The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

THIRD-COUNTRY DEPORTATION AND THE EROSION OF NON-REFOULEMENT: A COMPARATIVE ANALYSIS OF JUDICIAL SAFEGUARDS IN THE UNITED STATES AND INDIA

~ Jh Lalnuntluangi

Abstract

The present article critically reflects on the legality of the practice of deportations from third countries, under the normative framework of the principle of non-refoulement. It responds to the September 2026 ruling by the United States Court of Appeals for the First Circuit that non-citizens who are subject to removal to third countries should be provided with meaningful notice of the proposed country of final removal and should be given a meaningful opportunity to make a claim of persecution or torture. The ruling denied the expedited-removal program, which could deny people access to protection processes. Using doctrinal and comparative analysis, the article assesses the connection between international refugee law, international human-rights law, the constitutional guarantees of domestic law, and executive discretion in the field of immigration control. It examines the statutory and regulatory protections against persecution and torture in the United States, and contrasts them with the non-codified refugee protection framework in India, which is mostly based upon Article 21 of the Constitution and judicial interpretation. According to the article, diplomatic assurances and administrative convenience do not replace individual, independent, and procedurally fair evaluations of risk. It suggests a minimum procedure of notifying the subject of the decision, providing access to legal assistance, conducting an individual risk assessment, making decisions with reasons and providing effective judicial review. The author then concludes that direct and indirect refoulement in third country removal proceedings can only be prevented by explicit domestic incorporation of non-refoulement.

I. INTRODUCTION

The deportation of non-citizens to other countries than their country of nationality or country of habitual residence (territory) can be referred to as "third country deportation".[1] It has emerged as a fundamental legal and humanitarian question in the context of migration governance in the modern era. States have generally broad powers to control immigration and to act against immigrants with removal orders, but these powers are circumscribed by requirements for procedural justice and the international law principle of the non-refoulement.[2] Non-refoulement means that a person is not to be transferred to a territory where there is a real risk of having their human rights violated, including in matters of persecution or torture, and is particularly acute if a person is sent to a third country to which they may have no real relationship.[3] The problem took on a new dimension after the Supreme Court of the United States Court of Appeals for the First Circuit in September 2026 ruled against the Trump administration's policy of making quick deportations to third countries possible without a meaningful opportunity to discuss safety concerns. The court essentially upheld a lower-court ruling that declared the DHS policy to be "unlawful," particularly if a migrant was taken away from their country of origin with little notice and little procedural protection. There were reports that some deportees were given a few hours' notice before being transferred, and that this likely put them at a disadvantage in having legal counsel, making claims of fear and establishing the quality of administrative review difficult.

What is relevant about the ruling is that it indicates that third-country removal is not to be considered a procedural shortcut to the existing protective procedures against persecution or torture. The First Circuit stated that those to be removed from the United States should be afforded "effective notice" of the proposed country of removal and a "meaningful opportunity" to challenge the transfer before deportation is effected.[4] The court thus reiterated that immigration enforcement priorities and executive convenience do not carry precedence over the minimum guarantees in the law where they can result in irreversible damage. In addition, the controversy opens the question

---

[1] Carolina Trabalón & Alexandra Campos-Delgado, Liminal Deportations: The Politics of Third-Country Deportation in the Americas, J. Ethnic & Migration Stud. 1 (2026), https://doi.org/10.1080/1369183X.2026.2664792

[2] Muhammad Alvi Syahrin, The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law, 6 J. Indonesian Legal Stud. 53 (2021).

[3] Rossella Pulvirenti, Undesirable and Unreturnable Individuals: Rethinking the International Criminal Court's Human Rights Obligations Towards Detained Witnesses, Manchester Metropolitan University (2022), https://hdl.handle.net/10779/mmu.32461518.v1

[4] Jessica Templeman, Interweaving Jurisdictions: A Critical Examination of Legal Authority, Sentencing, and Deportation, 39 Canadian J.L. & Soc'y 268 (2024), https://doi.org/10.1017/cls.2024.14

of the general validity of the diplomatic assurances and administrative discretion in the context of a potential refoulement. The size of the policy – with thousands of migrants being deported to several third countries – suggests that it is not just a matter of procedure, but of a rising pattern of externalization of migration control. In this regard, the decision serves as a much-needed reminder to consider the future of domestic responses to state removal practices that may breach international protection standards.[5]

In light of this, this article questions how far procedural due process and the right to non-refoulement limit the states right to deport to a third country. It also queries whether the protections set forth in the September 2026 decision (in particular regarding effective notice, a meaningful opportunity to be heard, and individualized risk assessment) should be a floor for all third-country removals. The article focuses on the First Circuit's ruling and examines the competing principles of sovereign control of borders and the ongoing duty to safeguard persons against direct and indirect refoulement.

II. LEGAL BACKGROUND

The principle of non-refoulement, which is accepted on an international scale.

