

The Protection Nexus between Non-Penalisation and National Security Exception under the Refugee Convention

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1. Introduction

Mass influxes of refugees from neighbouring States to the State receiving refugees often create enormous pressure upon the resource capacity of the receiving State in handling them. However, refugees fleeing from ‘a well-founded fear of persecution’ may have no choice but to search for refuge in countries with proximity to the conflict or place of origin they were fleeing. The human rights of refugees are often at risk of being curtailed especially in situations of mass influx. For instance, regardless of whether the situation involves a mass influx of refugees, Contracting States to the *Convention Relating to the Status of Refugees* (Refugee Convention) are required to comply with relevant international refugee and human rights law norms such as the prohibition against sending them back to persecution (*non-refoulement*).

This article examines the nexus between non-penalisation of refugees who arrive at the border without proper documentation or with falsified documentation in order to gain access to asylum procedures and the national security exception. This article argues that the onus placed upon the decision-maker for determining whether a refugee would be deemed a 'national security risk' should be heightened so that the human rights of those suspected to be a 'national security risk' would not be undermined. Human rights of refugees suspected of being a 'national security risk' would be especially important given the detrimental effects of the removal of *non-refoulement* protection. Finally, it is suggested that a more onerous burden placed upon the decision-maker would also be in line with non-penalisation requirements of the Refugee Convention, given that asylum seekers should be granted the benefit of the doubt when seeking asylum from persecution, even if it involves improper or falsified travel documents.

1. Non-Penalisation

One definition of 'mass influx' is the arrival of a large number of displaced persons from a specific country or geographical area, whether their arrival was spontaneous or aided.[1] The office of the United Nations High Commissioner for Refugees (UNHCR) has, in its guidance note, emphasised the importance of safeguards that must be in place when implementing responses to mass influx situations.[2] Examples of these safeguards may include protecting refugees from instances of *refoulement*, and complying with relevant basic minimum treatment in accordance with international human rights standards.[3] In particular, in mass influx situations, the protection against being penalised for 'illegal entry' is especially important, where examples of 'illegal entry' may be entering the territory of a State without proper documentation, or entering with falsified documents or other methods of deception.[4] This protection against being penalised for illegal entry is codified within the Refugee Convention.[5] Article 31(1) of the Refugee Convention states:

The Contracting States *shall not impose penalties, on account of their illegal entry or presence*, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory *without authorization*, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (emphasis added).[6]

Therefore, the non-penalisation clause is relevant to analysing the situation of mass influx situations and the protection of relevant human rights norms of refugees. While the non-penalisation clause has been the subject of debate, various scholars have attempted to clarify the proper interpretation of the provision.[7] These studies have revealed that the non-penalisation clause is applicable in mass influx situations and that the exception to the non-penalisation clause, found in Article 31(2) of the Refugee Convention, may only be imposed when 'necessary'.[8] Moreover, regardless of the security risk, *non-refoulement* obligations require that no one be sent back to situations where there is a real risk of being subjected to torture as a matter of customary international law.[9] The prohibition against torture is also considered *jus cogens*, so that it is universal in character and no derogation is possible.[10] The office of the UNHCR has provided 'soft law' guidance to Contracting States of the Refugee Convention

on responses to mass influx situations, which includes the Guidelines on International Protection No. 11 on *prima facie* recognition of refugee status.[11]

1. National Security Exception

In the specific context of determining whether an individual claiming asylum may be considered a 'national security risk', and therefore would fall within the exceptions to *non-refoulement* protection under Article 33(2) of the Refugee Convention, the human rights of the individual being suspected of such a risk is tantamount. Article 33(2) of the Refugee Convention provides:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding *as a danger to the security* of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes *a danger to the community* of that country (emphasis added).[12]

Article 33(2) exception to *non-refoulement* protection should not be confused with Article 1F of the Refugee Convention, since the former refers to, and specifically applies to, refugees who have already been granted status through domestic asylum procedures, while the latter is a consideration during the refugee status determination process. [13] The argument can be made, that during mass influx situations, the human rights of those being deemed to be a 'national security risk' may be placed in jeopardy. The purpose of Article 33(2), unlike Article 1F, is to protect the country of refuge in anticipation of a present or a future threat.[14]

