

Strategies to Deal with State Circumvention: The European Court of Human Rights' Protection Practices and Jurisprudence Developments for Those Who Have Not Applied for Asylum in the Principle of Non-Refoulement

Kexin Wang*

Master of Laws, University of Malaya, Kuala Lumpur, Malaysia

*Corresponding author: Kexin Wang, wangkexin_2@163.com

Abstract

As the number of global refugees reaches an all-time high, various countries have adopted strategies such as maritime interception, border repatriation, and overseas processing to circumvent the legal obligations arising from the "non-refoulement" principle. This has led to a large number of individuals at risk of persecution being deprived of the opportunity to apply for asylum, thereby creating a special category of "unapplied asylum seekers". This article analyzes how the European Court of Human Rights (ECtHR) has functionally expanded its jurisdiction through its "effective control" principle and substantively strengthened procedural obligations. By using judicial activism to address the systemic protection gaps caused by evasion strategies, the ECtHR has transformed the application of the "non-refoulement" principle from a formal "submission of an application" to a substantive "within its jurisdiction and facing a real risk". This approach fills the protection gap for unapplied asylum seekers.

Keywords

Non-Refoulement Principle, European Court of Human Rights, State Avoidance Strategies, Non-Asylum Applicants, Extraterritorial Jurisdiction, Procedural Obligations

1. Introduction

The 2024 Global Trends Report by the United Nations High Commissioner for Refugees shows that the number of forcibly displaced people worldwide has reached a record high of 120 million, highlighting the unprecedented pressure faced by the international refugee protection system [1]. Under this backdrop, the principle of non-refoulement has encountered severe challenges. The traditional protection model only requires an individual to enter another country's territory and file for asylum. However, in contemporary national practices, due to new situations such as maritime interceptions and border repatriations, individuals' opportunities to submit applications have been deprived, resulting in a large number of "unapplied asylum seekers" who face real persecution risks but cannot receive effective relief. These evasion strategies not only weaken the effectiveness of the 1951 Convention on the Status of Refugees and its Protocols, but also directly challenge the cornerstone position of the non-refoulement principle in the refugee protection system [2].

The European Court of Human Rights (ECtHR), through its judicial practice, has become aware of the circumvention strategies of some countries and is committed to protecting refugees who have not applied for asylum. However, the existing literature has explored the principle of non-refoulement and state circumvention strategies [3], as well as extraterritorial jurisdiction [4] and the conflict between EU border controls and refugee rights [5] provides important insights, but there is still a lack of systematic analysis of how ECtHR specifically uses the two major legal tools of "jurisdictional obligation" expansion and "procedural obligation" to directly fill the protection gap of "non-applicant".

To fill this gap, the core research question of this paper is how the ECtHR extends the protection of the principle of non-refoulement to "persons who have not applied for asylum" through an evolutionary interpretation of Article 3 of the European Convention on Human Rights and procedural obligations, and the effectiveness and limitations of this jurisprudence development [6]. This paper argues that ECtHR has successfully shifted the threshold of protection from a formal state of "applied" to a substantive state of "accessible and at risk" by shifting the concept of "jurisdiction" from territorial to functional and substantively making "procedural obligations" a core component of the principle of non-refoulement, which is a significant and still limited legal response to modern state circumvention strategies.

2. The Absoluteness of the Principle of Non-Refoulement and Its Challenges: Giving Rise to "Non-Asylum Applicants"

The principle of non-refoulement, a cornerstone of international refugee and human rights law, absolutely prohibits States from returning any person to territory where they may face persecution, torture or other serious harm. Originally derived from Article 33 of the 1951 Convention relating to the Status of Refugees, this principle has evolved into an international norm widely recognized as having the status of customary and even jus cogens. Its core human rights core lies in the absolute guarantee of the right to life and the right to freedom from torture, requiring the state to conduct

individualized risk assessment and be prevention-oriented, triggering the obligation to protect based solely on "substantial risk", and must apply to all groups of people without discrimination.

However, there is a huge gap between the high legal status and the practice of the state. To circumvent the legal obligations arising from this principle, countries have developed a series of refined circumvention strategies that directly create a special group of "un asylum applicants", i.e. individuals who are in fact at risk of repatriation but are systematically excluded from formal asylum procedures.