The principle of non-refoulement is the basic principle of international refugee law. It forbids a State from sending an individual to a country where they have a real risk of being sent to torture, persecution, or some other serious violation of fundamental rights. The principle is called “refoulement” after the French word for to drive back or return. Its purpose is preventative; the state must consider the potential impact of removal before it happens, as the damage that can come from an unsafe removal could be irreparable.[6]

The most obvious expression of the rule is found in Article 33(1) of the Convention Relating to the Status of Refugees of 1951. It forbids a contracting state from expelling or returning a refugee “in any manner whatsoever” to the borders of areas where his life or freedom would be endangered on account of race, religion, nationality, membership of a certain social group, or political opinion. The word “in any manner whatsoever” is important because it extends beyond

[5] Atna Mesnard, Filip Savatic, Jean-Noël Senne & Hélène Thiollet, Revolving Doors: How Externalization Policies Block Refugees and Deflect Other Migrants across Migration Routes, 50 Population & Dev. Rev. 607, 607–42 (2024), https://doi.org/10.1111/padr.12650

[6] Sigit Riyanto, The Refoulement Principle and Its Relevance in the International Law System, 7 Indonesian J. Int'l L. art. 4 (2010).

formal deportation to a country of origin to "indirect" deportation, such as deportation to a third country or deportation to a country of origin via an intermediary or third country, in which case the deportation may leave the person subject to deportation or equivalent situation to the country of origin.[7] There is however a limited exception in Article 33(2). The protection of Article 33(1) may be denied when there are reasonable grounds for believing the person to be a danger to the security of the host state; or after the person's final conviction for a particularly serious crime, the person poses a danger to the community of the host state.[8] But this exception should be interpreted strictly. Should not be relied upon as a general principle for fast-track removal or collective expulsion or for refusal of an individual assessment. A person at serious risk of torture cannot be lawfully transferred because the receiving State gives general assurances on torture.

The principle of non-refoulement is also a principle that is broader than the 1951 Refugee Convention. International human-rights law prohibits removal where substantial grounds indicate that a person would face torture, cruel, inhuman, or degrading treatment or punishment in the destination state.[9] This protection is generally regarded as non-derogable in torture cases, meaning that it applies irrespective of migration status, criminal allegations, national-security concerns, or whether the receiving state is the person's country of nationality. Therefore, while refugee-law protection under Article 33 may be subject to limited exceptions, the prohibition on transfer to a risk of torture is substantially more absolute.[10]

A. CUSTOMARY INTERNATIONAL-LAW STATUS

A major legal question is whether non-refoulement binds states that have not ratified the 1951 Convention or the 1967 Protocol. The United Nations High Commissioner for Refugees has taken the position that the prohibition of refoulement, as expressed in Article 33 and reinforced by international human-rights law, constitutes a rule of customary international law.[11] Customary

[7] Rebecca Lilla Hassanová & Dominika Moravcová, The Principle of Non-Refoulement: A Cornerstone of Refugee Protection or a Legal Fiction?, 9 EU & Compar. L. Issues & Challenges Series 684 (2025), https://doi.org/10.25234/eclic/38136

[8] Erika Feller, Volker Türk & Frances Nicholson eds., Refugee Protection in International Law: UNHCR's Global Consultations on International Protection (2003).

[9] Ahmad Momeni Rad & Mohammad Habibi, The Principle of Non-Refoulement: A Customary Rule or an Emerging Peremptory Norm in International Law, 3 Legal Stud. in Digital Age (2024).

[10] Id.

[11] Hassanová & Moravcová, supra note 7.

international law arises from sufficiently general and consistent state practice accompanied by opinio juris, namely the belief that the practice is legally required.[12]

The customary-law argument is particularly relevant to states such as India, which are not parties to the 1951 Convention or the 1967 Protocol. According to the UNHCR position, customary non-refoulement is binding upon all states, including those that have not acceded to either instrument.[13] Some academic and judicial commentary goes further by characterizing protection against return to a risk of torture as a peremptory norm, or jus cogens, from which no derogation is permitted.

Nevertheless, the precise scope of customary non-refoulement remains debated. While there is wide agreement that removal to a real risk of torture is prohibited, there is less uniformity concerning every aspect of refugee-based non-refoulement, the applicable evidentiary standard, and the procedural measures required before removal. For this reason, domestic courts play an essential role in transforming the substantive prohibition into enforceable guarantees, including notice of the intended destination, access to legal assistance, an opportunity to present evidence, and judicial scrutiny of executive decisions.

B. THE UNITED STATES SCHEME

The United States has ratified the 1967 Protocol relating to the Status of Refugees and important protections against forced return were introduced in its national laws by the non-refoulement provision.[14] Section 241(b)(3) of the Immigration and Nationality Act, codified at 8 U.S.C. section 1231(b)(3) provides that the government shall not deport a person to a place where he/she could face threats to life or freedom on a protected ground. This protection is generally known as statutory withholding of removal.

