



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Non-Refoulement in Practice: The Role of Domestic Legislation in Refugee Protection

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Received 16 November 2024; Accepted 17 December 2024; Published 21 December 2024

Non-refoulement is a concept of international refugee law, which means prohibiting the return of individuals to countries where they face human rights violations. This article examines the critical role of domestic legislation in effectively implementing non-refoulement, highlighting how stringent immigration laws and border control measures can obstruct access to protection for asylum seekers. Through an analysis of current practices in various jurisdictions, including the EU and the United States of America, this article illustrates the challenges refugees face due to national policies prioritising security over humanitarian obligations. It emphasises the necessity for clear and transparent procedures for refugee status determination, legal representation, and opportunities for refugees to present evidence. This article advocates for broader interpretations of refugee definitions and the enactment of specific laws that align domestic practices with international standards. By addressing these gaps, states can enhance their commitment to protecting vulnerable populations and uphold their duties according to international law.

Keywords: *non-refoulement, refugee protection, domestic legislation, asylum seekers, immigration law, international law, human rights.*

INTRODUCTION

The principle of non-refoulement stands as the cornerstone of international refugee protection, safeguarding individuals from being returned to territories where they risk persecution, torture, or inhumane treatment. Rooted in international human rights law, refugee law, and humanitarian law, this principle reflects a universal commitment to protecting the dignity and rights of vulnerable populations. While international instruments, such as the 1951 Refugee Convention and the Convention Against Torture, firmly establish this obligation, the practical implementation of non-refoulement largely depends on domestic legal frameworks and policies within sovereign states.

Despite the principle's binding nature as customary international law, significant challenges arise when national interests prioritise security, deterrence, and border control over humanitarian obligations. Stringent immigration laws, administrative barriers, and controversial practices like pushbacks and safe third-country agreements often undermine access to asylum, exposing refugees to further harm. These practices are particularly evident in regions like the European Union and the United States, where restrictive measures frequently conflict with the non-refoulement principle.

This article highlights the critical role of domestic legislation in bridging the gap between international obligations and national implementation. It emphasises the need for clear, inclusive, and transparent refugee status determination procedures, robust legal safeguards, and broader interpretations of refugee definitions. By aligning domestic laws with international standards, states can ensure meaningful protection for asylum seekers. Recognising the inherent dignity of refugees, the article advocates for a humanitarian approach that balances national security with the obligation to protect those fleeing persecution and violence.

THE PRINCIPLE OF NON-REFOULEMENT

The guideline of non-refoulement is the foundation of refuge and universal outcast law. Following the right to seek and enjoy other countries asylum from persecution, as outlined in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment

of the international community to ensure all person's enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.¹

The principle of *non-refoulement* forms an essential protection under international human rights, refugee, humanitarian and customary law. Under international human rights law, the prohibition of *refoulement* is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).² In regional instruments, the principle is explicitly found in the Inter-American Convention on the Prevention of Torture, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union. International human rights bodies, regional human rights courts, as well as national courts have guided that this principle is an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights.³

As the principle is considered a customary law, it is believed to be binding on the States. Although many States respect the principle, few oppose adopting it as a domestic law. The enforcement of any internationally agreed principles can be guaranteed if they are also ratified as a domestic policy or law. This article discusses the importance of a nation's domestic laws in determining the enforceability of the principle of nonrefoulement and, thus, the protection of refugees.

UNDERSTANDING NON-REFOULEMENT

The word non-refoulement derives from the French *refouler*, which means to drive back or to repel. Non-refoulement is a principle of customary international law prohibiting the expulsion,

¹ 'UNHCR Note on the Principle of Non-Refoulement' (*Ref World*, 29 October 2023) <<https://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258>> accessed 14 November 2024

² 'Global Detention Project: Mapping Immigration Detention around the World' (*Global Detention Project*) <<http://www.globaldetentionproject.org/>> accessed 14 November 2024

³ 'The Principle of Non-Refoulement under International Human Rights Law' (*OHCHR*, 07 May 2018) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 14 November 2024

deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons.⁴ Article 33(1) of The Refugee Convention, 1951 states: 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 a particular social group or political opinion.⁵ The principle of non-refoulement applies to both refugees and asylum-seekers.⁶ It means the principle does not restrict itself from protecting the needy till the relevant authorities have declared the 'Asylum-seekers' as 'Refugees'.

