NON-REFOULEMENT DURING A PANDEMIC – WITH A CONTEXTUAL ANALYSIS OF BORDER CLOSURES IMPOSED BY THE EU, THE US AND INDIA

Setu Gupta[*]

ABSTRACT

Non-refoulement is the most basic protection afforded to a refugee. Despite agreeing in theory, States often ignore this principle in practice ending up refouling refugees from their territories or frontiers. In times of COVID-19 crisis, refugees require asylum and healthcare not only as a human right but also to prevent the further spread of the virus. Violation of this principle jeopardises both. This article analyses the scope and extent of the principle of *non-refoulement* in refugee law, customary international law and human rights law. It also evaluates the 'national security' exception and whether it could be invoked to justify refoulement on the basis of a public health emergency. It probes the validity of border closures imposed by the EU, US and India in light of their respective commitments to international treaty and customary law. The article concludes by summarizing the analysis and suggesting alternatives to violation of *non-refoulement* obligations.

Keywords: *Securing Borders, Pandemic, Non-refoulement, Refugee Crisis.*

I. Introduction

IT IS the direst need of a refugee to not be sent back into a territory where they risk suffering persecution and to be denied entry or stay by one country would inevitably lead them into a "perpetual orbit" looking for a State that would grant them entry.[1] The current pandemic is unrelenting and has unveiled levels of adversity that humankind in the twenty-first century was unprepared to face. There are so many dimensions to this suffering that it may become

[*] Ph.D. (SRF) Research Scholar, The Indian Law Institute, New Delhi. The author acknowledges the guidance provided by his Ph.D. Research Supervisor, Prof. (Dr.) Manoj Kumar Sinha, Professor and Director, Indian Law Institute, New Delhi, for his valuable feedback and comments.

[1] James C. Hathaway, *The Right of Refugees Under International Law* 279 (Cambridge University Press, 1st edn., 2005).

challenging to understand that the gravity of it faced by some may be more than others, until the suffering of these specific subsets of minorities is brought to focus. The present paper will focus on a particular predicament faced by refugees in this pandemic, *i.e.*, being forced to turn back from borders and frontiers to seek refuge elsewhere. This has happened primarily due to complete border closures imposed by several States to contain the spread of the virus. As per UNHCR, 167 States fully or partially closed their borders towards this end and 57 States made no exception for asylum-seekers.[2]

It is generally accepted that States are responsible for public health within their territories and therefore the measures they take towards the fulfilment of that goal, including total border closures, must be accepted as well, irrespective of the far-reaching consequences. However, this understanding may be at variance with international law. Additionally, increased border restrictions create hindrance in the humanitarian assistance programmes[3] that could have been availed of by the refugees forcing them to embark on perilous journeys.[4]

This paper discusses the principle of *non-refoulement* under international and regional refugee law, human rights law as well as customary international law. It also evaluates the legality of border closures imposed by the United States, the European Union and India, taking support of international and regional treaties, case laws as well as opinion of experts on the matter. It concludes by suggesting options other than imposing strict border closures which results not only in *refoulement* but also creates a greater health risk in terms of the spread of the virus, due to non-sequestering and lack of access to healthcare to the potentially afflicted refugees.[5]

[2] UNHCR, "Beware long-term damage to human rights and refugee rights from the coronavirus pandemic: UNHCR" *available at:* https://www.unhcr.org/en-us/news/press/2020/4/5ea035ba4/beware-long-term-damage-human-rights-refugee-rights-coronavirus-pandemic.html (last visited on March 4, 2021).
[3] Editorial, "Humanitarian crises in a global pandemic" 396 *The Lancet* Aug 15, 2020.
[4] "COVID-19: The impact of closing borders around the world" *available at:* https://data2.unhcr.org/en/dataviz/143(last visited on March 4, 2021).
[5] UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, para. 8 *available at:* https://www.refworld.org/docid/5e7132834.html (last visited on March 4, 2021).

II. *Non-refoulement* under Refugee Law

(a) The fundamental humanitarian nature of *non-refoulement*

The principle of *non-refoulement* states that a refugee shall not be expelled to the frontiers of territories where their life or freedom would be in danger because of their "race, religion, nationality, membership of a particular social group or political opinion."[6] The exceptions to this principle are mentioned in the second paragraph which provides that the benefit of this provision may not be available to a refugee for whom there are reasonable grounds for believing that they may be "a danger to the security of the country" or who may be considered "a danger to community of that country" after having been convicted for a particularly serious crime by a final judgment of court of law.[7]

UNHCR has noted that the principle of *non-refoulement* in article 33 of the 1951 Convention is:[8]

> [A] cardinal protection principle enshrined in the Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment.