The United States also complies with its obligations under the Convention Against Torture through Foreign Affairs Reform and Restructuring Act and its implementing rules. There is a legal mechanism that restricts removal to a particular country in which it is more likely than not that the person will be exposed to torture.[15] Withholding of removal and Convention Against Torture

[12] Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).
[13] Ashwini Kumar Lal, Non-Refoulement and India's Refugee Position (2019).
[14] Richard Clark, United States Accession to the 1967 Protocol Relating to the Status of Refugees and Domestic Incorporation of Non-Refoulement (2004).
[15] Ylli Shkembi & Esmeralda Dura, Implementation of the Convention Against Torture in U.S. Removal Law (2013).

protection are required if their respective legal thresholds are satisfied, and are not discretionary, unlike asylum, which can be withheld and may have additional requirements.[16] But these protections to stay in the United States are in general known as US protections instead of a universal right to stay in the United States. A person that establishes a risk of persecution or torture in his country of nationality, in principle, can be removed to another country where there is no such risk.[17] This doctrinal position serves as an explanation for the use by the government of third country removals. It also raises an important procedural issue: When authorities move a person to a new location, they don't necessarily protect them if they have not determined that location and given the person an opportunity to establish the type of threat he or she might face there.[18]

In September 2026, the First Circuit resolved this issue in favor of Burmese nationals by striking down expedient third-country removals where they failed to give adequate notice and an opportunity to make persecution and torture arguments. This ruling provides an example of the need for fair procedures to be provided in order for there to be statutory protection against refoulement. An assessment of the individual may otherwise result in their removal to a putatively safe third country, causing direct harm, or indirect harm by onward transfer to the country of origin.

C. INDIA'S LEGAL POSITION

India has not ratified the 1951 Refugee Convention, the 1967 Refugee Convention (Protocol) or has a detailed refugee law at the national level.[19] Refugees and asylum seekers are thus in most instances treated like "foreigners" and are not specifically protected by refugee laws, and protection is provided through executive policies and administrative discretion, judicial remedies and, in some instances, the help of UNHCR. The lack of legislation creates inequity across refugee sub-communities, and reduces predictability in regard to refugee admission, documentation, detention, deportation, and durable solutions. However, Indian constitutional law offers an incomplete, but significant, basis of protection. Article 21 ensures that a person shall not be deprived of life or personal liberty save in accordance with law laid down procedure. In National

[16] Id.
[17] Vincent Chetail, Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations Between Refugee Law and Human Rights Law, in Research Handbook on International Law and Migration (2014).
[18] Storozhuk, Third-Country Removal and Country-Specific Protection Claims (2020).
[19] Anaïs Boutier, India's Refugee Protection Regime and the Absence of Codified Refugee Law (2021).

Human Rights Commission v. State of Arunachal Pradesh (1996), the Supreme Court ruled that Article 21 applies to Chakma refugees and has called for the protection of their life and liberty.[20]

There have been several cases in the High Court that have interpreted non-refoulement as being included in Article 21. In Ktaer Abbas Habib Al Qutaifi v. Union of India (1998), the Gujarat High Court considered non-refoulement to be customary international law and connected it with the protection of Article 21. In a similar way, in Dongh Lian Kham vs Union of India (2015) the Delhi High Court stated that the principle of non-refoulement is embedded within the Constitution of India's guarantee of life and personal liberty. The decisions uphold the view that deportation can be checked by the Indian Constitution if the removal would lead to "grave harm" to the person.[21] The law, however, is not consistent in all aspects. The Supreme Court, in Mohammad Salimullah v. Union of India (2021) allowed deportation under the law and said that the right not to be deported was linked to Article 19(1)(e) which is for the right to reside and settle in. The ruling reflects the uncertainty caused by the lack of a specific refugee law. It also illustrates the importance of better statutory development of constitutional protections, particularly where these involve allegations of national security or irregular entry.

Thus, the United States and India share a legal challenge: substantive protection against unsafe removal is not enough unless coupled with enforceable procedural protection. US framework has conflict over fast deportation to third country, statutory and treaty-based mechanisms. India's dependence on constitutional interpretation and customary international law would also mean that the protection is uneven because there is no codification. It is therefore important that an individual risk assessment, prior notification of the proposed destination, access to legal counsel, reasoning in decision-making and meaningful judicial review would have to be provided as part of a coherent legal approach before a transfer to a third country.

III. CASE ANALYSIS

The challenge to D.V.D. v. Department of Homeland Security involves Third Country Removal jurisprudence. D.V.D. v. Department of Homeland Security is a major case in the history of third-country removal law for the United States Court of Appeals for the First Circuit. The policy at issue by the Department of Homeland Security (DHS) allowed for the deportation of non-

[20] Kalra et al., supra note 20.
[21] Lal, supra note 13.

citizens with final orders of removal to nations other than their country of nationality, country of removal, or any other country they had been identified by the immigration authority. The First Circuit's February 2026 decision in the case largely upheld the United States District Court for the District of Massachusetts, which found the policy to be invalid as it allowed for removal without providing meaningful notice or protection claims. The main legal question was not when can the government deport someone to another country. Under U.S. immigration law, an alternative country of removal may be designated in certain situations. Instead, the issue was over the process that should be used prior to the removal. DHS claimed that, while the new country for removal had not been designated during the original proceedings, persons already bound for final removal could be relocated quickly to its destination. Plaintiffs allege that a change of country can raise all new risks of persecution, torture, detention, onward deportation or other serious harm. They argued that removal without prior notice and a chance to be heard on claims of fears specific to their country was not in keeping with the provisions of the statute and regulations.

