

WHERE WILL THEY GO: CASE STUDY ON THE APPLICATION OF THE NON-REFOULEMENT PRINCIPLE DURING THE COVID-19 PANDEMIC*

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I. International Status of Refugees and Asylum Seekers

A. *1951 Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees*

War has ancient origins—and where there is war, there are survivors fleeing for their lives. Fortunately, the right to asylum and refugee protection has existed alongside wars, owing to the perceived moral responsibility of individuals to protect those whose fundamental human rights are threatened or violated.¹ Over the years, states have enacted domestic refugee laws, but the recognition of refugees and asylum seekers as an international concern came only after the First World War. In 1950, after the Second World War, the United Nations High Commissioner for Refugees (UNHCR) was founded.² It deals with humanitarian, social, and non-political matters. It also supervises the implementation of conventions protecting the rights of refugees and asylum seekers.³

The 1951 Convention Relating to the Status of Refugees (1951 Convention) recognizes the uneven burden of the refugee crisis on different states and the need for international cooperation and a collective solution.⁴ However, the 1951 Convention applies only to those displaced before 1 January 1951 and to European

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¹ Paul Tiedemann, *Are There Moral Duties toward Refugees? Considerations in Legal Ethics*, 10 LAWS 4 (2021), <https://doi.org/10.3390/laws10010004>.

² Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary*, (1990), <https://www.refworld.org/reference/research/unhcr/1990/100962>, at 4.

³ *Id.*

⁴ *Id.*

refugees.⁵ The 1967 Protocol Relating to the Status of Refugees (1967 Protocol), leveled the field by providing equal status to all refugees without discrimination.

B. The Refugees and Asylum Seekers

The expanded and inclusive definition of refugees ensures their equal status. Now, they are those who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁶

The 1951 Convention also provides a comprehensive list of disqualifications to balance the interests of the Receiving States and better allocate their resources meant for qualified refugees. Meanwhile, an asylum seeker is “someone whose request for sanctuary has yet to be processed.”⁷ Each state has its asylum system, based on the framework set in the 1951 Convention and 1967 Protocol, to determine those qualified for international protection.⁸

C. State Parties and Scope of Case Study

As of April 2015, there are 145 state parties to the 1951 Convention and 146 state parties to the 1967 Protocol.⁹ This case study covers the following states: Turkey, Germany, and the United States of America (US). These states have been

⁵ The 1967 Protocol, pmb1., 04 October 1967.

⁶ The 1951 Convention, art. 1(A)(2), 28 July 1951; The 1967 Protocol, art. 1, 31 January 1967.

⁷ UNHCR, *Asylum-seekers*, UNHCR.ORG, <https://www.unhcr.org/asylum-seekers#:~:text=An%20asylum%2Dseeker%20is%20someone,protect%20those%20who%20need%20it> (last visited on 12 February 2023).

⁸ The 1951 Convention, art. 35(2)(C), 28 July 1951.

⁹ UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR.ORG, <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73bod63.pdf>.

selected to juxtapose the key roles they generally play in refugee protection as against their response during critical events such as the Coronavirus Disease 2019 (COVID-19) pandemic.

Turkey ratified the 1951 Convention, and on 31 July 1968, it acceded to the 1967 Protocol.¹⁰ Its unique geographical location, with Europe to the west and the Middle East to the east, positions it as a crucial player in managing refugee flows. It is one of the leading refugee-hosting states in the world.¹¹ On 1 December 1953, Germany ratified the 1951 Convention, and on 5 November 1969, it acceded to the 1967 Protocol.¹² It is the leading hosting state in the European Union (EU) and the second-largest donor to the UNHCR.¹³ Lastly, the United States of America did not ratify the 1951 Convention but acceded to the 1967 Protocol on 1 November 1968.¹⁴ It is the largest donor to the UNHCR. Moreover, it has been a member of the UNHCR Advisory Committee since 1951 and a founding member of the UNHCR Executive Committee since 1959.¹⁵

II. The Non-Refoulement Principle

The non-refoulement principle is paramount for refugees and asylum seekers. It is enshrined in Article 33(1) of the 1951 Convention:

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.¹⁶

As aptly put by the Human Rights Committee, “the turning back of a

¹⁰ *Id.*

¹¹ UNHCR, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, UNHCR.ORG, <https://www.unhcr.org/sites/default/files/legacy-pdf/3b73bod63.pdf> (last visited on 12 February 2023).