Lauterpacht and Bethlehem aver that the 1951 Convention Relating to the Status of Refugees (*hereinafter* '1951 Convention') has a humanitarian character and within its scheme *non-refoulement* holds a "special place"[9] evident by the prohibition on having reservations *inter alia* to article 33.[10] Therefore, the prohibition on refoulement is of a non-derogable character.[11]*Non-refoulement* has been considered to possess a fundamental humanitarian

[6] The Convention Relating to the Status of Refugees (1951 Convention), 1951, art. 33(1).
[7] *Id.*, art. 33(2).
[8] UNHCR, submissions in *G* v. *G*, UKSC 2020/0191.
[9] Lauterpacht and Bethlehem "The Scope and Content of the Principle of Non-refoulement: Opinion" in Feller, Turk *et. al.*(eds.) *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* 106 (Cambridge University Press, 2003).
[10] See art. 42(1) of the 1951 Convention.
[11] See art. VII (1) of the 1967 Protocol. Affirmed by the Executive Committee as well as the UN General Assembly, see Conclusion No.79 (XLVII) – 1996 at para. (i); A/RES/51/75, 12 February 1997, at paragraph 3.

character and is considered a fundamental principle of international refugee protection regime.[12]

(b) Scope of *Non-refoulement*

The principle of *non-refoulement*, under the 1951 Convention, covers not only the refugees to whom the official status has been conferred after the status determination procedure but also those who are awaiting the determination. It obligates the States not to *refoule* a refugee to a country where he would be at risk of persecution and also not to countries where he would be exposed to risk of "onward removal to such countries".[13]

The Drafting Committee of the Convention commented that this article not only meant that the refugee should not be refouled to his country of origin but also any other country where his life or freedom may be jeopardised due to any of the Convention grounds.[14] However, it did not also mean that the refugee must in all cases be admitted.[15] The representative of the IRO clarified the position by adding that the article imposed a "negative duty" on a State forbidding it to expel any refugee to certain territories but it did not impose any positive obligation to allow refugees to take up residence.[16]

The Swiss representative expressed his doubts about the meaning attached to the words "expel" and "return" as in his government's view expulsion applied to a refugee already admitted into the territory while "*refoulement*" had a vaguer meaning and like the English word "return", could not be applied to a refugee who had not yet entered the territory.[17] He added that, in his opinion, this article talked about two categories of refugees, those who could be expelled and those who could be returned, and sought clarity on the word "return".[18] If "return" could be interpreted to apply to refugees who had already entered a territory but

[12] See ExCom Conclusion No.17 (XXXI) – 1980, at para. (b); Conclusion No.65 (XLII) – 1991, at para. (c); Conclusion No.79 (XLVII) – 1996, at para. (j); Conclusion No.81 (XLVIII) – 1997, at para. (i); Conclusion No. 103 (LVI) – 2005.
[13] *M.S.S.* v. *Belgium and Greece*, No. 30696/09, para. 293.
[14] Paul Weis, *Commentary on the Travaux Préparatoires* at 233.
[15] *Ibid*. This clearly alludes to the exceptions mentioned in the second para of the article 33.
[16] *Id.* at 235.
[17] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, UN Doc A/CONF.2/SR.16 (Nov. 23, 1951).
[18] *Ibid.*

were not yet resident there then the Swiss government would not have to "allow large groups of persons claiming refugee status to cross its frontiers."[19]

This view was endorsed by the French representative who agreed that the Convention maintains a State's right to refuse asylum.[20] Therefore, the duty of *non-refoulement* does not establish a right to asylum and a country can refuse asylum so long a refugee does not fall into the "arms of their persecutors".[21] This is in line with the prevailing legal view that States have the autonomy to regulate the right of a person to enter its borders.[22]

The obligation of the States *vis-à-vis non-refoulement* cannot be limited to within the territory of the State.[23] It depends on whether impugned conduct can be attributed to the State *i.e.*, whether the refugee is under the jurisdiction of the State, within or without the territory, whether the State was exercising effective control on the person or not.[24] As per the UNHCR, this obligation extends to wherever the State exercises jurisdiction:[25]

> UNHCR is of the view that the purpose, intent and meaning of article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.

