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Non-Refoulement Obligations in EU Third Country Agreements

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I. Introduction

This journal entry argues that EU third country agreements violate non-refoulement obligations as defined under international law based on a number of reasons. First, EU third country agreements violate Article 31(1) of the Convention Relating to the Status of Refugees (Refugee Convention), which protects refugees from being penalised for their illegal presence. Second, when read purposively, violating Article 31(1) would trigger corresponding protection from refoulement, most notably when a violation of Article 31(1) may lead to rejection at the frontier. Third, EU third country agreements as a form of migration control to deter claimants from reaching the territories of a State, would be both a form of penalisation of refugees? illegal presence as well as a violation of non-refoulement obligations.

II. Purposive Reading of the Non-Penalisation Clause

Article 31(1) of the Refugee Convention states that: ?The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ?enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence? (Non-Penalisation Clause).[1] A plain text reading of the provision suggests that the refugee claimant must be physically present on the territory of the State in order to benefit from the protection of non-penalisation. However, a purposive reading of the provision may suggest otherwise. A purposive reading of the text, taking into account the drafters? intentions by referring to the Refugee Convention?s *travaux préparatoires*, suggests that the drafters have intended to prevent a situation where the claimant may be in legal limbo between two sovereign orders: on the one hand, unable to reach a State?s territory to seek refuge, and on the other, unable to return to the country of origin for fear of persecution.[2] This reading is in line with the humanitarian objectives of the Refugee Convention to offer the widest possible protection to those deserving.[3]

A purposive reading of Article 31(1) permits broadening the non-penalisation protection of refugees to asylum claimants who would otherwise be penalised for illegal entry to areas *within the jurisdiction* of the State in question, rather than only to those who are physically present within the territory of a State. Working in conjunction with non-refoulement obligations under the Refugee Convention, which prevent the sending back of asylum claimants and refugees to territories where their lives or freedom would be threatened on account of the five Convention grounds, non-penalisation, read purposively, may enhance the protection for those who are in

legal limbo on the high seas. It is also suggested that migration control including the use of third country agreements would be a direct contravention of the Non-Penalisation Clause, read purposively. There is scholarly support for reading the Non-Penalisation Clause purposively, so that non-penalisation protection may be applicable in instances where the claimant is *seeking to enter* or *in the process of entering* the territory or jurisdiction of the State in question.[4] Penalisation of claimants on the high seas, therefore, would be contrary to Article 31(1), where the claimant can be shown to be *seeking to enter* or *in the process of entering* the territory or jurisdiction of a State with the aim of claiming asylum.

III. Non-Penalisation Clause and Non-Refoulement Obligations

The Non-Penalisation Clause and non-refoulement obligations are intrinsically linked. This link is also a strong one. First, where refugees are penalised for their illegal presence either on the territory of a State or, when read purposively, within the jurisdiction of the State, including when *seeking to enter* or *in the process of entering* the territory or jurisdiction of the State when on the high seas, they are likely to be rejected and sent back to their country of origin. This action of rejection at the frontier is precisely when non-refoulement obligations trigger.[5] Therefore, non-penalisation protection necessarily entails corresponding protection from refoulement. These two provisions, it is suggested, work in conjunction with one another. To take this argument further, it is suggested that the two provisions may be read together to enhance protection for beneficiaries.

The text of the non-refoulement provision under Article 33(1) states that: ?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? (emphasis added).[6] The terms ?frontiers of territories?, pursuant to the *travaux préparatoires,* suggests that non-refoulement obligations trigger when a refugee is within the frontier (i.e. borders) of a territory or country of origin.[7] While it may be argued that areas outside of the jurisdiction of a State such as the Exclusive Economic Zone or the high seas do not constitute ?frontiers of territories?, it is instead suggested that non-refoulement obligations are still applicable.[8] For instance, when read in conjunction with a purposive reading of the Non-Penalisation Clause, where claimants are not to be penalised when seeking entry to the territory of a State in search of refuge, ?frontiers of territories? in the context of non-refoulement obligations would suggest a similar interpretation. In other words, non-refoulement obligations should also trigger when claimants are *seeking entry to*, rather than directly *at* the frontier of a territory. This reading can potentially include areas such as the high seas.

IV. Non-Penalisation Clause and EU Third Country Agreements

It is suggested that EU third country agreements are in breach of both the Non-Penalisation Clause as well as corresponding non-refoulement obligations flowing therefrom. First, third country agreements between the EU and third countries (i.e. non-EU countries) are a form of migration control which seek to deter claimants from reaching the shores of Europe to claim asylum.[9] Second, these mechanisms of deterrence *vis-à-vis* third country agreements are methods which penalise claimants, resulting in heightened potential of rejection at the frontier, and direct contravention of the principle of non-refoulement.

While there are many other forms of migration control and deterrence measures, it is suggested that EU third country agreements are or at the very least, function as a form of migration control. Migration control, defined broadly, are methods utilised by States to reclaim their State sovereignty and to deter claimants from reaching their borders.[10] It can be argued that the very nature of EU third country agreements replicates the twin goals of migration control by permitting the EU to circumvent its international law obligations such as non-refoulement and by promoting chain

refoulement where there may not be an end in sight for claimants who are sent forth from third States to other States.[11]

As a method of migration control, EU third country agreements penalise claimants for their illegal presence by sending them forward to a third State where they are supposed to access asylum procedures. However, oftentimes, procedural guarantees are not in place in third States to properly determine refugee status for the claimant and diplomatic assurances relied upon by the sending State are not sufficient to guarantee against any potential future risk of refoulement.[12] Where claimants are penalised for their illegal entry (as read purposively), for example through rejection at the frontier during ?pushback? operations at sea, their corresponding risk of refoulement under the Refugee Convention would be heightened where they are legitimate refugees.

