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ARTICLE

Constructive Refoulement as Disguised Voluntary Return: The Internalised Externalisation of Migrants

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Abstract

This paper purports to extend the concept of constructive refoulement in the context of externalised migration policies. This concept has been recognised in jurisprudence at the domestic, regional and international levels, and has developed through State practice as well as the practice of regional and international organisations. In the externalisation of migration policies, constructive refoulement becomes evident in both visible and invisible prisons: the United States-Mexico partnership in the Southern Border Programme creates a situation where asylum seekers eventually abandon the hope of continuing their asylum procedures and reluctantly return to other places. The Australian offshore asylum processing system, which has been remodelled by the UK, adopts the *kyriarchical* system where asylum seekers themselves control their self-return to their country of origin as a result of a combined situation of severe discipline and hatred between officials and inmates as well as between the inmates themselves. Meanwhile, the EU's Reception Conditions Directive scheme incorporates migrants in a planned destitution scenario where they are forced to choose to leave Europe due to poor socio-economic conditions. The Japanese combination of *karihomen* and *kanrisochi* also creates a planned destitute environment which compels asylum seekers themselves to seek their return by depriving them of their basic needs. Such governmentality of internalising externalisation by the Global North must be critically assessed in terms of the developing concept of constructive refoulement implied under international refugee and human rights law.

Keywords Constructive refoulement · Non-refoulement principle · United Nations High Commissioner for Refugees (UNHCR) · International Organization for Migration (IOM) · European Court of Human Rights (ECtHR)

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1 Introduction

In the genealogy of externalisation, migration policies have undergone a gradual 'thickening', with increasing investment in resources to prevent asylum seekers from entering countries, rapidly 'diffusing' among Global North nations, and ultimately resulting in 'freneticism' throughout the world.[1] These policies encompass a wide range of extraterritorial pushbacks and pullbacks, such as interception at sea, the use of transit zones at border crossings, police and border guard stations, or de facto detention near land borders.[2] Additionally, refugees and asylum seekers are increasingly being transferred from territorial States to third countries, where they are detained and their claims are processed.[3]

In these situations, the fundamental principle of non-refoulement, which is a cornerstone of international refugee and human rights law, is egregiously undermined by the returning countries. The non-refoulement principle traditionally prohibits *direct* refoulement to another country where individuals will probably face the danger of human rights violations, which is only triggered when the individual reaches the territory of a sovereign country (Fig. 1). However, in the context of externalised migration policies, States are willing to circumvent their protection responsibility by devising techniques to prevent refugees and asylum seekers from ever reaching their territory, which would not trigger the application of the principle. This new strategy is known as neo-refoulement, according to Jennifer Hyndman and Alison Mountz, and involves excluding refugees and asylum seekers from the national territory with the assistance of third countries and other public and private actors.[4]

In order to address these neo-refoulement phenomena, the non-refoulement principle has been expanded to include *indirect* or *chain* refoulement, which occurs when a person is returned to another location from which refoulement subsequently takes place (Fig. 2). In its Note on the 'Externalization' of International Protection in 2021, the Office of the United Nations High Commissioner for Refugees (UNHCR) warns that externalisation practices 'often result in the transfer of people from one country to another, without adequate protection safeguards or standards of treatment', leading to the 'indefinite "warehousing"' of asylum-seekers in isolated places, exposing them to indirect refoulement and other dangers'.[5] An academic institution, the Refugee Law Initiative, has also adopted a Declaration on Externalisation and Asylum which provides that '[f]or each individual, this pre-transfer procedure must assess whether any of the following elements are present that would render the transfer contrary to international law: i. Any real risk of direct or indirect *refoulement* as a result of the transfer'.[6]

[1] Mountz (2020).
[2] 32nd General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1 January–31 December 2022, 30 March 2023.
[3] Cantor et al. (2022).
[4] Hyndman and Mountz (2008).
[5] UNHCR Note on the 'Externalization' of International Protection, 28 May 2021, para. 7.
[6] Refugee Law Initiative (2022), p. 117.

Nonetheless, the problem with the concept of indirect refoulement is that the enforcer of return seems to be limited to States, whether territorial or third country. Refoulement does not necessarily have to be carried out by the State in question, as refugees and asylum seekers may choose to do so themselves under the guise of being 'voluntary'. In externalising migration policy, 'voluntary' departure is generally considered a preferable option to a forced return for both the person concerned and the host country.[7] The volition of such a return is, however, easily disguised by a combination of multiple techniques by several actors.[8] In fact, they are forced to accept 'voluntary' repatriation due to long-term detention in poor conditions, extreme poverty resulting from the deprivation of essential goods for survival, and despair arising from the complete loss of prospects for successful applications.

It should therefore be argued that *constructive* or *disguised* refoulement with the same effect as (in)direct refoulement must be considered as a circumvention of the principle (Fig. 3).[9] The rationale behind this is that the principle intends to 'avoid certain consequences (namely, return to the risk of being persecuted), whatever the nature of the actions that lead to that result'.[10] However, compared to the direct and indirect/chain aspects, constructive refoulement is relatively new, and thus, is less well developed.[11] The reason for this conceptual underdevelopment stems from the ambiguity and invisibility where the voluntary nature of migrants' return is disguised. Practically speaking, the statistics generally register the numbers of forced and assisted voluntary returns, but this is often not the case with unassisted voluntary returns.[12] Theoretically, constructive refoulement represents the State's sovereign authority to internalize migrants as an excluded body within its own and allies' territories in order to safeguard its citizens.[13] Following this logic, the territorial States create an environment in which migrants are forced to willingly submit themselves to the governmental techniques of refoulement.[14]

This paper therefore critically assesses these practices disguising voluntary return in terms of 'constructive *refoulement*'.[15] Following this introduction, this contribution provides an overview of the jurisprudential and institutional developments related to voluntary return and constructive refoulement (Sect. 2). It then examines

[7] Report of the Special Rapporteur on the Human Rights of Migrants: Study on the Return and Reintegration of Migrants (2018), A/HRC/38/41, paras. 87–88.

[8] Erdal and Oeppen (2022).

[9] De Weck (2022), para. 27.

[10] Hathaway (2021), p. 361.

[11] Çalı et al. (2020), pp. 365–367.

[12] Maliepaard et al. (2022).