These strategies are mainly manifested in three forms:

Externalization: Physically and judicially blocking an individual's access to their home protection system by outsourcing border control and asylum processing procedures to a third country (e.g., the EU-Turkey Agreement.[7])

Interception and repatriation: Intercepting a vessel or flight carrying an asylum seeker on the high seas or international airspace and forcibly returning them to their country of origin or transit without any risk assessment.

Procedural barriers: Legal or de facto deprivation of the possibility of individuals to file applications through domestic legislation or administrative measures (e.g., criminalization of irregular entry, physical barriers).

The common consequence of these strategies is that they artificially create a disconnect between "substantial risk" and "procedural status", systematically depriving individuals of the opportunity to obtain identity review, thus forming huge protection loopholes. It is this serious challenge that constitutes the direct motivation for the European Court of Human Rights (ECtHR) to expand the scope of application of the principle of non-refoulement through judicial intervention and fill the gap in the protection of "non-applicants".

3. Those Who Have Not Applied for Asylum: Definition, Causes and Protection Dilemma

3.1 Definition of Concepts

"Non-asylum applicants" are those who have been intercepted at the border and have not been granted the opportunity to apply, those who have been deported on the high seas, those who have not applied for fear or information barriers, and those who are in a legal gray area due to being included in the "extraterritorial processing" procedure. They are individuals who are de facto at risk of persecution within the meaning of the Refugee Convention, but have not been able to formally initiate or complete the asylum application process for subjective and objective reasons. Its core feature is the identity dilemma caused by the substantive need for protection and the absence of procedures.

3.2 Causes and Dilemma

3.2.1 Subjective "Unwilling to Apply" and "Not Aware of Application"

Reluctance to apply is mostly due to fear of consequences and distrust of the system. First, fear of failure: Many fear that if their application is rejected, they risk immediate deportation, detention or loss of their existing temporary stability, believing that maintaining informal status is more "safe". Second, seek alternative routes: Some people want to obtain legal residence through other means, such as work, study or family reunification, and consider the asylum process not optimal. Third, psychological and trust disorders: severe post-traumatic stress disorder (PTSD) may make them unable to make normal decisions; The prejudice against the corruption, injustice or politicization of the asylum system also discourages them. Fourth, information misdirection and dependence: The informal intermediary network (such as snake head) it relies on may spread false information for its own benefit, exaggerate the difficulty of application, and dissuade it from entering the formal process.

The primary reason for not knowing how to apply is information isolation: language barriers, cultural differences and the digital divide make it difficult for refugees to obtain accurate information about their rights and access to applications. The second is educational and cognitive limitations: some groups may not understand the concept of "asylum" at all due to their educational background and do not know that they have the basic right to apply for protection. Finally, social isolation: New arrivals lack the support of local social networks and are in a situation of isolation and lack of necessary guidance and help.

3.2.2 Objectively "Unable to Apply"

This is mainly due to the legal and policy barriers set by the state. First, procedural obstacles: For example, many countries stipulate that illegal immigrants, those who have exceeded the application time limit, or those who pass through a "safe third country" cannot apply for asylum and are directly excluded from the procedure. Second, the system is closed: under political pressure, some countries may de facto suspend or severely restrict the acceptance of new asylum applications, leaving seekers "without help".

In summary, in addition to some refugees who do not know or do not want to apply for subjective reasons, the State also deprives them of access and access to the asylum application system through physical interceptions such as border interceptions, repatriation at sea or detention centres. Not applying for asylum is not a simple personal choice, but a complex result of a combination of individual psychology, national policy barriers and structural deficiencies in the international protection system. Despite the obstacles, ECtHR's case law serves as a key attempt by international law to ensure that States' obligations to assess and protect individuals within their jurisdiction are consistent with human rights

requirements.

4. Discussion on the Legal Contribution and Limitations of Ecthr to Protect Refugees Who Have Not Applied for Asylum

4.1 Main Legal Contributions

4.1.1 Ecthr Is Actively Explained by the Theory of "Effective Control"

The definition of "jurisdiction" has shifted from the traditional category of territorial sovereignty to the de facto exercise of power over the objects of its jurisdiction. When an official of a country exercises effective control over an individual outside the territory, its obligation to govern human rights arises. The key transformation of the concept of jurisdiction from territoriality to functionality has been completed. The core of its jurisprudence lies in the attachment point of state obligations.