The threshold for determining whether the exception to Article 33 applies is on the standard of 'reasonableness' grounds.[15] The threshold of 'reasonable grounds' has been interpreted as limiting the room for discretion of the State to determine the meaning of that phrase, except for determining it in an arbitrary or capricious manner.[16] Some States, such as the United Kingdom, read the exception to *non-refoulement* protection broadly, so that the requirement of 'having been convicted by a final judgment of a particularly serious crime' becomes a presumption having the effect of expelling the refugee, which applies as soon as the conviction is established.[17] Besides the broad discretion granted to States by virtue of a provision silent for determinations on what is considered 'reasonable grounds', the one-step test in determining whether a refugee suspected of being a 'national security risk' may be expelled creates problems of its own. First, the meaning of 'reasonable grounds' should be ascertained to ensure a more consistent application of this threshold standard across Contracting States of the Refugee Convention. Second, since the implications for expelling an individual with the protection against *refoulement* removed may include deprivation of life, the threshold required to prove a 'national security risk' should be higher than 'reasonable grounds'. This assertion is supported by examples of counter-terrorism measures that have taken place post-9/11 conducted by some States, where it has become common practice to read the national security risk under Article 33(2) broadly.[18]

Given the detrimental impact a designation of a 'national security risk' may have on a refugee, it is especially important to scrutinize and monitor the interpretation and implementation of this provision

carefully.

III. National Security Exception read in conjunction with

Non-Penalisation Protection

A potential new way of interpreting the national security exception while at the same time permitting a heightened threshold to be applied to the exception may involve reading the exception under Article 33(2) in conjunction with Article 31. This reading is helpful in that it can take into account other provisions of the Refugee Convention. It is also legally required to read Article 31 in conjunction with other provisions of the Refugee Convention, taking into consideration its context, pursuant to the treaty interpretation rules laid down in the *Vienna Convention on the Law of Treaties*.[19] When read in conjunction with the non-penalisation provision, it is suggested that refugees who are suspected of being a 'national security risk' should not be penalised for their illegal entry or presence and such 'illegal presence' should not be part of the consideration during the assessment for determining whether the individual poses a 'national security risk'. This is especially the case when there is a potential danger that an individual's 'illegal presence' may contribute towards heightening their risk of being suspected of posing a 'national security risk'.

Another issue that would be relevant to the consideration of whether to exclude *non-refoulement* protection from a refugee, is the threshold of 'reasonable grounds' required by Article 33(2) of the Refugee Convention. The current threshold, as established earlier, requires that the decision-maker has the burden of proof to establish that the refugee in question is deemed a 'national security risk'.[20] Under the domestic legislation of some States such as the United Kingdom, this burden of proof may be discharged by having sufficient proof, on 'reasonable grounds', that the refugee promote extremist views or engage in extremist activities that represent a danger to the security of the country.[21] While this threshold requires the decision-maker to meet the threshold of a 'national security risk' on 'reasonable grounds', the UNHCR has warned that 'the threshold for returning refugees to their country of origin – as an exception to the *non-refoulement* principle – has to be particularly stringent'.[22] Moreover, as with other exceptions within the Refugee Convention, the national security exception should be read and construed in a restrictive manner, having consideration of the circumstances of the case, and such restriction should only be made where it is necessary and proportionate, and in accordance with law.[23]

Further, and in addition to non-penalisation protection, any expulsion of a refugee lawfully within the territory of a Contracting State to the Refugee Convention shall be in accordance with the due process of law, including permitting the refugee to submit evidence to clear him or herself, and to appeal to and be represented for the purpose of appearing before the competent authority.[24] This means that the refugee alleged to be a 'national security risk' will be granted the right to be heard including having proper legal representation to challenge the case before him or her.

1. Concluding Remarks

This article briefly discussed the protection nexus between non-penalisation protection and the national security exception provided for under Articles 31 and 33(2) of the Refugee Convention respectively. While the Refugee Convention is silent on what constitutes 'reasonable grounds' for deeming a refugee a 'national security risk', the threshold upon which the decision-maker makes such a determination should be more onerous, so that the human rights of the refugee being suspected as a 'national security risk' should be protected. As the effect of removing *non-refoulement* protection from a refugee is detrimental, reading the national security exception in conjunction with non-penalisation might be helpful in ensuring that the decision-maker's interpretation of the 'reasonable grounds' threshold is not overly broad, to the extent of penalising the refugee for his or her 'illegal presence'. One way that a decision-maker may use his or her discretion in an overly broad manner while interpreting the 'reasonable grounds' threshold would be considering the refugee's 'illegal presence' during his or her assessment of a refugee's potential danger posed to the State. Finally, a more onerous threshold should be imposed upon the decision-maker deciding on the fate of a refugee whose human rights including the right to life and freedom from torture may be placed in jeopardy, especially when the 'national security risk' exception can be read in an overly broad manner.

