

# Refugee Rights Violations in Europe: In Conversation with Thomas Spijkerboer

## *Summary report*

**Thomas Spijkerboer:** Professor of Migration Law at the Vrije Universiteit Amsterdam

**Anila Noor:** Founder and Director of New Women Connectors, political refugee

**Ton Huijzer:** Consultant humanitarian aid

**Bahram Sadeghi:** Journalist and moderator

### **The status quo**

When it comes to the European debate on migration, the idea that once upon a time there was a golden age in which things were better is false. If you look at the process leading up to the creation of the Refugee Convention in 1951, the discussion was the same as it is now. Some countries were overburdened with post-war European refugees, and wanted a narrow definition of who is a refugee, because the lack of international solidarity means that they otherwise have to provide care and services to all of these people. In that area, not much has changed. What is new, is that Europe is more affected by refugees now than it has been in a long time, because crises are taking place much closer to our borders. Most importantly, if you look at the systematic pushbacks in Greece, Poland and elsewhere, Europe has let go of the pretence that it will live up to international law. Thomas Spijkerboer: “The gloves are off: the EU does not hesitate to violate international law, and they are open about it.”

### **Is the law wrong or its implementation?**

The open violation of international law by European states warrants the question if this law is of any use. Some say that the law is intrinsically wrong. As Anila Noor puts it: “The refugee convention was made to help refugees, but instead these laws are being used to exclude people. The law has a default of error and instead of helping refugees, states twist, avoid or even violate the law.” However, others find fault not with the law but with the implementation. Thomas Spijkerboer: “International law is ambiguous and much can be done in the finetuning. For example, the EU is responding positively to refugees from Ukraine. This makes it harder for them to say “we don’t care about refugees” in the future.” Thus, a change in attitude for the good is possible, although it is usually temporary.

### **State sovereignty VS Refugee rights**

An important question raised by Ton Huijzer was how the rights of refugees relate to the right of a state to control their own border. Thomas Spijkerboer answered as follows: “The Refugee Convention of 1951 was created as a very problematic compromise between states. It is a Eurocentric convention that was made to address the European refugee problem of the time. This is still visible in the text and in the definitions, and European states still think this convention is there for them instead of the refugees. This is visible in refugee-related court cases as well. When a European human rights court has a case that deals with migration, the first thing they open with is the right of states to control migration. The rights of migrants and refugees are second, and are seen as the exception. This is human rights law upside down and migration law is the only field where this happens. For example, if a policeman uses

violence against a citizen, the right not to be beaten up by police comes first, and it must be proven that the situation was exceptional to justify the use of violence against the citizen.”

### **The role of human rights courts**

It is possible to bring cases about the violation of refugee law to European courts, such as the European human rights court in Strasbourg and the EU court in Luxembourg. Although it is evident that these cases present violations of the law, it is uncertain whether the courts will rule that way. Thomas Spijkerboer: “Since 2014, these courts have been bending over backwards to not call things by their name. For example, in a case about the EU-Turkey deal at the Luxembourg court, the court ruled in a way that was evidently wrong and that would make a law student fail their exam.” Courts do not want to touch cases like that, so they declare the court incompetent to hear the case. The reason for this is that courts operate in a political environment. A good example of this is the case where a Syrian family wanted to apply for a visa from Belgium before traveling there, so that they could travel safely instead of having to use unsafe routes. On the morning of the verdict, the Volkskrant, a Dutch national newspaper wrote: “*EU court may blow up Dublin regulation.*” Courts will hesitate to make such a controversial decision for fear of their own demise.

### **Relevance of migration law for humanitarian organizations**

The following question was raised by the audience: “Humanitarians are officially neutral, and help everyone in need. So why should they care about migration law?” Anila Noor answered: “A good understanding of law and its enforcement helps to advocate for people’s rights. Laws can be used as a reference, to showcase what is going wrong.” Ton Huijzer added: “When during the Syrian refugee crisis organizations were considering giving aid in the camps on Lesbos, we first had to learn about the refugee law to know what exactly the rights are of the people coming to Europe.”