¹² UNHCR, *supra* note 10.

¹³ UNHCR, *Germany as a donor*, UNHCR.ORG, <https://reporting.unhcr.org/donors/germany> (last visited on 12 February 2023).

¹⁴ UNHCR, *supra* note 10.

¹⁵ UNHCR, *United States of America as a donor*, UNHCR.ORG, <https://reporting.unhcr.org/donors/united-states-america> (last visited on 12 February 2023).

¹⁶ The 1951 Convention, art. 33(1), 28 July 1951

refugee to the frontiers of a country where his life or freedom would be threatened on account of his race, religion, nationality or political opinion would be tantamount to delivering him into the hands of his persecutors.”¹⁷ The non-refoulement principle is embodied in several international instruments and is considered a *jus cogens* norm. As opined by UNHCR:

The principle of non-refoulement as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State. It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion. As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures. (citations omitted)¹⁸

Under Article 14(1) of the Universal Declaration of Human Rights, “everyone has the right to seek and to enjoy in other countries asylum from persecution.”¹⁹ Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that, “no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁰ Finally, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²¹ Article 4(2) emphasizes the

¹⁷ Weis, *supra* note 2, at 233.

¹⁸ 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*, (Jan. 26, 2007), <https://www.refworld.org/pdfid/45fi7a1a4.pdf>, ¶ 3.

¹⁹ UDHR, art. 14, 10 December 1948.

²⁰ U.N. CAT, art. 3(1), 4 February 1985.

²¹ ICCPR, art. 7, 16 December 1966.

non-derogability of this provision, even in times of public emergencies.²² Rodolfo Marques, a refugee law expert, argued that:

In this regard, according to the ICCPR, it is forbidden to expel an individual to a territory where he may be submitted to those ill treatments. In this case, the prohibition on refoulement is inferred as a component of the absolute prohibition of torture as well as inhuman and degrading treatments.²³

Per UNHCR Executive Committee Resolution No. 79, “the principle of non-refoulement is not subject to derogation.”²⁴ The Committee Against Torture, in its General Comment No. 4, further stated that “the principle of ‘non-refoulement’ of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute.”²⁵ These instruments effectively affirmed the status of the non-refoulement principle as a *jus cogens* norm.²⁶

The non-refoulement principle covers at least two situations. First is the territorial application, or when an asylum seeker is within the territory of the Receiving State. Here, the violation is often through deportation. However, a distinction should be made between refouling deportation and legal deportation. Refouling deportation happens when authorities forcibly return an asylum seeker to their Origin State without following established legal processes, thereby exposing them to persecution or serious harm. In contrast, legal deportation entails adhering to established legal processes and criteria, including conducting a fair and thorough assessment of the application of the asylum seeker.

The second situation is extra-territorial application, or when an asylum

²² ICCPR, art. 4(2), 16 December 1966.

²³ Rodolfo Marques, *Non-Refoulement Under the Inter-American Human Rights System*, SSRN JOURNAL (2017), <http://dx.doi.org/10.2139/ssrn.2992709>.

²⁴ UNHCR Exec. Comm., *General Conclusion on International Protection No. 79*, UNHCR.ORG (Oct. 11, 1996), <https://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>.

²⁵ U.N. CAT, *General Comment No. 4 on the implementation of Article 3 of the Convention in the context of Article 22*, (Feb. 29, 2018), <https://www.refworld.org/docid/5a903dc84.html>.

