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NON-REFOULEMENT AND ACCESS TO ASYLUM

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Abstract

Contemporary border management situations may trigger refoulement, whereas international refugee law and human rights law prohibit the return to a risk of persecution, torture, inhuman or degrading treatment or punishment. The applicability of non-refoulement, once a State exercises effective control over an individual by his officials, is contravened by international deterrence strategies. Practices of non-entrée are measures taken by States to deal with mass refugee influxes, but breach the fundamental prohibition against refoulement and result in limiting access to asylum. In the EU, non-refoulement and the prohibition of collective expulsions are tightly linked with for safeguarding access to the asylum procedure. The principle of non-refoulement also comes to play in the event of a transfer in the framework of the Dublin Regulation and upon a return after a negative and final decision on the application or as a possible consequence of the ending of the protection. Apart from a few and specific exceptions, the principle of non-refoulement has an absolute nature that ensures the right to asylum, even in cases of emergency for a Member State.

Keywords

Mass Influx, Deterrence, Border Management, Push-Backs, Access to Asylum

1. Introduction

Non-refoulement is a key principle in contemporary international refugee law. Alongside with the prohibition of collective expulsions, it helps to ensure access to international protection and to provide the necessary safeguards upon forced removal. Apart from specific exceptions, the principle of non-refoulement safeguards the protection against torture, inhuman or degrading treatment or punishment. In the EU, the returns or Dublin transfers bring non-refoulement into challenge in cases of emergency.

2. Legal grounds

The concept of non-refoulement is part of customary international law and is most prominently reflected in the 1951 Geneva Convention relating to the Status of Refugees – therefore referred to as “the Convention”- (Article 33(1)) and its 1967 Protocol. It also forms part of primary EU law (Article 78 (1) of the Treaty on the Functioning of the EU and Article 18 of the Charter of Fundamental Rights of the European Union). It is further based in Article 3 of the 1967 United Nations Declaration on Territorial Asylum (UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997) and in the Resolution on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967 (Council of Europe: Committee of Ministers, 1967).

3. Scope

3.1 Prohibited conduct

The prohibition of refoulement includes any type of removing refugees or asylum seekers by force to countries of origin or any country where the refugee would face persecution (Cambridge University Press, 2003). It involves direct return to a country where the person would be in danger, or removal to third countries where there is a risk of “indirect refoulement” to such countries (*M.S.S. v. Belgium and Greece*, 2011, para. 293).

The principle of non-refoulement also implies that refugees or asylum seekers cannot be prevented from requesting protection, even if they enter unlawfully, or if they are at the border. It

refers to non-rejection at the frontier, if rejection would result in return to a country of persecution. It may also concern fences, non-admission of asylum seekers, push-backs of boat arrivals or interdictions on the high seas. If there are no places along the border for the asylum seekers to request asylum, the presence of a fence does not comply with obligations related to access to international protection. (European Union: European Agency for Fundamental Rights, *Scope of the principle of non-refoulement in contemporary border management: evolving areas of law*, December 2016, page 17), (UN High Commissioner for Refugees (UNHCR), *La protection des refugies en droit international*, 2008)

Furthermore, non-refoulement obligations also derive from the prohibition of removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture, cruel, inhuman or degrading treatment or punishment (European Union: European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, June 2014)

3.2 Council of Europe – Article 3 ECHR as the corner stone for return

The European Convention of Human Rights (ECHR) contains no express provision relating to asylum or protection against refoulement and is not an international instrument concerned with the protection of refugees per se. Article 3 is an absolute prohibition, considered by the European Court of Human Rights (ECtHR) as an effective means of protection against all forms of return to places where there is a risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment. There needs to be a minimum level of severity of the ill treatment to be considered, a real risk and not a mere possibility of being subjected to ill treatment and substantial ground to assume the existence of such a real risk (*Soering v. The United Kingdom*, 1989), (*H.L.R. v. France*, 1997)

3.3 Actors

The state is responsible for the actions of all of its agencies, who exercise de facto or de jure control over an individual, whether they act under orders, or on their own accord. State officials such as the police, security forces, other law enforcement officials, and any other state bodies can be actors of refoulement.

4. Limitations

The principle of non-refoulement does not apply when refugee status is not needed or is no longer required (Article 1(C), (D), and (E) of the 1951 Geneva Convention), or for overriding reasons of national security or safeguarding the populations (Asian-African Legal Consultative Organization (AALCO), 1966, p.335)). This also applies to those asylum-seekers that are excluded from refugee protection (Article 1F of the 1951 Geneva Convention). Also, when a person is regarded as a danger to the security of the country or constitutes a danger to the community of that country (Article 33(2) of the 1951 Geneva Convention) or for safeguarding national security or in order to protect the community from serious danger, as in the case of a mass influx of persons. EU Member States may revoke, end or refuse to renew refugee status when there are reasonable grounds for regarding the person as a danger to the security of the Member State or if, having been convicted by final judgment of a particularly serious crime, they are a danger to the community (Articles 14(4) and 14(5) of the EU Qualification Directive).