---

[19] *Ibid.*

[20] *Ibid.* Mr. Rochefort (France):

> Referring to the amendment submitted jointly by the delegations of France and the United Kingdom (A/CONF.2/69), he observed that the text of the draft Convention admitted the principle that a State could refuse the right of asylum. It was therefore only just that countries which granted that right should be able to withdraw it in certain circumstances. If they could not do so, they would think twice before granting an unconditional right. He agreed that the right of asylum was sacred, but people should not be allowed to abuse it.

[21] UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twenty-First Meeting Held at Lake Success, New York, on Thursday, February 2, 1950*, UN Doc E/AC.32/SR.21 (Feb 9, 1950).

[22] *R* v. *Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.*, [2004] UKHL 55.

[23] Lauterpacht and Bethlehem, *supra* note 9 at 110.

[24] *Ibid.* See *Hirsi Jamaa* v. *Italy* where the ECtHR recognized the extra-territorial application of the principle of *non-refoulement*, Application no. 27765/09, Decision of February 23, 2012.

[25] See para. 24 of UNHCR, *Advisory Opinion on the Extra-territorial operation Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, *available at:* https://www.refworld.org/docid/45f17a1a4.html(last visited on 11.03.2021). UNHCR's view differs from that of the Supreme Court of United States in *Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners* v. *Haitian Centers Council, Inc., et. al.*, 509 U.S. 155 (1993) where it was held the obligation of *non-refoulement* extends only within the territory of the U.S.

The duty of *non-refoulement* extends not only to non-ejection from within the territory but also to the non-admittance at the frontiers.[26] Additionally, a government is not shielded from liability if non-State actors encouraged by the government drive the refugees back to territories of persecution.[27]

In sum, it can be said that *non-refoulement* is one of the most sacrosanct principles of international refugee protection. It imposes an obligation on States not to send back refugees to any place where they may be persecuted for Convention reasons but does not guarantee a right to asylum. It extends to wherever a State can exercise its effective control and applies not only to expulsion from within the territory but also rejection at borders.

(c) The scope of "reasonable grounds for regarding as a danger to the security of the country"

The pandemic has compelled one to question as to what could be construed as a reasonable ground constituting danger to the security of a country? More specifically, could the risk of spread of the virus to the citizens of the asylum country be considered as such a danger? At the Conference of Plenipotentiaries, the representative of Sweden introduced an amendment, which provided (*vis-à-vis* the exception to *non-refoulement*), "[B]y way of exception, however, such measures shall be permitted in cases where the presence of a refugee in the territory of a Contracting State would constitute a danger to national security or public order".[28] France and the U.K. too introduced a similar exception, "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is residing, or who, having been lawfully convicted in that country of particularly serious crimes of offences, constitutes a danger to the community thereof."[29]

The Danish representative expressed the apprehension that if the country of origin is a "great Power" and demanded the return of a refugee, the refusal to do so might lead to a political

[26] ExCom Conclusion No. 6 (XXVIII) – 1977 at para. (c). Additionally, other subsequent refugee protection instruments such as Asian-African Refugee Principles of 1966 (Bangkok Principles), the Declaration on Territorial Asylum, 1967 and the OAU Refugee Convention,1969 expressly consider rejection at frontiers a prohibited act. This provides a useful interpretative insight.
[27] James C. Hathaway, *supra* note 1 at 317.
[28] *Supra* note 17.
[29] Weis, *supra* note 14 at 235.

crisis. He wanted the assurance the there was no possibility in interpretation that such a situation could be considered as a 'reasonable ground' for regarding the refugee as a danger to the security of a country.[30] The representative of U.K. replied that it wouldn't be so as such matters of extradition were outside the purview of the Convention.[31]

Apropos the usage and interpretation of 'national security' under the ambit of article 33 of the 1951 Convention, there are indications that the term was included in the draft of the Convention to counter the threat of communist infiltration.[32] Sweden, at the Conference of Plenipotentiaries, was of the opinion that it was intended to meet the cases of refugees who engaged in "subversive activities" that threatened the national security of the asylum State.[33]

Hathaway opines that under the analogous modern interpretation, it would translate to situations where a refugee's presence or actions give rise to an "objectively reasonable, real possibility of directly or indirectly inflicted substantial harm to the host State's most basic interests, including the risk of an armed attack on its territory or its citizens, or the destruction of its democratic institutions".[34] A few scenarios where national security exception would not apply, would be to safeguard international relations,[35] to protect property or economic interests of the asylum State,[36] to deter the departure of other persons from refugee's country of origin[37] or to avoid the risk of retaliation from the persecutors of the refugee.[38] There is a notion of criminality associated with 'danger to the security of the country' in both the parts of the second paragraph.[39] While the first part deals with the refugee being a danger to

---

[30] *Supra* note 17.

