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## **Principle of Non-Refoulement, Its Relevance, and Exceptions, A critical Analysis**

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### **Abstract**

The principle of non-refoulement, enshrined in Article 33 of the 1951 Refugee Convention, stands as one of the cornerstone protections for refugees under international law, prohibiting the return of individuals to countries where they risk persecution. This paper critically analyzes the significance of non-refoulement within the broader context of international law, exploring its historical development, relevance, and the exceptions provided under Article 33(2). The study delves into the relationship between non-refoulement and human rights law, examining its incorporation into various international legal frameworks such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). The paper also discusses the challenges surrounding its implementation and enforcement, particularly in light of evolving geopolitical dynamics and state security concerns. Further, the paper investigates the exceptions to non-refoulement, focusing on how these limitations have been interpreted and applied by courts and international bodies. The impact of non-refoulement as a customary international law principle is also assessed, alongside its application in international humanitarian law. Ultimately, this work underscores the critical importance of non-refoulement in safeguarding the rights and security of refugees and displaced persons worldwide, emphasizing the global responsibility to uphold this principle in the face of political, security, and humanitarian challenges.

Key Words: Non-Refoulement, Refugee Protection, International Law

### **Introduction**

This article offers a comprehensive understanding of non-refoulement, the historical and legal evolution of this principle, and the legal requirements that are expected of the states. It further explores the exceptions to this principle and elucidates how national security and the rights of individuals offset these. Furthermore, the article will discuss how the principle applies to states and those that are not parties to the Refugee Convention. In the beginning, non-refoulement had not been defined in formal treaties but it was acknowledged in various international practices and treaties on the recognition of asylum seekers and refugees. We can note that after World War II, due to the large number of refugees who wanted to escape from the conflict area, it was necessary to create the rules of refugee protection. This brought about the 1951 Refugee Convention



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in which the principle of non-refoulement was clearly articulated thus barring forcible return of refugees to areas where they might be in danger.(Moran, 2021) Subsequently, that principle was applied outside the refugee law framework, incorporating it into other international human rights instruments such as the Convention against Torture. This adaptation made provisions for any person who might be in a life-threatening situation or face torture or inhumane treatment regardless of the status of being a refugee. Thus, nonrefoulement was no longer just the rule concerning refugees, which was subsequently extended and became the principle that protected the inviolable rights of any person who could be threatened with serious harm in case of return and turned into one of the foundations of modern international humanitarian and human rights law. (Chodorowska & Trylińska, 2021)

In the beginning, refugee law did not encompass formal arrangements that barred individuals from being sent back to a region at risk for their lives. However, the principle of non-refoulement developed from customary processes and initial legal ideas aimed at protecting individuals from persecution and harm. It should be noted that some of the first precursors of the modern prohibition of nonrefoulement were put into practice thousands of years ago and included in regional agreements. For instance, in some religious and cultural rituals, there were prohibitions regarding taking back a deceased to his house or area in case he or she was likely to be retaliated or hurt. In Europe, Asylum Rights provided special protection to people running away from peril, providing the first look at the nonrefoulement concept. (Coleman, 2003) In the 17<sup>th</sup> and 18<sup>th</sup> centuries, several countries practically maintained this principle, giving asylum to persecuted individuals (Grahl-Madsen, 1966). Nevertheless, these practices were not uniform and did not possess the obligatory character of modern law.

The concept was more developed after the First World War and the Russian Revolution when many people were forcibly displaced and this prompted the signing of the *1928 Arrangement Relating to the Status of Refugees Coming from Germany*. This and other early arrangements were some of the first to announce the need for protection against being forcibly returned, although the concept of nonrefoulement was not employed. A major achievement followed with the creation of the *Nansen Passport* through which stateless persons and refugees were issued with travel documents, which they could use to travel safely without being at the risk of being deported. It was an important move towards the codification of refugee rights because it was the first time that the idea of refugees enjoying the right to ask for safe conduct or asylum in other countries was suggested. (Kingsley)

### **Development through Treaty Law**

That nonrefoulement is a principle that was established for the first time on a formal legal basis after the Second World War, at a time when the international community searched for solutions for millions of people displaced by warfare, persecution, and political violence. It was during this period that international instruments were created solely for the protection of refugees leading to the 1951 Convention Relating to the Status of Refugees, which is abbreviated to the 1951 Refugee Convention (Fitzpatrick, 1996). The Convention also achieved a major



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step by formally enshrining the nonrefoulement principle as being one of the cornerstones of international refugee law.

