



# FAQ

Non-refoulement in  
the context of the  
EU Pact on Migration  
and Asylum

The [EU Pact on Migration and Asylum](#) is built on the assumption that all people who arrive or reside in the EU irregularly and whose asylum applications are unsuccessful should immediately return or be deported. This aligns with the EU's [ongoing effort](#) to boost the rate of returns via EU migration policies.

In reality, people may have other grounds for residence than international protection, including on compelling human rights grounds that do not allow for any derogation, exception or limitation, such as the **principle of non-refoulement**. Yet, the proposed [recast Return Directive](#) and EU Pact on Migration and Asylum would practically close or heavily restrict pathways through which people who cannot be deported could access a residence status, in line with non-refoulement and other [human rights considerations](#).

## Questions

1. What is the principle of non-refoulement? . . . . . 2
2. What makes people who cannot qualify for asylum non-returnable? . . . . . 3
3. How could the EU Pact on Migration and Asylum affect the principle of non-refoulement? . . . 3
4. Why is the push to link asylum and return procedures problematic? . . . . . 4
5. Non-refoulement and the 'return border procedure' . . . . . 5
6. Which changes in the procedural guarantees might harm non-refoulement? . . . . . 6
7. What are other reasons for which voluntary return and deportation might be impossible? . . . 7
8. What are the alternatives for people who don't qualify for international protection? . . . . . 8

# 1. What is the principle of non-refoulement?

**Non-refoulement** is a cornerstone of [international human rights law](#), which **prohibits states from removing people from their jurisdiction to a place where they would be at risk of serious human rights violations**, including persecution, torture, ill-treatment or other fundamental rights violations. Non-refoulement is also enshrined in Article 78 (1) of the [Treaty on the Functioning of the EU](#), and in the [EU's fundamental rights regime](#), as reiterated in articles 18 and 19 of the Charter of Fundamental Rights of the European Union. Non-refoulement is also specified in secondary EU law, such as the EU [asylum legislation](#) and the EU [Return Directive](#).

Non-refoulement is an [absolute principle](#), which cannot be breached for any reasons. It **requires cases to be examined individually by the state**. Each deportation decision should be reviewed in light of this principle and the appeal against a return decision which could lead to a violation of this principle should always have a suspensive effect. Non-refoulement also prohibits the return of people back to states which could further deport them to a country where they could be at [risk](#) of such violations.

In addition to the [prohibition of ill-treatment and torture](#), human rights jurisprudence clarifies that the principle of non-refoulement also requires states to assess the impact of return procedures on individuals' [medical condition](#) and overall [health situation](#), including [mental health](#). The principle of non-refoulement also precludes states from deporting individuals when there are risks of breaches of different human rights violations, including serious forms of [gender-based violence](#), [prolonged solitary confinement](#) and [degrading living conditions](#).

## 2. What makes people who cannot qualify for asylum non-returnable?

The principle of non-refoulement is broader than the grounds for obtaining international protection under EU asylum legislation. According to the [EU Qualification Directive](#), individuals applying for international protection under EU law can be granted either refugee status or subsidiary protection. Refugee status, which is also enshrined in [international law](#), is granted if a person has been or has a risk of persecution because of their "race, religion, nationality, membership of a particular social group or political opinion." In addition, EU law protects people who could suffer [serious harm](#) as defined by article 15 of the Qualification Directive. However, there remain certain circumstances under which a person might be considered non-returnable, yet they are unable to access refugee status and subsidiary protection.

Under international and EU law, **there are several human rights reasons for which people who do not qualify for international protection cannot be deported**, such as the principle of non-refoulement, protection of family and private life, the best interests of the child, the prohibition of arbitrary detention and protection on the grounds of statelessness. **In most countries, these considerations fall outside of the scope of the asylum procedure.**

In addition, there can be practical reasons, outside of individual control, for which return and deportation might be practically impossible. For instance, people might not be able to obtain a valid passport, or they might be unable to travel due to medical reasons. For all these reasons, it is crucial to conduct **an additional separate assessment before a return decision is issued.**

## 3. How could the EU Pact on Migration and Asylum affect the principle of non-refoulement?

The EU Pact on Migration and Asylum is built on the assumption that all people who arrive or reside in the EU irregularly and whose asylum applications are unsuccessful should immediately return or be deported. The proposals for a [Screening Regulation](#) and the amended [Asylum Procedures Regulation](#) (APR), as well as the [recast Return Directive](#) proposed in 2018, go one step further in this direction, attempting to entrench and operationalise this principle throughout the EU's immigration and asylum procedures. The proposals are currently in the final stages of the negotiations between the European Parliament and the Council. When adopted, they will become binding EU law. **If the provisions currently negotiated are adopted, the full application of the principle of non-refoulement will be at risk.**

Among the novel elements introduced by the Pact, the main setbacks in terms of non-refoulement concern:

- the new rules on return decisions for people who are refused entry or whose asylum application is rejected (see [question 4 below](#));
- the proposed return border procedure, which creates disparities and differential treatment for rejected applicants (see [question 5 below](#));
- the limited procedural guarantees that would make it easier for affected people to lodge an appeal in order not to be deported or access an alternative status under human rights law and national law (see [question 6 below](#)).

