

Non-refoulement before the UNTBs

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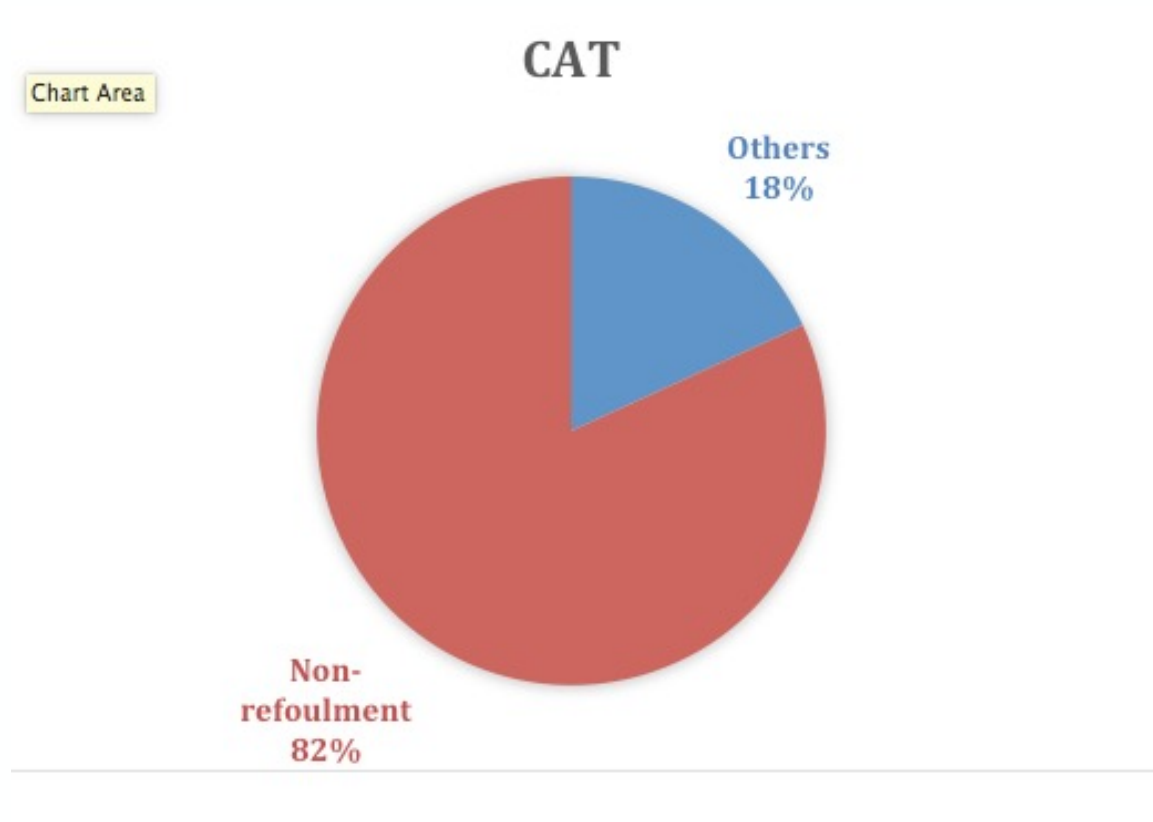


- Basak Çali, Cathryn Costello & Stewart Cunningham 'Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies' (2020) 21 German Law Journal 355
- <https://www.youtube.com/watch?v=PB3cEpujIOo>