THE ROLE OF DOMESTIC LEGISLATION

Like most international laws and principles, the principle of non-refoulement is also restricted in its being implemented in the sovereign States.⁷ Domestic laws become a crucial factor in determining the proper implementation of the principle of non-refoulement.

STRINGENT IMMIGRATION LAWS - A HINDRANCE TO REFUGEES

An important refugee processing policy, namely, the measurement policy, was proposed by Mexico. The State, faced with a growing flow of asylum seekers from the United States, has introduced a waiting list mechanism to facilitate its management.⁸ This listing mechanism facilitates the Mexican Government's efforts to maintain order at the border and prevent a mass influx of asylum-seekers into the United States. The 'Waiting-list Mechanism' and 'Principle of Non-refoulement' are potentially conflicting. If an asylum-seeker applies for asylum at the United States-Mexico border and is delayed or denied entry due to the limitations of the waiting

⁴ 'The Principle of Non-Refoulement. What Is Its Standing in International Law? What Purpose Does It Serve in Refugee Law and Protection?' (EPRAVO.CZ, 22 December 2010) <<https://www.epravo.cz/top/clanky/the-principle-of-non-refoulement-what-is-its-standing-in-international-law-what-purpose-does-it-serve-in-refugee-law-and-protection-68948.html>> accessed 14 November 2024

⁵ Ellen F. D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2021) 42(1) Vanderbilt Journal of Transnational Law <<https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss1/6/>> accessed 14 November 2024

⁶ 'Access to Territory and Non-Refoulement' (UNHCR, 11 December 2023) <<https://emergency.unhcr.org/protection/legal-framework/access-territory-and-non-refoulement>> accessed 16 November 2024

⁷ 'Home' (India4IAS, 18 November 2024) <<http://www.india4ias.com/>> accessed 16 November 2024

⁸ Natalie Ondiak, 'Refugees in a Global Era' (2007) 20(3) Journal of Refugee Studies <<https://doi.org/10.1093/jrs/fem025>> accessed 25 November 2024

list mechanism, that person may be forced to return to a country where they may be at risk of persecution, which may be a violation of the principle of nonrefoulement. The United States Government maintains that the waiting list mechanism is necessary to prevent abuse of the asylum system and to maintain order. However, critics have argued that this practice may result in asylum-seekers being put at risk while awaiting processing, thereby violating the non-refoulment principle.⁹

IMMIGRATION POLICIES IN THE EUROPEAN UNION

Over the past decade, the EU has witnessed an increasing number of third-country nationals trying to reach its borders to find a haven there. In these difficult times, both the EU institutions and its member states have continued to proclaim their adherence to the right to seek asylum and the principle of non-refoulment while at the same time exercising (member states) and tolerating (EU institutions) sometimes rigid border policies which have, in practice, repeatedly caused the circumvention or breaches of these rules. Some states exercise deterrence techniques to keep migrants and refugees outside their borders and to prevent refugees' access to meaningful protection. There are pushbacks and border police obstruction techniques and then there are subtler techniques that are used in administrative procedures and which exploit legal uncertainties by relying on the concepts of the 'safe third country', 'first country of asylum', and 'safe country of origin'. EU member states' border practices and their unwillingness to admit third-country nationals to a refugee status determination procedure on their territory can result in refoulement. Even though member states mostly avoid direct refoulement to the country or territory of origin, which threatens the third-country national with persecution or serious harm, they also avoid offering protection within their territory. Deterrence and responsibility shifting is the name of the game played by defector states.¹⁰

⁹ Liu Jinhao, 'The Principle of Non-Refoulement: The Legitimacy of Refugee Policies in Western Countries' (2024) 1(6) Art, Culture and Language <<https://doi.org/10.61173/sp8dkq68>> accessed 25 November 2024

¹⁰ Iris Goldner Lang and Boldizsár Nagy, 'External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement' (2021) 17(3) European Constitutional Law Review <<https://doi.org/10.1017/S1574019621000249>> accessed 25 November 2024