[31] *Ibid.* Lauterpacht and Bethlehem differ from this position and maintain that extradition too falls within the purview of *non-refoulement* and a refugee may not be extradited to a country where he may be persecuted. In their opinion the usage of the phrase "any manner whatsoever" undoubtedly means that the concept of *refoulement* could be construed expansively. See Lauterpacht and Bethlehem *supra* note 9 at 112. See also Problems of Extradition Affecting Refugees, ExCom Conclusion No. 17 (XXXI) – 1980.

[32] James C. Hathaway, *supra* note 1 at 345.

[33] Mr. Petren (Sweden):

> The second paragraph of the Swedish amendment had been moved for more or less the same reasons as the joint amendment, and was intended to meet the case of refugees engaged in subversive activities threatening the security of their country of asylum, refugees who, after having been accepted as residents, were found to have been fugitives from justice in their own country, and refugees who failed to comply with the conditions of residence.

See *Supra* note 17.

[34] James C. Hathaway, *supra* note 1 at 346.

[35] *Attorney-General* v. *Zaoui (No. 2),* [2005] 1 NZLR 690.

[36] James C. Hathaway, *supra* note 1 at 346.

[37] *Ibid.*

[38] *Id.* at 347. See *In re Anwar Haddam*, 2000 BIA Lexis 20 (BIA 2000).

[39] See James C. Hathaway, *id.* at 343.

national security implying armed threats,[40] terrorist funding activities,[41] subversion of democratic institutions,[42] espionage,[43] the second part deals with the refugee being a danger to the asylum State's community and applies to refugees convicted by a final judgment of a particularly serious crime such as rape, homicide, armed robbery, arson, *etc*.[44]

Aside from the traditional interpretation of national security in the context of the exceptions to article 33, scholars are divided in their views about whether health security should fall into the category of national security and while some argue that national security essentially involves external threats of a military nature posed to a sovereign state others believe that the concept of security is much more complex.[45] Nunes posits that "health-security nexus is not a natural state of affairs" but rather a very specific version of a "physical phenomena, events and conditions".[46] Interpretation of a disease as a threat requires a process of "interaction, negotiation and struggle between actors."[47]

Traditionally, health challenges have fallen under the ambit of human security that focuses on the well-being of individual human beings, however evidence linking health security to national security is also not short.[48] Concerns about proliferation of biological weapons and bioterrorism have definitely impacted the linkage between the two types of security.[49] Fidler suggests that prevention and control of infectious diseases has been a concern of foreign policy of States for a long time and so has national security.[50] However, the consideration of non-military threats as threats to national security gained momentum in the 1990s[51] and since

[40] *Id.* at 346.
[41] *Home Secretary* v. *Rehman* [2000] 3 W.L.R. 1240 (Eng. C.A.).
[42] James C. Hathaway, *supra* note 1 at 346.
[43] Weis, *supra* note 14 at 245. See also, James C. Hathaway and Colin J. Harvey, "Framing Refugee Protection in the New World Disorder" 34(2) *Cor. Intl. L. J.* 292 (2001).
[44] See Weis, *id.* at 246.
[45] Garrett Wallace Brown and Preslava Stoeva, "Re-evaluating health security from a cosmopolitan perspective" in Simon Rushton and Jeremy Youde (eds.), *Routledge Handbook of Global Health Security* 305 (Routledge, 2015).
[46] João Nunes "The politics of health security" in Rushton and Youde, *id.* at 61.
[47] *Ibid.* Nunes further states that while disease is a physical condition, when intertwined with 'security' it becomes a political phenomenon.
[48] Debra L. DeLaet "The securitization of health" in Rushton and Youde, *id.* at 305.
[49] See David Fidler, "Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism, and Realpolitik" 35(4) *Geo. Wash. Intl. Rev.* 788 (2003).
[50] *Id.* at 790.
[51] E.g., "Non-military security threats, such as environmental scarcity and degradation, the spread of disease, overpopulation, mass refugee movements, nationalism, terrorism, and nuclear catastrophe", see Roland Paris, "Human Security: Paradigm Shift or Hot Air?" *Intl. Security* 97 (2001) cited in Fidler, *id.* at 788.

then has become entrenched in domestic[52] as well as international policy[53]. In light of these arguments and findings it would be fallacious to assume that a danger to public health can be kept outside the purview of national security in that the whole meaning of security has become inextricably intertwined with public health.