²⁶ Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INTERNATIONAL JOURNAL OF REFUGEE LAW 533 (2001), <https://doi.org/10.1093/ijrl/13.4.533>.

seeker is at the frontier or border. This situation is covered by the phrase “in any manner whatsoever” in Article 33(1). The UNHCR stated that the prohibition extends to the frontier of a Receiving State and to the high seas. Applying the rules of construction outlined in Article 31 of the 1969 Vienna Convention on the Law of Treaties²⁷ (VCLT), it clarified that:

The ordinary meaning of “return” includes “to send back” or “to bring, send, or put back to a former or proper place[.]” The English translations of “refouler” “include words like ‘repulse’, ‘repel’, ‘drive back.’” It is difficult to conceive that these words are limited to refugees who have already entered the territory of a Contracting State. The ordinary meaning of the terms “return” and “refouler” does not support an interpretation which would restrict its scope to conduct within the territory of the state concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way.²⁸

Article 26 of the VCLT emphasizes that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Under Article 27, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁹ The non-refoulement principle binds both state and non-state parties of the 1951 Convention and 1967 Protocol as it is a non-derogatory norm. It is worth emphasizing that customary international law, especially *jus cogens* norms, is binding even on dissenting states—“The dissentient minority of States is as much bound by the formulated rule as those who actively participated in its creation.”³⁰ Overall, States are required to observe the non-refoulement principle in good faith. They cannot simply invoke their internal law for non-

²⁷ Article 31(1) of the 1969 Vienna Convention provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31(3) states that, in interpreting a treaty: “... there shall be taken into account, together with the context, ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties.”

²⁸ UDHR, *supra* note 19, ¶ 27.

²⁹ VCLT, art. 27, 23 May 1969.

³⁰ MERLIN MAGALLONA, PROBLEMS AND PROSPECTS IN INTERNATIONAL LAW (2019).

compliance with their obligations. If a case of refoulement is attributable to them, they could be held responsible for their internationally wrongful act,³¹ either through the International Court of Justice, if those involved are state parties,³² or other elected dispute settlement mechanisms, in the case of non-state parties.

III. Refoulement During the COVID-19 Pandemic

Article 9 of the 1951 Convention permits certain provisional measures during exceptional circumstances when a person is a threat to national security:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.³³

At first glance, this exception seems to be dependent on every Receiving State, particularly during the early stages of the COVID-19 pandemic—when the nature of the disease was barely understood. With infection rates exponentially rising and death rates increasing, the imposition of stringent measures on the entry and exit of individuals in territories was deemed a critical aspect of protecting the population. Moreover, despite previous pandemics, such as the Spanish Flu of 1918, Asian Flu of 1957, Hong Kong Flu of 1968, and Swine Flu of 2009, there is still a scarcity of precedent in relation to asylum seekers, leaving states without clear guidance on navigating the latest pandemic. Data from the International Organization for Migration shows that by 24 August 2020, 219 states or territories issued 85,034 travel restrictions, with a significant number implementing radical and unilateral border closures.³⁴

Dennis McNamara (McNamara), Director of International Protection at

³¹ ARSIWA, art. 2, 3 August 2001.

³² The 1951 Convention, art. 38, 28 July 1951

³³ The 1951 Convention, art. 9, 28 July 1951.

³⁴ IOM, *Global Mobility Restriction Overview Bi-Weekly Update*, (Aug. 24, 2020), <https://dtm.iom.int/sites/g/files/tmzbdh461/files/reports/DTM-Covid19%20Global%20Overview%20Output%2024.08.2020%20Final.pdf?iframe=true>.

UNHCR, in his 1951 Convention Commentary, underscored the importance of applying good faith when states decide to take provisional measures against a person for national security.³⁵ He also defined what “national security” is in the context of Article 9:

“National security” is a rather well-defined term. It is used in a number of international agreements, e.g., the 1933 and 1938 Conventions and the European Convention on Establishment. The term and its equivalent (“sécurité nationale”, “Staatsicherheit”, “rikets sikkerhet” etc.) are also used in municipal laws and touched upon in decisions by international as well as national tribunals.

Anything which threatens a country’s sovereignty, independence, territorial integrity, constitution, government, external peace, war potential, armed forces or military installations may be construed as a threat to “national security.”³⁶

McNamara also discussed the rationale of the decision of the Drafting Committee to limit the applicability of Article 9 to individuals instead of groups:

The Committee felt that the first alternative was drafted in too wide terms, and it decided in favor of a provision more along the lines of the second alternative. The expression “a refugee” was changed into “any person”, which in turn was amended by the Conference to “a particular person”, the meaning clearly being to restrict the applicability of provisional measures to individual persons, thus ruling out large scale measures against groups of refugees.³⁷

The careful considerations and delineations made during the drafting and discussions of the 1951 Convention show the nuanced applicability of Article 9 and the need for a judicious application of provisional measures in protecting national

³⁵ UNHCR, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-17*, (1997), <https://www.refworld.org/reference/research/unhcr/1997/en/72739>, at 28.