A. THE POLICY WHICH WAS CHALLENGED BEFORE THE COURT.

The challenged policy stemmed from a guidance for DHS about third country removals. The policy challenged was based on DHS guidance relating to third country removals. It gave immigration officials the power to deport some non-citizens to other countries as long as they have diplomatic assurances from other countries. The guarantees usually stated that the receiving state would receive the person and that he would not be persecuted or tortured by the receiving state. The policy, however, allows the affected person to receive insufficient notice of the destination, and insufficient opportunity to raise individualized fear objections. This procedural model posed an obvious legal difficulty. A person cannot meaningfully challenge the safety of a proposed destination unless that destination is disclosed with sufficient specificity and sufficiently in advance. A non-citizen may have a well-founded fear of persecution in a third country because of political activity, ethnicity, religion, sexual orientation, prior residence, family relationships, gang violence, or links to an armed conflict. The individual may also face a serious risk of onward transfer from the receiving country to the country from which the United States is legally barred from removing them. That latter risk is commonly described as indirect, chain, or secondary refoulement.

The District Court had concluded that class members were entitled to meaningful notice before third-country removal and a meaningful opportunity to raise a country-specific protection claim. It also required DHS to follow the country-of-removal sequence reflected in the applicable immigration regulations. The First Circuit largely upheld the notice-and-opportunity requirements but vacated the sequencing component on standing grounds. That appeal decision thus left in place the government's most important protection: that a new third-country destination could be ignored as “administratively insignificant,” even if the person has a final order of removal.

B. THE FIRST CIRCUIT'S OPINION

Its central argument in the First Circuit was "textual," "regulatory," and "functional. In a unanimous three-judge opinion, Judge Seth Aframe disagreed with the DHS argument that the statute and regulations impliedly authorize third-country removals. The Court determined that the provisions of the underlying claims for fear of persecution and fear of torture necessitate a procedure which cannot be circumvented simply by DHS choosing to rely on a country other than the one originally considered in removal proceedings.

But the Court's most important proposition was simple: the right to resist deportation to a foreign state for fear of persecution has “little meaning” unless the U.S. government provides “reasonable notice” about the country where they are to be deported “and a meaningful opportunity” to challenge that country's deportation policy (Reference from Politico, 18 September 2026). This is a substantive non-refoulement statement that connects substantive non-refoulement protection with procedural due process. Not knowing where they will be removed to, not being able to communicate with counsel, not being able to present evidence, and not being able to seek a review prior to their removal to persecution or torture will make a legal prohibition on removal ineffective. The Court was also unimpressed with a broad interpretation of the executive discretion. DHS had contended that having a final removal order meant that the government could move swiftly when a receiving third country agreed to take in the person. The First Circuit did not conclude that the original removal order was a final order for all possible destinations. A removal order can allow deportation, and only as long as the country being removed to is safe and legally permitted. The risk analysis needs to be flexible in case of a change of destination.

This is a doctrinal difference. Removal and Convention Against Torture protection are country-specific protection. Do not always bestow upon an individual the right to stay in the United States permanently, but rather the right not to be removed to a country where the applicable risk is

set. DHS will then seek to remove to a true safe third country. However the government has to provide the person with an opportunity to demonstrate that the other country isn't safe in his or her case. The First Proposition was accepted by the First Circuit and the Second was made legally enforceable.

The Court's analysis also recognized that the vague nature of diplomatic assurances could not be a substitute for individual procedures. The general assurance of a receiving country to not persecute or torture a transferred person can be evidence, but it may not be determinative evidence for whether the person in question will be protected in practice. Diplomatic assurances can't address risks based on the person's identity, political profile, previous experiences, health, social vulnerability or possible onward removal. The Court's emphasis on a meaningful opportunity to raise a claim is thus indicative of a desire that diplomatic agreements frequently are executive-to-executive, as opposed to non-refoulement analysis which is person-specific.In accordance with the procedural standard set, where DHS seeks to use a third country destination, the First Circuit will not require it to reopen and relitigate the whole original removal proceeding. This is a big drawback of the judgment. The Court did not rule every third-country removal is illegal, nor did it establish an unconditional right to a full immigration-court hearing prior to every transfer. It, on the contrary, called for a process that would render the existing statutory protections effective and meaningful.

In the very least, there are two related security measures that need to be taken:

Effective notice: Communicate to the person the specific third country to which DHS intends to move the person; communicate in a way and at a time that allows for understanding of the proposed transfer and assistance.