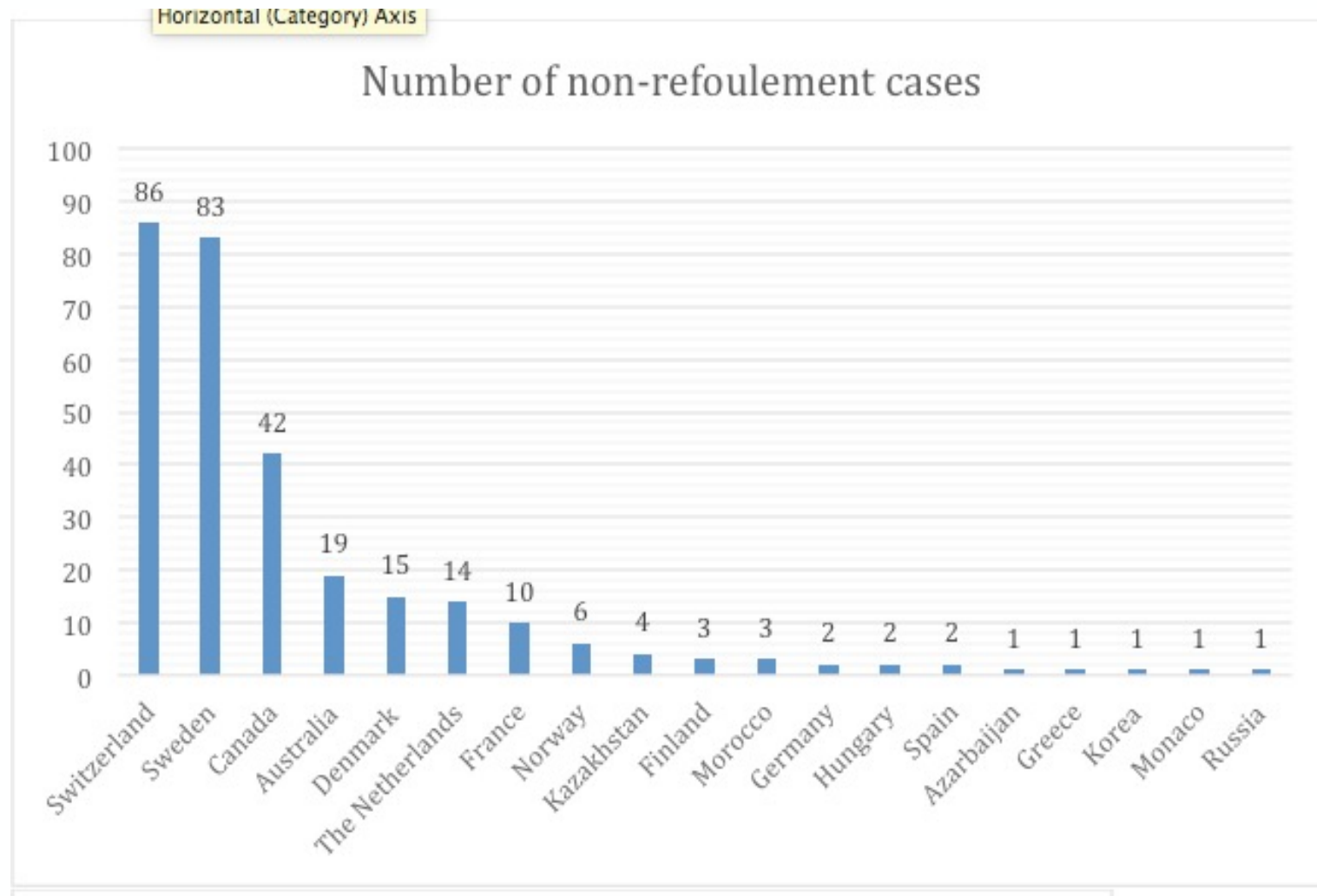


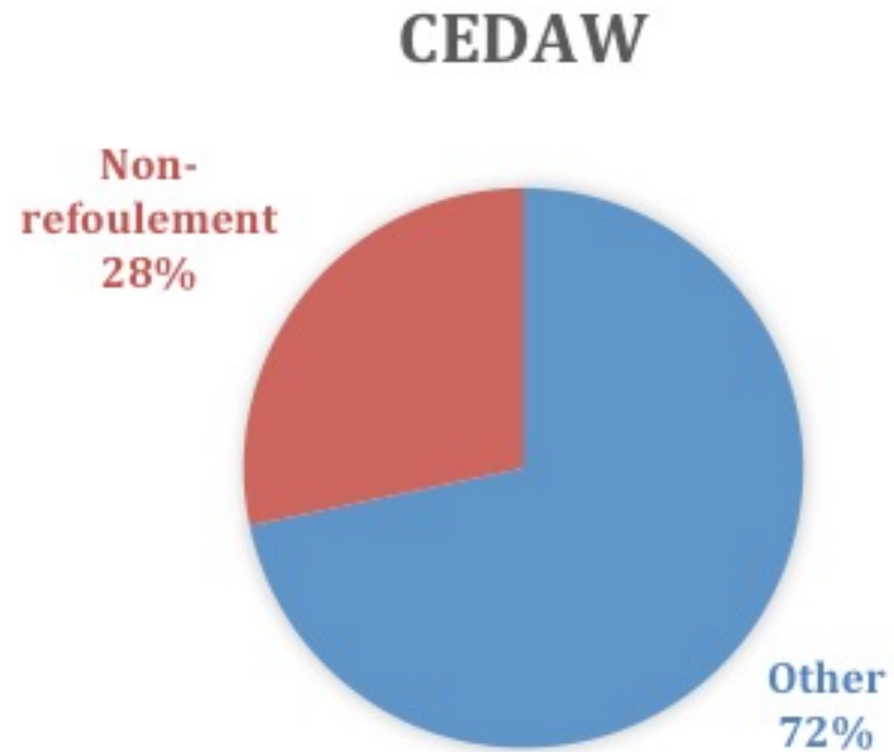
Genesis

Empirical observation: Lots of *non-refoulement* ,cases' before the UNTBs (HRC, CAT, CEDAW, CRC)



CAT – number of cases..





