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in the Context of International Law**

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Abstract

With the instability and armed conflicts prevalent in the world today, we are seeing staggering numbers of displaced people, refugees, and migrants. The laws and principles governing refugee acceptance have arguably never been more relevant. The principle of non-refoulement has traditionally been considered a territorial concept and has mainly applied upon refugees entering the land territory of a country. Its application in an extraterritorial context is much debated and its importance within the context of the law of the sea has historically not been given enough attention. The question as to how this principle should be applied in an extraterritorial framework with regards to sea borders is necessary and pertinent. Non-refoulement is applicable to state actions, regardless if they are undertaken at the border on land or at the maritime zones. The main characteristic of this principle is that the acts of a state that may cause harm to an individual by sending him or her back to a situation where he or she is at risk should be avoided. The duty or responsibility to not send refugees/migrants back to a place where they might face persecution or be tortured is not simply a territorial matter.

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It cannot be simplified to land borders, instead it can be applied to any situation where the state has jurisdiction.

Keywords: *non-refoulement, refugees, migrants, maritime zones, UNCLOS, coastal state, innocent passage, freedom of navigation, flag state*

Introduction

The principle of non-refoulement refers to the concept that a state should not remove or expel refugees from its land territory or send them back to a place where they could potentially become victims of torture or persecution under Article 3 of the Convention Relating to the Status of Refugees (CRSR).¹ Most academics agree that the principle of non-refoulement is specifically a territorial concept and is mainly applicable upon refugees entering the land territory of a country. Its application in an extraterritorial context is much debated.

With the instability and armed conflicts prevalent in the world today, we are seeing staggering numbers of displaced people, refugees, and migrants. The number of migrants crossing the English Channel increased in 2021, with the BBC reporting that 12,600 people made the journey in that year alone.² The laws and principles governing refugee acceptance have arguably never been more relevant. This paper focuses on the importance of this principle within the context of the law of the sea. This area of law is applied in order to determine the situations and conditions in which people aboard vessels are and should be granted access to territory at sea. The main emphasis is on how to apply this principle in an extraterritorial framework with regards to sea borders. It is ascertained that this concept is indeed applicable past the land territory of states.

United Nations Convention on Law of the Sea

This analysis here centres around the right of ships and vessels prescribed within the United Nations Convention on Law of the Sea (UNCLOS), also within other similar conventions. It serves to identify the flaws in the international system and also within the 'Constitution of the Oceans',³ i.e., the UNCLOS, regarding the protection and safeguards of rights of migrants at sea.

The distribution of powers within the zones of the sea has led to differing opinions on the application of the principle of non-refoulement. It has also led to diverging views on the safeguarding of potential migrants and refugees at sea. UNCLOS is very unsatisfactory and vague where it concerns refugees, the rescue of persons in distress, and the right of entry into state sea territory. This is in large part due to the fact that many of the key rights are not adequately defined or not implemented in cases where they are defined. Inadequate attention is given to the distinctive situation of potential refugees at sea. This is one of the reasons why we see such great discrepancy in the treatment of refugees from varying countries and why countries continue to treat refugees and migrants in a less than humane manner.

The implementation, according to UNCLOS and customary international law, of exclusive powers in the various sea zones can cause issues in the application of the principle of non-refoulement. Even though the principle of non-refoulement cannot be extended indefinitely, it can still logically be considered to provide a short-term right to disembark in order to process potential applications for asylum.⁴ However, a possible system that incorporates sharing the burden and an enduring and

adaptable agreement for receiving these refugees/migrants seems to be an imperative workable answer to this problem.

International Law of the Sea

The fundamentals regarding this legal system are provided by the UNCLOS document, which is complemented by another two treaties, i.e., the International Convention on Maritime Search and Rescue (SAR) and the International Convention for the Safety of Life at Sea (SOLAS).⁵ For the purpose of this analysis, the focus will remain on UNCLOS and its relevant provisions.

