

## Sending Them to Their Deaths: National Borders and the Principle of Non-refoulement

**Abstract:** The principle of non-refoulement, formulated in international law in 1951, prohibits states from returning refugees or asylum-seekers back to territories where there is a risk that their lives and/or freedoms will be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. To put it another way, states are obliged to rescue refugees and asylum-seekers who will be persecuted if they are returned to their home states. However, this principle applies only to refugees and asylum-seekers who have entered a state's territory, or its frontier, seeking refuge or asylum. The principle of non-refoulement thus gives physical borders, and border spaces, great normative importance. Literally, where you stand makes a difference to what states, and their agents, are permitted by international law to do with you in regards to your admittance or expulsion. In this paper, I argue a) that there are good reasons for accepting the principle of non-refoulement as an international legal principle, and b) that the principle of non-refoulement does not set the limits of states', and their agents', moral duties to refugees and asylum-seekers.

I begin my argument, in section I, by examining the principle of non-refoulement and providing a coherent, historically informed interpretation of its scope and content. The principle of non-refoulement was first expressed in Article 33 of the 1951 UN Convention Relating to the Status of Refugees, which has since been ratified, in some version, by over 145 states. Taking up a Rawlsian approach to international law, I argue that, legally, the principle of non-refoulement is justified as an overlapping consensus—states, faced with the difficult problem of whether or not to admit refugees and asylum-seekers, agreed to the principle, and furthermore (we might think) they would agree to be legally bound by it if asked. This gives us good reason to accept the principle of non-refoulement as a justified international legal principle.

In section II, I argue that, despite its justification as an international legal principle, there are some fundamental first-order moral problems with the principle of non-refoulement. To begin, the principle of non-refoulement treats location as having great moral importance, when what is actually morally important, at the individual level, is the amount of risk that a would-be rescuer would have to take in order to perform the rescue. (Compare this to Singer's famous 'baby in a pond' example: what is morally important is whether I can swim, not, as Singer so famously argues, whether the pond is near or far away.) Location, to the extent that it is morally salient to the obligation to rescue, is so only insofar as locational differences—such as territorial boundaries, etc—can change the amount of risk that would-be rescuers would have to take. This makes the principle of non-refoulement problematic from a first-order moral point of view: it mistakenly focuses on location when it should be focusing on risk.

Secondly, the principle of non-refoulement requires state agents to engage refugees and asylum-seekers in credible fear interviews, in order to determine whether those refugees and asylum-seekers would be persecuted if they were to be returned to their home states. Because of prevailing state and institutional attitudes about admitting non-citizens, there is top-down institutional pressure for the interviewers to attempt to catch the interviewees in lies. Thus, such credible fear interviews often force refugees and asylum-seekers not only to re-live extraordinarily traumatic experiences, but also to do so in a setting where disbelief and disregard of testimony is the norm. As Alison Jaggar and others have argued, such forced re-livings of trauma can themselves be another assault, and being faced with disbelief and disregard in such a context both partially constitutes and contributes to the oppression and degradation that refugees and asylum-seekers (who are overwhelmingly women, children, and persons of color) already suffer. Thus, the principle of non-refoulement allows for the furthering of individual and structural oppression and degradation in various ways.

Thirdly, the principle of non-refoulement allows states to order their agents to act in manifestly unjust, immoral ways. Because of the principle's emphasis on refugees and asylum-seekers literally reaching a state's territory or frontier, some states have ordered their agents to tow refugees and asylum-seekers

away, if they are found in international waters, and to block them from stepping foot over the border, if they are found on land. This is the moral equivalent, we might think, of pushing the baby back into the pond when she has (miraculously) managed to make it to the water's edge. State agents know that such actions are immoral, in many cases, but because of the principle of non-refoulement, their orders are not—absent more stringent domestic laws—illegal, and so the agents are not legally allowed to disobey.

In section III, I argue that the three first-order moral problems that I identify in section II give us good reason to change the domestic laws of states, so that they go above and beyond the international standards set by the principle of non-refoulement. The political and the moral pull apart strongly here; while there are political reasons to keep the principle of non-refoulement in place at the international level, there are moral reasons to change the domestic policies of states in regards to non-refoulement, so that they take account of, and attempt to solve, the three first-order moral problems that I set out. I conclude with a brief discussion of potential U.S. domestic policy changes that would help make the U.S.'s enactment of the principle of non-refoulement morally defensible.