³⁶ *Id.*

³⁷ *Id.*

security while respecting the human rights of individuals. Overall, the complexities of balancing national security and human rights call for a thoughtful and context-specific approach in the face of an unforeseen challenge like the COVID-19 pandemic.

Nevertheless, asserting that Article 9 provides a permissive provision to suspend asylum procedures during COVID-19 would not only be absurd but also perilous. Such an interpretation could significantly compromise the rights of refugees and asylum seekers escaping persecution. While states have the duty to protect their citizens, it is crucial to emphasize their concurrent international obligation to safeguard the rights and well-being of asylum seekers, reinforcing the importance of upholding humanitarian values even amid pressing public health concerns. If states are permitted to completely close their doors to refugees and asylum seekers during a pandemic, *where will they go?*

IV. Case Study

The following case study of Turkey, Germany, and the United States will assess their compliance with the non-refoulement principle during the COVID-19 pandemic, from 2020 to 2022, through the lens of territorial application and extra-territorial application.

A. Turkey

Turkey reserved its obligation under the 1951 Convention and 1967 Protocol to the acceptance of persons from Europe only. Therefore, strictly speaking, it can only legally recognize European asylum seekers as refugees. However, this has been liberally construed. Turkey grants non-European asylum seekers limited protection through “conditional refugee status,” “humanitarian residence permit,” or temporary protection. This allows them to stay in Turkey until a long-term place of settlement in another state is found for them. More recently, Syrians have been placed under temporary protection, while non-Syrian and non-European applicants may apply to the UNHCR for refugee status determination.³⁸

³⁸ UNHCR, *Temporary protection in Türkiye*, UNHCR.ORG, <https://help.unhcr.org/turkiye/information-for-syrians/temporary-protection-in-turkey/> (last visited on 12 February 2023).

1. *Territorial Application*

Asylum seekers have the right to stay in Turkey throughout their application procedure, save for some exceptions. While Law No. 6458, or the 2013 Law on Foreigners and International Protection, recognizes the non-refoulement principle, it also provides for an entry ban or deportation for reasons of public order, public security, or public health.³⁹ Law No. 7070, enacted in 2018, related to the regulation of emergency provisions, provides that a deportation decision “may be taken at any time during the international protection proceedings” against an applicant due to leadership, membership, or support of a terrorist organization or a benefit-oriented criminal group; threat to public order or public health; or relation to terrorist organizations.⁴⁰ Fear of being deported is not unreasonable considering that public health is one of the exceptions to their right to stay.⁴¹

Pre-pandemic, Human Rights Watch reported that Turkey is not a safe country for Syrian asylum seekers because of the risk of forcible transfer to Syria. They documented several cases of Syrians who were arbitrarily detained in refugee deportation centers and coerced into signing voluntary return forms under threats of physical violence or transfer to the war-torn Idlib. This has been corroborated by reports from Amnesty International, the Istanbul Bar Association, and the Syrian Center for Media and Freedom of Expression.⁴²

Between March and August 2020, Turkey implemented a suspension of deportation proceedings in response to the pandemic, leading to the release of individuals who would have otherwise faced deportation from removal centers. Upon the resumption of these proceedings, a report from Advancing Alternative Migration Governance (ADMIGOV) highlighted a significant decline in both voluntary returns and deportations, as determined by their lawyer-informants. Routine checks by security forces and subsequent apprehensions also decreased. ADMIGOV suggested that challenges in organizing charter flights for collective

³⁹ Turkey Law 6458 (2013), art. 4, 9.

⁴⁰ Turkey Law 7070 (2018).

⁴¹ Derya Ozkul, *Governing Migration and Asylum Amid COVID-19 and Legal Precarity in Turkey*, 14 MIDDLE EAST LAW GOV. 141 (2022), <https://doi.org/10.1163/18763375-14010006>.