A genuine opportunity to make fear-based claims: The individual must be able to argue that they would be persecuted or tortured in the proposed country and the court must deem their claim to be true before even considering their removal. The use of the term meaningful opportunity is neither a loose nor a passive term. A notice given just before transport that is written in a language that the recipient does not understand, is not provided a copy of his lawyer's, and is not allowed to present pertinent information, is unlikely to meet the standard. The Court's reasoning thus requires an operational mechanism that can identify the real danger and not simply a symbolic opportunity that can be employed in practice.

C. SAFE-THIRD-COUNTRY AGREEMENTS (RELATIONSHIP).

Litigation under the D.V.D. should not be confused with, but should be reviewed in conjunction with, “safe third country” agreements. Safe-third-country agreement is a formal document in which one country agrees to send an asylum-seeker to another country with a responsibility for examining the asylum application. In the U.S., these types of agreements are allowed under the Immigration and Nationality Act Section 208(a)(2)(A), provided they comply with certain statutory requirements.

The most obvious is the United States and Canada Safe Third Country agreement. One form of this would typically be whether asylum is available in the receiving state in a fair procedure and provides meaningful protection. The concept presupposes that the third party is not only willing to accept the person, but also has the legal and practical capacity to consider the individual's protection claim. The legality of the arrangement relies on ongoing safety of the recipient nation, entry to a protection process, and efficient remedies.

Unlike the policy that was challenged in D.V.D., the policy was not a statutory safe-third country process, but rather ad hoc third-country removals. The distinction matters. At least a formal agreement is supposed to distribute the burden for protection claims among states. An ad hoc transfer on the basis of diplomatic acceptance can be misleading and potentially lead to the marginalisation of removal into externalisation (sending state transfers the responsibility without ensuring access to a durable, individual and accessible protection procedure by the receiving state). The First Circuit's decision reduces this risk by imposing a requirement for pre-removal notice and for the claimant to raise a country-specific fear claim.

Safe-third-country concerns also exist with respect to S3C. A nation can be generally described as "safe" but be not so safe for certain groups or individuals. Refugees may be subjected to detention, discrimination, no access to an asylum procedure, no legal representation or be deported on to another country, including gender-based violence. As such, a country's designation as safe should never be a “presumption” that cannot be rebutted. The procedural logic of D.V.D. is useful here: even if, as a policy the government deems a country safe, the relevant person has a realistic chance to call this into question.

IV. THE IMPORTANCE TO NON-REFOULEMENT JURISPRUDENCE

The significance of D.V.D. is that it treats procedure as a part of substantive protection. General assurances and internal administrative discretion or post-removal remedies are not

sufficient to meet international and domestic non-refoulement obligations. Access to US courts, counsel, evidence and protective institutions may be significantly curtailed once a person has been transferred to a third country. For this reason, it is important that safeguards be in place prior to removal, rather than after damage. In addition, the judgment acknowledges the risk of chain refoulement. An individual can be taken into a third country on temporary basis, and then deported to the country of origin or deported to another unsafe country. It is not enough for the sending state to simply know, or reasonably be expected to have known, that onward removal is a reasonably to be expected consequence, and that this is not a legal problem separate from the first transfer. The non-refoulement obligation should also apply to indirect transfers, especially when the receiving state does not have a stable asylum system and/or has made vaguer, non-binding assurances.

Lastly, the decision offers a good comparative framework for other jurisdictions like India, where refugee protection is not fully entrenched in law. The destination-specific notice, individual risk assessment, fair opportunity to claim protection, and review prior to removal core standards of the First Circuit are transferable. They do not inhibit the enforcement of immigration laws; they are designed instead to make sure that immigration laws are enforced in a way that is consistent with constitutional due process and the ban on refoulement. In this sense, D.V.D. establishes that the legality for third-country removal not only depends on where the state wants to remove a person but also on whether or not a credible legal procedure has been provided by the state to assess whether the removal is safe.

V. COMPARATIVE SECTION: INDIA'S CONSTITUTIONAL AND JUDICIAL APPROACH TO DEPORTATION OF REFUGEES

The deportation of refugees in India is characterized by a stark dichotomy between constitutional protection and the absence of any reference in the statute book. Refugees are not protected by a comprehensive refugee law, but instead by general laws that apply to "foreigners", particularly the Foreigners Act, 1946, and by ad hoc judicial action and executive policy, in absence of a clear, cohesive refugee law specific to refugee protection in India.[22]This statutory void has led to a jurisprudence that is disjointed, humanitarian in its tone and doctrinally not always coherent and has placed the judiciary at the heart of the refugee protection system in India.