Hirsi Jamaa and Others v. Italy (2012) [8], this case was a landmark decision for the ECtHR to deal with state circumvention. Italian customs police intercepted a group of Eritrean and Somali migrants on the high seas and repatriated them en masse to Libya.

The court held that Italian government personnel exercised effective control over the applicant on board the vessel and that the applicant was within Italian jurisdiction at the time of the incident. However, since no legal procedures were provided for the entire interception and removal process, the applicant had no access to a lawyer at all and could not raise an objection to any Italian court or institution. As a result, they are deprived of their "right to an effective remedy." The return of the applicant to Libya, where he or she is subjected to inhumane treatment and to the country of origin at risk of the situation, constitutes a violation of the principle of non-refoulement.

The Court invoked article 4 of Protocol IV and noted that the Italian side had committed collective expulsion without any individualized examination, which was a serious violation of the procedure [9]. The case also explicitly excludes "immigration emergency" as a reason for derogating from absolute rights; Extraterritorial acts such as interception on the high seas are included in the scope of the convention, and states are blocked from circumventing their obligations through geographical manipulation; It emphasizes the obligation of States to proactively identify asylum needs, even if individuals have not formally applied for it.

In *Hirsi Jamaa*, the majority of the Court held that jurisdiction within the meaning of article 1 of the European Convention on Human Rights constitutes jurisdiction within the meaning of article 1 of the European Convention on Human Rights when the authorities of the State party exercise continuous and exclusive de facto control over an individual on the high seas [10]. This interpretation not only fills the logical loophole of traditional territorial jurisdiction, but also pioneers extending the application of human rights obligations from territorial boundaries to any space where the State exercises its power.

4.1.2 Ecthr Stipulates and Substantively Implements Procedural Obligations

The State has a positive procedural obligation in border control. If foreigners themselves circumvent the legal entry and reception procedures that should exist through illegal collective acts, they cannot in turn accuse the State of not providing individual procedural safeguards.

N.D. and N.T. v. Spain (2017) [11], this case involved two applicants who were immediately forcibly deported to Morocco by Spanish authorities after attempting to cross the Melilla border fence. Spain has set up a legal reception procedure for legal entry. The applicant chose not to use these procedures, but adopted a "violent" collective approach to customs clearance. Therefore, they are liable for the lack of procedure due to their own actions." The act of repatriation in Spain does not constitute an unlawful collective expulsion in this particular case. The key to the court's decision is not whether the border crossing is organized, but whether Spain provides any accessible and effective procedure to enable the applicant to make a request for protection.

The court found that procedural rights are inseparable from substantive rights, and that the procedural right to obtain asylum application channels is a prerequisite for realizing substantive rights of non-refoulement. In the absence of due process, any expulsion may amount to unlawful mass eviction. The Court made it clear that the lack of an effective application procedure in itself constitutes a violation of Protocol 4 to the ECHR [12]. Even in the complex environment of large-scale border shocks, the State still has a procedural obligation not to push back. Although the case is because Spain provides accessible and effective procedures, testing the legitimacy of State acts with "procedural accessibility" inevitably leads to strategies to circumvent substantive obligations by creating procedural obstacles. To elevate procedural access from a matter of policy discretion to a mandatory legal requirement, it is important to examine strategies to avoid some States circumventing substantive obligations by creating procedural barriers.

4.2 Inherent Limitations and Implementation Challenges

First, the tension between justice and sovereignty. The ECtHR's rulings have faced severe implementation difficulties in the field of immigration control. The UK, through the "2023 Illegal Immigration Act", explicitly authorized the government to disregard the ECtHR's interim measures (Rule 39). Italy and Greece have been continuously accused of systematically implementing deportation operations [13]. This resistance reflects the structural predicament of human

rights justice within the tension between globalism and nationalism. When the judgment touches upon the core interests of national sovereignty, the judicial institution lacks an effective enforcement mechanism to ensure it.