However, article 33(2) falls under the category of individuated exceptions and therefore each case purportedly falling under it requires individual scrutiny.[54] Therefore, a blanket ban on asylum, irrespective of the threat to the asylum State, would still be impermissible.[55]

Circling back to the negotiations, the representative of Holy See stated that the words 'reasonable grounds' were ambiguous in his opinion, and that the phrase in the joint French and UK amendment should be replaced by "may not, however, be claimed by a refugee *who constitutes* a danger to the security of the country".[56] To address his objections the representative of UK argued that it must be left to States to decide whether there were sufficient grounds to regard a refugee as a danger to the security of the country.[57] The "reasonable grounds" condition attached to the assessment of danger has been contemporarily understood to mean that a State cannot act "arbitrarily or capriciously" and the determination whether a refugee constitutes a danger to national security must be made on the basis of evidence[58] and after following due process.

To sum up, applying the national security element of article 33(2) to prevent the entry of refugees in order to contain the spread of virus would make sense, but only if the health

[52] Bill Frist, "Public Health and National Security: The Critical Role of Increased Federal Support" 21(6) *Health Affairs* 120-121 (2002).
[53] UN Security Council, SC Res 1308, UN Doc S/Res/1308 (July 17, 2000) on HIV/AIDS, UN Security Council, SC Res 2532, UN Doc S/Res/2532 (July 1, 2020) on coronavirus pandemic recognises these threats to public health as threats to international peace and security. In January 2000, the Central Intelligence Agency (CIA) of the United States, issue a report where the impacts of infectious diseases on national security such as high mortality, stunted economic growth, travel restrictions, probability of attacks etc. were discussed. See "The Global Infectious Disease Threat and Its Implications for the United States", National Intelligence Council, NIE 99-17D, 10 (2000) *available at*: https://www.dni.gov/files/documents/infectiousdiseases_2000.pdf (last visited on 18.03.2021).
[54] Oona Hathaway, "The Trump Administration's Indefensible Legal Defense of its Asylum Ban" *available at:* https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/ (last visited on March 10, 2021). See also, James C. Hathaway, *supra* note 1 at 342.
[55] *Ibid.*
[56] *Supra* note 17.
[57] *Ibid.*
[58] *Zaoui (No.2), supra* note 35 Para. 133. See also the opinion of Mr. Herment (Belgium). He "drew attention to the fact that in article 28 the prohibition on returning refugees to the frontier could be construed as applying to individuals, but not to large groups.", *supra* note 17.

assessment of every refugee was done on a case-to-case basis and no other options such as self-isolation or institutional quarantine were available to the State. A blanket ban on entry and rejection at frontiers appears to be a legally untenable action despite taking into consideration the expanded ambit of national security.

III. *Non-refoulement* under Human Rights Treaties

The principle of *non-refoulement* is couched in the language of certain article of several human rights treaties as well. Article 6 paragraph 1 of the International Covenant on Civil and Political Rights, 1966, (ICCPR) which is non-derogable[59] meaning it cannot be compromised,[60] provides that every human being has an inherent right to life which is protected by law and cannot be deprived arbitrarily of this right.[61] UN Human Rights Committee (UNHRC) is of the view that the obligation not to extradite, deport of transfer otherwise under article 6 of ICCPR may include the protection even those aliens who might not be entitled to refugee status, thus having a scope wider than *non-refoulement* under international refugee law.[62]

Article 7 of ICCPR unequivocally and unconditionally prohibits torture, cruel, inhuman, degrading treatment or punishment.[63] This obligation was interpreted by the UNHRC as follows, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their

[59] See definition and remark, *available at:* https://unterm.un.org/unterm/Display/record/UNHQ/non-derogable_right/D4DBB9694E5B40DA8525751B0077E882 (last visited on 14.03.2021). It reads - "Definition: A right that, at least in theory, cannot be taken away or compromised." "Remark: In human rights conventions certain rights have been considered so important that they are non-derogable: the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws. These rights are also known as *peremptory* norms of international law or *jus cogens* norms."