[22] Atul Alexander & Nakul Singh, India and Refugee Law: Gauging India's Position on Afghan Refugees, 11 Laws 31 (2022), https://doi.org/10.3390/laws11020031

The most significant provision at the constitutional level is Article 21 of the Indian Constitution which ensures that "No person shall be deprived of his life or personal liberty except in accordance with procedure established by law. The importance of Article 21 is that it is not limited to citizens.[23] One of the main reasons why Article 21 is relevant is because it applies to all “persons” and not just citizens. This provides the main doctrinal avenue that courts have been able to use to defend refugees and asylum seekers from deportation. However, the constitutional right to life, as understood in India, including the dignity, fairness and substantive right to be free from arbitrary state action, is ambulatory and thus a right to be free from refoulement is a part of the constitutional right to life.

However, at the same time, Indian legislations also provide ample powers to the executive to deport foreigners. Under the Foreigners Act, 1946, foreigner refers to anyone who is not an Indian and section 3 of the act provides for the regulation of the entry, movement, presence and departure of foreigners from the territory of India by the Central Government. This is a very broad category that covers the entire category of refugees, tourists, undocumented migrants and others who are not citizens. This has led to refugee claims being evaluated in a context very much oriented towards immigration control and national security. It has been left to courts, then, to determine if it is possible to distinguish between “refugees” and “foreigners” in a constitutionally meaningful manner, even without legislative recognition.[24]

The Supreme Court's previous decisions provided some ground for refugee protection, albeit with no doctrine of non-refoulement. In Louis De Raedt v. Union of India, the Court held that the right of life and liberty as guaranteed under Article 21 extends to foreigners too, thus recognizing that non-citizens can be deprived of their lives or freedoms only according to law (Reference from International Journal of Refugee Law, 2023). However, the Court differed in the interpretation of Article 21 from Article 19(1)(e) which is the right to reside and settle in India, stating that the latter is applicable only to citizens. There was an important sense in which this was the case, because later on courts have sometimes relied on it to imply that foreigners enjoy a right to a procedure but not a right to deportation per se.

Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Supreme Court found the sovereign power of the State to deport foreigners and the ruling has been cited in support of a wide

[23] Akanksha Kumar, Article 21 and Non-Citizen Protection in India (2025).
[24] Tiwari, The Foreigners Act 1946 and Executive Power over Deportation (2024).

executive deportation power. But the case did not occur in a contemporary refugee protection setting and did not specifically consider the constitutional consequences of return to persecution or torture or statelessness. Subsequent governments and courts, however, have picked up the trail of its sweeping terms and used them to justify deportation over and over again, without making adequate distinctions among refugees and other removable non-citizens. This doctrinal legacy has hampered the refugee jurisprudence in India.

Nevertheless, a number of courts have taken a more protective stance based on Article 21 and international law, despite this uncertainty. The Gujarat High Court in Ktaer Abbas Habib Al Qutaifi v. Union of India is cited as one of the most important decisions in India which has affirmed the applicability of the non-refoulement principle to Article 21, and has also held that India is bound by international law and humanitarian obligations to uphold this principle. The court ruled that deportation of refugees would put them at risk of loss of life or liberty and that international norms would be used as interpretive guides in the absence of domestic norms. This was an important move as it took constitutional protection beyond issues of procedural fairness to connect it directly to what refugee safety meant to the substance.

In Dongh Lian Kham v. Union of India, the Delhi High Court decided that the right to life under Article 21 also encompasses the right to be free from deportation to a state of persecution or danger. The Court, however, held that the government had the general authority to deport foreigners, but that such authority could not be exercised in a way that would endanger life and liberty. It is just as many Indian High Court cases have done that the court has provided temporary or ‘conditional protection' to stop harm from happening immediately, despite not having developed a complete constitutional refugee doctrine.

Inconsistency in Indian refugee laws can be seen in the cases of Mohammad Salimullah v. Union of India before the Supreme Court and Nandita Haksar v. State of Manipur before the Manipur High Court. Mohammad Salimullah (Supreme Court of India Order dated 8th April 2021): In relation to the potential deportation of Rohingya refugees to Myanmar, the petitioners claimed that non-refoulement was part of Article 21, meaning that India's international human-rights commitments reinforced this obligation. The Supreme Court confirmed that a treaty can be used to explain the meaning of the domestic law provided it does not contradict it, but rejected the demand for interim relief and reiterated that the right not to be deported is ancillary to the Article 19(1)(e) right to reside and settle, which is only for citizens (Supreme Court of India Order, 8 April

2021). The Court also upheld the Union government's argument on internal security concerns and did not delve into the argument about grave danger that the Rohingya could face if they were returned to Myanmar.

On the other hand, the Manipur High Court in Nandita Haksar took a broader and rightful interpretation. It asserted that the wide sweep of Article 21 "would without doubt cover the right of non-refoulement", thus establishing that the right of non-refoulement is a consequence of the protection of life and liberty, and not restricted to the existence of a refugee law. It also made a distinction between refugees and those who are merely illegal migrants and stressed that it is not enough to make broad security claims, one must need to look at the actual risk. The judgment was temporarily stayed, but its reasoning is significant as a blueprint for the adoption of refugee protection norms in Indian constitutional law in a principled manner.