Maritime Frontiers and the Principle of Non-Refoulement

The law of the sea must be considered in this analysis as it makes up the arm of international law which is concerned with rules and regulations according to which countries interact with each other regarding maritime issues. The sea zones are allocated within the UNCLOS. This convention also lays out a regime that focuses on freedom of navigation, responsibilities of flag states, and the powers of the coastal states.⁶ In order to understand how the principle of non-refoulement is applied within the various sea zones, the focus of this paper is on the following aspects:

1. The internal waters
2. The territorial sea
3. The contiguous zones
4. The high seas

The Internal Waters

The internal waters are considered those that fall within the limits of the border between the territorial sea and the other

maritime zones. Internal waters and the areas constituting the ports are considered to be under the full sovereignty of the coastal state and it is up to that state to control matters relating to irregular migration for all vessels in the port.⁷ Therefore, the coastal states hold jurisdiction over vessels in specific zones near their coasts. Even when there might be bilateral treaties establishing the right of entry, it is the coastal states that hold the power to bar entry when their welfare or security is under threat.⁸

In terms of the principle of non-refoulement, it can be determined that coastal states have an obligation not to send back vessels to their country of origin in the case of refugees being present on board who are at risk of being tortured or persecuted back home. On the other hand, they also do not have an obligation to allow vessels to enter their internal waters or their ports. UNCLOS gives these states the right to dictate its law and regulations and the right to prevent vessels from passing through its internal waters.⁹ This ability to block the right of innocent passage is what differentiates internal and territorial waters.

Territorial Waters

UNCLOS states in Article 2(1):

The sovereignty of a coastal state extends, beyond its land territorial and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.¹⁰

The territorial sea is mentioned in Article 3 of UNCLOS to extend up to 12 nautical miles. A major exemption to this is the right of innocent passage, which is enshrined in Article 17 of the UNCLOS. The coastal state is not permitted to obstruct any foreign ships from conducting innocent passage through the

territorial sea of the aforementioned state but it is allowed to regulate the terms of the passage in the areas listed in Article 2(1),

The prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal state.

However, a distinction can be made between a vessel enjoying the right of innocent passage in the territorial sea of a coastal state and a vessel crossing the territorial waters in order to reach the land territory of a coastal state. In the first instance, the coastal state has no jurisdiction on the passing vessel unless it knows that it is harbouring illegal passengers, undocumented refugees, or any other breach of the conditions required for innocent passage. The coastal state can deny admission of the vessel into its territory and this can, in turn, lead to severe impact on the rights of seeking asylum and non-refoulement.¹¹

Legal Application within Territorial Waters

These laws have to be applied keeping the articles of the UNCLOS and the rules and regulations of international law in mind. Power of the coastal state to determine the limits and control the movement of ships/vessels carrying refugees and migrants has to be in conformity with customary international law, along with other international agreements or conventions that the state may be a party to.

First of all, it is difficult to determine when the vessel actually entered into the territorial waters. Conversely, entry of a vessel into the port or internal waters of a coastal state is a lot simpler to determine, hence, it is very easy to recognise the specific time when the rights, regulations, and responsibilities were triggered. Another issue raised by scholars is that an

extension of the principle of non-refoulement to the outer perimeter of the territorial sea makes it very difficult for the concerned states to regulate and try to control unlawful entry and migration.

It is also important to differentiate between the operations carried out by coastal states. If the authorities are intending to expel the vessel as they believe that it has unlawfully entered its territorial sea, the coastal state can use its sovereign powers to do so. However, once a vessel enters a state's jurisdiction, the persons present can then avail the rights available to them under various international conventions and treaties, including non-refoulement.¹² Conversely, if a ship is being denied entry to the territorial sea of that state, then by law the border is moved to the area where the aforementioned ship has been stopped. In doing so, the persons present aboard the ship do not fall under the jurisdiction of the coastal state and so the state is merely restricted by non-refoulement only so far as non-rejection at the frontier. Hence, states can refuse refuge without breaching the rules of non-refoulement.¹³

