossing borders. The active participation of a country's government is also necessary to achieve the goal of refugee protection. This can start from the country's borders, *screening process*, complementary protection, such as providing special humanitarian status or additional status under national law as an administrative consideration. Communication between governments and UNHCR also needs to be done because once again this task is not only imposed on UNHCR, but is an obligation of all countries on the basis of humanitarian principles. Regional cooperation also needs to be built and developed continuously before the refugee problem gets worse.

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