Theory

- Fragmentation / integration backdrop
- Comparative human rights

Methods

Unique database of *non-refoulement* cases before the four aforementioned UNTBs, starting with the first case in 1990 and leading up to 2019/2020

506 *non-refoulement* cases:
370 CAT
107 HRC
23 CEDAW Committee
6 CRC.

Object of comparison

Interpretation of the UNTBs

Comparison *inter se*

Comparison with ECtHR (needs
explanation / justification)

Comparing UNTB Interpretation of the Norm

Five Dimensions of the Norm

1. Extraterritoriality
2. Forms of *non-refoulement*
3. Harm
4. State protection
5. Standard and burden of proof

Cf. Table, page 377

3. Harm

HRC: right to life (Article 6 ICCPR); prohibition on torture and other cruel, inhuman, or degrading treatment or punishment (Article 7 ICCPR), “irreparable harm,”

CAT: torture only

CEDAW: General Recommendation No. 32 - State parties have duties “to protect women from being exposed to a real, personal and foreseeable risk of serious forms of discrimination against women, including gender-based violence.”

CRC: “irreparable harm” and in its General Comment No. 6 and Joint General Comment with the Committee on Migrant Workers cites breach of the right to life, and Article 37 CRC, which includes both protection against torture and inhuman or degrading treatment and the right to liberty, as examples. In addition, its interpretation of the best interests principle informs these protections against *refoulement*.

Global Compact for Migration - irreparable harm

HRC on Harm

Jasin v. Denmark (2015) – Dublin return to Italy

Teitiota v. New Zealand (2020) – climate displacement

- foreseeable risks (not imminence)

- “right to a life with dignity,”

CAT on Harm

CAT on Dublin

A.N. v. Switzerland, an Eritrean protection seeker successfully resisted removal from Switzerland to Italy. His particular *vulnerability* as a victim of torture was noted. The Committee emphasized that for return to Italy to be permissible, Switzerland would have needed “individual assurances” from the Italian authorities, including as regards his access to rehabilitation services as a victim of torture, drawing on Articles 14 and 16 CAT. Notably, the Committee stated that the likely ill-treatment in Italy,

“together with the absence of the stable social environment provided by his brother, would entail a risk of his depressive states worsening to the extent that he would be likely to commit suicide and that, in the circumstances of this case, this ill-treatment could reach a level comparable to torture.”

CEDAW on Harm + State Protection

Loveday Hodson (2014)

“[t]he Committee has ... been unable to establish much of a voice on the asylum claims of vulnerable women.”

A. v. Denmark, “unrealistic to require the author to have sought protection in advance of her flight,” and noted the concluding observations on Pakistan that there is a “persistence of patriarchal attitudes and deep-rooted stereotypes concerning women’s roles.”

R.S.A.A. et al. v. Denmark, CEDAW found that the Danish asylum authority’s assessment on state protection was incorrect, “especially taking into account the level of tolerance towards violence against women in Jordan,” as “reflected in the Committee’s concluding observations on the periodic report of Jordan ... and the additional country information provided by the author.”

Comparison with ECtHR

This section is the first step towards a comprehensive response to the following questions: Are the UNTBs more progressive interpreters of non-refoulement than the ECtHR? Or do they seek to act as norm consolidators, following their European hard court co-interpreter closely?

(p 381)

UNTBs both depart from the standards articulated by the ECtHR and offer added protection, and follow its apparent lead. There are, however, important variations across the UNTBs in terms of how they interpret non-refoulement. Their interpretive stances therefore cannot be explained in light of their “soft” character alone.

Conclusion

The two UNTBs that have a single-issue focus, the CAT with the prohibition of torture and the CRC's role for the protection of children, in particular, challenge the logic of migration control and operate with less deferential standards than the HRC, CEDAW, and the ECtHR. Against the backdrop of efforts by states in and beyond Europe to interpret *non-refoulement* restrictively, these variations can be pitted against each other by domestic authorities. Progressive soft courts can be on the losing end of compliance and diffusion in these cases. This insight calls for further and close attention to be paid to UNTB caselaw on *non-refoulement* by the ECtHR in the spirit of internal coherence of the global prohibition of *non-refoulement* and external effectiveness, vis-à-vis domestic decision makers.



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