⁴² *Journey of Death to Europe and the Challenges Syrian Refugees Face in Greek Camps*, (2021), <https://scm.bz/en/the-challenges-syrian-refugees-face-in-greek-camps/>.

deportations or voluntary returns contributed to the inevitable decrease in detentions and deportations. However, the report also underscored the heightened difficulty in accessing legal assistance crucial for navigating deportation proceedings.⁴³

2. *Extra-territorial Application*

In the controversial 2016 EU-Turkey Agreement (the Agreement), Turkey committed to accepting asylum seekers unable to enter Greece via its territory in exchange for substantial funding to support refugees and asylum seekers, visa liberalization for its citizens, and renewed negotiations for EU accession.⁴⁴

However, following the unfulfilled commitments of the EU, Turkey lifted its border controls in 2020. This resulted in an influx of 3.6 million asylum seekers at the borders of Europe. Remarkably, Turkey facilitated this movement by providing transportation to the European borders. Nonetheless, recognizing that European voters were inclined to support stringent measures to restrict the entry of asylum seekers amid the pandemic, EU governments adopted a firm stance, even if it meant “letting refugees drown in the Aegean.” Turkey eventually changed its approach and resealed its western land borders after its first COVID-19 fatality.⁴⁵

To recall, the non-refoulement principle prohibits any state from expelling or returning a refugee or asylum seeker 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. It is not limited to the return or pushback of a refugee or asylum seeker in the Origin State. By utilizing vulnerable asylum seekers within its territory as leverage against the EU, Turkey knowingly exposed them to perilous conditions at the European borders. This deliberate strategy not only undermined the sanctity of humanitarian protections but also unequivocally constitutes a violation of the non-refoulement principle.

⁴³ SIBEL KARADAĞ & AYSEN ÜSTÜBİCİ, PROTECTION DURING PRE-PANDEMIC AND COVID-19 PERIODS IN TURKEY, ADMIGOV DELIVERABLE 4.2 (2023), https://admigov.eu/upload/Deliverable_42_Karadag_Protection_Turkey.pdf.

⁴⁴ Akyan Edimir, *Coronavirus Pandemic Impacts Turkey's Approach to Displaced Syrians*, INTERNATIONAL PEACE INSTITUTE (Mar. 30, 2020), <https://reliefweb.int/report/turkey/coronavirus-pandemic-impacts-turkey-s-approach-displaced-syrians> (last visited on 12 February 2023).

⁴⁵ *Id.*

B. Germany

Asylum seekers in Germany encounter legal barriers to "asylum protection".⁴⁶ and residing therein. Article 16(a) of the German Constitution limits refugee status to those not coming from a "safe third country," encompassing EU Member States, Norway, Switzerland, and neighboring states of Germany.⁴⁷ Political persecution requires state involvement. Should it come from a non-state actor, asylum seekers will be recognized only if the Origin State suppresses the non-state actor or the Origin State fails to protect its citizens adequately. Thus, asylum seekers fleeing war or natural disasters are excluded. Finally, refugee status is denied if a "secure region" exists in their Origin State. Once refugee status is granted, a residence permit, valid for three years, is issued, subject to renewal if the conditions in the Origin State persist.⁴⁸

1. Territorial Application

Pre-pandemic, the German policies for asylum and residency had been described as both restricted and liberalized—i.e., there was a greater chance of being granted residency, but so were attempts to deport unwanted asylum seekers as delinquents. In 2015, during the European Refugee Crisis, some EU states opened a humanitarian corridor for people arriving in Greece to travel to Germany. Moreover, a significant share of applications was accepted. Nonetheless, in the same year, the Residence Act entered into force. It entailed changes to facilitate and accelerate the enforcement of deportations, including the reinstallation of custody procedures. Two months later, the Asylum Procedure Acceleration Act was passed. This classified Albania, Kosovo, and Montenegro as "safe countries of origin." Asylum seekers arriving from these states would have to stay in initial reception centers until the end of their asylum application process or until their departure in the case that their claim was rejected. This law also reduced the time for complaints or appeals against asylum decisions.⁴⁹

⁴⁶ The German nomenclature for recognition of status as a refugee.

