THE PRINCIPLE OF NON-REFOULEMENT: A NOTE ON INTERNATIONAL LEGAL PROTECTION OF REFUGEES AND DISPLACED PERSONS*

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In the few pages which follow, it is proposed firstly to examine the contours and content of the principle of *non-refoulement* in the law concerning asylum, refugees and displaced persons. Next we would focus on the function—and hence the relative importance—of *non-refoulement* within the general structure of the international legal protection of refugees and displaced persons. Here the effort is to delineate the contraposed interests of asylum-seekers on the one hand, and of the state from whom asylum is sought on the other hand, and to indicate the points of possible equilibrium. We would, finally, explore the status of *non-refoulement* as a principle or norm of international law, conventional and customary.

I. *Shape and Content of Non-Refoulement.*

1. It is convenient to begin with the etymological meaning of *non-refoulement* which is set out in Article 33(1) of the 1951 U.N. Convention on the Status of Refugees[1]:

> "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 [sic] a particular social group or political opinion."

The principle may thus be summarily described as importing an obligation of "no return, no expulsion". The obligation is cast in limitative terms: "no return, no expulsion" to the country where the refugee's life or freedom is threatened on account of specific circumstances. The state within whose borders the refugee is found may expel him to any country *not* presenting the same threat, provided of course some such country is found which is

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[1] 189 U.N.T.S. 137. Done at Geneva on 28 July 1951: also in UNHCR COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 10 (1979), hereinafter referred to as Collection. The principle was apparently first set out in Article 3 of the *Convention Relating to the International Status of Refugees of 1933,* 159 L.N.T.S. 199.

willing to grant him entry into its territory, unless the refugee undertakes to risk surreptitious entry therein. Thus, though the principle of *non-refoulement* appears to press but lightly upon the state into which the refugee has in one way or another gained entry, in practice such state may find it very difficult to expel the asylum-seekers, especially if there are great numbers of them, except to the very country threatening their lives or freedom. It should be noted that the manner in which the asylum-seekers have gained entry into a country of proposed asylum is not material so far as concerns applicability of the rule of *non-refoulement*. Put in somewhat different terms, the asylum-seekers are protected by the rule of *non-refoulement* although they may have entered in violation of the municipal law on immigration and admission of aliens.

The conventional rule of "no return, no expulsion" is not cast in absolute terms. We must, however, in the interest of orderly presentation, defer somewhat our analysis of the scope and implications of the exceptions to *non-refoulement* set out in Article 33(2) of the 1951 U.N. Convention.

2. The 1967 Declaration on Territorial Asylum adopted by the United Nations General Assembly[2] purported to extend the original rule of "no return, no expulsion" by prohibiting *"rejection at the frontier"* where the end result is the same—compulsory return to or involuntary stay in the country "where he may be subjected to persecution".[3] Two years later, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,[4] followed suit and forbade Members States of the OAU to subject any person "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" by persecution.

The explicit mention of "non-rejection at the frontier" has obviously a clarifying effect though it probably has limited utility so far as land frontiers are concerned. There appear to be very few countries with walls or fences right at their international boundaries. Thus, as has been noted by Professor Grahl-Madsen, once an asylum-seeker has penetrated the frontier by even one step, the rule of *non-refoulement* is applicable, such that for states with a common frontier with the country from which the refugees have fled, the rule of "no return, no explusion" already realistically

[2] Adopted by the U.N. General Assembly on 14 December 1967, in Resolution 2312 (XXII); COLLECTION, *supra,* note 1 at 57.

[3] Actually, the *Convention Relating to the Internatioanl Status of Refugees of 1933, supra,* note 1, had established an obligation of Contracting Parties "not to refuse entry to refugees at the frontiers of their countries of origin." (Article 3).