[13] For Giorgio Agamben, the state of exception (*ex-capere* or taken outside) explicates the situation where the people (small p) as an excluded fragmentary body (*zoe*) is not absolutely without relation to the People (capital P) as an included political body (*bios*), but maintains itself in relation to the rule in the form of the rule's suspension. See Agamben (2000), p. 30.

[14] According to Michel Foucault, the concept of governmentality (the mentality of government) explains the governmental power to intervene in an environment where 'the person who accepts reality or who responds systematically to modifications in the variables of the environment, appears precisely as someone manageable'. See Foucault (2007), p. 133.

[15] An exception is the study by Mathew (2019).

Fig. 1 Direct refoulement

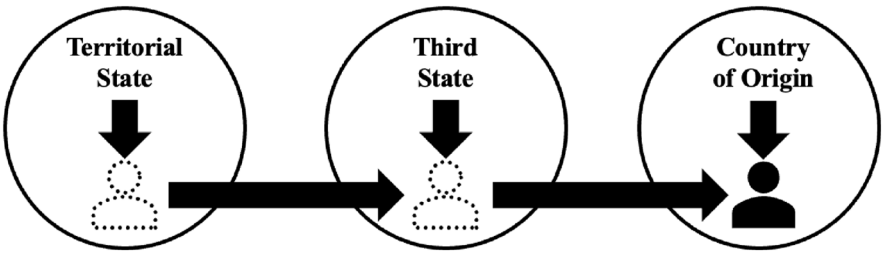

Fig. 2 Indirect refoulement

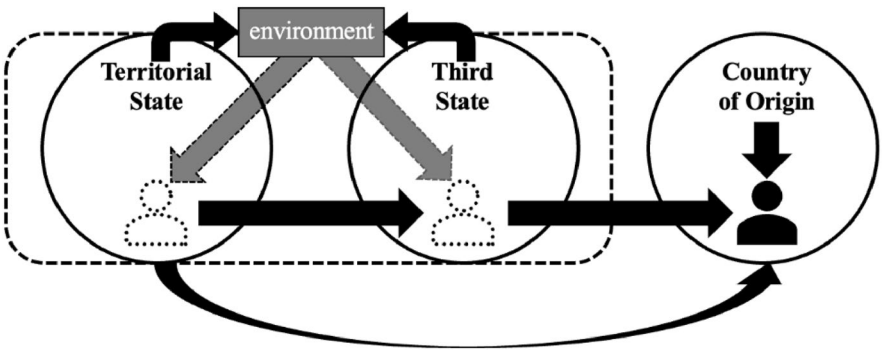

Fig. 3 Constructive refoulement

two patterns of constructive refoulement in externalized migration policies: involuntary returns from *visible* prisons in offshore asylum processing, exemplified by offshore detention centres established by Australia and the UK (Sect. 3); and forced repatriation from *invisible* prisons resulting from planned destitution that deprives individuals of their basic socio-economic needs, as typified by the EU and Japan

(Sect. 4). This article concludes that constructive refoulement refers to the process by which the territorial sovereign State incorporates refugees and asylum seekers into an environment that is constructed to exclude them from it (Sect. 5).

2 Constructive Refoulement as a Technique Governing Migrants

2.1 Jurisprudential Development

The concept of constructive refoulement is sporadically invoked in domestic courts. For example, in the *JA (and Ors)* case concerning the blanket prohibition on the employment of mandated refugees and screened-in torture claimants, Judge Andrew Cheung of the Court of First Instance of the High Court of Hong Kong stated that such a policy 'amounts to inhuman or degrading treatment', and in an extreme case, 'could even amount to constructive refoulement'.[16] Similarly, in the *Kituo Cha Sheria* case regarding a Government Directive to relocate all refugees living in urban areas to refugee camps, the Kenya High Court of Nairobi decided that 'aggressive pursuit of such a policy may have the effect of constructively repatriating urban refugees back to the countries from which they had fled'.[17]

At the international level, Article 10 of the Draft Articles on the Expulsion of Aliens adopted by the International Law Commission (ILC) provides in the first paragraph that '[a]ny form of disguised expulsion of an alien is prohibited'. The second paragraph elaborates on the concept of 'disguised expulsion': 'the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law'. In defining the requirements of disguised expulsion, the ILC relies on the precedents of the Iran-United States Claims Tribunal and the Eritrea-Ethiopia Claims Commission.[18] Similarly, the Committee against Torture (CAT) touches upon the concept of constructive refoulement in General Comment No. 4 issued in 2017: 'States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or prolonging them unduly, or cutting funds for assistance programmes for asylum seekers, which would compel persons in need of protection under article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment there'.[19] In its first general comment in the context of migration, the Committee on Enforced Disappearances also demands that

[16] *JA (and Ors) v. Director of Immigration* [2011] HKCFI 10, para. 82.

[17] *Kituo Cha Sheria & 8 others v. Attorney General* [2013] eKLR, para. 72.

[18] Draft Articles on the Expulsion of Aliens, ILC, with Commentaries, 2014, UN Doc. A/69/10, commentary on Art. 10 citing Harris (2010), p. 470; Partial Award, Civilians Claims, Ethiopia's Claim 5, Eritrea-Ethiopia Claims Commission, The Hague, 17 December 2004, paras. 91–95.

[19] CAT, General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, CAT/C/GC/4, 4 September 2018, para. 14.

States parties must avoid 'the creation of conditions that leave migrants no option but to return to a country where there are substantial grounds that they would be in danger of being subjected to enforced disappearance or transferred to another country where they face such a risk'.[20]

As a regional body, the European Court of Human Rights (ECtHR) has addressed the disguised nature of returning foreigners. In the case of *MS v. Belgium* regarding the deportation of an Iraqi national who made an initial asylum application alleging persecution by members of Saddam Hussein's regime, the Strasbourg Court minutely assessed the genuine voluntariness of his return. In this case, the applicant was faced with the choice of either remaining in Belgium without any hope of one day obtaining the right to reside there legally and without any concrete prospect of living there in freedom, or of returning to Iraq with his family while running the risk of being arrested there and suffering ill-treatment in prison.[21] Given the dilemma, the Court opined that the applicant was not put in a position to be able to provide his free consent and he was thereby considered to be subject to a forced return contrary to Article 3 of the European Convention on Human Rights (ECHR).[22] In the case of *MA v. Belgium* where the applicant had participated in a voluntary return programme to Sudan, the government had relied on the applicant's acquiescence in the voluntary programme to contest his status as a victim for admissibility under Article 3 of the Convention.[23] The European Court dismissed the objection because the Immigration Office had abused the applicant's vulnerable situation resulting from his deprivation of freedom in order to force him to consent to a disguised voluntary return without the assistance of 'an interpreter'.[24] The same approach was adopted in *Akkad v. Türkiye* where the applicant's voluntary return to Syria was disguised without properly assessing the risks he might face in that country, which was in violation of Article 3.[25]