[60] ICCPR, art. 4 para. 2.

[61] ICCPR, art. 6 para. 1: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

[62] UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018), para. 31. It reads as:

> 31. The obligation not to extradite, deport or otherwise transfer pursuant to article 6 of the Covenant may be broader than the scope of the principle of *non-refoulement* under international refugee law, since it may also require the protection of aliens not entitled to refugee status. States parties must, however, allow all asylum seekers claiming a real risk of a violation of their right to life in the State of origin access to refugee or other individualized or group status determination procedures that could offer them protection against refoulement.

[63] ICCPR, 1966, art. 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end."[64] Again, this is a *non-derogable* right.[65]

The article 3 of the Convention Against Torture, 1984 (CAT), prohibits expulsion, return (*refouler*) or extradition of a person to any State where there would be substantial grounds to believe that the person would be in danger of being subjected to torture. The UN Committee Against Torture (UNCAT) opines that: [66]

> 10. Each State party must apply the principle of *non-refoulement* in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law.

UNCAT further states that the principle of *non-refoulement* of persons to other States where there are substantial grounds to believe that they might be subjected to torture, is non-derogable and absolute.[67] This means that here too, no public health emergency exception can be located.

Regional human rights treaties such as the European Convention on Human Rights (ECHR) too place prohibition on torture, cruel and inhuman treatment or punishment[68] and the European Court of Human Rights (ECtHR) has interpreted article 3 to have *non-refoulement* within its ambit finding that if there are substantial grounds to believe that the person might be subjected to torture, inhuman or degrading treatment or punishment upon return then the

[64] UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, (Mar. 10 1992), *available at:* https://www.refworld.org/docid/453883fb0.html (last visited on April 8, 2021).
[65] *Supra* note 60.
[66] UN Committee Against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, UN Doc. A/53/44 (Feb. 9, 2018) Annex IX.
[67] *Id*., at para. 8-9.
[68] ECHR, 1950, art. 3. See also arts. 4 and 19(2) of Charter of Fundamental Rights of the European Union. Art. 51 of this Charter makes the provisions of the 1951 Convention binding on EU institutions and Member States as and when they implement EU law.

returning state could be held liable.[69] Similarly, article 21 of the EU Qualification Directive[70] upholds the prohibition on *refoulement*.

The Inter-American Court of Human Rights (IACtHR) has upheld that *non-refoulement* is an "effective measure to ensure the right to seek and ensure asylum."[71] In *Pacheco Tineo Family* v. *Bolivia*[72] where the IACtHR opined that *non-refoulement* under the Inter-American Human Rights covers not just refugees but asylees and asylum-seekers as well. Article 22(8) of the American Convention on Human Rights (ACHR) prohibits *refoulement* by stating that:[73]

> In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

It may be noted that this section too includes all aliens, refugees, asylees or asylum-seekers. Additionally, article 22(9) prohibits the collective expulsion of aliens.[74] This would mean that border closures leading to *refoulement* during the time of pandemic were prohibited for the Members States party to this Convention.[75] Thus, it can be observed that *non-refoulement* as part of a system to prevent torture and other inhuman practices as well as that of the right to seek and receive asylum can be located in international as well regional human rights treaties.

IV. *Non-refoulement* as Part of Customary International Law

The principle of *non-refoulement*, as per the 1951 Convention applies to "Contracting States". In order to qualify as customary international law, there must be widespread and uniform practice of nations and states must engage in the practice out of a sense of legal

[69] *Soering* v. *United Kingdom* [1989] ECHR 14; *Vilvarajah* v. *United Kingdom* 45/1990/236/302-306. See also *Chahal* v. *United Kingdom* 70/1995/576/662, where the ECtHR observed that the scope of art. 3 is broader than that of art. 33 of the 1951 Convention in that the prohibition in expulsion is absolute and without exceptions if the conditions are met.
[70] Qualification Directive 2011/95/EU.
[71] Advisory Opinion OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, OC-21/14, Inter-American Court of Human Rights (IACrtHR) (Aug. 19, 2014), *available at:* https://www.refworld.org/cases,IACRTHR,54129c854.html (last visited on March 15, 2021).
[72] (2012) Ref.: Case No. 12.474.
[73] ACHR, 1969.
[74] *Ibid.*
[75] Elizabeth Gonzalez, Chase Harrison *et. al.* "The Coronavirus in Latin America", *available at:* https://www.as-coa.org/articles/coronavirus-latin-america (last visited on March 03, 2021).