[4] Adopted at Addis Ababa on 10 September 1969. Also in COLLECTION, *supra,* note 1 at 193.

includes "no rejection at the frontier".[5] The rule as so formulated does, however, make clear that a country anticipating a mass influx of refugees or asylum-seekers may not seal off its frontier with a view forcibly to preventing their entry. The events that took place a few years back at the Thai-Kampuchea border, where Thai troops in the beginning turned back waves of asylum-seekers fleeing from the Vietnamese satellite regime of Heng Samrin and the barbarous armed strife that wracked Kampuchea, offer tragic illustration. When international solidarity began to manifest itself, through the efforts of the UNHCR, the International Red Cross and private organizations, and with the arrival of material and financial assistance in the establishment of refugee camps, Thailand ceased its *refoulement* measures.[6] Thus the principle of *non-refoulement* logically imports an *obligation* to permit *entry* to asylum-seekers at least for the purpose of granting *temporary refuge* pending a decision by the territorial sovereign to grant or withhold territorial asylum to all or some of the asylum-seekers, and pending an effective opportunity to seek durable asylum eleswhere. The revolutionary nature of this development should not escape notice, in view of what is accepted as a truism, that is, that international law imposes no duty upon states to grant asylum, understood as durable residence, to anyone, even to refugees, in the absence of a treaty obligation to do so.

3. We turn to a consideration of the meaning of the "no rejection at the frontier" aspect of *non-refoulement* when sought to be applied in respect of the maritime frontiers of a state. The recent events in Southeast Asia, more specifically in Malaysia and Singapore, involving the turning away and towing out to sea of boat-loads of Vietnamese asylum-seekers attempting to land, are well known.[7] Sometimes, the *refoulement* resulted in the capsizing or sinking or deliberate scuttling of the boats, many being hardly sea-worthy to begin with, and in considerable loss of life. It might be worth noting that in most cases, the *refoulement* took place not at the maritime frontier, which commonly and for many purposes is taken to refer to the boundary between the coastal state's territorial waters and the high seas, but simply at or near the shoreline.

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[5] GRAHL-MADSEN, TERRITORIAL ASYLUM 74 (1980). See, however, Sadruddin Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 HAGUE RECUEIL 287 (1976).

[6] Useful description is provided by Muntarbhorn, *Thailand: Displaced Persons in Thailand—Legal and National Policy Issues in Perspective*, ROUND TABLE OF ASIAN EXPERTS ON CURRENT PROBLEMS IN THE INTERNATIONAL PROTECTION OF REFUGEES AND DISPLACED PERSONS 165, Manila, April 1980, under the auspices of the UNHCR, the Int'l. Inst. of Humanitarian Law and the University of the Philippines Law Center, hereinafter referred to as MANILA ROUND TABLE; see also Sobhak-Vichtir, *Indo Chinese Refugee Problems: Viewpoint from Thailand*, MANILA ROUND TABLE 176; and Cheang, *Refugees and Displaced Persons: The Singapore Experience*, MANILA ROUND TABLE 180.

[7] For a comprehensive survey, see G.J.L. Coles, *Background Paper*, prepared for the Asian Working Group on the International Protection of Refugees and Displaced Persons, Int'l. Inst. Of Humanitarian Law, San Remo, 1981.

How are such measures to be characterized in terms of compliance with law? If the vessel seeking to make land or its passengers are in distress, customary international law requires coastal states to grant safe haven to the vessel and its passengers at least until the conditions of distress are relieved and the vessel and passengers are able to resume their journey.[8] We note that this ancient rule of custom does not concern itself with asylum-seekers and that it applies, *ex proprio vigore,* without regard to the possible applicability simultaneously of the rule of *non-refoulement.* If the passengers of the vessel in distress are indeed asylum-seekers, is it clear that the rule of *non-refoulement* is applicable and requires the coastal state to grant permission to land and temporary refuge as well to the asylum-seekers? An argument which, it is submitted, cannot casually be ignored, can be made that once the condition of distress is relieved (in other words, once the requirements of the ancient custom prescribing succour to vessels in distress are satisfied), the vessel and its cargo of asylum-seekers may be expelled and forced to put out to sea again, seaworthy and with adequate provisions for the safety and health of its passengers, upon the supposition that there is no compulsion then operating upon the vessel to sail back to the country of origin and persecution.[9] If the vessel flies the flag of a third state, the additional supposition can be indulged in that ultimately, the vessel can always land in the flag state. Unlike the situation existing in land frontiers, the coastal state can physically expel vessels onto the high seas without having to obtain the consent of another territorial sovereign.