Another incident in Europe occurred along the Latvian border where a number of refugees and migrants had arrived in an irregular manner from Belarus. In its report entitled 'Return Home or Never Leave the Woods', Amnesty International demonstrated that Latvia had carried out systematic pushbacks to force asylum seekers to remain in a forest for several months in freezing temperatures.[26] The Latvian authorities are alleged to have abused emergency powers escalating into acts constituting serious human rights violations to force people to return voluntarily.[27] According to the independent researcher Aleksandra Jolkina, Latvia is also accused of abusing the power to detain them as 'illegal migrants' and to pressure them into signing a

[20] CED, General Comment No. 1 on Enforced Disappearance in the Context of Migration, 18 September 2023, para. 34.
[21] ECtHR, *MS v. Belgique*, Appl. No. 50012/08, Judgment of 31 January 2012, para. 124.
[22] Ibid., paras. 124–125.
[23] ECtHR, *MA v. Belgium*, Appl. No. 19656/18, Judgment of 27 October 2020, para. 58.
[24] ECtHR, *MS v. Belgique*, Appl. No. 50012/08, Judgment of 31 January 2012, paras. 60–61.
[25] ECtHR, *Akkad v. Türkiye*, Appl. No. 1557/19, Judgment of 21 June June 2022, paras. 74–76.
[26] Amnesty International (2022).
[27] Ibid.

voluntary return declaration without having been given any opportunity to apply for asylum.[28] In this situation, 41 Kurdish-ethnic Iraqi nationals made an application to the ECtHR for interim measures. The Strasbourg Court decided in favour of their petition and determined that the Latvian authorities should 'provide all the applicants with food, water, clothing, adequate medical care and, if possible, temporary shelter', additionally noting that 'they are currently unable to enter those States nor to return to Belarus'.[29]

2.2 Institutional Developments

Constructive refoulement has been implied in relation to the existing institutional framework of voluntary returns. Within the UNHCR, the Executive Committee (EXCOM) examined the topic of 'voluntary repatriation' in detail, which resulted in its Conclusion No. 18 (XXXI) in 1980, No. 40 (XXXVI) in 1985, and No. 101 (LV) in 2004. The UNHCR also published the *Handbook—Voluntary Repatriation: International Protection* in 1996, where voluntariness refers to 'not only the absence of measures which push the refugee to repatriate, but also means that he or she should not be prevented from returning, for example by dissemination of wrong information or false promises of continued assistance'.[30] In practice, the UN Agency has concluded tripartite agreements as legally binding documents with countries of asylum and the host country governing voluntary repatriation. However, as a critical commentator has emphasized, the system may be abused by States as 'involuntary repatriation' which is unfavourable to refugees and asylum seekers.[31] One such account concerned the Tripartite Agreement governing the repatriation of Afghan citizens living in Pakistan. Based on interviews, Human Rights Watch reported that 'UNHCR's involvement in not only facilitating but also promoting involuntary refugee repatriation through significant cash support to returnees without calling the situation refoulement contradicted its basic refugee protection mandate and made it complicit in Pakistan's mass refoulement of Afghan refugees'.[32]

The International Organization for Migration (IOM) has similarly advanced the so-called Assisted Voluntary Return and Reintegration (AVRR) Programme, as enshrined in Article 1(1)(d) of its Constitution. In the context of AVRR, the IOM assumes that voluntariness exists when the following dual conditions are met: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enrol in the programme; and (b) an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision.[33] However, the voluntariness in this programme cannot escape from

[28] Jolkina (2022b).

[29] ECtHR, *RA and Others v. Poland*, Appl. No. 42120/21 and *HMM and Others v. Latvia*, Appl. No. 42165/21; Press Release: 'Court indicates interim measures in respect of Iraqi and Afghan nationals at Belarusian border with Latvia and Poland', ECHR 244 (2021), 25 August 2021.

[30] For a critical reading, see Takahashi (1997).

[31] Chimni (2004).

[32] Human Rights Watch, Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees, 13 February 2017.

[33] IOM, International Migration Law: Glossary on Migration (2019), p. 13.

international criticism.[34] *NA v. Finland* before the ECtHR is a case in point, where an asylum application by the applicant's father and his subsequent expulsion assisted by the IOM had subsequently led to his death in Iraq only a few weeks after his return. The Strasbourg Court determined that 'the applicant's father had to face the choice between either staying in Finland without any hope of obtaining a legal residence permit, being detained to facilitate his return by force, and handed a two-year entry ban to the Schengen area, as well as attracting the attention of the Iraqi authorities upon return; or agreeing to leave Finland voluntarily and take the risk of continued ill-treatment upon return'.[35] It was therefore concluded that 'the applicant's father did not have a genuinely free choice between these options, which renders his supposed waiver invalid'.[36] After the Court's ruling was published, the IOM acknowledged the seriousness of this tragic episode and underlined its commitment to a rights-based approach that upholds and protects migrants' rights.[37]

Another type of constructive refoulement concerns a 'voluntary departure' within the European Union (EU). Article 3(8) of Return Directive 2008/115/EC defines 'voluntary departure' as compliance with the obligation to return within the time-limit fixed for that purpose in the return decision. In this Directive, a voluntary departure under Article 7 is preferable to enforced removal under Article 8. According to Article 7(1), however, a voluntary departure is only allowed within an appropriate period of between seven and thirty days as determined by a return decision. Therefore, the voluntariness in this period is not genuine because the alternative that the person in question faces is a forced return, often combined with detention or destitution.[38] Notwithstanding this euphemism, the currently proposed recast of the Return Directive purports to abolish the seven-day minimum period for a voluntary departure in the current Article 7(1). Given the reports that almost all Member States have already shortened the period for voluntary departure to less than 7 days in certain cases, the proposed amendment disregards the fact that the minimum 7-day period was established in 2008 to avoid arbitrary State practices.[39] Furthermore, the European Commission adopted the EU Strategy on voluntary return and reintegration in 2021 as a key objective under the 2020 New Pact on Migration and Asylum. It has been criticized, however, that the Strategy does not fully address the shortcomings identified by the ECtHR in its *NA v. Finland* judgment, namely the

[34] Fine and Walters (2022).