## 4. Why is the push to link asylum and return procedures problematic?

Two key proposals in the Pact on Migration and Asylum and the proposed recasting of the Return Directive foresee asylum or return as the only two procedures applicable to undocumented people:

- The **Screening Regulation** introduces mandatory pre-entry screening at the EU external borders. In the Commission's [proposal](#), which is maintained in the Council's [position](#), individuals who do not apply for international protection or do not fulfil entry conditions should be subject to return or refusal of entry (Art. 14).
- The Commission's proposal and Council [position](#) on the amended **Asylum Procedures Regulation** (APR) also require Member States to issue a return as part or at the same time of the decision rejecting an application for international protection (Art. 35a).

The **European Parliament** (EP) presented amendments on both the [Screening Regulation](#) and the amended [APR](#) that, if adopted in the final text, would uphold non-refoulement. The EP clarifies that issuing a refusal of entry or a return decision should be without prejudice to the possibility to authorise entry on humanitarian grounds, on grounds of national interest or because of international obligations, foreseen in the [Schengen Borders Code](#) and under national law. It also recalls that return should not lead to risks of violations of the principle of non-refoulement and other fundamental rights under the Charter of Fundamental Rights and other EU and international obligations.

Adopting the EP position would represent an essential safeguard to ensure that national permits on humanitarian, medical or other compassionate grounds remain accessible to people who are not eligible for international protection. However, this does not substitute a full assessment of the person's protection needs and eligibility for other permits prior to issuing return decisions.

- The Commission proposal for a [recast Return Directive](#) also introduces the obligation to issue a return decision in the same act or at the same time as any decision ending a legal stay of a third-country national, including the decision rejecting an application for international protection (Art. 8(6)). While one could argue that art. 6(4) of the Return Directive, which foresees the possibility to grant at any stage a permit for humanitarian, compassionate or other reasons would still apply, in practice this would only apply after a return decision has already been issued, because states would be obliged to do so in conjunction with asylum application rejections.

In all of the cases mentioned above, unless there is an [ex-officio assessment](#), the only way for the applicant to demonstrate the risk of refoulement and prove eligibility for other permits would be to lodge an appeal against a return decision, which presents substantial practical challenges. Member states should comprehensively assess fundamental rights considerations *before* a return decision is issued, including establishing whether third country nationals fulfil the [criteria](#) to apply for an autonomous residence permit or other authorisation granting a right to stay. This would vastly reduce the number of unenforceable return decisions and prevent human suffering.

## 5. Non-refoulement and the 'return border procedure'

The Commission's [proposal](#) for the **amended Asylum Procedures Regulation** (APR) envisions an expanded and, in some cases, mandatory use of border procedures, despite the existence of [fundamental rights](#) and [feasibility](#) concerns. Individuals whose application for international protection is rejected in the context of the asylum border procedure (art. 41) will be issued a return decision or a refusal of entry and channelled into a '**return border procedure**' (art 41a), which will likely entail prolonged detention with fewer safeguards and no access to alternative permits. Applicants continue being subject to the '[fiction of non-entry](#)' (although individuals may be physically present within a member state's territory, they are not regarded as having officially entered that territory). This remains unchanged in the Council's general approach.

The introduction of a return border procedure in the APR raises several serious concerns. Firstly it introduces **differential treatment** between applicants whose application is rejected in the context of the asylum border procedure – who would be automatically channelled in the return border procedure – and all the other rejected applicants who fall under the scope of the [Return Directive](#). A return border procedure as the one proposed, carried out under the fiction of non-entry and in detention or detention-like conditions, raises serious concerns as to the possibility to apply adequate safeguards to ensure that applicants have access to remedies and legal assistance to challenge a return decision or demonstrate the risks they would face upon return. The **European Parliament's** [position](#) introduces limited improvements, including a mandatory period of voluntary departure of 25 days, and limiting detention only where a reasonable prospect of return exists.

The scenario in which people whose application is rejected in the context of the asylum border procedure are issued a **refusal of entry** is equally problematic. According to the Commission [proposal](#) and Council [position](#), they could be returned with an even lower set of safeguards, corresponding to the minimum standards set by art. 4(4) of the [Return Directive](#). This would deprive the applicants of crucial safeguards, such as the possibility to have a suspensive effect in case they appeal against the refusal of entry. The Parliament's [position](#) is the only one that requires member states to fully apply the Return Directive (and therefore the regular return procedure) also to people who have been issued a refusal of entry. **This would be a fundamental guarantee for people who have already been on the EU territory for almost three months (during the pre-entry screening and the asylum border procedure).**

## 6. Which changes in the procedural guarantees might harm non-refoulement?

In scenarios in which people are issued a return decision without a procedure to examine their protection concerns outside of international protection, the only way to access other permits would be to appeal against the return decision. Forcing people to seek judicial remedies as the only way to enforce their rights goes against the principle of efficiency and will likely drain the already-limited resources of many judicial systems. Yet, the Pact proposals restrict access even to this last-resort option.