Second, the ambiguity of jurisdiction and evasion strategies. The "effective control" standard encounters difficulties in applying to new evasion strategies. In *S.S. and Others v. Italy* [14], the Italian authorities will rescue migrants rescued in international waters and return them en masse to Libya without any personal assessment or legal process. None of the actions of the migrant in this case could be considered as "circumventing the legal entry procedures that already existed" and fully complied with the instructions of the rescue vessel and the Italian authorities. The Court found that the Italian authorities knew or ought to know that returning these migrants to Libya would expose them to a real risk of inhumane treatment, in violation of the principle of non-refoulement of human rights. The loopholes in the concept of jurisdiction in Italy and other EU countries' attempts to "push back" migrants to insecure areas through cooperation with third parties such as the Libyan coast guard, coupled with the deliberate use of circumvention tactics by the state, seriously undermine the practical effectiveness of the principle of non-refoulement and the accessibility of the right to asylum.

Third, the dilemma between judicial initiative and restraint. ECtHR has demonstrated significant strategic judicial restraint in border control cases. In *Khlaifia and Others v. Italy* [15], the procedure was simplified under the "state of emergency" due to the mass migration flow, and the migrants were returned en masse to Tunisia without receiving assistance or making an asylum application individually. But the court adopted an unusually lenient standard in the case, holding that the state has the right to take "expedited procedures" to process apparently unfounded asylum applications or to identify illegal immigrants. Although this judicial prudence helps maintain the political acceptability of judgments, it objectively leads to incoherence in protection standards and weakens the consistency and authority of jurisprudence.

Fourth, the gap between the confrontation between state power and individual relief. ECtHR's individual grievance mechanism is inherently difficult to deal with systemic rights violations. Cases have long trial cycles, during which thousands of people may have been illegally repatriated. More deeply, court decisions are difficult to provide forward-looking, systematic procedural norms, leading member states to avoid substantive obligations by minimizing technical compliance. This structural gap reveals the institutional limitations of regional human rights mechanisms in addressing large-scale rights violations.

4.3 The Context and Internal Tension of Jurisprudence Evolution

ECtHR has gradually built a legal defense line against state evasion strategies through the dual judicial strategy of "expanding jurisdiction" and "strengthening procedural obligations". Its core innovation is to shift the trigger condition of the principle of non-refoulement from the formal element of "filed application" to the substantive element of "under jurisdiction and at real risk", thus providing a key legal tool to fill the protection loophole of "non-applicant". From the above cases, it can be seen that the jurisprudence of ECtHR is constantly expanding the scope of protection on the one hand, and maintaining political balance through judicial restraint on the other. This evolutionary trajectory reflects the court's difficult balance between advancing human rights standards and respecting the sovereignty of member states.

5. Conclusion

Through its judicial practice, the European Court of Human Rights has made significant legal contributions to addressing state circumvention strategies and protecting "non-asylum-seekers". This paper shows that ECtHR reconstructs the concept of jurisdiction through two key jurisprudential innovations, and extends it to the concept that human rights obligations must be applied to any space in which the state exercises power. and substantively making "procedural obligations" a core component of the principle of non-refoulement, which is judged to test the legitimacy of State acts by examining the accessibility of procedures. Change the trigger condition for non-refoulement protection from a formal requirement of "filed application" to a substantive requirement of "under jurisdiction and at real risk". This paradigm shift is a direct judicial response to the systematic circumvention of protection obligations by modern states through strategies such as extraterritorial processing, interception and repetition, and procedural obstacles, reflecting the core value of people-oriented human rights law.

Yet limitations remain. The ECtHR judgment faces serious enforcement and politics in the highly politicized field of immigration control, such as the public challenge to interim measures in the UK's Illegal Immigration Act 2023. It is planned to transfer asylum seekers who arrive in the UK alone to other countries for processing asylum applications. This new evasion strategy, evolving with agency by other countries, is an open challenge to the principle of non-refoulement through legislation to push asylum seekers back to their countries of origin where there is a real risk. At the same time, in order to balance national sovereignty and show strategic judicial restraint in the process of maintaining its authority and admissibility of judgments, ECtHR sometimes leads to incoherence of protection standards and weakens the thoroughness of jurisprudence. In addition, the structural gap between the individual case relief mechanism and systemic rights infringement makes it difficult for judicial intervention to fundamentally fill the protection loopholes.