Still, it is pertinent to keep in mind that even though the territorial sea is considered 'territory' of the state, the seas have a special judicial status and international law has absolute supremacy in this area. It is mentioned in UNCLOS that "the sovereignty over the territorial sea is subject to this convention and to other rules of international law." This is a strong indication that the principle of non-refoulement is as valid in maritime territory as it is on land territory. And in the case where the refugees/migrants have entered into the territory of the state (sea or land) then Article 31 of the CSRS becomes fully applicable.¹⁴

The Right of Innocent Passage

It entails that a vessel can navigate through another state's territorial sea but keeping out of the internal waters. In a way, it is limiting the exclusive powers given to the coastal state within the territorial sea.¹⁵ Nonetheless, a coastal state has a great deal of discretionary powers to determine the innocence of the passage and to take measures against vessels involved in illegal migration or irregular activities. It has the right to regulate conditions of passage pursuant to Article 2(1) of UNCLOS. Thus, a state could prevent the right of innocent passage. Additionally, it is stated in Article 19(1) of UNCLOS that a passage cannot be considered innocent if it is a danger to the peace, order, and security of a coastal state.

Ultimately the idea that the principle of non-refoulement is triggered with regard to refugees and migrants crossing into the territorial sea can be countered by the argument that a state could perceive these persons as a threat to the security of the country.¹⁶

The Case of MV Tampa

The MV Tampa was a merchant ship that rescued 433 people in August 2001, many of whom were Afghans.¹⁷ They were trying to escape to Australia in a rickety fishing boat that had started to sink nearly 140 km from Christmas Island; part of Australia. Many of the people on board the fishing boat required specialised and urgent medical attention so the Tampa decided to get them to the nearest port, which was Christmas Island. It came to a stop at the frontier of territorial sea of Australia and asked for consent to enter but Australia rejected their request. Considering the health of the ailing passengers, the Tampa

decided to overlook this denial of permission and crossed the threshold into Australian territorial waters in search of help. The Australian government sent a small special operation force of the army to board the ship, take control, and care for the wounded. The passengers, however, were still prevented from disembarking.¹⁸

The Tampa adamantly refused the order to exit the territorial waters because of the dangerous condition of the ship as it had in excess of 450 passengers and was built to safely hold no more than 50. On 1 September, Australia and New Zealand decided on a plan of action and moved the passengers to a naval ship and brought them to Australian military bases within the territory of New Zealand and later were relocated to Nauru. Two concerns were brought up in this case relating to LOTS, i.e., the duty to provide help and the right of innocent passage.

The MV Tampa's flag state was Norway and it claimed that Australia, by violating the right of innocent passage, had breached Article 24(1) of UNCLOS. Conversely, it was claimed by Australia that the steps taken by the MV Tampa were an obvious abrogation of Australian laws on immigration. Australia argued that this was a domain on which it had jurisdiction under Article 19(2) of UNCLOS. Article 25 of UNCLOS provided it with all the allowance to take essential steps to prevent passage which was deemed not innocent. Australia was exercising its legal rights to stop and board the Tampa and in article 25(2) of the UNCLOS it is stated:

In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state also has the right to take necessary steps to prevent any breach of the conditions to which

admission of those ships to internal waters or such a call is subject.¹⁹

Considering the right of innocent passage, on the surface, it seems that Australia responded well within the parameters of the law. However, it seems to be a violation of the principle of non-refoulement. Australia redirected the vessel and refused to carry out a preliminary screening of the persons on board the Tampa, which constitutes a refoulement. The passengers had intended to enter Australia and as such being the first country of arrival, it fell upon it to give temporary refuge and preliminary screening. Later on, it could have transferred the refugees to a third state for further processing and to send back those who were not deemed eligible.²⁰

The Contiguous Zones

These are the maritime zones located next to the territorial sea of a state, extending from the exterior boundaries of the territorial sea up to 24 nautical miles. This area is not under the limited sovereignty of the coastal state and it maintains the navigational freedoms allowed within the high seas.²¹ According to Article 33 of UNCLOS the coastal state is allowed to maintain control essential to

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

The contiguous zone is of a specifically functional nature. Migratory issues and the control afforded to coastal states within this zone seek to make prominent the difference amongst the two

separate legal regimes which apply within this maritime zone. Firstly, the coastal states have the right to use their sovereign powers of prevention when its domestic immigration law is in danger of being violated. Secondly, the state must also comply with its international obligations regarding the non-refoulement and provide rights to the persons seeking asylum, which have been provided by Article 14 of the Universal Declaration of Human Rights (UDHR).²² This leads to certain issues for the coastal state.