[35] ECtHR, *NA v. Finland*, Appl. No. 25244/18, Judgment of 14 November 2019, para. 60.

[36] Ibid.

[37] IOM, IOM Acknowledges European Court of Human Rights Judgement of 14 November 2019, https://eea.iom.int/news/iom-acknowledges-european-court-human-rights-judgement-14-november-2019 (accessed 27 March 2024).

[38] EMHRN—EuroMed Rights, Return Mania. Mapping policies and practices in the EuroMed Region, Chapter 1 The EU framework of return policies in the Euro-Mediterranean Region (2021), p. 25, https://euromedrights.org/wp-content/uploads/2021/04/EN_Chapter-1-EU-Return-Policies.pdf (accessed 4 April 2024).

[39] European Parliamentary Research Service, The proposed Return Directive (recast): Substitute Impact Assessment (2019), p. 52; Majcher and Strik (2021), p. 114.

practice of Member States requiring waivers of legal responsibility to be signed by the returnees.[40]

3 Constructive Refoulement from Visible Prisons: Complicity with Third State Detention

We have examined the jurisprudential and institutional developments in the concept of constructive refoulement. The following sections demonstrate that the Global North has recently deployed the techniques for the disguised return of migrants. This section addresses the complicity between the territorial State and third States to create an environment of constructive refoulement, which may trigger shared international responsibility and the extraterritorial application of human rights treaties.[41] Here the focus is on the relationship between the United States and Mexico (Sect. 3.1), Australia and Papua New Guinea and Nauru (Sect. 3.2), and the United Kingdom (UK) and Rwanda (Sect. 3.3).

3.1 The United States: Supporting the Mexican Border Programme

Mexico is known as the migration corridor through which migrants make the journey from Central and South America to the United States. Against the increase in the numbers of asylum seekers and refugees as a background, the Mexican government finally adopted the Law on Refugees, Complementary Protection, and Political Asylum in 2011, which was subsequently amended in 2014. In order to implement Mexico's obligations under the Refugee Convention, the law incorporated the principles of non-refoulement, non-discrimination, confidentiality, and the best interests of the child. Such aspirations were significantly deviated from, however, since the Mexican President Enrique Peña Nieto announced the start of the *Programa Frontera Sur* (Southern Border Programme) in 2014 to coordinate border control and management in order to deal with the so-called Central American refugee crisis during that year. This crisis was instigated by pervasive gang violence, with a particular emphasis on its impact on women and children, within the nations comprising the 'Northern Triangle', namely Honduras, El Salvador, and Guatemala. In parallel, the Obama Administration officially designated the influx of a significant volume of asylum seekers from Central America to the United States as a humanitarian crisis.

The Southern Border Programme has attracted extensive criticism for its stringent strategy, which notably escalates the participation of law enforcement and military personnel primarily centred on apprehending refugees and migrants, with the goal of repatriating them to their respective home countries. The Inter-American Commission on Human Rights (IACHR) expressed concerns over the stepped-up actions reportedly being taken against migrants and human rights defenders and

[40] Moraru (2022), p. 204.
[41] Nollkaemper et al. (2022).

it recommended that the Mexican government should implement the international standards of detention and deportation proceedings.[42] In their Concluding Observations on the periodical State reports, the UN human rights treaty bodies, such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), and the Committee on the Rights of the Child (CRC), similarly expressed concerns that the implementation of the adopted migration policies falls short of adequately safeguarding the rights of migrants and asylum seekers, with a particular concern regarding the effective protection of children.[43] It came as no coincidence that Amnesty International and Human Rights Watch criticised the fact that overwhelming factors such as ongoing detention and inaccessibility to the asylum process constitute 'constructive refoulement' inducing detainees to abandon their claim for protection and placed them at risk on their return to their country of origin.[44]

The constructive refoulement occurring in this Programme is not solely the responsibility of the Mexican government but operates as part of the externalisation of the United States' migration policies.[45] In fact, the Mérida Initiative and more broadly the United States-Mexican security cooperation have been developed, under which the Mexican government has been responsible for southern border security with the United States' financial, logistical and training support. In the words of Aaron Korthuis, 'the United States, through its financial and political support, has exported, or "outsourced" its humanitarian crisis to Mexico', which results in international responsibility being shared between these two States.[46] In this sense, the United States is complicitly involved in Mexico's alleged practice of constructive refoulement concerning refugees and asylum seekers, especially with regard to unaccompanied and separated children.[47]

3.2 Australia: The *Kyriarchal* System in Papua New Guinea and Nauru

In the externalisation of migration policies, constructive refoulement is mostly visible in so-called offshore asylum processing, as represented by the Australian model. Australia has concluded a Memorandum of Understanding (MoU) with Papua New Guinea and Nauru regarding a transfer, assessment and settlement arrangement. Under this type of agreement, Australia would transfer asylum seekers to Regional Processing Centres in Papua New Guinea and Nauru for the processing of any asylum claims and these countries would settle these persons determined as refugees. Within the framework of the Operation Sovereign Borders, all unauthorized maritime arrivals in Australia after 2013 are to be transferred to detention centres in either Nauru or Papua New Guinea. These offshore detention centres have been

[42] Press Release: 'IACHR Expresses Concern over Mexico's Southern Border Plan', 10 June 2015.
[43] CRC/C/MEX/CO/4-5 (2015); CCPR/C/MEX/CO/6 (2019); CERD/C/MEX/CO/18-21 (2019).
[44] Human Rights Watch (2016), p. 5; Amnesty International (2017), p. 32.
[45] For an analysis of constructive refoulement in the United States' detention system, see Tabak (2023).
[46] Korthuis (2016).
[47] Grover (2018), pp. 196–201.

harshly criticised for their unsafe and inhumane treatment of detainees resulting in significant problems with regard to their physical and mental health. As a prime example, the Supreme Court of Papua New Guinea handed down the *Namah v. Pato* judgment in 2016, determining that detention and treatment at the centre were unconstitutional as well as contrary to international human rights standards.[48]