### The 1951 Refugee Convention: A Historical Context

In the post-World War II period, there was an understanding of the need to avoid such a catastrophe as the war and all the refugee tragedy. Millions of people were rendered stateless and helpless, and the world intended to establish legal parameters for refugee status and guarantee refugees' protection.

The 1951 Refugee Convention was adopted by the United Nations, solely for refugee protection, and aims at providing a legal definition of refugee status. The Convention was established more or less because of the situation of the European refugees after the Second World War, and its main purpose was to give refugees the right not to be forcibly sent back to the countries they feared persecution. Out of the principles applying to refugees and asylum seekers, nonrefoulement stands out Article 33 of the Convention is devoted to it. (Stepočkina, 2022)

Region	States Party to the 1951 Refugee Convention	States Party to the 1967 Protocol	Non-Signatory States
Europe	All EU member states, Norway, Switzerland, etc.	All EU member states, Norway, Switzerland, etc.	Some microstates and small territories
Africa	46/54 African states	53/54 African states	None
Asia	7/40+ Asian states	15/40+ Asian states	Many states (e.g., China, India, Japan)
Americas	35/35 American states	35/35 American states	None
Oceania	14/14 Oceanian states	14/14 Oceanian states	None

### States' Participation in the 1951 Refugee Convention and 1967 Protocol

#### Article 33(1) of the 1951 Refugee Convention

Article 33(1) of the 1951 Convention articulates the principle of nonrefoulement in clear and binding terms:

*Nowhere may a Contracting State expel or return a refugee in any way whatsoever to the frontiers of territories in which his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.*

This provision requires that states refrain from returning refugees to places where they face a genuine risk of persecution based on the five recognized grounds: including race, religion, nationality, social group opinion, or membership of a particular political party. Article 33 was a very positive advancement because it afforded anyone in a situation of refugee hood legal protection against forced repatriation no matter their legal standing in the host country (Weis, 1984). The Convention established nonrefoulement both as a state responsibility and a refugee safeguard. Comparatively, by embedding this protection in Article 33, the Convention bestowed upon nonrefoulement a status as easily adoptable by all the signatory states, thus making it one of the most



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universally applicable across international refugee law. It provided a legal basis that has been followed by other international human rights and humanitarian instruments. (Gilani, Zahoor, & Rehman, 2021)

### **Limitations and Exceptions under Article 33(2)**

While Art 33(1) postulates the general principle for refugees, Art 33(2) admits several exceptions, which enable the contracting state to expatriate or deport a refugee, where such a person is considered a menace to national security or public safety. According to Article 33(2):

*The present provision may not, however, be claimed by a refugee who, for reasons therein stated, can properly be regarded as a danger to the peace, order, and tranquility of any country within which he is, or as a person who, having been convicted by a final judgment of a heinous crime against humanity, is likely to endanger the community of that country.*

This exception was included mainly in an attempt to meet the need to protect refugees as well as the security of states that host them. However, it has been given a strict construction in the hands of the courts and tribunals so that the principle of nonrefoulement cannot be easily circumvented. The exception is even allowed only under certain circumstances, commonly with the proviso that the risk the individual refugee poses is grave and established. (Gatt, 2023)

### **Impact of the 1951 Refugee Convention on International Law**

Through Article 33, the 1951 Convention regulates nonrefoulement as an international legal rule initially applicable only to the states that are party to the Convention for Refugees (Duffy, 2008). This codification played an important role in transforming nonrefoulement from the regional or customary notion into formally recognized protection within international law. While refugees had rights status only in Europe through the time of the making of the Geneva Convention, the 1967 protocol modernized the approach by making the principle applicable to all refugees across the globe. (Tokuzlu, 2006)