HUNGARY'S PUSHBACK POLICY AND LEGAL CONTROVERSIES

The most radical move to legalise pushback was made by Hungary. In the summer of 2020, it used COVID-19 as a pretext to adopt a law ordering the turning away of everyone who approaches the Hungarian border intending to seek protection. In reality, it was a reaction to the judgment of the Court of Justice in *FMS and Others v Hungary*. In its judgment, the European Court of Justice found illegal the previous system of pushing back over the border fence with Serbia all asylum seekers without the right to stay in Hungary. The Court also declared that the Hungarian practice of detaining an applicant for international protection in the transit zone was precluded by Articles 8 and 9 of Directive 2013/33, as it was based on the sole ground that the applicant was unable to provide for his or her needs. Additionally, such detention was taking place without a reasoned decision ordering the detention, without investigating the necessity and proportionality of such a measure, and without the availability of judicial review of the lawfulness of the administrative decision ordering the detention. The United Nations High Commissioner for Refugees immediately demanded the withdrawal of the Act, while the Commission expressed concerns and launched infringement proceedings.

PUSHBACKS IN CROATIA AND THE BALKAN ROUTE

During the last few years, many countries have been accused of the act of pushback to stop people from reaching European territory. Even though people who flee a place where they can be in danger because of war or persecution must be given refuge, many European countries have been violating this obligation, and one of them is Italy. Croatia is another country that has been repeatedly accused of the act of pushback. In general, according to the European Centre for Constitutional and Human Rights, the Balkan route had been a safe path for people who wanted to go to Northern and Western Europe from Greece. However, in 2016 the countries of this route closed their borders, and even though the European Council, in March of the same year, announced that the 'irregular' flows of refugees had ended, people continued to migrate on this route, with many of them finding death instead of protection. The number of collective expulsions has increased, with many claiming that they had no access to the asylum procedure and also being violently treated during their pushback to Serbia or Bosnia. The pushbacks at the Croatian borders are not isolated cases but part of a systematic practice of collective expulsions,

according to the case report of the European Center for Constitutional and Human Rights. From several interviews that Human Rights Watch has taken, there were testimonies which were revealing that the pushbacks were accompanied by detention (before they were pushed back) and violence from the Croatian police, such as beating them with batons, kicking and punching them, stealing their money and mobile phones and even destroy them. Those have been confirmed from different documentation of Human Rights Watch, and UNHCR has received reports about Croatia pushing back 2,500 migrants and asylum seekers to Serbia and Bosnia since the beginning of 2018 (Human Rights Watch, 2018). According to the European Council on Refugees and Exiles (2021), between June 2019 and September 2021, more than 30,000 pushbacks were reported, accompanied by the use of violence. Despite all these reports and testimonies, crucial has been the fact that for the first time, the European Court of Human Rights (ECtHR) has recognised the pushback of migrants and asylum seekers from Croatia in the judgment of *M. H. and Ors v Croatia*. The Deputy Director for Europe at Amnesty International, Massimo Morratti, has said that other European countries can take the message from this ruling that pushbacks, collective expulsions and the denial to people to seek asylum violate the European Convention on Human Rights.¹¹

SAFE THIRD COUNTRY POLICIES: A MEANS OF BURDEN-SHIFTING

The term ‘Safe Third Country’ is often used to denote a variety of situations. Leaving extra-procedural configurations aside, there are two main connotations. What is implied in UNHCR documentation, mainly in EXCOM Conclusion 58, has subsequently been referred to as the ‘Country of First Asylum’ principle. This notion responds to the desire to combat the irregular movement of refugees who have already been granted protection in one country and decide subsequently to reach another country without authorisation, where they file a new asylum request. Adherents to this concept usually invoke Article 1E of the Refugee Convention as a basis of support so that those who have already found asylum in one country may be refused protection in the second State and returned there. Given the silence of the 1951 Refugee Convention concerning the allocation of responsibility for asylum claims and in the absence of