5. Application of non-refoulement

According to UNHCR, the principle of non-refoulement applies not only on a state's territory, but also at a state's borders, and on the high seas (UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007).

5.1 Measures within the territory

5.1.1 Collective expulsions

Collective expulsions refer to the return of a group of persons without any examination of the individual situation of the persons concerned; instead, a single measure is taken to expel all persons having the nationality of a particular state (Council of Europe: European Court of Human Rights, *Fact sheet - Collective expulsions of aliens*, November 2013), (UN High Commissioner for Refugees, *UNHCR Manual on Refugee Protection and the European Convention on Human Rights*, August 2006).

5.1.2 Return

The Return Directive (2008/115/EC) is not considered a part of the CEAS, but its Article 4 shows that the principle of non-refoulement needs to be respected when returning illegally staying third country nationals (Council of Europe: Parliamentary Assembly, 2013).

5.2 At borders

States have by international law a right to control the entry of migrants into their territory. States may send an individual to a third State, provided that the person would not be at risk of persecution if sent to that third State. However, states that turn asylum seekers away at their border or erect walls and fences to restrict access to asylum, can breach the prohibition of refoulement (*Amuur v. France*, 1996, paras. 43 and 5). Thus, borders should not be closed or impenetrable to prevent the entry of refugees, as this may violate the state's non-refoulement obligations.

5.3 Extra-territorial application

A state's obligations are engaged as soon as the State can be said to be exercising effective control by actions or omissions. The ECtHR in *Hirsi Jamaa v. Italy* (*Hirsi Jamaa and Others v. Italy*, 2012) and the UN Committee Against Torture in *Marine I* (*J.H.A. v. Spain*, 2008) both held that states are bound by the prohibition of refoulement from the moment a person comes within the jurisdiction of a certain state, even if this person is outside the state's physical territory. This ruling was reinforced by the UN Special Rapporteur on Torture who explained that "the obligations enshrined in the Torture Convention also apply to state vessels patrolling or conducting border control operations on the high seas and states' pushbacks of migrants under their jurisdiction can breach the prohibition of torture and ill-treatment and non-refoulement obligations (UN High Commissioner for Refugees, *Rescue at Sea. A Guide to Principles and Practice as Applied to Refugees and Migrants*, January 2015). The decisive criterion for "effective control", which generates extraterritorial human rights obligations, is the relationship created between the actor(s) and the victim(s) of the violation. When it comes to de facto control, where a certain level of physical constraint is required, de jure responsibilities are created (International Association of Refugee Law Judges, 2011) (UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007).

Hirsi – a landmark case: In *Hirsi Jamaa and Others*¹ v Italy the ECtHR clarified that whenever state agents exercise de facto control or authority over an individual, then that state is obliged to respect the principle of non-refoulement, even if the state is operating outside its own territory. Furthermore, the prohibition of collective expulsions also applies to measures taken at high seas, when they aim at preventing migrants from reaching the borders of the state or pushing them back to another state (*Hirsi Jamaa and Others v. Italy*, 2012, paragraphs 74-75, 180-181 and 183-186).

5.4 Deterrence strategies

In order to quell the tide of refugees, states have pursued a series of measures to prevent refugees and other migrants² from entering their territory. These have included imposing restrictive visa regimes and air carrier sanctions, erecting physical barriers at borders, the summary rejection of asylum-seekers at borders or points of entry, creating international zones, creating buffer zones or designating safe areas as well as the maritime interception of asylum seekers and other migrants.

Pushbacks, interception on the High Seas, off-shore processing arrangements, financial assistance and other policies of extra-territorial deterrence are pursued, sometimes under the guise that a receiving country is safe. Within the EU, the Dublin Regulation operates so as to prevent refugees from movement within the Union, but has placed a difficult burden on Italy, Greece and Spain (European Union: European Agency for Fundamental Rights, *Guidance on how to reduce the risk of refoulement in external border management when working in or together with third countries*, December 2016) (European Union: European Agency for Fundamental Rights, *Fundamental Rights at Europe's Southern Sea Borders*, 2013) (Overseas Development Institute (ODI), 2016), (Council of Europe: Parliamentary Assembly, 2011)

¹ ~~The case concerned Italy's push back practices of Somali and Eritrean migrants travelling from Libya who had been intercepted by the Italian authorities at sea, way out of Italian territorial waters by the Italian authorities and sent back to Libya. The ECtHR noted that the personnel on the military ships which returned the migrants to Libya were neither trained to conduct personal interviews nor assisted by interpreters or legal advisers. It concluded that the absence of such guarantees made it impossible to examine the individual circumstances of each person affected by the return measures.~~

² Immigration policy is one of the platforms through which the government can encourage or discourage and shape migration (Mashitah hamidi, 2016)

US (geographic limitation of non-refoulement): By preventing people from landing in the US and not being able to make a claim for refugee status, these persons cannot avail themselves of the principle of non-refoulement.

