Observatoire ARGA

ARGA Atlas

COLLAPSE OF NON-REFOULEMENT

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Purpose of the document:

This report provides a systematic analysis of the growing gap between the formal strength of the principle of non-refoulement and the actual practices through which that protection is being eroded in contemporary migration, extradition and border-control regimes. It treats non-refoulement not as an abstract humanitarian slogan but as a binding legal limit on state discretion, one that is still formally recognised across international and European legal frameworks, yet increasingly undermined through procedural filters, externalisation, safe third country concepts, accelerated proceedings, weak remedies and the fragmentation of institutional responsibility. The purpose of the report is to show how this shift from norm to functional depletion operates, what legal risks it creates and which protection strategies remain workable. (UNHCR)

CONTENTS

1. EXECUTIVE SUMMARY

The principle of non-refoulement remains a cornerstone of international protection. In the 1951 Refugee Convention it appears as a prohibition on returning a refugee to territories where life or freedom would be threatened; in Article 3 of the Convention against Torture it is framed as a prohibition on expulsion, return or extradition where there are substantial grounds for believing that a person would face torture; in EU law it is reflected in Article 19 of the Charter; and in the case-law of the European Court of Human Rights it is developed through the absolute nature of Article 3 ECHR. Formally, this legal architecture looks solid. In practice, however, the problem is not the disappearance of the norm but the construction of administrative and procedural systems in which the risk of refoulement is not openly denied but diluted through presumptions of safety, accelerated procedures, barriers to access, weak suspensive remedies and the transfer of responsibility to other states or externalised control zones. (UNHCR)

For that reason, it is more accurate to speak not of the legal abolition of non-refoulement, but of its institutional exhaustion. The current crisis appears where states preserve the language of compliance while redesigning procedures so that a real individual risk assessment is delayed, narrowed or made practically unavailable. In that sense, the collapse of non-refoulement is not the formal death of the rule but the destruction of its protective function. (European Union Agency for Asylum)

The central practical conclusion is that protection based on non-refoulement now requires more than citing the rule itself. It requires attacking the procedure through which the state attempts to empty that rule of effect. A strong legal strategy must address access to procedure, individualisation of risk, the prohibition of chain refoulement, the right to an effective remedy, country-of-destination evidence and scrutiny of externalised or intermediary return mechanisms. (HUDOC)

2. WHY THIS ISSUE HAS LEGAL AND INTERNATIONAL SIGNIFICANCE

Non-refoulement matters far beyond asylum in the narrow sense. It operates in extradition, return, deportation, refusal of entry, border rejection, maritime interception and other forms of transfer to another state's control. The Committee against Torture has explicitly clarified that, for the purposes of Article 3, "deportation" includes expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier and pushback operations, including at sea. That clarification destroys the convenient state fiction that refoulement begins only once a formal deportation order is issued. Law has moved well beyond that illusion, even if administrations often have not. (OHCHR)

The legal significance of the issue is reinforced by the fact that non-refoulement is tied to absolute guarantees. Under Article 3 ECHR and Article 3 CAT, the question is not one of balancing administrative convenience against public policy, but of prohibiting transfer where there is a real risk of torture or inhuman or degrading treatment. In EU law, Article 19 of the Charter expressly prohibits removal, expulsion or extradition to a state where there is a serious risk of the death penalty, torture or other inhuman or degrading treatment. State discretion is therefore limited from the outset. (ECHR-KS)

Its international significance today is also linked to the changing architecture of migration control. The EU and European states increasingly rely on screening, border procedures, externalisation, safe third country frameworks and tighter coupling between asylum and return procedures. Even where these frameworks formally invoke respect for non-refoulement, they increase the risk that the individual assessment of danger will be replaced by presumptions of manageability. This is where the central contemporary conflict lies: the rule survives, while procedure is slowly redesigned against it. (EUR-Lex)

3. NORMATIVE AND INSTITUTIONAL FRAMEWORK

The starting point is Article 33(1) of the 1951 Refugee Convention, which prohibits returning a refugee to territories where life or freedom would be threatened for Convention reasons. UNHCR consistently describes non-refoulement as the cornerstone of international refugee protection and stresses that the obligation extends to questions of access to territory and to extraterritorial forms of control. (UNHCR)

In international human rights law, the framework is broader. OHCHR explains that non-refoulement prohibits the transfer or removal of persons from a state's jurisdiction or effective control where there are substantial grounds for believing they would face irreparable harm, including torture, ill-treatment or other serious human rights violations, and that the principle applies to all migrants regardless of status. The Human Rights Committee, in General Comment No. 36, likewise holds that states must not remove, extradite or otherwise transfer persons where there are substantial grounds for believing there is a real risk of irreparable harm, including under Articles 6 and 7 ICCPR. (OHCHR)