⁴⁷ GERMAN CONST., art. 16(a).

⁴⁸ UNHCR, Forms of Asylum and Refugee Protection, at <https://help.unhcr.org/germany/asylum-in-germany/forms-of-asylum-and-refugee-protection/> (last visited on 12 February 2023).

⁴⁹ Maren Kirchhoff & David Lorenz, *Between Illegalization, Toleration, and Recognition: Contested*

In March 2020, a general suspension of deportation was implemented due to the logistical challenges posed by the COVID-19 pandemic.⁵⁰ However, the exact duration of this suspension was unclear. Moreover, the asylum procedures were not suspended. They were instead modified to ensure social distancing. For asylum seekers flagged for security concerns, hearings continued through mobile teams, and notifications were sent via mail.⁵¹ A critical issue that warrants attention was the stringent documentary requirements during asylum procedures. In 2021, *Deutsche Welle*, a German news network, highlighted the case of "Toure," who was required to present a passport to German authorities for identity verification. Regrettably, the Guinean Embassy in Berlin did not issue passports, necessitating his return to Guinea to apply for one. However, that was unthinkable for him, given the torture he endured in his Origin State. Applicants like him, lacking essential documentation, were at risk of deportation, and obtaining official documents during the pandemic was evidently challenging.⁵²

The case of Germany underscores the need for a comprehensive assessment of the commitment of a state to the non-refoulement principle that goes beyond a mere scrutiny of its adherence to institutionalized asylum procedures. It is imperative to broaden the perspective to include practical considerations, recognizing the myriad challenges confronted by asylum seekers as they navigate the complex asylum process, often constrained by limited resources.

Asylum and Deportation Policies in Germany, in PROTEST MOVEMENTS IN ASYLUM AND DEPORTATION 49 (2018), https://doi.org/10.1007/978-3-319-74696-8_3.

⁵⁰ Danni Reches, *Complying with International and Regional Law during the Pandemic - Asylum Seekers and COVID-19 Emergency Measures in EU Member States Germany and Greece*, 6 SOCIAL SCIENCES & HUMANITIES OPEN 100370 (2022), <https://doi.org/10.1016/j.ssaho.2022.100370>.

⁵¹ *Id.*

⁵² Daniel Pelz, *Germany Keeps up Deportations despite COVID*, DW.COM (Mar. 26, 2021), <https://www.dw.com/en/germany-presses-on-with-deportations-despite-covid-pandemic/a-57011088>, <https://www.dw.com/en/germany-presses-on-with-deportations-despite-covid-pandemic/a-57011088> (last visited on 12 February 2023).

2. *Extra-territorial Application*

As mentioned above, the 2015 European Refugee Crisis best reflects the significant shift in the attitude of Germany towards refugees and asylum seekers. With the number of asylum seekers increasing, Germany suddenly ordered temporary border restrictions in 2015, including spot checks on vehicles trying to cross the border. As noted by The New York Times:

The restrictions put in place by Chancellor Angela Merkel's government were seen as a strong sign—if not an outright message—to other European Union members that Germany was growing weary of shouldering so much of the burden in Europe's largest humanitarian crisis in decades without more help and cooperation from other nations.⁵³

To recall, Greece closed its borders to asylum seekers in 2020. This action was supported by Germany. Through tweets sent by the German interior ministry in Arabic, Farsi, English, and German, asylum seekers were sternly warned that “Europe’s borders are not open for [refugees] from [Turkey], and neither are our German borders.”⁵⁴ Nonetheless, the situation on the border is less harrowing than the rhetoric. Instead of border closures, stringent border controls were implemented. In 2022, border control authorities recorded a total of 34,731 persons entering Germany irregularly and seeking asylum. Out of these, 34,061 were referred to the Federal Office for Migration and Refugees. By June 2022, all remaining entry restrictions and COVID-19-related border controls were lifted, excluding countries designated as “virus variant areas.”⁵⁵

⁵³ Melissa Eddy, Rick Lyman & Alison Smale, *Germany Orders Curbs at Border in Migrant Crisis*, NEW YORK TIMES (Sept. 12, 2015), <https://www.nytimes.com/2015/09/14/world/europe/germany-emergency-measures-european-migrant-crisis.html> (last visited on 12 February 2023).