This appalling situation has been graphicly described by the Kurdish journalist Behrouz Boochani who was illegally detained on Manus Island in Papua New Guinea in 2013. He thumbed thousands of Farsi text messages on a phone describing situations of prolonged duress, torment, and suffering, which were later translated by the philosopher Omid Tofighian and published as *No Friend but the Mountains*. In this book, the author coined the term *System-e hākem* to illustrate the governing function in the prison denoting the sovereign spirit within the detention centre and Australia's ubiquitous border-industrial complex. The translator adopted the philosophical term *kyriarchal* to translate the Farsi term for the 'system of governmentality' that reinforces and multiplies with the aim of punishing, subjugating and suppressing asylum seekers.[49] The *kyriarchal* system creates an atmosphere constituted by micro-level and macro-level disciplinary measures not only in the hierarchical relations between officials and detainees but also in the horizontal level of animosity between the detainees themselves. By amalgaming such public and private hatred,[50] the system functions with the aim of '[r]eturning the refugee prisoners to the land from which they came'.[51]

Against such an implicit returning policy, international bodies invoke the concept of '*constructive refoulement*'. After a monitoring visit to the Regional Processing Centres, the UNHCR expressed concerns that *bona fide* refugees 'contemplate a return to their country of origin as a result of the combined uncertainty around processes in [Nauru and Papua New Guinea], the prospect of lengthy delays in accessing a permanent solution, the harsh conditions, and the lack of the prospect'.[52] The UNHCR therefore concluded that '[p]ressure exerted by persons in authority to return, coupled with poor conditions, and/or the failure to correctly identify the "voluntariness" of the asylum-seekers return, raises concerns around "constructive *refoulement*" under Article 33 of the 1951 Refugee Convention'.[53] In addition, in its Concluding Observations on the Sixth Periodic Report of Australia in 2017 the HRC expressed concerns that the detention centres in question demonstrated 'the fact that the harsh conditions have reportedly compelled some asylum seekers to return to

[48] Supreme Court of Papua New Guinea, *Namah v. Pato*, [2016] PGSC 13; SC1497, Judgment of 26 April 2016.

[49] Boochani (2019), Translator's Tale: A Window to the Mountains.

[50] Chakrabarty (2020).

[51] Boochani (2019), p 165.

[52] UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013 (Report, 26 November 2013), para. 136; UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013 (Report, 26 November 2013), para. 116.

[53] UNHCR monitoring visit to the Republic of Nauru, 7 to 9 October 2013, para. 140; UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013, para. 119.

their country of origin, despite the risks that they face there', which is contrary to the non-refoulement principle.[54]

3.3 The United Kingdom: The Illegal Migration Bill and the UK's Partnership with Rwanda

The lessons learnt from the Australian model can be transposed to the recent UK migration policy in both a negative and a positive sense.[55] On 13 April 2022, the UK government entered into a MoU with Rwanda to establish a bilateral asylum partnership in which Rwanda commits itself to receive asylum seekers from the UK and to consider their claims for asylum. The partnership with Rwanda forms part of the Illegal Migration Bill that allows domestic authorities to detain irregular migrants and then to promptly remove them either to their home country or to a safe third country. The MoU and the Bill quickly received criticism from various international bodies. The UNHCR published a legal analysis in June 2022 which demonstrated serious concerns that asylum seekers transferred under the agreement 'will not have access to fair and efficient procedures for the determination of refugee status, with consequent risks of refoulement'.[56] Multiple mandate holders under the special procedures of the United Nations Human Rights Council (UNHRC) also expressed concerns in relation to the MoU and its compatibility with the State's international human rights obligations.[57] In particular, the Special Rapporteur on trafficking in persons, especially women and children, requested the ECtHR to grant urgent interim measures in *NSK (formerly KN) v. the United Kingdom* and thereafter to determine in favour of an asylum seeker facing imminent removal to Rwanda under the MoU.[58]

Criticism also came from domestic political institutions. The House of Lords' International Agreements Committee also cited several witnesses arguing that the MoU risked breaching the non-refoulement principle under the Refugee Convention.[59] With regard to disguised return, before Parliament's Joint Committee on Human Rights held on 8 June 2022 the expert witness Colin Yeo, a barrister, pointed out the risk of breaching Article 33 of the Refugee Convention in the sense of constructive refoulement as follows: 'where you are saying to somebody, "You can either go to Rwanda or you can go to your home country where you will face

[54] HRC, Concluding Observations on the Sixth Periodic Report of Australia, CCPR/C/AUS/CO/6, 1 December 2017, para. 35(a).

[55] For the impact of the Australian model on the UK's migration policies, see Matera et al. (2023).

[56] UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement, 8 June 2022, paras. 17–21.

[57] OL GBR 9/2022, 1 July 2022.

[58] Letter from the Mandate of the United Nations Special Rapporteur on Trafficking in Persons, especially women and children, Siobhán Mullally, to the President of the European Court of Human Rights, 13 June 2022.

[59] UK House of Lords, International Agreements Committee, 7th Report of Session 2022–23, Memorandum of Understanding between the UK and Rwanda for the provision of an asylum partnership arrangement, HL Paper 71, 18 October 2022, para. 21.

persecution. Which would you prefer?" Some people might choose to go back to their own country and take their chances there'.[60] In June 2023, the House of Commons' and House of Lords' Joint Committee on Human Rights published a report concluding that the Illegal Migration Bill enabling the removal of asylum seekers from the UK to a 'safe third state' like Rwanda breaches a number of the UK's international human rights obligations including the principle of non-refoulement.[61]

The judicial branch's findings regarding the legality of the Bill and extradition to Rwanda are divided among the courts. In its judgment in *AAA and Others* on 19 December 2022, the High Court of Justice supported the legality of making arrangements for relocating asylum seekers to Rwanda and for their asylum claims to be determined in Rwanda rather than in the UK.[62] In contrast, the Court of Appeal reached a majority opinion that the inadequacies within Rwanda's asylum system are such that there are substantial grounds for believing that there is a real risk that persons sent to Rwanda will be returned to their home countries where they face persecution or other inhumane treatment.[63] Nevertheless, the Prime Minister Rishi Sunak respectfully disagreed with the Court's decision and demonstrated the government's intention to appeal against this judgment to the Supreme Court. In its judgment on 15 November 2023, the UK Supreme Court upheld the Court of Appeal's conclusion that the Rwanda policy is unlawful because there would be substantial grounds for believing that asylum seekers would face a real risk of ill-treatment by reason of refoulement to their country of origin if they were removed to Rwanda.[64] Despite such judicial reactions, the political branch signalled the emergency passing of the Safety of Rwanda (Asylum and Immigration) Bill and the signing of a new UK-Rwanda Asylum Partnership Treaty. However, as criticised by the UNHCR, this extraordinary position fails to 'meet the required standards relating to the legality and appropriateness of the transfer of asylum seekers and is not compatible with international refugee law'.[65]

[60] UK Parliament: Joint Committee on Human Rights, Oral evidence: The UK-Rwanda Migration and Economic Development Partnership and Human Rights, HC 293, 8 June 2022.