Further, the principle of nonrefoulement has shaped other international legal documents including human rights instruments as contained in the 1951 Convention. For example, when comparing Human Rights to nonrefoulement; The International Covenant on Civil and Political Rights (ICCPR) and (CAT) both contain some provisions that provide some form of protection against the return of individuals who may undergo torture or inhuman treatment. The impact of the Convention is not limited to its coverage but has effectively used the policy of nonrefoulement to apply it as a standard of no return even if the states are not bound by the Convention. The principle of nonrefoulement was enshrined into international law by codifying it in the 1951 Refugee Convention ensuring one of the core protections for refugees. Today, nonrefoulement is considered the principle of customary international law that applies to all states including those which are not parties to the convention. It is therefore still current and remains at the back of the general provision as the fundamental measure for ensuring refugees' rights and security continue to be upheld globally. While the legal recognition of refugee rights began with the adoption of this general principle in the twentieth century, the 1951 Convention enclosed nonrefoulement in treaty





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law, a modern tenet of refugee protection (Kulish, 2020).

### **Post-World War II Developments**

The aftermath of the Second World War and the mass influx of refugees led to a shift in the international regime's recognition of the need to protect minorities. Since many refugees and internally displaced persons were in Europe and other parts of the world, there was a need to develop new legal measures that would ban the forced repatriation of persons to countries where they risk being persecuted or killed. These circumstances were not only relevant to the formation of the procedural concepts of refugee status determination but also directly affected the formalization and codification of the nonrefoulement principle. In the post-World War II scenario, the world saw a mass migration of people due to intolerance, holocaust, and political turmoil all over the world. The members of the Allied powers and the newly formed United Nations realized that an organized, coercive regime of the refugees' protection was required to avoid further catastrophes. It eventually culminated in the agreement that people who are fleeing persecution should have the right to seek asylum and that states should refrain from pushing refugees back to face danger. (Shah Gilani, Ullah, & Zahoor, 2022)

Nonrefoulement started to be considered an important humanitarian responsibility during this period. While it was at first an ethical notion, it gradually gained legal imperative to make state action not to expel or repatriate an individual to a place where he or she is likely to face adverse consequences.

### **The Influence on New Legal Frameworks**

Formation of the United Nations and Human Rights Instruments:

The formation of the United Nations in the year 1945 provoked the emergence of norms of human rights and refugees. In addition, human rights were given an international legal frame in the form of the (UDHR) formulated in 1948, and several new individual human rights enumerated in Article 3 of the Refugee Convention were already incorporated into the UDHR. It was an alternative to nonrefoulement since it acknowledged the existence of the legal gap concerning people threatened with a loss of liberty or their lives. UNHCR was created in 1950 also to promote international cooperation in refugee matters and to uphold the principles of refugee rights such as nonrefoulement. This was a precursor to nonrefoulement, as it admitted the presence of a legal vacuum in dealing with people under threat of a loss of freedom or life. The establishment of the UN High Commissioner for Refugees (UNHCR) in 1950 was also to facilitate international cooperation in refugee affairs and to uphold the principles of refugee protection including nonrefoulement. (Tekin, 2018)

2. The 1951 Refugee Convention and Codification of NonRefoulement:

The nonrefoulement principle derives its origin and authority predominantly from the 1951 Convention Relating to the Status of Refugees because of the situations that were created by the Second World War. The nonrefoulement principle is stated in *Article 33* of the convention, which restricts states from sending refugees back to their country of origin because they are in Danger of persecution based on their race, religion, nationality, membership in a particular social group, or political opinion (Gammeltoft-Hansen, 2011). This codification



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established nonrefoulement as a fundamental duty incumbent on states that have ratified the treaty, giving it a velocity, a legal certainty that made the protection of refugees around the globe possible.

### 3. Development of Customary International Law:

As more and more states were ratifying either the 1951 Convention or later the 1967 Protocol removing geographical and temporal limitations on the Convention, nonrefoulement emerged as a principle of customary international law. This meant that, even though the countries that were not bound by the provisions of the Refugee Convention were not under a legal obligation to apply nonrefoulement, they started to progressively realize this principle as a legal requirement.

### **Expansion into Other Legal Instruments**

The principle of non-refoulement also had applications beyond the refugee-specific treaties that existed at the time. After WWII, new international human rights frameworks incorporated the principle in broader contexts: (ICCPR): This followed the treaty of 1966 that extended safety against torture and inhuman treatment and prevented the states from the repatriation of individuals to such situations (Shkemi & Dura, 2013).