⁵⁴ Philip Oltermann, *Germany tweets to deter Syrian refugees, fearing 'repeat of 2015'*, THE GUARDIAN (Mar. 4, 2020), <https://www.theguardian.com/world/2020/mar/04/germany-tweets-to-deter-syrian-refugees-fearing-repeat-of-2015> (last visited on 12 February 2023).

⁵⁵ Paula Hoffmeyer-Zlotnik and Marlene Stiller, *Access to the Territory and Push Backs: Germany*, ASYLUM INFORMATION DATABASE (June 4, 2023), <https://asylumineurope.org/reports/country/germany/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/> (last visited on 12 February 2023).

Parenthetically, on 26 April 2022, the Court of Justice of the EU held that border controls cannot exceed a duration of six months unless there is a new threat justifying a renewed introduction of controls for another six months maximum. Nonetheless, Germany continued to impose prolonged border controls, although no longer related to COVID-19. This extension had been criticized by non-government organizations who argue that the control leads to refusal of entry and shifts to other land borders.⁵⁶

C. *The United States of America*

Dany Bahar succinctly highlights the vulnerability of the US asylum seeker policy – “without a robust institutional binding framework in place to administer global migration flows, any future president could do and undo as he or she pleases.”⁵⁷ The deportation of immigrants, including refugees and asylum seekers, is ingrained in US history. During the Great Depression, Herbert Hoover enforced large-scale deportation of Mexican laborers and families, driven by the “American jobs for real Americans” principle. Despite attempts by George Bush and Barack Obama to ease immigration policies, deportation rates remained high. Obama even earned the title “deporter in chief” for surpassing other presidents in historic deportation numbers, including Trump.⁵⁸ As to pushbacks, the US turned away at least 200,000 Jewish asylum seekers who fled the Nazis during the Second World War. In the 1980s, when many Central American asylum seekers came to the US, primarily due to US-backed brutality, Ronald Reagan and George Bush labeled them as “economic migrants,” and less than 3% were granted protection.⁵⁹

1. *Territorial Application*

The Trump administration used the COVID-19 pandemic as a justification for modifying established immigration policies. The deportations and pushbacks of asylum seekers stemmed from the Department of Health and Human Services

⁵⁶ *Id.*

⁵⁷ Maxwell Newsome, *A Constitutional Right to Asylum? A Comparative Analysis Could Ground the Design of Better Protection for Asylum Seekers*, 48 UNIVERSITY OF DAYTON LAW REVIEW (2022), <https://ecommons.udayton.edu/udlr/vol48/iss1/6>.

⁵⁸ Anthony W. Fontes, *The Long, Bipartisan History of Dealing with Immigrants Harshly*, THE CONVERSATION (July 9, 2019), <https://theconversation.com/the-long-bipartisan-history-of-dealing-with-immigrants-harshly-119523> (last visited on 12 February 2023).

⁵⁹ *Id.*

(DHHS) interim guidelines, which were based on Section 265, Title 42 of the US Code (Title 42):

Whenever the Surgeon General determines that by reason of the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States, and that this danger is so increased by the introduction of persons or property from such country that a suspension of the right to introduce such persons and property is required in the interest of the public health, the Surgeon General, in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.⁶⁰

These interim guidelines were used as a basis by the Centers for Disease Control and Prevention (CDC) for its 20 March 2020 Order that suspended entry from the Canadian and Mexican borders, with exceptions for US citizens, residents, immediate family members, military personnel, and those with valid travel documents.⁶¹ The Department of Homeland Security took swift action to shut down the southern border, promptly deporting any intercepted migrants, including asylum seekers and children, to Mexico or Central America, through the Immigration and Customs Enforcement (ICE).⁶² On 11 September 2020, the DHHS finalized its interim regulation. Here, it acknowledged for the first time that its order was used to turn away refugees and asylum seekers and declared its belief that doing so was legal. Nonetheless, the new CDC Order issued in October 2020 was almost the same as the March Order.⁶³

⁶⁰ U.S. Code (1789), § 265, Title 42.