Thus, repellent though the suggestion may be, it is less than clear that the present rule of *non-refoulement* as such applies to the situation sketched above. That *non-refoulement ought* to be clearly extended to cover expulsion or rejection of boatloads of asylum-seekers would seem to be the appropriate response demanded by the conscience of humanity. From the viewpoint of impact upon human values, the legal availability

[8] See McDougal & Burke, The Public Order of the Oceans: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 110 (1962) for a succinct statement and documentation of the customary law on this point.

[9] The argument has been made in Hyndman, *Asylum and Non-Refoulement—Are These Obligations Owed to Refugees Under International Law,* 57 Phil. L. J. 43 at 52 (1982), an article which became available to the author after this note was first prepared and completed.

Cf. The analysis by G. L. Coles in *Background Paper, supra* note 7 at 117: "... (I)f refusal to allow a refugee 'boat' to enter or remain in territorial waters exposes thereby the refugees on board to any danger, the principle of non-rejection should apply. If, on the other hand, rejection does not expose those on board to danger, in the case where the boat is seaworthy, well provisioned, those on board in good health and the boat is capable of sailing to another State, it should not *prima facie* apply." Mr. Coles goes on, however, to say that account must be taken by the State of initial contact of the possibility that "the boat may be refused admission subsequently by other States with the consequence that those on board will eventually be placed in jeopardy. The initial refusal of admission may be a direct cause of subsequent suffering and loss of life. If there is any possibility of that happening, it is arguable that there is a duty to grant the refugees asylum or temporary refuge." *Quaere* whether the question of whose refusal of admission—the State

of the protection of *non-refoulement* should not depend upon the kind of frontier-land or sea-being crossed by the asylum-seekers.[10] Perhaps that response will be hastened by the establishment in different regions of receiving and holding centers for refugees in the territory of some generous states, to which vessels carrying asylum-seekers can proceed to discharge their human cargo. Such centers of temporary refuge could be financed by international contributions and perhaps administered under the supervision of the UNHCR.

The problem discussed above may be posed in even sharper focus by considering the case of vessels which are quite seaworthy and under paid charter to carry asylum-seekers. The incidence of the obligations of *non-refoulement* should not, it may be argued, be made contingent upon the decision of the vessel's master as to which port state he should first seek to make. If the asylum-seekers, healthy and in no immediate danger, wish to disembark and apply for asylum, does *non-refoulement* require the port state to grant them permission to land and temporary refuge? Once again, the answer is that it is not clear *non-refoulement* compels the port state to do so. Normative analysis is not adequately substituted by recourse to what are clearly statements of preferences like: "asylum should not be denied on the sole ground that it can or should be sought elsewhere", and "international solidarity should not be a condition precedent for the grant of asylum".[11]

4. What about the application of *non-refoulement* at airports of entry? While the matter is not free from doubt, the appropriate analogy would seem to be to non-rejection at land frontiers. The authorities at the airport can in fact require an aircraft to bring back an asylum-seeker it has flown in, but cannot realistically require the same or another aircraft to fly out the asylum-seeker to another state without the latter state having granted an entry visa to him.

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of initial or subsequent contact—created the danger, is more than a metaphysical problem.

Montes, *Working with the Indo-Chinese Refugees: (The) Philippine Experience,* MANILA ROUND TABLE, *supra,* note 6 at 160, 162 wrote: "... (The) Philippine government has established the following principles and policies: It would grant temporary asylum in the Philippines when the refugees enter Philippine territorial waters by force majeure; when the refugees' boats are no longer seaworthy and they cannot proceed anymore to their final destination without risk to their lives; and when the refugees lack food or have become seriously ill and can no longer proceed to another country." Note that the Philippine position, as expressed by then Deputy Minister of Social Services and Development S. P. Montes, effectively identifies the customary law rule on succour to *vessels in distress* with the requirements of the principles of *non-refoulement.* To the same effect is Conclusion No. 15 (XXX) adopted by the Executive Committee of the UNHCR Programme "Refugees Without an Asylum Country", General Principle (c): "It is the humanitarian obligation of all coastal States to allow *vessels in distress* to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum." (Emphases supplied).

[10] See *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia,* paragraph 35, Intl. Inst. of Humanitarian Law, San Remo, Jan. 1981.