As shown, EU third country agreements permit the violation of both the Non-Penalisation Clause as well as corresponding non-refoulement guarantees.

V. Concluding Remarks

This journal entry has briefly demonstrated that EU third country agreements, as a method of migration control, may violate the Non-Penalisation Clause, where it can be shown that, when read purposively, claimants are penalised for their illegal presence within the jurisdiction of the State in question, hence resulting in rejection at the frontier and potentially heightening the risk of refoulement on return.

Given the ongoing situation in the Mediterranean Sea route, there is an increased need to monitor and scrutinise how States govern their migration control policies, which may result, at times, in the violation of international law norms such as non-refoulement. Now more than ever, the human rights of asylum claimants and refugees need to be safeguarded so that instances of refoulement may be reduced.

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The views expressed herein are the author?s own and do not represent the views of the Faculty of Law, University of Western Ontario, ECRE, or EDAL. The author may be reached at jpoonlaw@gmail.com [1].

[1] Convention Relating to the Status of Refugees 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), art 31(1) (Refugee Convention).

[2] Paul Weis, ?The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis? *available at:* <http://www.refworld.org/docid/53e1dd114.html> [2] (last visited 11 February 2018), 202 (Weis).

[3] Refugee Convention (n 1) preamble.

[4] Cathryn Costello, ?Article 31 of the 1951 Convention Relating to the Status of Refugees?, July 2017, *available at:* < http://www.refworld.org/docid/59ad55c24.html?mc_cid=96ab5023e8&mc_eid=29... [3] (last visited 11 February 2018) 23-24.

[5] The terms ?in any manner whatsoever? in Article 33(1) includes non-rejection at the frontier in Weis (n 2) 245.

[6] Refugee Convention (n 1) art 33(1).

[7] At the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons during the negotiations on the 1951 Refugee Convention, the United Kingdom representative proposed that the words ?to the frontiers of territories? should be replaced with ?to the frontiers of their country of origin, or to the frontiers?? of Article 33(1) in Weis (n 2) 205.

[8] Some scholars have argued that ?frontiers of territories? does not include the Exclusive Economic Zone (EEZ) or the high seas, since the UN Convention on the Law of the Sea Articles 58 and 65 provide that neither the EEZ nor the High Seas are subjected to any one State?s sovereignty in Bríd Ní Ghráinne, ?Left to Die at Sea: State Responsibility for the May 2015 Thai, Indonesian and Malaysian Pushback Operations? in Fiona de Londras and Siobhán Mullally (eds) (2015) *Irish Yearbook of International Law,* 123-124.

[9] See, for example, the arguments made by James C Hathaway and Thomas Gammeltoft-Hansen, ?Non-Refoulement in a World of Cooperative Deterrence? (2014) *Law & Economics Working Papers No 106, available at:* <https://goo.gl/jVrZdV [4]> (last visited 26 March 2018); For a discussion on migration control and human rights more generally, see: Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge, Cambridge University Press, 2011).

[10] There are some scholars who argue that international human rights law places a strict and strong limit on the sovereignty of States in States? exercise of discretion in the adoption and enforcement of migration policies; See, for example: Francesca Pizzutelli, ?The Human Rights of Migrants as Limitations on States? Control Over Entry and Stay in Their Territory?, 21 May 2015, *EJIL:Talk! available at:* <https://goo.gl/HDaK7D [5]> (last visited 26 March 2018).

[11] For a discussion on how EU third country agreements may circumvent non-refoulement obligations, see: Nula Frei and Constantin Hruschka, ?Circumventing Non-Refoulement or Fighting ?Irregular Migration??? *EU Immigration and Asylum Law and Policy, available at:* < https://goo.gl/3Zt9rK [6]> (last visited 26 March 2018); For a discussion on how EU third country agreements such as the EU-Turkey Deal permits violations of international law norms such as non-refoulement obligations, see: Jenny Poon, ?EU-Turkey Deal: Violation of, or Consistency with, International Law?? 1(3) *European Papers (Insight) Forum*, 1195-1203, 22 December 2016, *available at:*<https://goo.gl/hFNHRP [7]> (last visited 26 March 2018).

[12] For instance, the Committee Against Torture, in its General Commentary No. 4, has stated that ?diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement? in Committee Against Torture, ?General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22?, 9 February 2018, Advance Unedited Version, *available at:* <https://goo.gl/G8ntB6 [8]> (last visited 26 March 2018); For a further discussion of the Committee Against Torture General Commentary No. 4 and implications, see: Ba?ak Çali and Stewart Cunningham, ?Part 1: A few steps forward, a few steps sideways and a few steps backwards: The CAT?s revised and updated GC on Non-Refoulement?, 20 March 2018, *EJIL:Talk! available at:* <https://goo.gl/9TBLka [9]> (last visited 26 March 2018).

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