This study has three implications for the international refugee protection system:

First, at the legal level, it is necessary to further clarify and consolidate the human rights obligations of the individuals

exercising state power, so that they can cover the obligations that the state assumes towards the jurisdictional subjects through its control actions, transforming the traditional territorial concept into a functional one. Future judicial precedents need to provide clearer criteria for the "de facto jurisdiction", in order to cope with the evolving evasion strategies.

Second, at the mechanism level, strengthen the systematic supervision and the accessibility review mechanism of procedures. Efforts should be made to mandate the establishment of independent and accessible rapid risk assessment procedures at borders, ports, and off-site processing points, to ensure that asylum seekers can receive procedural guarantees and that the protection obligation is fulfilled promptly.

Third, at the normative level, the international community needs to promote a complete transformation from formal requirements to substantive needs, using the actual risks faced by individuals rather than their procedural status as the sole basis for providing protection. The severe reality of the global refugee crisis urgently requires the reform of the existing international protection cooperation framework to uphold the core effectiveness of the non-refoulement principle.

The legal development of the ECtHR marks an important effort by regional human rights mechanisms to bridge the gap between legal norms and national practices. Although the activism of judicial institutions has its boundaries and it is inevitable that the existence of avoidance policies will lead to a dilemma in balancing national sovereignty and human rights, the fundamental solution to overcoming this protection loophole lies in integrating human rights obligations into the operation of state power. Moving beyond the passive model of post-event remedies, while ensuring the accessibility of the application process complies with the requirements of the non-refoulement principle and establishing a reasonable supervision and review mechanism. Only through multiple changes in law, politics and mechanisms can the commitment of the non-refoulement principle as an absolute norm of international law become a reality for every individual at risk, including those who are the most vulnerable "non-applicants".

References

- [1] United Nations High Commissioner for Refugees. (2024, June 13). Global trends: Forced displacement in 2023. <https://www.unhcr.org/global-trends>
- [2] United Nations. (1951, July 28). Convention relating to the status of refugees. United Nations Treaty Series, vol. 189, p. 137. <https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention>
- [3] Goodwin-Gill, G. S., & McAdam, J. (2021). *The refugee in international law* (4th ed.). Oxford University Press. <https://global.oup.com/academic/product/the-refugee-in-international-law-9780198808565>
- [4] Milanovic, M. (2011). *Extraterritorial application of human rights treaties: Law, principles, and policy*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199696208.001.0001>
- [5] Moreno-Lax, V. (2017). *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU law*. Oxford University Press. <https://doi.org/10.1093/oso/9780198701002.001.0001>
- [6] Council of Europe. (1950, November 4). *European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS No. 005. https://www.echr.coe.int/documents/convention_eng.pdf
- [7] European Council. (2016, March 18). *EU-Turkey statement*. <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>
- [8] European Court of Human Rights. (2012, February 23). *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09). HUDOC. <https://hudoc.echr.coe.int/eng?i=001-109231>
- [9] Council of Europe. (1950, November 4). *European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS No. 005. https://www.echr.coe.int/documents/convention_eng.pdf
- [10] Council of Europe. (1950, November 4). *European Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS No. 005. https://www.echr.coe.int/documents/convention_eng.pdf
- [11] European Court of Human Rights. (2017, October 3). *N.D. and N.T. v. Spain*(Applications nos. 8675/15 and 8697/15). HUDOC. <https://hudoc.echr.coe.int/eng?i=001-201353>
- [12] Council of Europe. (1963, September 16). *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*. ETS No. 046. https://www.echr.coe.int/documents/convention_eng.pdf
- [13] UK Government. (2023). *Illegal Migration Act 2023*. <https://www.legislation.gov.uk/ukpga/2023/37/contents/enacted>
- [14] European Court of Human Rights. (2020, November 30). *S.S. and Others v. Italy*(Application no. 21660/18). HUDOC. <https://www.refworld.org/jurisprudence/amicus/unhcr/2019/en/120594>
- [15] European Court of Human Rights. (2016, December 15). *Khlaifia and Others v. Italy*(Application no. 16483/12). HUDOC. <https://www.refworld.org/jurisprudence/caselaw/echr/2016/en/114241>