Moreover, states can (ab)use the law to instrumentalize NGOs. Thomas Spijkerboer gave an example of how this happens: “Many migrants wanting to come to the EU are stuck in Morocco. Morocco has the obligation to take care of the health of these people and receives money from the EU to do so. Morocco leaves it to NGOs to provide health care to this group. In turn, they expect NGOs to limit their assistance to these people. In reality, Morocco is not at all taking care of the health of these vulnerable populations, and NGOs thus end up doing the exclusion work of Morocco and the EU. NGOs need to be aware of this and realize that law is not always good-natured.”

### **Options to change or improve the law**

There are places in the world where they deal differently with migration law. In Africa and South America, human rights courts are using regional conventions which contain roughly the same human rights norms as the European Convention on Human Rights. There, the first thing a court mentions is the right of non-discrimination, instead of the rights of states to control migration. This shows that they operate in a different normative, legal and moral universe where non-discrimination is the primary norm. Anila Noor: “A country like Canada also has a different relation to migration, presenting migration as a common thing. These examples show possibilities for a different attitude.”

We should be careful, however, to not be too optimistic about changing refugee law or making a new convention. A couple of years ago the [Global Compact on Refugees \(2018\)](#) was created, which is a non-binding instrument. The norms benefiting refugees in this text are ultra-soft, whereas European states have made sure that all their rights are well-represented. We

should realize that the 1951 convention was a muddy compromise but at least it recognized that states were dependent on each other. According to Thomas Spijkerboer, this recognition of multilateralism is currently completely missing from European policy: “For example, the EU has sponsored the making of an asylum law in Tunisia. But the draft law is not submitted to parliament, because the Tunisian government fears (with good reason) that when it is adopted, the EU will designate the country as safe and start returning people in large numbers.” This paradox is bad for Europe, because the situation in Tunisia makes more refugees want to go to Europe, and it is bad for the refugees because their situation does not improve. It shows a complete lack of sight for interests that are not European, which is detrimental to all parties.

### **How to initiate change**

One issue that was raised by the audience, is the difficulty for a humanitarian organization to be very outspoken on a sensitive topic like this. Neutrality is one of the core humanitarian principles, mostly because it ensures access to places where help is needed. Humanitarians can speak out about the law, write letters to politicians, and even engage in confidential dialogue with states, but starting a court case against a state for violating refugees rights might jeopardize their neutrality and result in losing access to places controlled by that state. Thomas Spijkerboer acknowledged this, and provided options for what humanitarian organizations can do. “Humanitarian organizations can help to create the political space for human rights courts to be courageous and make the right decision. Large and apolitical NGOs can send in documents with factual information and observations that they have gathered, without it being a political statement. It would be even better if you can find a state who is willing to step up in these cases, as all states can intervene in the human rights courts and give their opinion on a case.”

Ton Huijzer adds that the humanitarian sector itself should also reflect critically on their own role. Instead of only being reactive, humanitarian organizations should look ahead and anticipate future challenges. The sector has the ability to influence the European Parliament, so it should think about if and how to compromise between human rights and the limits of policy making. Moreover, humanitarian organizations should be more open to discussing controversial or sensitive topics: “Take, for example, the article written by [Marcia Luyten](#) about border policies. She got so many negative comments, also from our sector, that she will think twice before writing a piece like that again. Instead, we should take such an article as a starting point for discussion.”

### **Conclusion**

It is undeniable that international refugee law is Eurocentric and flawed. But more importantly, our attitude towards it is flawed. The response to refugees from Ukraine shows us that it can be different, if only there is the political will. Even human rights courts operate in a political space, so supporting them and giving them valuable information is a way that humanitarian organizations can play a role in changing the way we deal with refugees. Moreover, humanitarians and academics should be proactive, and rethink their normative position, despite their fear of being called moralist or unrealistic. A recommendation from Thomas Spijkerboer is to read [Migration as Decolonization](#) by Tendayi Achiume, which is no doubt not the final word on the issue but does show the possibility to fundamentally rethink migration law.