[61] House of Commons / House of Lords Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, Twelfth Report of Session 2022–2023.

[62] UK High Court of Justice, *The King (on the Application of AAA and Others) v. The Secretary of the Home Department* (United Nations High Commissioner for Refugees Intervening) [2022] EWHC 3230 (Admin), Judgment of 19 December 2022.

[63] UK Court of Appeal, *The King (on the Application of AAA and Others) v. The Secretary of the Home Department* (United Nations High Commissioner for Refugees Intervening) [2023] EWCA Civ 745, Judgment of 29 June 2023.

[64] UK Supreme Court, *R (on the application of AAA and others) (Respondents/Cross Appellants) v. Secretary of State for the Home Department* (Appellant/Cross Respondent) [2023] UKSC 42, Judgment of 15 November 2023.

[65] UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda Arrangement: An Update, 15 January 2024.

4 Constructive Refoulement from Invisible Prisons: Planned Destitution

In the preceding section, we confirmed that constructive refoulement can arise due to harsh detention conditions established by host and third countries. However, the environment in which constructive refoulement occurs is not necessarily confined to 'visible' prisons. Host and third countries can compel asylum seekers to choose self-deportation by exerting pressure on their social and economic circumstances. In the following, we will explore the potential for constructive refoulement from 'invisible' prisons to occur through such planned destitution, using specific examples from the EU (Sect. 4.1) and Japan (Sect. 4.2).

4.1 The European Union: The Reception Conditions Directive

Constructive refoulement does not only occur in visible detention camps but also in invisible forms triggered by the deliberate deprivation of socio-economic rights. The EU is one of those criticised for adopting so-called 'planned destitution' policies designed to return asylum seekers.[66] In the European asylum policy, the Dublin system has evolved from Dublin I (Dublin Convention 1990), through Dublin II (Council Regulation (EC) No. 343/2003) to Dublin III (Regulation (EU) No. 604/2013). The general principle is that an application by any third country national who applies for asylum at the border of any of the Member States or in their territory shall be examined by a single Member State (Art. 3 of Dublin I, Dublin II and Dublin III). When it can be proved that an applicant for asylum has irregularly crossed the border into a Member State by land, sea or air, having come from a non-Member State of the European Communities, the Member State so entered shall be responsible for examining the application for asylum (Art. 6 of Dublin I; Art. 10 of Dublin II; Art. 13 of Dublin III).

Although the Dublin system determines that one Member State is responsible for processing an asylum application, if a substantive examination of asylum applications varies from one Member State to another, refugees may tend to concentrate in Member States with more lenient examination standards. It is therefore necessary to harmonize various aspects of the acceptance of asylum seekers by Member States, the examination procedures for asylum applications, and the examination criteria for asylum recognition. One such measure was Council Directive 2003/9/EC of 27 January 2003 (the Reception Conditions Directive), which set out the conditions that Member States should meet when accepting asylum seekers who have been granted residence. This Directive has been recast by the European Parliament and Council as Directive 2013/33/EU of 26 June 2013 (the recast Reception Conditions Directive). Despite the common standards of reception conditions, there existed a real risk of constructive refoulement in which refugees and asylum seekers were forced

[66] Wessels (2023). For the concept of planned destitution, see Lester (2018), Chapter 6.

to 'voluntarily' accept their return to their country of origin due to the inadequate distribution of socio-economic needs.

The turning point concerning this problem was the case of *MSS v. Belgium and Greece* before the ECtHR. The applicant in this case, an Afghan national, had entered the EU through Greece and later applied for asylum in Belgium. However, according to the Dublin Regulation, the Belgian Aliens Office ordered him to leave the country and return to Greece, where responsibility for examining his asylum application lay. Upon arriving in Greece, he was detained in poor conditions and lived on the streets as he had no means of subsistence. In its 2011 judgment the Grand Chamber concluded that Greece had violated Article 3 of the ECHR as its authorities had placed the applicant in a situation where he 'found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs', with 'feelings of fear, anguish or inferiority capable of inducing desperation'.[67] The Court furthermore found a violation of Article 3 by Belgium in that 'by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment'.[68] In reaching these conclusions, the Strasbourg judges emphasised that 'the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States'.[69] The Court also attached considerable importance to the applicant's status as an 'asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection' in light of the Refugee Convention, the UNHCR's activities and the Reception Conditions Directive.[70]

Although several commentators have referred to the *MSS* judgment, Lieneke Slingenberg provides the most persuasive explanation for the Court's reasoning which has been coherently applied in subsequent similar cases.[71] Gaining inspiration from Frank Lovett's conceptualization of 'freedom as non-domination', Slingenberg formulates that State domination materializes when (1) coercive force including the distribution of resources is exerted over an individual, (2) that force is not sufficiently governed by effective and reliable public rules, and (3) the individual is dependent on this relationship with the state.[72] In the *MSS* case concerning the deliberate withholding of basic needs (1), Slingenberg explicates that the Court emphasized asylum seekers' vulnerability and dependency on the relationship with

[67] ECtHR (GC), *MSS v. Belgium and Greece*, Appl. No. 30696/09, Judgment on Merits and Just Satisfaction of 21 January 2011, para. 263.
[68] Ibid., para. 367.
[69] Ibid., para. 250.
[70] Ibid., para. 251.
[71] For example, ECtHR, *VM and others v. Belgium*, Appl. No. 60125/11, Judgment of 7 July 2015; ECtHR (GC), *VM and Others v. Belgium*, Struck Out of the List, 17 November 2016.
[72] Slingenberg (2019), pp. 293–298.