Yet another unique aspect of Indian system is the presence of UNHCR. Under the non-applicability of a national refugee status determination system of general application, courts may consider UNHCR documentation to substantiate the refugee claim or as grounds for delaying deportation. However, this practice is equally fragile, in that India does not incorporate UNHCR status determinations into its domestic law. Consequently, eligibility for protection can be based on the region, on administrative practice or on judicial discretion and not on a legal entitlement.[25]

In comparison, the Indian Constitution has a silver lining, but black spots. Article 21 offers a broad and normative mandate to safeguard refugees from unsafe deportation, and several High Courts have done just that. But lack of development of refugee law has created uncertainty about refugee protection, where the attitude of judges plays a key role, and protection can easily be undermined by the executive's usage of the language of sovereignty, immigration control, and national security. The experience of India thus shows that constitutional adjudication in a refugee situation is capable of both and it also shows its limits: Article 21 can be used as a protection against refoulement, but if it is not legislature codified and supported clearly and unambiguously by the Supreme Court, then that protection is incomplete.

VI. POLICY IMPLICATIONS

[25] Rohaida Nordin, Norilyani Hj Md Nor & Rosmainie Rofiee, Ineffective Refugee Status Determination Process: Hindrance to Durable Solution for Refugees Rights and Protection, 11 Indonesia L. Rev. art. 5 (2021), https://scholarhub.ui.ac.id/ilrev/vol11/iss1/5

The September 2026 First Circuit decision is important for more than just what it means for the legality of one deportation procedure. The main point of its message is that those norms that are recognized as protection in the judiciary must have some substance to them in that they can be exercised with executive authority. The court said that the government was not providing them with “meaningful notice or meaningful opportunity to present claims of persecution or torture” before deporting them to a third country, a process that could be repeated without providing migrants with much warning. This faces the first significant policy peril: that of the executive's circumvention of judicial review in haste, secrecy, and administrative reconfiguration.

If the removal process is hastened to the point where those who are affected are not able to contact counsel, collect evidence, or obtain any interim protection from a court, judicial review becomes nominal and not real. Executive design not only circumvents the courts formally but makes it functionally difficult as well. Reports associated with the challenged policy suggested that in some instances, migrants were given as little as 6 hours' notice before their transfer to third countries, even when the removal order did not specify any third countries. In this context the state does not have to deny review in law, it can prevent review by acting too quickly for review to occur.

This reverberates on the principle of the rule of law. Judicial oversight requires time, notice and intelligibility of procedure. Where the executive has the freedom to change the country of removal at the last minute, it is legally possible for him to base his decision on confidential or little-examined diplomatic assurances and to move people before courts can get to them, there are no institutional safeguards for non-refoulement. In this way, the First Circuit's demand for meaningful notice is not only a protection for migrants, but a structural protection to maintain the integrity of the judicial system's oversight of coercive state action.

The second policy challenge is the increasing trend of using third-country transfers as a tool of externalized migration control. The advantage of externalization is that it persuades the sending state that it does not have to bear humanitarian, legal and reputational costs while it sends a person elsewhere and claims that they have not returned the person "directly to the place of original persecution. However, this approach can all too easily result in indirect or ‘chain’ refoulement – particularly if the country to which the person will be sent does not have well-developed asylum processes or may deport the individual to a third country. The First Circuit's reasoning is important because it acknowledges that the test isn't whether a third country will

accept a person but whether the person has had a "genuine opportunity" to demonstrate the "unsafety" of the transfer.

The case also illustrates the shortfalls of the policy of diplomatic assurances. In certain deportation contexts, such as politically charged cases, executive authorities may consider such assurances to be effective alternatives to case to case hearings. Generalised assurances from receiving states are insufficient to determine if any individual is at risk because of ethnicity, religion, political affiliation, previous residence or risk of onward removal. The reliance on assurances can then allow the executive to take shortcuts, as an individual protection can become a state-to-state management arrangement. The First Circuit, in essence, said "no" to this substitution in its opinion that existing anti-persecution and anti-torture protections have minimal application without prior notice and a substantive opportunity to challenge the destination country. The judgment also resonates strongly in a comparative sense in India, where the issue is not so much that the executive is circumventing a carefully designed statutory review mechanism, as it is that there is no statutory review mechanism in the first place. This is because there is no refugee law in India, no uniform asylum procedure enshrined in statute, and no clear definition of non-refoulement in the legislation. Protection is instead provided to refugees under the Foreigners Act 1946, via executive discretion and by limited judicial interpretation of Article 21 of the Constitution. This can result in a structural context in which deportation decisions can be very discretionary, and documentation of deportation can vary, while access to legal confrontation is also unclear.

This policy risk due to codification gaps has two dimensions. Broadly, because the Executive does not differentiate between refugees and asylum seekers and other groups of foreigners, it may apply a broad 'control' regime to all those who enter without permission, which will obscure the legal importance of a claim based on persecution. Second, judicial protection is uneven in that courts have to make up the rules on their own from constitutional principles. This is why Indian case law sometimes treats Article 21 as also protecting against unsafe deportation, in other instances, deportation is carried out despite grave humanitarian concerns.