Illegal migration is only committed when crossing a national border, land or maritime. When we are talking about the sea, this border is the external limit of the territorial sea. This implies that if the coastal state intervenes in the contiguous zone, this cannot be justified by the prevention and repression powers afforded to them by Article 33(1) of UNCLOS. The only way in which the interception and redirection would be deemed legal is if it is intended for the protection of interests. It can be argued that preventing the violation of a migration law cannot be deemed as justifying any form of intervention. This can be seen in the 1929 *I'm Alone* case, which was related to the smuggling of goods.²³ Even in exercising its exclusive powers, a coastal state must always keep in mind that its actions are not putting the passengers of the vessel in danger.²⁴

In the context of non-refoulement, it implies that that a state can act against a vessel with refugees present on it to protect the laws and regulations of their country. However, the phrasing of Article 33(1), specifically the use of the word 'necessary', makes it very difficult to ascertain how much is too much in terms of the powers that a coastal state can exercise.²⁵ Thus, there is a very real

chance that this article could be exploited or taken advantage of by the coastal states.

The High Seas

Article 86 of the UNCLOS defines the high seas as:

All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.

This zone cannot be appropriated by any country and this does not imply the lack of rules, rather it implies that all states have equal rights and freedoms within the high seas.²⁶ Article 87 of UNCLOS provides us with a long list of freedoms afforded to all states in the high seas. These include the freedom of navigation.

The high seas are open for use to all states. However, this in no way means that states can disregard the conventions, rules and principles of international law. A main aspect of the high seas is that vessels are under the jurisdiction of the flag states and since domestic law cannot be applied generally to this area, each vessel is subjected only to the laws of the flag state and international law. This means that it is the flag state's responsibility to ensure that no vessel flying its flag takes part in the illegal trafficking and smuggling of people. States do tend to take advantage of the ambiguity in this field of law to take extraterritorial steps to curb the flow of migration and refugee arrival by sea.²⁷

There are certain anomalies and exceptions when it comes to flag state jurisdiction such as vessels engaged in illegal activities such as piracy, smuggling, slave trading, etc. In these cases, or when a justification of intervention can be found in one

of the treaty provisions, a flagged vessel can be boarded or searched.

The arrival by sea of refugees presents us with a challenge when interpreting and applying the principle of non-refoulement. It also leads to confusion about how to understand the relevant rules relating to the freedom of high seas.

Freedom of Navigation

This freedom comprises two main beliefs:²⁸

1. Ships regardless of the flag under which they are sailing, have the right to navigate through the high seas; and
2. The navigation of any vessels of any state must not be hampered by any other state.

Vessels without a Flag

In order to control illegal migration, vessels sailing without a flag are extremely important because it is likely that the vessels engaging in illegal or irregular migration activities will be sailing without a flag. Usually, it is the right of a flag state to exercise jurisdiction over a vessel on the high seas. UNCLOS does not declare anything about how states should treat stateless vessels, except for allowing warships to authenticate the flag under which a ship is sailing. UNCLOS Article 10 does not explain consequences of statelessness.

