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The Extraterritoriality of the Principle of Non-Refoulement: A Critique of the Sale case and Roma case

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This post is the second of four articles to be published as part of this week's intensive series on refugee and migration rights. Stay tuned for tomorrow's article on seeking asylum in the European context.

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Article 33(1) of the [1951 Refugee Convention](#) sets forth that “No 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”; this is more often referred to as the principle of non-refoulement.

The principle of non-refoulement does not only apply to refugees, but also applies to asylum-seekers irrespective of whether they have been formally acknowledged as refugees. That being so, it is incumbent upon states to first conduct a refugee status determination in order to separate those who qualify as refugees from those who do not, and hence may be returned to their state of origin. Nonetheless, the protection against refoulement is not in any way equivalent with the right to asylum. As a sovereign entity, the state retains complete discretion not to admit those whose claims as refugees are proven to be unfounded.

The principle has often been referred to as the cornerstone of asylum and international refugee law. Not only that, the principle is also embedded in numerous human rights conventions, such as article 7 of the [International Covenant on Civil and Political Rights \(ICCPR\)](#), article 3 of the [Convention against Torture \(CAT\)](#), along with a number of regional human rights instruments.

State practice: from breaching to circumventing

Despite the principle's firm grounding in international law, states' practices do not always conform with it. Rather, states may either blatantly [breach their non-refoulement obligation](#) or craftily conceive ways to circumvent their obligations, at times insisting that the protection against refoulement only extends to asylum seekers either at the border or within the territory of a state. The [Sale v. Haitian Centers Council \(1993\)](#) and [Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others \(2004\)](#) cases are two prime examples of where states contested the extraterritorial application of the principle and successfully prevented the notion of protection from even being triggered.

The *Sale* case dated back to September 1981, when the US and Haiti entered into an agreement authorizing the US Coast Guard to intercept vessels in high seas, which were engaged in the illegal transportation of Haitian migrants to US shores. Following the 1992 Executive Order by President Bush, the Coast Guard started repatriating Haitians, depriving them of any opportunity to establish their qualification as refugees. When the case found its way to the US Supreme Court, the Court denied relief to the plaintiffs on the grounds that the non-refoulement obligation only applies for those who are [“at the border or within a country, not the high seas”](#).

Meanwhile, the *Roma* case stemmed from a 2001 bilateral agreement between the United Kingdom and the Czech Republic which would permit British immigration officers to “pre-clear” (to give or refuse permission to enter the UK) all passengers at Prague Airport before they boarded any aircraft bound for the UK, which was labeled a response to the increasing number of asylum applications made by Czech nationals of Roma ethnicities to the UK. In this case, the UK Appellate Court adjudged that the principle of non-refoulement does not apply to those who have yet to [“leave their country of origin”](#).

Now the question arises as to whether the principle of non-refoulement strictly applies to asylum-seekers at the border and within the territory of destination state, as claimed by the US and UK in the abovementioned cases, or whether it can also apply extraterritorially. There exists a wealth of authority supporting the latter.

Extraterritoriality of non-refoulement: from treaty interpretation to UNHCR acknowledgment

Article 31(1) of the [1969 Vienna Convention](#) rules that a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in light of its object and purpose. Suppose if the principle of non-refoulement were to be strictly interpreted to apply only at the border and within a state's territory, states could assume an extremely wide latitude in preventing asylum seekers from ever being protected by the principle.

In both cases, this is exactly what the US and the UK have practiced. The US authorities intercepted the Haitians in the high seas *before* they even reached US territorial waters; whereas the UK immigration officers pre-cleared the Romas *before* they even boarded the plane, arguing without qualms that the people have not arrived at their border and that they are therefore not under the protection of non-refoulement. In other words, they seek to avoid the obligation by “[doing indirectly what they are not allowed to do directly](#)”. How can such an interpretation be in line with the object and purpose of the 1951 Convention, that is, the protection of refugees’ fundamental rights and freedoms?

The United Nations Refugee Agency (UNHCR) itself has affirmed the extraterritoriality of the principle of non-refoulement in its [Advisory Opinion](#). The international community also seems to concur with UNHCR in this respect. The Inter-American Commission of Human Rights, for instance, in 1997 [expressed its disagreement](#) with the conclusion reached by the Court in the *Sale* case that the principle of non-refoulement does not apply extraterritorially.

Jurisdiction through effective control

States may assert that they are not bound by the obligation of non-refoulement as they possess no jurisdiction whatsoever towards persons *beyond* their territory (or those who are prevented from arriving in their territory). In regards to *Sale*, the US argued that on the high seas, the Haitian flag upon the intercepted ship indicated that Haiti was solely responsible for whoever was aboard it, thereby releasing the interdicting state (the US) from its own obligations. Likewise, in the *Roma* case, the state conducting preclearance measures, the UK, argued that it should be relieved from its own obligations as the Roma were within the territory of another state (i.e. the Prague Airport).

Nevertheless, human rights obligations are not confined to state’s territory. States are also responsible for the persons “subject to its jurisdiction”, as provided under article 2(1) of the [ICCPR](#) and article 1 of the [European Convention on Human Rights](#). Such jurisdiction may take the form of, among others, effective control. Therefore, the principle of non-refoulement is not only territorial in nature but also applies when asylum-seekers come within the effective control of states, albeit extraterritorially. Both interdiction on the high seas and preclearance measures in other state’s airports undeniably establish effective control by the state organs through their actions towards asylum-seekers, thus invoking the application of the principle.

Upholding the principle of non-refoulement through refugee status determination

Given the grave, damaging and often irreversible implications of exposing an individual to the risk of persecution, states should conduct independent and rigorous scrutiny in determining one’s refugee status. Such determination must at least contain [procedural safeguards](#) such as competent officials with clear instructions in dealing with the cases, guidance and facilities for the applicants, and the opportunity for review in cases of rejection, all of which serve to prevent the risk of error and refoulement. The superficial pre-clearance measure at the airport certainly falls short of this requirement, let alone the interdiction of asylum-seekers without affording them any opportunity to establish their refugee qualifications.

The protection against refoulement provided for under article 33 of the 1951 Refugee Convention has to be broadly interpreted to extend to asylum-seekers extraterritorially. Otherwise, this just adds to the seemingly endless list of possibilities available to states that can help them circumvent their international obligations. Furthermore, giving such wide discretion to states forfeits the very nature of international obligation. It would certainly be detrimental to the international community as a whole, and to asylum-seekers who, more than ever, are in dire need of protection.

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