- During the Screening Procedure it will be almost impossible to access a lawyer, especially if the screening is conducted only in proximity to the border or remote locations (this is exacerbated for unaccompanied children, who may not be appointed a guardian during the screening procedure);
- The proposed [Asylum Procedures Regulation](#) and [recast Return Directive](#) introduce extremely short time limits for appealing against the rejection of the asylum application and the issuance of a return decision. In addition, these proposals do not provide for the automatic suspensive effect of the appeal, which means that people could be deported before a decision on their appeal is taken.

**Being able to remain in the country is an essential part of the right to remedy against a return decision.** If applicants were to be sent back to third countries, this would clearly hinder their right to be heard, to legal assistance and information. Moreover, there are risks that this would lead to irreparable harm whereas the return leads to violations of the principle of non-refoulement, to serious breaches of the right to health or to violation of the right to family life.

## 7. What are other reasons for which voluntary return and deportation might be impossible?

There are various reasons and obstacles that can prevent the removal of individuals from a country in addition to non-refoulement.

Considerations relating to the **protection of private and family life**, in line with the [European Convention of Human Rights](#) (ECHR - art. 8) and the [EU Charter of Fundamental Rights](#) (art. 7), could override a return decision. Both the European Court of Human Rights and the Court of Justice of the EU have an established [jurisprudence](#) that requires states to assess the existence of family ties and particularly the interest of children against immigration considerations.

Under the [UN Convention on the Rights of the Child](#) (art. 3) and the [EU Charter on Fundamental Rights](#) (art. 24), before issuing a decision on return, states are required to consider, as a primary consideration, the **best interests of each child** affected by the decision. This is the precondition to any return of any child, whether they are unaccompanied, separated or within a family, and requires specific procedures to be implemented in every decision-making process.

**Statelessness** is another factor to consider. According to the [UNHCR Handbook on Protection of Stateless Persons](#) (2014), if a stateless person cannot acquire or reacquire nationality through a simple, quick, and non-discretionary procedure, or if they do not have permanent residence status in a country of previous habitual residence where immediate return is possible, their return would be considered unlawful.

**Practical reasons or technical obstacles**, such as the lack of travel documents, may impede the removal process. Medical reasons can also be a hindrance. [Frontex's](#) "Code of Conduct for return operations and return interventions coordinated or organized by Frontex" (art. 8) states that return operations can only occur if the returnees are "fit to travel" and requires member states to provide a medical examination of the returnee prior to the return.

Additionally, protection concerns arise when individuals face the prospect of **being returned or pushed back to a country that is not their country of origin** or prior habitual residence, such as in cases of [refusal of entry](#) at the EU external borders. Such returns would violate the principle of [non-refoulement](#), which prohibits the return of individuals to places where they may face persecution, torture, or inhuman treatment.

**Other fundamental rights considerations** may also play a role, on the basis of a risk of fundamental right violations other than the prohibition of torture and ill-treatment. In [Othman v. UK](#), the European Court of Human Rights found that the deportation of an individual to a country in which they would face a violation of article 5 ECHR (right to liberty and security) and article 6 ECHR (right to a fair trial) would represent a breach of the European Convention on Human Rights.

## 8. What are the alternatives for people who don't qualify for international protection?

**The EU focus on returns is not a realistic response to the complexities of migration, and will likely only lead to an increase in irregularity.** On the contrary, ensuring access to alternative ways to solve their migration status is key to address a complex reality, allow people to integrate in the community and avoid situations of legal limbo and exclusion from basic rights.

The obligation to issue a return decision while rejecting an asylum application closes access to residence permits outside asylum which are currently available under national law. For instance, more than half of EU member states provide a temporary residence permit on [medical grounds](#); at least [five](#) countries have legislation granting special permits for undocumented victims of domestic violence; and at least [eight](#) countries have regularisation mechanisms for children, young people or families. As a consequence, several people who would have access to options for regularisation under national legislation (including humanitarian permits) would risk being deported nonetheless, leading to risks of violations of fundamental rights including family life and non-refoulement.

Ensuring that a return decision can only be issued after it is assessed that the applicant does not fulfil the conditions to apply for a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons under Member States legislation and that their return would not lead to risks of violations of the principle of non-refoulement, the best interests of the child, and other fundamental rights obligations under the Charter of Fundamental Rights and other EU and international obligations.

### If I would like to know more, what can I read?

- PICUM, 2022, [Barriers to return: Protection in international, EU and national frameworks](#)
- PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#)
- PICUM, 2020, [Insecure Justice? Residence permits for victims of crime in Europe](#)

### Do you have any question?

Please contact Silvia Carta ([silvia.carta@picum.org](mailto:silvia.carta@picum.org)).





© PICUM, 2023

This publication was made possible with the kind support from:



Co-funded by the  
European Union



Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or European Union Programme for Employment and Social Innovation "EaSI" (2021-2027). Neither the European Union nor the granting authority can be held responsible for them.