

PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: NON-REFOULEMENT AND INTERNATIONAL LAW

What Is The Principle Of *Non-Refoulement*?

Non-refoulement is an international legal obligation not to forcibly remove, return, expel, extradite, or deport an individual to a State in which they will be at risk of a specific type of harm. The term '*refoulement*' comes from the French verb '*refouler*', or to 'turn back' or 'turn away.' In simplest terms, *non-refoulement*, therefore means 'to not turn away'.

The principle of *non-refoulement* developed following the Second World War and was formally established in the [Refugee Convention](#). It has since also been incorporated into the [Convention against Torture](#), the [Convention on the Rights of the Child](#), and the [Convention for the Protection of All Persons from Enforced Disappearance](#), amongst other treaties.

To Whom Does The Principle Of *Non-Refoulement* Apply?

All people have the right not to be 'refouled'—under international law, this means that no one can be required to go or return to a place where they may be in specific danger.

International treaties that incorporate *non-refoulement* describe the types of danger, often referred to as 'harm', from which a person is protected. These include the risk of: the [persecution](#) on the basis of their actual or perceived race, religion, nationality, membership of a particular social group or political opinion ([criteria discussed under the Refugee Convention](#)); torture or cruel, inhuman or degrading treatment or punishment ([criteria discussed under the Convention against Torture](#)); and other serious violations of the right to life (for example, [as found in the International Covenant on Civil and Political Rights](#)).

A person has the right not to be 'refouled' regardless of whether they have been determined to be a refugee.

Who Must Uphold The Principle Of *Non-Refoulement*?

All States must uphold the principle of *non-refoulement*.

This is because the principle of *non-refoulement* has now been recognised as [a part of customary international law](#). 'Customary international law' is a type of law, separate from treaty law, that is recognised in [the Statute of the International Court of Justice](#) as a legitimate source of international legal obligations. Customary international law applies to all States.

The recognition of the principle of *non-refoulement* as customary international law is important especially given there is [low regional uptake in Asia of treaties such as the Refugee Convention](#).

Because *non-refoulement* is customary international law, all States have an obligation not to forcibly return, expel, or deport people to danger—regardless of whether they have signed the above treaties.

If *Non-Refoulement* Is A 'Principle', Does It Have Any Legal Force?

Although described as a 'principle', a violation of the obligation to uphold *non-refoulement* can be legally challenged depending on which source of law provides the obligation. For example, although yet to happen at time of writing, it is conceivable that one State Party to the *Refugee Convention* could take another State Party to the International Court of Justice for violating *Refugee Convention* article 33(1)—the article describing the obligation of *non-refoulement*. Separately but relatedly, the same conduct that could cause a person to be '*refouled*'—the forcible transfer of people—could also constitute a [crime against humanity](#) under the jurisdiction of the International Criminal Court if sufficiently widespread or systematic. (Further information on the International Court of Justice and International Criminal Court can be found [here](#)).

Regional courts may also have jurisdiction to hear challenges based on a violation of the principle of *non-refoulement* (for example, the [African Court on Human and People's Rights](#)). Or, if the principle of *non-refoulement* has been incorporated into domestic law, it may be possible to challenge a violation of *non-refoulement* in domestic

courts. Legal advice must be sought. Nevertheless, there can be legal consequences for violations of the principle of *non-refoulement*.

Likewise, complaints by individuals or groups may be made to [the Human Rights Council](#) or relevant treaty bodies, such as the [Human Rights Committee](#), the [Committee against Torture](#), the [Committee on the Rights of the Child](#), the [Committee on Enforced Disappearances](#), and others. Further information on making a complaint may be found [here](#). Decisions by such bodies are [not legally binding](#), but they can bring attention to the violation and may influence policy.

Are There Exceptions To The Application Of The Principle of *Non-Refoulement*?

Certain rights under international law can have exceptions—these are sometimes referred to in international human rights law as ‘derogations’. For example, under [article 4 of the *International Convention of Civil and Political Rights*](#), there can be certain exceptions related to some rights in a ‘time of public emergency which threatens the life of the nation’. However, there can be no derogations from the right to life, right to be free from torture, or the right to be free from slavery, amongst others—these rights are described as ‘[non-derogable](#)’.

The principle of *non-refoulement* exists to prevent an individual’s forcible return, expulsion, or deportation to a State where their right to life or to be free from torture may be at risk. Because of this close relationship to these non-derogable rights, the principle of *non-refoulement* is described by the [United Nations High Commissioner on Refugees as non-derogable](#), or ‘absolute’.

This is sometimes confused when interpreting the *Refugee Convention*. In [article 33\(2\)](#), the *Refugee Convention* provides circumstances in which the principle of *non-refoulement* does not apply. These include where ‘there are reasonable grounds’ to believe that the individual in question is a danger to national security or has been convicted of a serious crime and remains a danger. However, for a State to claim this exception, [it must evaluate the individual’s circumstances on a case-by-case basis—not through a blanket ‘turn-back’](#).

Furthermore, this exception is limited to *non-refoulement* for reasons related to *Refugee Convention* criteria only. There are *no* exceptions, for example, where an individual may be at risk of torture if ‘refouled’ under the *Torture Convention* or human rights law in general.

Does The Principle Of *Non-Refoulement* Apply At Sea?

The legal obligation to uphold the principle of *non-refoulement* applies at the point at which a person enters a State’s territory (including its territorial sea) or comes under the State’s ‘effective control’. [‘Effective control’](#) describes circumstances where a State may exert its power—and therefore its force—either actively (such as boarding or seizing a boat) or passively (such as warning boats or ordering a change of route). Therefore, when a State takes an action to engage with individuals at sea, this activates the State’s obligation to uphold the principle of *non-refoulement*.

This is important considering [a rise in the practice of boat ‘turn-backs’ or ‘push-backs’ throughout Asia](#).

For example, in 2012 the European Court of Human Rights found that the principle of *non-refoulement* applies to individuals at sea in the case of [Hirsi Jamaa and Others v Italy](#). There, the Court considered Italy’s obligations to individuals from Somalia and Eritrea who were [intercepted at sea by Italian authorities in 2009](#). Italian authorities forced the individuals back to Libya, their departure point, where it was [argued that they would be at risk of ill-treatment](#) as migrants in Libya or suffering further human rights abuses after being returned to their countries of origin. The Court found that Italy’s actions were in violation of its obligations under the *European Convention on Human Rights* to not to be ‘refouled’. In his concurring opinion, Judge Pinto de Albuquerque [stated plainly the principle’s application](#): ‘The prohibition of *refoulement* is not limited to the territory of a State, but also applies to extraterritorial State action, including action occurring on the high seas.’

Further, [international bodies](#), [regional courts](#), and [domestic courts](#) have recognised that the principle of *non-refoulement* applies ‘extraterritorially’ (meaning outside the physical territory or territorial waters of a State), including but not limited to the high seas.