Convention against Torture (CAT): CAT was ratified in 1984; it provided one non refoulement provision (Article 3), which requires states not to return the person to any country since there is genuine reason to believe that they would be exposed to torture there.

Within these postwar structures, non-refoulement also received international legal legitimacy and has since become enshrined as a core principle of refugee and human rights law. This change from a humanitarian principle to a legal norm is a reflection of the world's reaction to the horrors of World War II and the determination to prevent further infringements on the sanctity and physical integrity of human beings. Although non-refoulement has origins in refugee law, it has been expanded with the universal human rights instruments codified inter alia ICCPR and CAT. These instruments help in stopping the states from sending back the citizens to their countries where they will be subjected to torture and inhuman and degrading treatment. Incorporation of the non-refoulement principle has thus advanced the concept of refugee rights protection to cover any person who is in real danger of being subjected to human rights violations. As was stated in the previous sections, this approach stands on acknowledging the fact that protection from inhumane treatment is a universal principle regarding human rights for everyone, including refugees, which makes non-refoulement an intrinsic part of the international human rights architecture. As a rule of treatment in armed conflict, the nonrefoulement principle is applied under IHL as protection against transfer to the place where the person has a chance of being injured. It is most appropriate for the safety of non-combatants and prisoners of war cases (Fabijanić Gagro, 2014). The principles of this nature are reiterated in humanitarian law documents, including the Geneva Conventions. By applying nonrefoulement to the humanitarian law, the principle also acts as a protection where in the scenario of war and armed conflict the potential vices can occur.

In recent years, nonrefoulement has been restated in numerous international treaties and conventions thus enhancing its importance as a principle of



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international law. Other subsequent conventions, including regional human rights and those that supplement torture, have restated nonrefoulement principles that states have to observe. All of these reaffirmations affirm the principles as legal and obligatory for all states and reaffirm the global commitment to not return individuals to situations that put their lives or rights at risk. Operating as a fundamental principle of refugee protection, nonrefoulement involves a wide range of responsibilities for states and is an important part of international law that focuses on protecting individuals who are in danger of persecution or face risk to their lives or freedom. These obligations are meant not only to prevent states from direct readmission of individuals to danger but also to require states to do nothing that may constitute indirect refoulement. This consists of protection against the risks that could be common for the whole group, the issues concerning indirect refoulement through third countries, procedural guarantees, and criteria for appreciating the risks in case of persons who may be admitted to the territory. Combined, these duties signify the importance of nonrefoulement in not only respecting the compactness of vulnerable persons but also in protecting their lives, thus reminding states of their commitment to meet international humanitarian law standards. This duty is taken further through legal arrangements and processes on how states should deal with such people. Besides these procedural directives, states must also individually consider cases, afford anyone the chance to explain why they should not be expelled, and then carefully decide to expel that person. The legal and moral principles inherent in nonrefoulement mean that states must fall within human rights obligations, always being careful not to cause harm to protected persons. (Haertel, 2022)

### **Protection against Collective Threats**

Another key aspect of nonrefoulement is the principle that the groups of people must not be returned to a place where the group will be in danger. This idea of protection from people endangering the whole group stemmed from cases when some communities – ethnic, religious, or political, face general threats of violence or oppression in their home countries (Kulish, 2020). It means that states should evaluate the threats threatening certain groups in certain circumstances irrespective of individual situations to not expel or return large groups of people who might suffer collectively or collectively be harmed. This principle puts a lot of focus on the assessment of the situation in the origin country, and the conditions that may be a threat to the entire group. Therefore, in addition to banning direct refoulement, nonrefoulement must also prevent the return of individuals into generalized threat situations to ensure that states act preventively in protecting the individuals. The principle also covers the idea of indirect refoulement, wherein it means that while the person is not directly sent back to a hostile country, they are sent to another country that may also deport them back to the area of danger. This prohibition of indirect refoulement requires states to undertake rigorous evaluation of the safety of, as well as the treatment of human rights in the third countries involved in such transfer. For example, a state can transfer an asylum seeker to a third country that is not safe or has a history of deporting asylum seekers to areas where they are likely to be persecuted, and it will still be a violation of nonrefoulement. It therefore



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enshrines the notion that the indirect refoulement rule simply means that states cannot shift the blame; shifting responsibilities to another country to avoid direct responsibility of ensuring that transfers do not put a person at risk of any form of refoulement.