⁶¹ Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

⁶² Holly Ventura Miller et al., *Immigration Policy and Justice in the Era of COVID-19*, 45 AM J CRIM JUST 793 (2020), <https://doi.org/10.1007/s12103-020-09544-2>.

⁶³ American Immigration Council, *A Guide to Title 42 Expulsions at the Border*, AMERICAN IMMIGRATION COUNCIL, <https://www.americanimmigrationcouncil.org/fact-sheet/guide-title-42-expulsions-border/> (last visited on 12 February 2023); To note, on 11 May 2023, DHHS terminated

This case illustrates refouling deportation. The US has violated the non-refoulement principle by indiscriminately applying the 20 March 2020 Order against migrants, without consideration for the established legal processes for asylum seekers, thereby exposing them to persecution or serious harm. Even without explicit admission from the DHHS regarding the use of its order to turn away refugees and asylum seekers, the swift interception and conspicuous absence of a fair assessment of an asylum seeker serve as compelling indicators of the violation at hand.

2. *Extra-territorial Application*

The 20 March 2020 Order was also used as a basis to stop migrants arriving at the US border, even if they expressed fear of persecution in their Origin State.⁶⁴ The US government data shows over 400,000 migrant pushbacks on the southern border from February through December 2020. Moreover, pushbacks were coupled with abuse of power, including physical cruelty, verbal harassment, and misrepresentation. For instance, when two Honduran transgender women tried to cross the border, Customs and Border Patrol (CBP) agents threatened them with guns, ridiculed them, and told them to return to Mexico, where they had already suffered assaults.⁶⁵ In 2021, CBP agents dismantled a Haitian camp and forcibly pushed the migrants back across the border.⁶⁶

The UNHCR emphasized that when a state is not prepared to grant asylum to persons who are seeking international protection on its territory, it must at least adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger. Generally, this entails at least giving asylum seekers access to its territory, as well as a fair and efficient

the COVID-19 public health emergency in the US. In effect, it also ended the use of Title 42 as a border policy.

⁶⁴ National Immigration Forum, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, FORUM TOGETHER.ORG (Nov. 18, 2020), <https://forumtogether.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/> (last visited on 12 February 2023).

⁶⁵ Kino Border Initiative and Red Jesuita con Migrantes – Centro América y Norte América, *Pushback Practices at the US/Mexico Border*, https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/pushback/Franciscans_International_SubmissionI.pdf (last visited on 12 February 2023).

⁶⁶ Emily McConville, *An Old Illness: How the United States Uses Racist and Xenophobic Ideas About Disease to Exclude Haitian Migrants During the Covid-19 Pandemic*, 11 IND. J.L. & SOC. EQUAL. 360 (2023).

asylum procedure.⁶⁷ The pushback described above by the US, through its CBP agents, was a blatant violation of the non-refoulement principle, as they failed to provide even a modicum of a fair legal process for the asylum seekers at their border.

V. Conclusion

Overall, the cases above illustrate how states, despite their commitment to protect asylum seekers, could still violate the non-refoulement principle during uncertain times, such as the COVID-19 pandemic, when the interests of their citizens are at stake, and there is a scarcity of clear guidelines on navigating the situation. Nonetheless, the non-refoulement principle is the cornerstone of asylum and international refugee law. Every person has the right to seek asylum. This right is undermined when Receiving States push back or deport refugees and asylum seekers to where the threat of persecution, danger, or even death lies. Until the 1951 Convention and 1967 Protocol cease to apply, Receiving States are duty-bound to comply with their obligations under international law. Public health and human rights are not incompatible. In fact, they strengthen each other. Receiving States must delicately strike a balance between the needs of their citizens on the one hand and their international obligations to refugees and asylum seekers on the other. States must not use the pandemic to evade the principle. During the pandemic, refugees and asylum seekers should not be narrowly seen as hosts of the disease because of their precarious circumstances. Instead, they should be seen as a sector that has become even more vulnerable, desperate for security and safety, and in dire need of support and assistance.

⁶⁷ UNHCR, *supra* note 18.