Any ship sailing without a flag is not afforded the legal ability to enjoy any of the rights or privileges afforded by UNCLOS. However, if a boat sailing without a flag is transporting migrants, it still does not seem to allow for unlimited enforcement jurisdiction. With regard to the non-refoulement principle, any action taken to return refugees to the country from which they originated is not allowed.²⁹

Duty to Provide Assistance

The duty to assist people in danger of being lost or injured at sea is one of the most fundamental and entrenched principles of the law of the sea. Article 98(1) of UNCLOS states;

Every state shall require the master of a ship flying its flag, in so far as he can do without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him [...].³⁰

In highlighting this article, it becomes apparent that the obligation lies with the flag state of the mariner rather than on any individual. It is required of the flag state to enact a law that levies this obligation on the controller of the ship. It is, consequently, not a self-executing norm. Scope of this duty has also been extended to 'any person', regardless of their circumstances. This is an essential factor to consider when keeping in mind that most of the people requiring assistance could be refugees or migrants. The only requirement stipulated in the course of providing assistance is that there should be a situation of distress. Even though there is apparent clarity in this article, the extent of the assistance to be provided or the scope of related duties (for instance getting the distressed persons to a safe place) remains vague.³¹

Even though this duty is mentioned within the section of UNCLOS pertaining to the obligations and rights on the high seas, obligation to provide assistance should be considered applicable in every maritime zone. Because the duty to provide assistance

has been repeated within treaty and domestic law, it is commonly considered as a principle of customary law.

Duty to Allow Disembarkation

In all problems of law of the sea, a balance needs to be struck between the interests of flag states and coastal states. However, disembarkation entails entering into the territorial or internal waters of a state and raises the question of territorial sovereignty.

Any obligation of a flag state to disembark shipwrecked persons at the next port of call would turn out to be useless, were it not logically linked with a corresponding duty of the coastal state of the next port of call to temporarily accept the rescued person on its territory.³²

It is a difficult task to ascertain whether a flag state is under obligation to allow disembarkation because this would mean allowing them to enter a coastal state's sea or land territory. UNCLOS does not explicitly contain such an obligation. However, according to certain academics, given that there is a duty to provide assistance at sea, any decision or action that would destabilize the rescue mission could be considered a break of international law. Nevertheless, there is no basis for such an assumption in treaty law as it would lead to a serious infringement on the rights provided to the coastal state. So, it would seem that although there is a duty and obligation for the flag state to assist people in need and for the coastal state to ensure that mechanisms exist for this assistance to be provided efficiently, there is no obligation on the flag state to disembark rescued

persons or on the coastal state to accept any disembarked persons on its maritime or land territory.

Conclusion

The principle of non-refoulement generally seems to be applicable without any formal recognition of refugee status or any other form of official protection.³³ This principle is applicable to state actions, regardless if they are undertaken at the border on land or at the maritime zones. The main characteristic of this principle is that the acts of a state that may cause harm to an individual by sending him or her back to a situation where he or she is at risk should be avoided.³⁴ The duty or responsibility to not send refugees/migrants back to a place where they might face persecution or be tortured is not simply a territorial matter. It cannot be simplified to land borders, instead it can be applied to any situation where the state has jurisdiction.

The determination of jurisdiction is the most important factor that needs to be considered when talking about non-refoulement. Internal waters and, consequently, ports are under the full jurisdiction and sovereignty of the coastal state. Entry into a port without permission cannot even be allowed in consideration of the right of innocent passage. The only exception to this rule provided in UNCLOS is for vessels that are in distress. The protection of human life and providing assistance in moments of distress are the occasions on which entry must be accorded. The principle of non-refoulement applies on the various maritime zones. Nothing in UNCLOS stipulates, however, that the coastal state must accept the seized people. The coastal state only has an obligation to not force these people to return to their home countries.

UNCLOS does not provide states with a legal obligation to accept refugees and migrants into their territories and, in this regard, it seems to have failed to provide a solution to such a pertinent problem. It has been mentioned earlier that the principle of non-refoulement applies in the case of maritime borders and as a consequence, refugees or migrants that are rescued at sea, generally have a temporary right to disembark so that their status might be resolved. Although, it cannot be denied that this situation is unsustainable in the long-run and as certain coastal states feel the brunt of refugee influxes, a system of burden sharing and permanent explicit agreements need to be put into place.

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