### **Procedural Safeguards and Remedies**

For nonrefoulement to work, member states are obliged to ensure that individuals facing deportation or removal are allowed to challenge their removal. Such protective measures include allowing the concerned person to seek the services of a lawyer, and interpreters and an ability to produce evidence to the effect that the person poses a danger in his country of origin. Moreover, the states should also ensure that there is impartial and detached decision-making for each case in the light of offering effective remedies against wrongful deportation. These procedural safeguards are important for the implementation of nonrefoulement because they provide the individual with a proper opportunity to show what threats they might encounter. Measures are also required where a person is unjustifiably expelled; it can be argued that states can have positive obligations to restore rights or other appropriate actions. Both these procedural measures act as protective barriers against violations and explain the need for implementing transparency, fairness, and accountability when making decisions regarding deportation or return. As mentioned above, states may also be under legal obligations of nonrefoulement to admit persons into their territories if otherwise; they face severe threats in the country from which they came. This aspect of nonrefoulement focuses on the obligation of countries to evaluate risks that the applicants face or may face in the future and where necessary grant asylum to persons who are likely to face persecution or other forms of harm. Although it does not state an absolute requirement for states to let through all endangered persons, this principle ought to make states more compassionate especially when people have no other way out. In this way, the principle of nonrefoulement coherently supports other humanitarian objectives insisting that the states should offer asylum to those people who are exposed to various imminent threats, which does not allow them to avoid further harm with the help of a humanitarian visa for refugees. The principle of nonrefoulement, which is a well-established foundation of refugee and human rights law, is not per se unqualified. In international law, specific circumstances that permit states to lawfully return or expel individuals are provided for despite the general provision on refoulement (Al-Dweikat, 2022). These occur particularly in concerns to do with the security of the state and the people, this being the main reason through which states must protect their people from individuals who are considered a menace. However, the use of these exceptions implies that states must adhere to very high standards to avoid abuse. These exceptions are qualified within Articles 33(2) and 1F of the Refugee Convention, and other general human rights law, which sets out the conditions under which a state may refuse the principle of nonrefoulement to particular persons. These limitations stress a delicate balance between human rights and state security interests and encourage the use of the approach, which tries to see how grave a threat may be against the obligations that states have under international law. (Worster, 2017)





### **Exception under Article 33(2) of the Refugee Convention**

The nonrefoulement principle is perhaps one of the most well-known principles in the refugee and human rights laws; however, it is not an absolute principle. Certain circumstances are accepted by international law, which permits states to lawfully return or expel persons even under the no refoulement principle. These exceptions are mostly based on matters of national interest and security, where states have a right to protect their citizens against persons who are considered a threat. However, their use is subject to certain conditions whereby the states are forced to meet high standards to avoid abuse of the provisions. Refused protection is still within certain provisions of the Refugee Convention such as *Article 33(2) and 1F*, and through other human rights provisions that outline under what conditions states can deny nonrefoulement protection to some persons (Wallace, 2014). Such limitations stress the conflict of interest between the right to personal freedoms and state security threats, fostering an attitude that tries to balance the degree of the threat with the responsibility that states have under international law. Article 1F of the Refugee Convention supplements nonrefoulement protection by denying the refugees' right to protect anybody involved in serious crimes. This article is directed towards persons who have committed a war crime, crime against humanity, or serious nonpolitical crime in a country other than their host country. The rationale for Article 1F is to ensure that persons who have committed serious acts do not trick as refugees to escape justice. For example, persons who have engaged in acts of organized violence or systematic human rights violations may not be considered refugees and therefore not protected by the principle of nonrefoulement. Through this exclusion clause, the international community keeps the idea of refuge from being used as a shield against accountability for atrocious acts. Article 1F also emphasizes the importance of strict screening when deciding on refugee status determination to recognize and exclude all those dangerous individuals due to their previous severe criminal records. One major consideration in nonrefoulement exceptions is a balance between the expulsion decision and with threat posed by the individual. This proportionality principle encourages states to balance the threat posed by an individual with the likely damage that the person is likely to suffer in their country of origin once repatriated. For example, if the subject poses a limited threat to public safety, the state must consider whether such a risk warrants exposing this individual to grave danger or persecution in their home country. The concept of proportionality for instance will prevent states from expelling individuals for petty or perceived threats. This balancing test puts pressure on states to think through what might be done besides expulsion and thus supports nonrefoulement as a principle only in cases where the threat is high and specific.