the State (3), which should have been regulated by legally valid rules within the framework of the Reception Conditions Directive.[73]

The Reception Conditions Directive has also been interpreted within the framework of the Charter of Fundamental Rights of the European Union (CFREU). In the *GISTI v. Ministre de l'Intérieur de l'Immigration* case, the Court of Justice of the European Union (CJEU) reconciled the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter stipulating that human dignity must be respected and protected. The rights-based interpretation led the Court to articulate that 'asylum seekers may not … be deprived—even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State—of the protection of the minimum standards laid down by that directive'.[74] The Luxembourg Court reiterated this position in *Saciri and Others*, according to which the amount of financial aid granted by each Member State under the Directive 'must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence'.[75]

The interaction between civil (first generation) and social (second generation) rights for migrants' subsistence has also been observed within the framework of the European Social Charter (ESC). The case of *CEC v. the Netherlands*, decided on the merits in 2014, was an opportunity for the European Committee of Social Rights (ECSR) to clarify the scope of the right to social and medical emergency assistance under Article 13(4) of the Charter in relation to asylum seekers. Compared to the standards set in *MSS v. Belgium and Greece* by the ECtHR and in *GISTI* and *Saciri and Others* by the CJEU, the ESC observed that the ESC provides wider protection that 'requires that necessary emergency social assistance be granted also to those who do not, or no longer, fulfil the criteria of entitlement to assistance specified in the above instruments, that is, also to migrants staying in the territory of the States Parties in an irregular manner, for instance pursuant to their expulsion'.[76] This interpretation was amplified in the *FEANTSA v. the Netherlands* decision adopted at the same time, where the Committee noted that 'the right to emergency shelter and to other emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human dignity'.[77] The twin decisions led to discussions within the Strasbourg Court in *Hunde v. the Netherlands* when interpreting the social aspect of Article 3

[73] Ibid., pp. 303–304.

[74] CJEU, Case C-179/11 *Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Judgment of 27 September 2012, ECLI:EU:C:2012:594, para. 56.

[75] CJEU, Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others*, Judgment of 27 February 2014, ECLI:EU:C:2014:103, paras. 35 and 40.

[76] ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision on the Merits of 1 July 2014, para. 117.

[77] ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, Decision on the Merits of 2 July 2014, para. 185.

of the ECHR, though not leading automatically to a violation thereof.[78] In the 2015 Statement of Interpretation on the Rights of Refugees under the Charter, the ECSR further noted that 'certain social rights directly related to the right to life and human dignity are part of a "non-derogable core" of rights which protect the dignity of all people [and] must be guaranteed to refugees, and should be assured for all displaced persons'.[79]

These accumulations of judicial protection from constructive refoulement in Europe promoted the universal standards based on the International Covenant on Civil and Political Rights (ICCPR). A prominent example is the *Warda Osman Jasin v. Denmark* case concerning the deportation of a Somali asylum seeker to Italy according to the Dublin scheme. While the ECtHR had not found a systemic failure to provide support or facilities catering for asylum seekers in Italy,[80] the Committee underscored the applicant's 'own personal experience that, despite being granted a residence permit in Italy, on two occasions she was faced with indigence and extreme precarity'.[81] Despite this precarious situation, the Committee found that Denmark had failed to undertake a sufficient analysis of the applicant's personal experience and the foreseeable consequences of forcibly returning her to Italy, and thereby, had violated Article 7 of the Covenant.[82] To clarify the majority decision, Committee members Yuval Shany and Konstantine Vardzelashvili reasoned as follows: 'In fact, these two entitlements appear to be, at least in some cases, closely interrelated, as the inability to exercise the most basic economic and social rights, which would enable asylum seekers to stay in the country of asylum, may eventually leave them no choice but to return to their country of origin, effectively rendering illusory their right to non-refoulement under international refugee law'.[83] The Committee adopted a similar stance in the *OYKA v. Denmark* case concerning an attempted return of the applicant back to Greece within the Dublin framework. As was the case concerning the applicant in *MSS*, the applicant in *OYKA* had lived on the streets in Greece and had not received any assistance from the authorities prior to coming to Denmark. Returning him to Greece would have exposed him to the same conditions from which he had fled and would thus have violated Denmark's obligations under Article 7.[84]

[78] ECtHR, *Hunde v. the Netherlands*, Appl. No. 17931/16, Decision of 5 July 2016, para. 53.

[79] ECSR, Statement of Interpretation on the Rights of Refugees under the European Social Charter (2015), para. 10.

[80] ECtHR, *Mohammed Hussein and Others v. the Netherlands and Italy*, Appl. No. 27725/10, Judgment of 2 April 2013.

[81] HRC, *Warda Osman Jasin v. Denmark*, Comm. No. 2360/2014, CCPR/C/114/D/2360/2014, View of 22 July 2015, para. 8.8.

[82] Ibid., paras. 8.9–8.10.

[83] Ibid., Individual opinion of Committee members Yuval Shany and Konstantine Vardzelashvili (concurring), para. 2.

[84] HRC, *OYKA v. Denmark*, Comm. No. 2770/2016, CCPR/C/121/D/2770/2016, View of 7 November of 2017, paras. 8.10–8.12.

4.2 Japan: The *Karihomen* and *Kanrisochi* Systems

The principles and practices of the universal system that have been shaped through the European regional experiences may provide valuable insights for other contexts, including the Japanese migration policy. Japan's deportation system presupposes a mandatory detention policy (*zenkenshuyoyugi*) for an indefinite term without judicial review under Article 39 of the Immigration Control and Refugee Recognition Act. Under Article 54 of the Act, detainees may be provisionally released (*karihomen*), but those who are provisionally released (*karihomensha*) are not allowed to receive health insurance and to work in order to earn a living wage. Moreover, they are 'subject to a "recall" for redetention at any time'; the governmental technique for this invisible cage 'often lasts until the detainee in question concedes to "self-deportation" at his own expense'.[85] Further socio-economic difficulties arose during the COVID-19 pandemic, during which there were higher numbers of provisionally released detainees in order to avoid outbreaks of the coronavirus within detention facilities (2,217 cases in 2019; 3,061 cases in 2020; 4,174 cases in 2021), thereby resulting in more *karihomensha* having to live while being deprived of basic social needs.[86] A survey conducted by NPO North KANTO Medical Consultation demonstrates that the *karihomensha* had experienced further poverty during the pandemic.[87]