obligation (*opinio juris*).[76] Over the decades there have been opinions that *non-refoulement* has become part of customary international law.[77] This means that even the States that are not party to the 1951 Convention have to abide by this principle.[78]

The trend of not recognising exceptions to the principle of *non-refoulement* was first observed in 1969 among the Latin American countries as there were no exceptions to article 22(8) of the ACHR.[79] The ExCom has observed "the principle of *non-refoulement*…was progressively acquiring the character of a peremptory norm of international law".[80] Deriving from ICJ's reasoning in that for a new rule of custom to evolve, not only the practice should be widespread and uniform but also must include the practice of States who are specifically affected,[81]Jean Allain opines that the "pronouncements (of ExCom) carry a disproportionate weight in the formation of custom, as they are the States most specifically affected by issues related to *non-refoulement.*"[82]

It is observed that when discussing about the status of *non-refoulement* as customary international law, there are two schools of thought. *First,* that maintains that *non-refoulement* when applicable in the context of torture, cruel, inhuman or degrading treatment or punishment, is quintessentially non-derogable[83]. This entails that in this milieu no exceptions would be permitted and a person, whether a refugee or not cannot be returned or expelled to a

[76] Statute of International Court of Justice (ICJ),1963, art. 38. Jack L. Goldsmith and Eric A. Posner, "A Theory of Customary International Law" 66(4) *Univ. Ch. L. Rev.* 1116 (1999).

[77] UN High Commissioner for Refugees, *The Principle of Non-refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93,* (Jan. 31, 1994), *available at:* https://www.refworld.org/docid/437b6db64.html (last visited on March 08, 2021). See also, Evan J. Criddle and Evan Fox-Decent "The Authority of International Refugee Law" *available at:* https://www.law.nyu.edu/sites/default/files/The%20Authority%20of%20International%20Refugee%20Law.pdf (last visited on 16.03.2021). See also the San Remo Declaration on the Principle of *Non-refoulement,* 2001 where the International Institute of Humanitarian Law in cooperation with UNHCR and experts observed that *non-refoulement* is an "integral part of customary law". See also "Extraditions, Expulsions, Deportations' in, *Anti-terrorism Measures, Security and Human Rights Developments in Europe, Central Asia and North America in the Aftermath of September 11* (The International Helsinki Federation, 2003) cited in Aoife Duffy "Expulsion to Face Torture? *Non-refoulement* in International Law" 20(3) *IJRL* 383 (2008). See also Guy S. Goodwin-Gill "The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*" 23(3) *IJRL* 444 (2011).

[78] See paragraph 15, *supra* note 25. See also paragraph 40 of *Mr Husain Ibrahimi and Mr Mohamed Abasi* v. *The Secretary of State for the Home Department*, [2016] EWHC 2049. See also Lauterpacht and Bethlehem, *supra* note 09 at 140-141.

[79] *Supra* note 73.

[80] ExCom Conclusion no. 25 (XXXIII), 1982.

[81]International Court of Justice, *North Sea Continental Shelf Cases*, *Germany* v. *Denmark* (1969) ICJ Rep 3 at 42 Para. 73.

[82] Jean Allain "The *jus cogens* nature of *non-refoulement*" 13(4) *IJRL* 539 (2002).

[83] Criddle and Fox-Decent, *supra* note 77 at 9.

state where there are substantial reasons to believe that they may face torture. It would also make the prohibition on *non-refoulement vis-à-vis* torture, a peremptory norm.[84] *Second*, that while the former proposition might be true, *non-refoulement* of refugees has not achieved the status of customary international law,[85] let alone *jus cogens*. Proponents of this view hold that there simply isn't enough evidence of consistent state practice and *opinio juris* to start considering it as customary international law despite the averments of UNHCR and ExCom,[86] in fact it might prove to be counter-productive in the longer run.[87] Hathaway asserts:[88]

> Not only are courts disinclined to accept policy claims simply because they are advanced as customary legal claims, but there is a real risk that wishful legal thinking about the scope of the duty of *non-refoulement* may send the signal that customary law as a whole is essentially rhetorical, with a resultant dilution of emphasis on the real value of those norms which really have been accepted as binding by a substantial majority of states.