### **Balance between Individual Rights and National Security**

This conflict between the civil liberties of the asylum seeker and the security of the receiving state is common in nonrefoulement exceptions, in which states are legally obliged to balance these interests. Nevertheless, this right is not unqualified when state security is in peril; it has passed through a process of gradual evolution and remains qualified even today. Yet, any limitation for this right is allowed only when strictly required and only for security reasons.



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International law similarly anticipates that states not only justify the threat but also prove that expulsion is needed to eliminate the threat referencing the basic right of life and freedom from persecution. This balance seeks to guarantee that the national security measures are not injurious to the fundamental rights of individuals in a way that recognizes the legitimate security concerns of states while implementing and applying national security measures. Some Human Rights Acts also include provisions for the exclusion of nonrefoulement under a situation of security of a country. For example according to the European Convention on Human Rights (ECHR) right to nonrefoulement can be limited where an individual is regarded as a threat to public safety or national security (Ahmed, 2016). However, the provisions of these exceptions are generally subject to rigorous review and frequently involve the need for judicial intervention to avoid abusive and unfair implementation. The frameworks of human rights state that the exceptions should only be applied where the common law rules are inadequate and that any departure from those rules must be well supported. They also reaffirm the need to avoid a situation whereby an expelled or returned person will be subjected to inhumane treatment or torture in their home country, which is why great care must be taken. Moreover, the inclusion of nonrefoulement within human rights largely provides additional protection against its misuse for the national security interest while extending rights to protected individuals. Whereas treaty rules require states that are party to the treaties in which the nonrefoulement principle is contained to adhere to the rule, other states not party to these treaties are expected to respect nonrefoulement since it has been widely accepted as a customary international law norm. Customary international law contains norms that have been accepted and persisted in the actions of states and are widely recognized as being legally required, irrespective of state membership to a particular treaty. Nonrefoulement has been described as one of these customary norms; therefore, nonsignatory states are bound by its terms. Like many developing countries, Pakistan has not signed the Refugee Convention but it has an obligation under customary international law not to refugees to their country of origin where they are at real risk of persecution (Gilani, Ali, & Zahoor, 2023)(I. Hussain, 1985). This obligation is indicative of the nonrefoulement principle as well as the affirmation of the roles of all countries, including those that are not signatories to any of the international conventions on refugees, in the provision of protection to refugees.(Allain, 2001)

### **Conclusion**

The conclusion of Article 3 emphasizes that nonrefoulement remains a pillar in refugee and human rights law. It is important as it offers asylum to people who are subjected to serious human rights abuse, persecution, or risk of being killed if they are to be repatriated to their home countries. Being one of the principles of standing customary international law, nonrefoulement is thus, in that sense, a more powerful standard, which constrains all countries, including Pakistan, which is not party to the Conventions, from violating this protection. It is for these reasons that nonrefoulement remains central to the protection of the rights and dignity of vulnerable persons everywhere. In conclusion, the principle of **nonrefoulement**, as codified in Article 33 of the 1951 Refugee Convention,



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stands as a cornerstone of international law, providing critical protection to individuals fleeing persecution and danger. Emerging from the post-World War II humanitarian response, it has evolved into a universally recognized norm, reinforced by both treaty law and customary international law. The principle balances the need to safeguard human rights with state security concerns, offering a legal and moral framework that transcends national boundaries. Its enduring relevance underscores the global commitment to upholding the dignity and safety of refugees, ensuring that no individual is forcibly returned to face threats to their life or freedom. Nonrefoulement remains a testament to the international community's dedication to protecting the most vulnerable in the face of ever-changing global challenges.

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