In a recent development the Liberal Democratic Party (LDP) submitted a Bill to amend the Immigration Control and Refugee Recognition Act in 2021. One of the major changes, based on the Recommendations of the Sub-Committee on Detention and Deportation (SCDD), was to modify the current system of *zenkenshuyoyugi* and instead to introduce a non-custodial measure, namely a monitoring measure (*kanrisochi*). This alternative to detention was intended to designate a 'monitor' (*kanrinin*) from among private actors such as relatives and supporters assigned to the person in question by the supervising immigration inspector, under which certain activities could have been allowed including earning a living when the inspector found this to be appropriate (Arts. 44-3, 44-5). The Bill was supposed to require those persons who had been provisionally released to pay a deposit of not more than three million yen (Art. 52-2(1)), and to be monitored by relatives or supporters who would have been obliged to report on the subject's daily life and they could be fined if they violated that obligation (Arts. 44-3, 52-3 and 77-2). The 2021 Bill was abandoned due to strong public criticism after the tragic death of a Sri Lankan woman, Wishma Sandamali, who was in custody at an immigration detention facility. Nonetheless, the LDP resubmitted a similar Bill in 2023 that maintains the basic framework but with minor changes. Regarding the *kanrisochi* system, the new proposal

[85] Endoh (2022), p. 56.

[86] Immigration Services Agency of Japan, Immigration Control statistics 2019–2021.

[87] NPO North KANTO Medical Consultation, 'Report on the Living Conditions of *Karihomensha*', March 2022 (141 valid responses, corresponding to 2.4% of the total number of *Karihomensya* (5,781) at the end of 2020); 70% of the respondees could not earn any income (0 yen); 86% of the respondees earned less than 900,000 yen; 66% of the respondees were in debt (2.3 times higher than the MHLW's survey; 85% of the respondees answered that their lives had become more difficult).

seems to reduce the burdens concerning the payment of a deposit (Arts. 44-2(2)(6) and 52-2(2)(5)) and concerning the reporting on the daily lives of the provisionally released detainees in question (Arts. 44-3(5) and 52-3(5)), but the supervising immigration inspector retains the authority to reimpose these burdens when necessary. The new Bill was finally adopted by the Japanese Diet on 9 June 2023.

Furnished with information from domestic civil societies, international bodies have sent alarming messages concerning the Japanese immigration detention system. The presupposition of *zenkenshuyoyugi* has been generally criticized by several human rights treaty bodies due to their indeterminate timeframe, without establishing fixed time limits and the possibility of judicial review.[88] As regards the individual case of *Deniz Yengin and Heydar Safari Diman*, the Working Group on Arbitrary Detention (WGAD) under the UNHRC special procedures issued an opinion in 2020 that the detainees' human right to liberty, a fair trial and non-discrimination as protected under the ICCPR had been ignored.[89] For the destitute living conditions of those provisionally released, in its latest concluding observation in 2022 the HRC pointed out that 'the precarious situations of *karihomensha*, individuals who have lost their resident status or visas and are on "provisional release", without options to work or obtain revenue', and recommended 'the State party should … (c) Provide the support necessary to immigrants who are on "provisional release" and consider establishing opportunities for them to engage in income generating activities'.[90]

The proposed amendments to the Immigration Control and Refugee Recognition Act have been subject to severe criticism from the international community. For the 2021 Bill, the UNHCR submitted a comprehensive analysis expressing concerns regarding the *kanrisochi* system, specifically highlighting the unclear opportunities for work permits and potential penalties against *kanrinin*.[91] The concerns were shared by several mandate holders under the UNHRC special procedures including the WGAD and the Special Rapporteur on the rights of migrants.[92] These mandate holders reiterated their concerns with regard to the 2023 Bill where they welcomed some minor changes but highlighted the problems that persist within the main structure.[93] All of these comments and concerns critically assess the Japanese techniques of urging detainees, including *karihomensha*, to self-return from Japan in the disguise of voluntariness, which contradicts the non-refoulement principle.

[88] HRC, Concluding observations on the sixth periodic report of Japan, CCPR/C/JPN/CO/6, adopted on 23 July 2014, para. 19; CERD, Concluding observations on the combined tenth and eleventh periodic reports of Japan, CERD/C/JPN/CO/10-11, adopted on 28 August 2018, paras. 35–36.

[89] *Deniz Yengin and Heydar Safari Diman (Japan)*, Working Group on Arbitrary Detention, Opinion No. 58/2020, A/HRC/WGAD/2020/58, 25 September 2020.

[90] HRC, Concluding observations on the seventh periodic report of Japan, CCPR/C/JPN/CO/7, 30 November 2022, paras. 32–33.

[91] UNHCR comments on the Bill for partial amendments to the Immigration Control and Refugee Recognition Act submitted to the 204th Diet session of year 2021 Based on the Recommendations of the Sub-Committee on Detention and Deportation (SCDD), 7th Immigration Control Policy Discussion Panel, 9 April 2021, paras. 65–68, 72–74.

[92] OL JPN 3/2021.

[93] OL JPN 1/2023.

5 Conclusion

This paper purported to extend the understanding of the non-refoulement principle to its constructive pattern in the contexts of externalised migration policies. This concept has been recognised in jurisprudence at the domestic, regional and international levels, and has developed through State practice as well as the practice of regional and international organisations. In the externalisation of migration policies, constructive refoulement becomes evident in both visible and invisible prisons: the United States-Mexico partnership in the Southern Border Programme creates a situation where asylum seekers eventually abandon the hope of continuing their asylum procedures and reluctantly return to other places. The Australian offshore asylum processing system, which has been remodelled by the UK, adopts the *kyriarchical* system where asylum seekers themselves control their self-return to their country of origin as a result of a combined situation of severe discipline and hatred between officials and inmates as well as between the inmates themselves. Meanwhile, the EU's Reception Conditions Directive scheme incorporates migrants in a planned destitution scenario where they are forced to choose to leave Europe due to poor socio-economic conditions. The Japanese combination of *karihomen* and *kanrisochi* also creates a planned destitute environment which compels asylum seekers themselves to seek their return by depriving them of their basic needs. Such governmentality of internalising externalisation by the Global North must be critically assessed in terms of the developing concept of constructive refoulement implied under international refugee and human rights law.

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