In European law, that framework is supplemented by Article 19 of the EU Charter, the Asylum Procedures Directive 2013/32/EU, the Return Directive 2008/115/EC and practical guidance issued by EUAA. The essential point is simple: non-refoulement must be respected not only at the final stage of removal, but throughout the procedure, including access to the procedure, first-instance

examination, appeal and return. EUAA expressly describes it as an essential and crucial safeguard throughout the asylum procedure. (EUR-Lex)

4. KEY MECHANISMS OF EROSION AND ABUSE

The first mechanism is blocking access to procedure itself. If a person cannot lodge a protection claim, cannot be heard or cannot obtain an individual assessment of risk, the formal existence of non-refoulement offers little protection. That is why both UNHCR and EUAA link non-refoulement to access to territory and access to asylum procedures, not merely to the final removal decision. (emergency.unhcr.org)

The second mechanism is procedural acceleration, through which the right to an effective remedy becomes illusory. The Asylum Procedures Directive and EUAA materials make clear that, in cases engaging non-refoulement, the remedy must be effective, and in many situations the critical issue is whether it has an automatic or otherwise real suspensive effect. Where an appeal exists only on paper, while removal may occur before risk is assessed, protection becomes decorative. (EUR-Lex)

The third mechanism is the use of safe third country concepts and chain refoulement. The issue is not merely whether the removing state itself sends the person directly to a country of torture; it is enough that the person is transferred into a jurisdiction from which further unsafe removal is foreseeable. In Ilias and Ahmed v. Hungary, the ECtHR stressed the duty to assess the risk of indirect refoulement through Serbia. That remains one of the most important points in modern practice: responsibility does not disappear merely because danger is distributed along a chain. (HUDOC)

The fourth mechanism is externalisation. By moving migration control beyond traditional territorial procedures, into transit zones, maritime operations, joint screening systems or arrangements with third countries, states try to present what is happening as logistical management rather than a legally relevant act engaging responsibility. Yet international materials increasingly make clear that non-refoulement applies wherever a state exercises jurisdiction or effective control, and that contemporary externalisation policies may engage state responsibility. (UNHCR)

5. TYPICAL SCENARIOS AND PATTERNS OF PRACTICE

A classic scenario is transfer through a formally safe route without any real examination of actual conditions. That was central to M.S.S. v. Belgium and Greece, where Belgium relied on an interstate presumption and transferred the applicant without adequately assessing the real conditions and risks in Greece. The Court showed that mutual trust between states does not remove the duty to verify whether a transfer would expose the person to treatment contrary to Article 3. (HUDOC)

Another recurring scenario is border or maritime pushback designed to prevent procedural entry into the protection system. The Committee against Torture explicitly includes pushbacks, including at sea, within the scope of Article 3. This makes legally untenable the idea that a state has no duty to assess risk simply because it reframed the event as border management rather than formal deportation. (OHCHR)

A third scenario is the tight coupling of asylum rejection and return decisions without meaningful procedural separation. Recent EU acts aim to reduce the “gap” between rejection of international protection and a return decision, which may increase administrative efficiency but also heightens the danger that the risk of refoulement will be displaced by speed, workflow and removal logistics. Whenever speed becomes a system value, individual protection usually begins to irritate the administration. That is rarely a healthy sign. (EUR-Lex)

6. RISK ASSESSMENT AND PROBLEM AREAS

The main risk lies in the gap between the norm and procedural reality. A state may point to the formal existence of an asylum process, appeal or screening mechanism, yet if the person has no real access to counsel, interpretation, preparation time or an opportunity to submit evidence, non-refoulement remains declaratory. (European Union Agency for Asylum)

A second risk is the fragmentation of responsibility. Different bodies are responsible for border control, asylum, return, detention, external cooperation and diplomatic assurances. As a result, each institution may claim its own segment of the system is neutral, while the danger arises somewhere further down the chain. For protection work, this means the case must be built against the chain, not merely against a single administrative act. (HUDOC)

A third risk is the normalization of exceptions. The wider the use of safe country concepts, instrumentalisation frameworks, external processing and accelerated border procedures, the greater the likelihood that individual assessment will be replaced by group presumptions. In its 2024 legal considerations, UNHCR specifically stressed that the right to seek asylum and protection from refoulement must be preserved in all situations, including so-called instrumentalization. (Refworld)

7. INTERNATIONAL AND EUROPEAN STANDARDS

At least five firm standards emerge from international and European materials. First, non-refoulement is broad and covers not only deportation in the narrow sense, but also extradition, return, frontier rejection and pushbacks. Second, the obligation applies wherever a state exercises jurisdiction or effective control. Third, risk assessment must be individual and based on all relevant circumstances. Fourth, the remedy must be effective before removal, not merely after it. Fifth, states must take account of the risk of indirect or chain refoulement. (OHCHR)

These five elements should structure any modern protection strategy. Any system that preserves the rhetoric of rights while undermining even one of these components in practice is, in substance, weakening non-refoulement even if it never openly denies the principle. (European Union Agency for Asylum)