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References

1. Migration and Home Affairs, 'Mass Influx', *available at:* https://ec.europa.eu/home-affairs/content/mass-influx_en.

2. See, for example: United Nations High Commissioner for Refugees, ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’, 19 February 2001, UN Doc EC/GC/01/4, para 13, *available at:* http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html.
3. ibid.
4. Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection’, October 2001, para 34, *available at:* http://www.unhcr.org/3bcfdf164.pdf Goodwin-Gill).
5. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 31(1), *available at:* http://www.refworld.org/docid/3be01b964.html (Refugee Convention).
6. ibid.
7. See, for example: ibid (n 4); Cathryn Costello, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees’, July 2017, *available at:* http://www.refworld.org/pdfid/59ad55c24.pdf (Costello).
8. ibid (n 7) 14; Goodwin-Gill (n 4) para 121.
9. United Nations High Commissioner for Refugees, ‘UNHCR Note on the Principle of Non-Refoulement’, November 1997, *available at:* https://www.refworld.org/docid/438c6d972.html .
10. UNHCR and its Executive Committee have argued that the principle of *non-refoulement* is progressively acquiring the character of *jus cogens*; see Executive Committee, ‘Conclusion No. 25’, para. (b); UN docs A/AC.96/694, para 21; A/AC.96/660, para. 17; A/AC.96/643, para. 15; A/AC.96/609/Rev.1, para. 5; See, also: Cathryn Costello and Michelle Foster, ‘Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’ in Maarten den Heijer and Harmen van der Wilt (eds) *Netherlands Yearbook of International Law 2015* (TMC Asser Press, 2016), 273-327.
11. United Nations High Commissioner for Refugees, ‘Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status’, 24 June 2015, UN Doc HCR/GIP/15/11, *available at:* http://www.unhcr.org/publications/legal/558a62299/guidelines-international-protection-11-prima-facie-recognition-refugee.html (Guideline No 11).
12. Refugee Convention (n 5) art 33(2).
13. United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’, 4 September 2003, UN Doc HCR/GIP/03/05, paras 1 and 4, *available at:* http://www.refworld.org/pdfid/3f5857684.pdf.
14. United Nations High Commissioner for Refugees, ‘Addressing Security Concerns without Undermining Refugee Protection: UNHCR’s Perspective’, 17 December 2015, para 29, *available at:* http://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/UNHCRs_perspective_Addressing_Security_Concerns_ENG.pdf (Security Concerns).

15. Refugee Convention (n 5) art 33(2).
16. Alice Farmer, 'Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection' (2008) 23:1 *Georgetown Immigration Law Journal* 1-38, 10 (Farmer).
17. Farmer (n 16) 9; Legal Tools, 'Asylum Policy Instruction: Articles 1F and 33(2) of the 1951 Refugee Convention', October 2006, 29, 8.3.3, *available at:* https://www.legal-tools.org/doc/1b41ab/pdf.
18. Farmer (n 16) 14-16.
19. Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 23 May 1969, 27 January 1980), art 31(2); Costello (n 7) 5.
20. Security Concerns (n 14) para 24.
21. United Kingdom Home Office, 'Exclusion (Article 1F) and Article 33(2) of the Refugee Convention, Version 6.0' 1 July 2016, 33, *available at:* http://www.refworld.org/pdfid/58b017e4391.pdf.
22. Security Concerns (n 14) para 29; Further to the practice of the UK, the Supreme Court of Canada concluded that, although 'generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would constitutionally violate the *Charter's* s.7 guarantee of life, liberty and security of the person [in] an exceptional case such deportation might be justified either in the balancing approach under s.7 or 1 of the *Charter*' in *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, para 129.
23. Guideline No 11 (n 11) paras 2 and 24.
24. Refugee Convention (n 5) art 32.