5. The basic function of the *non-refoulement* principle, considered within the context of the law concerning asylum, is to place human beings in a position effectively to apply for asylum (understood as *durable* relief and protection) either in the country of first refuge or in some other country. It needs no demonstration to show that if asylum-seekers are either effectively prevented from penetrating the frontiers, or are returned or expelled to the county of origin and danger, no claims to asylum can in practice be asserted vis-a-vis the rejecting or expelling state. For that state, as it were, the humanitarian problem goes away. In respect of the country to whom the claim or request for durable protection is addressed, the principle of *non-refoulement* in effect requires that country to grant temporary refuge while the availability of or eligibility for asylum within that country or elsewhere or the feasibility of voluntary repatriation, is being determined and organized. So conceived, *non-refoulement* imports a minimum humanitarian duty to be complied with pending resolution of claims to more lasting protection.

II. *Basic Policy Issues Presented by Claims about Non-Refoulement*

Legal analysis of *non-refoulement* may, it is hoped, be enhanced by examining explicitly the basic issues of policy underlying the principle. These issues may be conceptualized in terms of claims asserted by human beings, whether singly or in groups of vastly differing sizes, from a small refugee family to surging seas of humanity, and of contraposed claims by the country or countries from whom refuge and protection are sought.[12]

The claim of the human individuals is to access to the territory of a state for the purpose of securing relief and protection from danger to life, liberty or physical integrity arising from acts or policies of governmental authorities in the country of origin. We deal here with deprivations threatened or imposed on account of race, religion, nationality, political and social opinion and affiliation—the classic "human rights" issue of racial, religious, social and political persecution. The claim is essentially that, the civil and political human rights of the asylum-seekers having been ignored and violated in the country of origin, the country of proposed refuge should redress the balance, as it were, by granting entry and protection. It is implicit that the deprivations imposed or threatened are of a high degree of severity since they impelled the asylum-seekers to abandon their places of habitual residence to seek relief elsewhere.

History tells us that people leave their homes and become refugees not only when sufficiently intense persecution in the classic sense is exer-

[11] These statements are found in, e.g., the *Declaration on the International Protection of Refugees and Displaced Persons in Asia (The Manila Declaration)*, paragraph 10, in MANILA ROUND TABLE, *supra*, note 6 at 187, and in *id.*, at paragraphs 37 and 66.

[12] The mode of analysis referred to here is exemplified, in relevant detail, in McDOUGAL, LASSWELL & CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980).

cised against them but also for various other reasons.[13] People flee from approaching armed conflict, whether the conflict be internal or international in character. Natural disasters such as severe drought, desertification and devastating earthquakes have also caused involuntary movements of peoples. It cannot be supposed that the degree and scope of human suffering caused by the clash of armed forces equipped with modern weapons of war or the breakdown of public order or by some violent upheaval of the natural environment or severe disturbances of climate, are any less than the suffering occasioned by political or religious or other persecution. The principle of *non-refoulement,* however, as formulated in general instruments, still accords legal recognition only to claims to protection and assistance based upon persecution. The OAU Convention is, in this regard, more advanced than the 1951 U.N. Convention since the former covers refugees from armed conflict. It is, in our submission, an important question for future consideration whether the principle of *non-refoulement* in particular, and the law on refugees and displaced persons in general, should be extended to cover situations not only of refugees from armed conflict but also refugees from natural catastrophes.

The contrapuntal claim in effect asserted by states to whose territory claims for admission are made, is a claim to competence and discretion to determine for themselves to whom such access is to be granted. At bottom, this is a claim by states to competence to protect themselves—i.e., their decision-making structures and processes, their human and physical resources, and their over-all value position commonly designated as security.[14] The security of the receiving state may be endangered by the admission of refugees where the country of origin interprets such admission, especially selective admission, as a hostile act and threatens retaliatory measures. Recourse to hostile retaliation would of course run counter to the widely held principle that the grant of refuge or asylum by a state is a humanitarian act and not to be regarded as a hostile or unfriendly act, but such retaliation has in fact been resorted to. The activities of refugees and displaced persons within the receiving state may also threaten the security of such receiving state by provoking hostile reactions from the country of origin. There have been many instances where political refugees continue their fight against their own government by subversion, political propaganda and armed insurgency from the country of refuge. Thus, Article 4 of the 1967 U.N. Declaration on Territorial Asylum[15] requires states granting

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[13] See the careful and very thoughtful and wide-ranging *Study on Human Rights and Massive Exoduses,* by Sadruddin Aga Khan, Special Rapporteur of the U.N.