8. PRACTICAL FINDINGS AND A LEGAL-RESPONSE MODEL

An effective legal response must operate on several levels. The first is the immediate documentation of individual risk, including country evidence, medical material, procedural status, past persecution, risk of torture or ill-treatment and the danger of chain refoulement. The second is procedural attack: access to procedure, the right to lodge a claim, interpretation, legal assistance, time, suspensive effect and the prohibition of removal before risk review. The third is institutional decomposition: counsel must identify which authority, at which stage, creates the risk, and must prevent the state from dissolving responsibility across agencies. The fourth is international escalation: UN mechanisms, interim measures, supervisory engagement and evidence work addressing externalisation routes and safe-third-country presumptions. (European Union Agency for Asylum)

In practical terms, non-refoulement claims are rarely won today by one grand moral formula. They are won by precise procedural construction of risk and by dismantling the legal fictions through which states try to present dangerous transfer as technically neutral administration. (HUDOC)

9. CONCLUSION

The collapse of non-refoulement does not mean that law has forgotten the principle. On the contrary, international and European texts still describe it as fundamental. The collapse occurs elsewhere: in institutional design that preserves the norm in declaratory form while making it less and less reachable in actual procedure. That is why the central question in current practice is not merely whether the

prohibition of refoulement exists, but whether the person still has a real opportunity to activate that prohibition before transfer, return, pushback or indirect removal takes place. (UNHCR)

For ARGA, and for any serious international protection practice, the conclusion is direct: the struggle for non-refoulement today is a struggle not only for the rule itself, but for procedure, access, time, evidence, jurisdiction and the allocation of responsibility. In the current legal landscape, these elements decide whether non-refoulement remains a real barrier against arbitrary transfer into danger or becomes a polished legal monument to obligations states no longer wish to honour in good faith. (ECHR-KS)

APPENDIX A. TERMINOLOGY

Non-refoulement. A prohibition on removal, expulsion, return, extradition or other transfer to a place where a person would face persecution, torture, inhuman treatment or other irreparable harm. (UNHCR)

Chain refoulement. Indirect refoulement through transfer to a third state from which the person may then be removed onward without real protection. (HUDOC)

Pushback. A forced rejection or return without genuine access to an individual procedure and risk assessment; under CAT it may fall within Article 3. (OHCHR)

Effective remedy. A legal remedy capable of actually preventing the violation; in non-refoulement cases this usually requires the ability to suspend removal until risk has been assessed. (European Union Agency for Asylum)

Externalisation. The relocation of migration-control and protection functions beyond the classic territorial asylum procedure, including cooperation with third countries, border zones and outsourced responsibility structures. (Council of Europe)

APPENDIX B. MATRIX OF RISKS / POWERS / LEGAL CONSEQUENCES

Access to procedure.
Legal risk: the person cannot lodge a protection claim.
Legal limit: non-refoulement requires real access to procedure and risk assessment.
Consequence: unlawful removal or pushback.
Practical note: treat denial of access as a standalone violation. (emergency.unhcr.org)

Accelerated procedure.
Legal risk: no real time and no real suspensive effect.
Legal limit: the remedy must be effective before removal.
Consequence: irreversible transfer before review.
Practical note: challenge not only the outcome but the pace of the procedure. (European Union Agency for Asylum)

Safe third country.
Legal risk: presumption of safety without individual review.
Legal limit: the state must assess the risk of chain refoulement.
Consequence: indirect exposure to danger.
Practical note: attack the factual reliability of the third country, not merely the label. (HUDOC)

Externalisation.
Legal risk: responsibility is blurred across states and operators.
Legal limit: obligations apply where there is jurisdiction or effective control.

Consequence: de facto removal without acknowledged removal.
Practical note: prove control, coordination and foreseeable consequences. (UNHCR)

OFFICIAL SOURCES

- 1951 Refugee Convention and 1967 Protocol. The baseline treaty framework for refugee protection and the original treaty formula of non-refoulement. (UNHCR)
- Convention against Torture, Article 3, and CAT General Comment No. 4. Essential for the prohibition of expulsion, return and extradition where torture risk exists, including pushbacks and other transfer forms. (OHCHR)
- OHCHR, The Principle of Non-Refoulement under International Human Rights Law. Key universal human-rights framework, including jurisdiction and effective control. (OHCHR)
- Human Rights Committee, General Comment No. 36. Important for linking non-refoulement with the risk of irreparable harm under the ICCPR. (OHCHR)
- EU Charter of Fundamental Rights, Article 19. Core European constitutional rule against removal, expulsion and extradition where serious risk exists. (EUR-Lex)
- Directive 2013/32/EU and Directive 2008/115/EC. Core EU acts governing asylum procedures and returns, within which non-refoulement must remain practically effective. (EUR-Lex)
- EUAA materials on non-refoulement and access to asylum procedure. Important for understanding procedural safeguards and their operational application. (European Union Agency for Asylum)
- ECtHR case-law, including M.S.S. v. Belgium and Greece and Ilias and Ahmed v. Hungary. Foundational case-law on systemic deficiencies, mutual trust and chain refoulement. (HUDOC)