Australia: They are processing refugee claims offshore. However, refugee claimants are living in remote refugee camps for protracted periods of time, which constitutes harsh and unusual treatment.

EU- Turkey: According to the EU-Turkey deal (agreement) of the 18th March 2016, asylum-seekers are being held in refugee settlement centers and then sent back to Turkey; they are not allowed to travel to any EU States to claim asylum (Amnesty International, 2017), (UN News Service, 2016).

As it is shown through the combination of the following tables, the construction of fences in Central EU and the EU-Turkey deal have both resulted in Member States receiving fewer applicants in 2017 than in 2016 or 2015 (Hungarian Helsinki Committee, 2017), (UN High Commissioner for Refugees (UNHCR), *Regional Refugee and Migrant Response Plan for Europe - Eastern Mediterranean and Western Balkans Route, January-December 2016*).

Table 5.3.1: *Asylum applicants –annual data by Eurostat*³

	2014	2015	2016	2017
EU (28)	626.960	1.322.825	1.259.955	237.335
GREECE	9.430	13.205	51.110	20.325
GERMANY	202.645	476.510	745.155	64.871
ITALY	64.625	83.540	122.960	48.328
HUNGARY	42775	177.135	29.430	1.548

Table 5.3.2: *Arrivals detected by Frontex*⁴

³<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00191&plugin=1>

	JAN-AP 2017	COMPARED TO 2016
EU	47.000	-84%
ITALY	37.200	+33%
GREECE	6.100	-96%

Some EU Member States have similarly sought to limit the extraterritorial application of the prohibition of torture and ill-treatment to minimize its impact on expulsion cases. In *Saadi* (Council of Europe: European Court of Human Rights, 2008), the ECtHR made clear that Human rights law allows for no derogations; the absolute prohibition of torture allows for no balancing of the risk of torture against national security risks and is not subject to any exception whatsoever. Since Article 3 provides an absolute prohibition, that provision imposes an obligation not to take into account the conduct of the person concerned, however undesirable or dangerous, and therefore not to send away any person who would run a real risk of being subjected to such treatment.

6. EU Acquis

Non-refoulement and the prohibition of collective expulsions are intrinsically linked with, if not critical for safeguarding access to asylum through Common European Asylum System (CEAS). Non-refoulement intends to protect persons by prohibiting their return back to a country where they could be at risk of ill treatment. The prohibition of collective expulsions guarantees a thorough examination, on an individual basis, of any claim to enter the territory and to move on and ‘go ahead’. The principle of non-refoulement returns to the fore on the so-called ‘asylum route’ in the event of a transfer in the framework of the Dublin Regulation and upon a return after a negative and final decision on the application or as a possible consequence of the ending of the protection.

⁴ <http://frontex.europa.eu/news/arrival-of-migrants-in-april-italy-higher-than-year-ago-numbers-in-greece-drop-4MeK0Z>

First contact officials play a key role in the access to the asylum procedure. Their role in ensuring access to the asylum procedure, stipulated in Article 3a of the Schengen Borders Code mentioned here above, has been further enhanced by the EU asylum framework, especially by the recast Asylum Procedures Directive (APD).

7. Transfers under the Dublin system

The Dublin system is based on the notion that all States Parties have similar asylum systems and safeguards, and that therefore they are assumed safe for all asylum seekers. In *M.S.S. v Belgium and Greece*⁵, the European Court of Human Rights decided that a Member State may not transfer an asylum seeker to the responsible Member State where due to systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers, it is believed that there is a real risk of the asylum seeker to be subjected to inhuman or degrading treatment (Council of Europe: European Court of Human Rights, 2011), (European Council on Refugees and Exiles, 2013).

8. Conclusion

Non-refoulement is a key principle safeguarding international refugee protection. More specifically, States are bound by international treaties and customary law not to transfer (“refouler”) any individual to another country if this would imply human rights violations, mainly torture, ill-treatment or any form of persecution. In cases of emergency such as mass influxes, States should take international responsibility, safeguard access to asylum and abstain from any deterrence action.

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⁵ Belgium was held to be in violation of Art. 3 and Art. 13 ECHR for exposing the applicant (asylum seeker) to the risks arising from the deficiencies in the asylum procedure in Greece. The Belgian authorities knew or ought to have known that the applicant had no guarantee that the Greek authorities would seriously examine his asylum application.

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