Policy Design-wise, both the US and the Indian experience shows that non-refoulement cannot depend exclusively on general statutory prohibitions or the constitutional values. It involves procedural architecture. The basic requirements of that architecture are that the proposed country of removal is communicated in advance in writing, that there is access to legal counsel, a country-

specific risk assessment, a reasoned administrative decision, and the opportunity for pre-removal judicial review. Otherwise, the rights granted in law are too intangible to be a meaningful check on the exercise of executive power. The bigger picture is that codification and procedure are constitutional issues, not technical ones! When refugee protection is not embedded in a framework of law (as is the case in India), the discretion of the executive is increased because there are no legal limits on the process of admission, documentation, detention, or deportation. When protections are written but procedures are weak, like in the US third country removals policy as found by the First Circuit, the executive can still get around the spirit of the law by misaligning the process and the time for invoking the law. The policy implication is thus that protection of refugees is not only a matter of what the law prohibits, but also of whether legal institutions are in place to make the prohibitions enforceable before the refugees are removed.

VII. SUGGESTIONS AND CONCLUSIONS

The central issue seems not to be the lack of legal principle, but the lack of enforceable procedure, as is evident from the comparative analysis of the September 2026 decision of the First Circuit with Indian constitutional refugee jurisprudence. The principle of non-refoulement is already well established in treaty law, customary international law, and in human rights practice, as a bar to the return of persons under the threat of persecution, torture, or other grave harm. Controversy still surrounds how states implement that duty in deportation systems today, which are more speedy, externalized, and driven by executive discretion. Three interrelated reforms are needed - procedural safeguards, codification of rights in statute, and independent monitoring.

First, any legitimate third-country removal system should have an underlying framework of minimum non-refoulement protections. International standards and principles continue to stress that transfer is an individual matter, and that individuals affected by a transfer are to be informed, interpreted, given legal help, afforded an opportunity to present their views in a personal hearing, and provided with alternative options for review. Domestic law should at the very least stipulate: advance notice in writing of proposed country of removal; communication in a language understood by the person; access to counsel and interpreters; a confidential opportunity to present evidence of persecution or torture; and a reasoned, written decision of a competent authority (Reference from CTI safeguards paper; OHCHR note). Most importantly, appeals and reviews of the transfer order must be suspensive, that is, there can be no removal until the appeals are decided.

Otherwise, the right to challenge removal is ineffective since some damage could be done prior to the challenge of the legality of the removal.

Second, states should also translate the principle of non-refoulement into clear statutory text instead of relying on bits and pieces of legislation and piecemeal judicial rulings. One of the following model clauses might be included: ‘No person shall be removed, expelled, extradited, or otherwise transferred to a third country where there are substantial grounds for believing that the person would face a risk of persecution, a risk of torture, a risk of cruel, inhuman or degrading treatment, a risk of arbitrary deprivation of life, or a risk of onward transfer to such risk; prior to any such removal to a third country, the competent authority shall give written notice of the proposed destination, ensure access to legal representation and interpretation, and conduct an individualized assessment of risk; independent review shall be made available, and removal shall be automatically suspended pending final determination. The language used is in line with the fundamental obligation of Article 33 of the Refugee Convention, 1951, and with the general consensus about the non-refoulement obligation under the torture and life-protection norms of the human rights framework. In India, codification would help bridge the gap in which refugee protection is left to the interpretation of Article 21 of the Indian Constitution and vulnerable to the discretion of judges in determining the difference between refugees and other types of foreigners.

Third, monitoring should be institutionalized, not just diplomatic. Monitoring is introduced as a protection measure in third-country transfers, but it has a legal meaning only if it is independent, continuous and is capable of having consequences. Monitoring bodies will need to be allowed to have unhindered access to transferred persons, asylum records, detention sites, and relevant authorities; that bodies should be able to feed into the suspension of transfers where systemic risk is identified; and that comparative guidance will place a focus on the importance of monitoring bodies. Any domestic or bilateral transfer scheme should therefore include an independent oversight mechanism, with judicial officers, refugee-law experts and human-rights institutions, should have periodic public reporting, should allow for complaints, both urgently and by the transferee, lawyer, or civil society group, and should require automatic review of any transfer arrangement where credible evidence of refoulement, torture, or denial of asylum procedures occur. Monitoring should not be viewed as a “humanitarian courtesy”, but rather as a mechanism for legal compliance.

Finally, the best lesson from the current third-country deportations is that principle alone is not enough to sustain non-refoulement. It necessitates a legal structure that will make abstract protection concrete in the procedure of pre-removal, as well as a clear statutory prohibition and institutional control. In principle, a rights-compliant removal regime, then, is one that does not rely on executive pledges to make room but, rather, mandates that the state explain every transfer using fair processes, binding standards and external oversight before it does irreparable damage.