[14] *The Manila Declaration, supra,* note 11 at paragraph 7, in MANILA ROUND TABLE, note 6 at 187, expressly recognized the legitimacy of this claim Commission on Human Rights, E/ON.4/1503, 31 December 1981 and the evocative indication of "push" and "pull" factors which lead to mass movements of peoples across national boundaries. See also G.J.L. Coles, *Pre-Flow Aspects of the Refugee Phenomenon,* Background Paper prepared for the Int'l. Inst. of Humanitarian Law, San Remo, April 1982.

[15] *Supra,* Note 2.

asylum not to "permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations". Article III (2) of the OAU Convention is more explicit: it obligates signatory states to prohibit refugees residing in their territories from attacking any Member State of the OAU "by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio". The OAU Convention also enjoins countries of asylum, "for reasons of security", to settle refugees "at a reasonable distance from the frontier of their country of origin".

Different states have differing perceptions of security and its requirements.[16] Malaysia saw the increasing numbers of boatloads of asylum seekers from Vietnam in 1978-1980—basically of Chinese ethnic origin—as likely to upset the delicate racial balance sought to be maintained by the Malaysian Government between ethnic Chinese Malaysians and Malaysians of Malay (or Bumiputra) origin. The determination with which the Federal Government has sought to equalize the economic imbalance between nationals of Chinese origin and nationals of Malay origin is reflected in the ruthlessness with which the boats from Vietnam were prevented from landing and turned back to sea. A different threat to security was experienced in Thailand. Thai villagers living near the border with Kampuchea saw the Kampuchean refugees in the camps supported by UNHCR receive international food, medical and other assistance, creating for the refugees a standard of living materially higher than that of the indigenous villagers. The Thai Government had to take special measures—including the relocation of some of the refugee camps—to control the dissatisfaction and resentment swelling up among the Thais inhabiting the border areas. More evident and direct is the threat to public order which a developing country must confront when the pressures upon its available financial and other resources and its administrative structures are suddenly magnified many times over by the influx of very large numbers of refugees who must be fed and sheltered and clothed and who can neither be returned to their country of origin nor resettled quickly, if at all, in third countries more distant from the source of refugee flow.[17]

How are these competing human and state interests to be viewed within the framework of the law on *non-refoulement* and asylum? The international conventions and declarations speak in terms of *exceptions* to the principle and rule of *non-refoulement.* Article 33(2) of the 1951 U.N. Convention permits a contracting State to deny the benefits of

[16] For a new and important effort at theory construction, see SOLIDUM, DUBSKY & SALDIVAR-SALI, SECURITY IN A NEW PERSPECTIVE: TOWARDS A FRAMEWORK FOR A THEORY OF SECURITY (University of the Philippines; 1980).

[17] See Martin, *Large Scale Migrations of Asylum Seekers,* 76 AJIL 598, 609 (1982).

non-refoulement to refugees who may be reasonably regarded as a "danger to the security of the country [of refuge]", or who have been convicted of particularly serious crimes and hence constitute "a danger to the community". The 1967 U.N. Declaration on Territorial Asylum, in Article 3(2), refers to exceptions *"only* for *overriding* reasons of national security or in order to safeguard the population as in the case of a mass influx of persons." In seeking to determine in particular cases whether the general norm of *non-refoulement* is applicable or whether exceptions thereto are appropriately made, the first step is to recognize that both the humanitarian claims of refuge-seekers and the claims of states to authority to protect their security interests are legitimate claims. There is no need to pretend that legitimate state interests are not engaged by the presence of refugees insistently knocking at the frontier, as it were. Neither can it be reasonably supposed that state interests must simply and always override claims made in the name of humanity.