¹¹ Malvina Kola, ‘The principle of non-refoulement, the pushbacks of asylum seekers by Greece, and the role of Frontex’ (Masters in Human Rights and Migration Studies thesis, University of Macedonia 2023)

an explicit requirement to recognise refugees and grant them permanent protection, States are free to send asylum seekers to safe countries, provided that their obligations under the Convention, and particularly the non-refoulement clause in Article 33 CSR, are observed. It is difficult to maintain that safe third country mechanisms rest on pre-existing protection obligations accepted as such by the readmitting State or that such interpretation of protection responsibilities stands on firm ground. Nor does this situation reflect international cooperation for the provision of asylum to refugees.¹² The primary purpose of readmission agreements, as generally stated in their preambles, is to strengthen cooperation to combat illegal immigration more effectively. Safe third-country returns are hence more likely to be conducive to burden-shifting than burden-sharing. Their immediate result is not the diminution of the global numbers of asylum seekers but the displacement of the responsibility to provide international protection, which, in the absence of specific guarantees, may lead to further orbiting and refoulement, feed legal uncertainty, and potentially defeat the purpose of the 1951 Convention.¹³

SOVEREIGNTY, NATIONAL SECURITY AND REFUGEE RIGHTS

The immigration laws of the sovereign States are often formulated to keep immigration as minimal as possible. They also use bad methods to refool the asylum-seekers. Even when the domestic policies have the objective of admitting the refugees, the lengthy processes of admission formulated by the States make it difficult for these vulnerable people to stay strong in their difficult, demanding times. The States, being sovereign, seem to prioritise their national security and thus become hostile towards the asylum-seekers. They tend to strictly push back those looking to enter the borders. This results in the victims going back to the places where they face threats. Sometimes, the States don't even have any domestic laws or policies that might give a chance to the asylum-seekers to apply for protection. The recent trend of sending refugees to safe third countries does not ensure human rights protection.

¹² *Ibid*

¹³ Violeta Moreno-Lax, 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties', in G.S. Goodwin-Gill and P. Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Martinus Nijhoff, 2015) 665-721

DOMESTIC LEGISLATION AS A MECHANISM FOR IMPLEMENTING NON-REFOULEMENT

All these gaps between the domestic legislation and the policy of non-refoulement can be filled by enacting specific laws by States to protect refugee rights and grant asylum-seekers a sense of security. First of all, the interpretation of the term refugees should be made more inclusive by the States. States should gather data on the number of asylum-seekers. This will help to gather the needed number of resources. If asylum legislation is adopted by a State, there should be a proper, clear procedural code to enforce it. It makes the enforcement easier for the executives, thus ensuring accurate implementation. Instead of uniform legislation for the whole border of a State, there should be modified legislation for the borders having different terrains. The existing international laws can be referred to formulate domestic legislation. The 'Asylum Procedures Directive' and the UNHCR Guidelines, 2002 are a few such directions.

The Asylum Procedures Directive is compatible with different, sometimes even contrasting, properties of domestic asylum policies. The risk of failing common standards and the principles of international refugee law is thus not only a matter of implementation but is already inherent in the directive's design. Meanwhile, the Commission has launched a new proposal, which aims to replace the Asylum Procedures Directive with a regulation. Directly applicable, regulation is expected to prevent divergences resulting from the transposition of EU directives into domestic legislation. Determining refugee status stands out as an important factor. For this, States can list out parameters through which an asylum-seeker can be declared as a refugee. These parameters should be flexible. However, the difficulty of knowing the truth behind an asylum-seeker's contentions is difficult to determine. This can make the national security of the State vulnerable. States should be more hospitable when admitting refugees by assessing every individual's case as an independent and different case with varying circumstances.

CONCLUSION

However, the effective implementation of this principle is heavily influenced by domestic laws and policies, which can either facilitate or obstruct access to protection. As highlighted in this article, various challenges arise from stringent immigration laws, border control measures, and

the misuse of safe third country agreements, all of which can lead to violations of non-refoulement.

To bridge the gap between international obligations and domestic practices, states must take proactive steps to align their legislation with the principles of non-refoulement. This includes enacting specific laws that protect refugee rights, broadening the definition of who qualifies as a refugee, and ensuring that asylum procedures are clear, fair, and accessible. Additionally, states should prioritise the establishment of robust procedural safeguards that guarantee the right to legal representation and the opportunity for asylum seekers to present their evidence without undue barriers.

Furthermore, states must adopt a more humanitarian approach in their immigration policies, recognising the inherent dignity and rights of those seeking refuge. By fostering an environment that values compassion and protection over deterrence and exclusion, countries can fulfill their international obligations while also addressing legitimate security concerns.

As global migration continues to rise due to conflict, persecution, and climate change, the commitment to non-refoulement must remain unwavering, ensuring that all individuals in need of protection receive the safety and security they deserve.