The next task is to evolve principles and methods for accommodating and adjusting the human claims of asylum-seekers and the interests of the state of proposed asylum. It is submitted, with great diffidence, that those principles would include a *principle of necessity*, that is, that humanitarian claims for refugees may be denied and *refoulement* resorted to only when such measure has become indispensably necessary for the protection of an equally weighty state interest. A related principle would seem to be that of *proportionality*—that is, the human suffering imposed by *refoulement* must not be grossly disproportionate to the substantive value of the state interest sought to be maintained. Careful examination of the instances when *refoulement* was resorted to would probably show that *refoulement* is seldom if ever really or absolutely necessary for the effective protection of important state interests. Even in cases of mass influxes of asylum-seekers, the most exigent demands of national security can frequently be met adequately by the receiving state granting entry and temporary refuge in camps or zones of assigned residence,[18] until international solidarity can be sufficiently organized to secure either (a) voluntary repatriation or (b) relocation to holding and processing centres elsewhere pending resettlement in third countries of many or most or all of the asylum-seekers.

[18] See the careful and comprehensive studies by G.J.L. Coles: *Problems of the Large Scale Influx,* in MANILA ROUND TABLE, *supra,* note 6 at 135; *The International Protection of Refugees and the Concept of Temporary Refugee,* in ROUND TABLE ON HUMANITARIAN ASSISTANCE TO INDO-CHINESE REFUGEES AND DISPLACED PERSONS 93, San Remo, May 1980, under the auspices of the UNHCR and the Int'l. of Humanitarian Law; *Temporary Refuge and the Large-Scale Influx of Refugees,* in Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx, Executive Committee of the High Commissioner's Programme, EC/SCP/16/Add. 1, 17 July 1981.

See also: *Report of the Round Table on the Problems Arising from Large Numbers of Asylum Seekers,* Int'l. Inst. of Humanitarian Law, San Remo, June 1981; and the *Report on the Meeting of the Sub-Committee of the Whole on International Protection,* Executive Committee of the High Commissioner's Programme, A/AC.96/599, 12 October 1981.

III. *Status of the Principle of Non-Refoulement*

It is proposed to conclude this impressionistic treatment of *non-refoulement* by examining the status of the principle in international law. The first point which should be made is that, considered as a norm of conventional international law, an impressive number of multilateral instruments have embodied the principle. The general principle itself—as a humanitarian limitation upon the competence of states to reject the entry of aliens and deport or expel those found in their territory—is set out in (a) the 1951 U.N. Convention on the Status of Refugees (Art. 33);[19] (b) the 1969 OAU Convention (Art. 11);[20] (c) the 1969 American Convention on Human Rights (Art.22[8]);[21] (d) the 1954 Caracas Convention on Territorial Asylum (Art. 3);[22] and (e) the 1957 Hague Agreement on Refugee Seamen (Art. 10).[23] The *non-refoulement* principle—in the form of a specific limitation on treaty obligations to extradite—is also established in, most notably, (f) the 1957 European Convention on Extradition (Art. 3);[24] (g) the 1977 European Convention on the Suppression of Terrorism,[25] (h) the 1979 U.N. Convention on the Taking of Hostages;[26] and (i) the 1971 OAS Convention to Prevent and Punish Acts of Terrorism.[27]

Has the *non-refoulement* principle become a norm of customary international law, so as to be binding even upon states who are not parties to the conventions noted above? We note in this connection that the *non-refoulement* provisions in those multilateral instruments are in turn reinforced and generalized by the 1967 U.N. Declaration on Territorial Asylum, even though this Declaration did not in explicit terms purport to announce existing generally applicable legal norms. What it modestly did was to

> *"Recommend*[-] that, *without prejudice to existing instruments dealing with asylum and the status of refugees and stateless persons.* States *should base themselves in their practices* relating to territorial asylum on the following principles:" (Underlining supplied)

Yet thirteen years earlier, in 1954, the U.N. Conference on the Status of Stateless Persons attended by 27 states had unanimously expressed the

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19 *Supra,* note 1.
20 *Supra,* note 4.
21 Collection, *supra,* note 1 at 207.
22 *Id.,* at 264.
23 *Id.,* at 48, 51.
24 *Id.,* at 313, 314.
25 Adopted by the Committee of Ministers of the Council of Europe on 10 November 1976 and opened for signature on 27 January 1977. 15 INT'L. LEGAL MAT. 1272 (1976).
26 Adopted by the U.N. General Assembly in Resolution 34/146 on 17 December 1979, without vote. 18 INT'L. LEGAL MAT. 1456 (1979).
27 Done in Washington, D.C., 2 February 1972. 10 INT'L. LEGAL MAT. 255 (1971).

opinion that the *non-refoulement* provision of the 1951 U.N. Refugees Convention was "an expression of [a] *generally accepted* principle".[28] Other documents worth noting include the Declaration on Territorial Asylum adopted by the Committee of Ministers of the Council of Europe in 18 November 1977,[29] reaffirming an earlier (1967) Resolution 14 on Asylum to Persons in Danger of Persecution,[30] and the Conclusions of the Executive Committee of the UNHCR Programme referring to *non-refoulement*.[31] Still other documents bearing upon *non-refoulement* as a customary law norm include the 1966 Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee;[32] the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia dated January 1981 (San Remo) which characterized *non-refoulement* as "a fundamental principle of international law";[33] and the Report of the Colloquium on Asylum and International Protection of Refugees in Latin America dated May 1981 (Mexico City) which referred to the principle of *non-refoulement* as "a basic norm of international law".[34]

We observe in operation here a continuing effort at reiteration of the principle of *non-refoulement*—a process of formulating, organizing, focusing, maintaining and developing consensus and acceptance of the *non-refoulement* principle. Put a little differently, the process is one of crystallizing the subjectivities and expectations which support the establishment of a customary law norm—the *opinio juris sive necessitatis*—and of encouraging the objective practices reflecting those subjectivities. Measured by the ordinary indicia it is submitted that, with one material qualification, the *non-refoulement* principle may properly be regarded as having matured into a norm of customary international law. The qualification relates to the important fact that socialist countries, by and large, do *not* show either the rhetoric or the operational practices of *non-refoulement*. Thus it appears that *non-refoulement* is a principle not of *general* customary law but of *regional* or *hemispherical* customary law, being widely or generally acknowledged in the non-socialist part of the globe.

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[28] See Final Act of the U.N. Conference on the Status of Stateless Persons, in Collection, *supra*, note 1 at 79, 81, where the Conference went on to say that, accordingly, "(it) has not found it necessary to include in the Convention (on Stateless Persons) an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951."

[29] COLLECTION, *supra*, note 1 at 306.

[30] *Id.*, at 305.

[31] *Conclusions on the International Protection of Refugees*, adopted by the Executive Committee of the UNHCR Programme, No. 6 (XXVIII) "Non-Refoulement" (1977), p. 14; No. 15 (XXX) "Refugees Without an Asylum Country" (1979), p. 31. See also Report on the 32nd Session of the Executive Committee of the High Commissioner's Programme, A/AC.96/601, 22 October 1981, pp. 15-16.

[32] GRAHL-MADSEN, *op. cit.*, note 5 at 153-156.

[33] *Supra*, note 10 at p. 9.

[34] Mimeographed material made available by Professor Hector Gross-Espiel.

Some suggestions have been made to the effect that *non-refoulement* is not only a generally recognized "fundamental principle" of international law but also a *peremptory* norm of international law, a principle, in other words, of *jus cogens*. My own submission is that this statement is not free from substantial doubt. The criteria and even the whole concept of *jus cogens* appear to my mind still too amorphous to permit operationalized inquiry into whether any particular norm or principle of international law may be characterized as *jus cogens*.[35] One technical function of *jus cogens* appears to be to furnish a basis for overriding specific treaty obligations. In these terms, one possible application of *non-refoulement* as a peremptory norm would be to override existing treaty obligations to extradite persons who would otherwise qualify as refugees. The need for such application is not clear—the political offenses exception to undertakings to extradite is written into the vast majority of extradition treaties. Moreover, as noted earlier, there is presently developing a practice of specifying in extradition conventions that extradition is not to be granted where *non-refoulement* would otherwise be applicable. The most recent illustration is the 1981 Inter-American Convention on Extradition.[36] Perhaps the whole problem of peremptory norms is one of treaty interpretation—what has been referred to as teleological interpretation or interpretation by major purposes. In any case, prudence requires one to leave it at that.

[35] See *The Concept of Jus Cogens in International Law*, Papers and Proceedings of the Conference on International Law (Lagonissi, Greece, April 1966), Carnegie Endowment for International Peace, Geneva, 1967.

[36] Done at Caracas, 25 February 1981. 20 INT'L. LEGAL MAT. 723 (1981).