As regards *non-refoulement* acquiring the status of *jus cogens*, Duffy[89] posits that even though ExCom stated in 1982 that *non-refoulement* is "progressively acquiring peremptory status",[90] the widespread violation of this principle as mentioned in the resolution by UN Commission on Human Rights, make one circumspect of this claim.[91] Other scholars such as Lauterpacht and Bethlehem,[92] Jean Allain[93] and Costello and Foster, relying on treaty law, General Assembly resolutions, ExCom Conclusions and other evidence of state practice argue that *non-refoulement* can be said to have acquired the status of a peremptory norm.[94]

The purpose of the discussion presented here is not to arrive at a precise conclusion regarding the peremptory status or lack thereof of the principle of *non-refoulement*. Instead, the focus

[84] *Ibid.*
[85] James C. Hathaway, *supra* note 1 at 363.
[86] *R (European Roma Rights Centre and Others)* v. *Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 and *R* v. *Immigration Officer at Prague Airport et al., ex parte European Roma Rights Centre et al.,* [2004] UKHL 55.
[87] James C. Hathaway, *supra* note 1 at 364.
[88] *Id.,* at 367.
[89] Aoife Duffy "Expulsion to Face Torture? *Non-refoulement* in International Law" 20(3) *IJRL* 388 (2008).
[90] *Supra* note 80.
[91] UN Commission on Human Rights, *Resolution 1997/75 on Human Rights and Mass Exoduses*, UN Doc E/CN.4/RES/1997/75 (April 18, 1997).
[92] Lauterpacht and Bethlehem, *supra* note 9 at 141.
[93] Jean Allain, *supra* note 82 at 533.
[94] Cathryn Costello and Michelle Foster, "*Non-refoulement* as Custom and *Jus Cogens*? Putting the Prohibition to the Test" in Heijer, van der Wilt (eds) 46 *Netherlands Yearbook of International Law*273 (2015).

here is drawn to the fact that at least in the context of refugees susceptible to facing torture and torture like conditions, *non-refoulement* can be said to have acquired *jus cogens* status. As far as Convention refugees are concerned the opinions are divided.

However, it is submitted that even if the principle has not reached the level of a peremptory norm, preponderance of evidence suggests that it may in the very least be considered a part of customary international law, applying to States who are not party to the 1951 Convention or its 1967 Protocol.[95] Additionally, even if derogation is considered permissible, it cannot be in the form of a complete closure of borders as the assessment should be done on an individuated basis.[96]

V. Evaluating Border-Closures Measures of the European Union, the United States and India in the context of *Non-refoulement*

Having discussed the principle of *non-refoulement* under refugee law, human rights law as well as customary international law, this part of the paper will appraise the legitimacy of border closures imposed by the European Union (all the EU States are parties to the 1951 Convention as well as the 1967 Protocol), the United States (party to the 1967 Protocol) and India (neither a party to the 1951 Convention nor the 1967 Protocol). Refugees and asylum-seekers faced *refoulement* (including rejection at frontier) in all these States[97] and the most common justification opted for was that of state necessity (*raison d'état*).[98]

[95] *Ktaer Abbas Habib Al Qutaifi* v. *Union of India* [1999] CriLJ 919, where the Gujarat High Court opined that "there is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent." The Court, however, did accommodate exceptions of law and order and security of the country. In *Dongh Lian Kham*v v. *Union of India*, [WP (CRL) 1884 of 2015, decided on December 21, 2015] the Delhi High Court too considered *non-refoulement* obligation as part of article 21 of the Constitution of India, making allowance for the national security exception. But see *Babul Khan* v. *State of Karnataka* [Crl. P. No.6578/2019], where the Karnataka High Court opined that "since India is not a signatory to the 1951 Refugee Convention, the United Nations principle of *non-refoulement* and impediment to expulsion does not apply in India."

[96] Oona Hathaway, *supra* note 54.

[97] Not to imply that they didn't face *refoulement* in other States but these three have been selected for discussion due to their different positions *vis-à-vis* international refugee law.

[98] Criddle and Fox-Decent, *supra* note 77 at 30.

(a) European Union

All the States party to the EU are parties to the 1951 Refugee Convention as well as its 1967 Protocol. The EU has its own robust framework to protect rights of refugees and asylum seekers against *refoulement*.[99] Stands to reason that countries part of the Union would be expected to hold to higher standards and when their actions reflect intentions that go against the letter and spirit of human rights and refugee protection, they would be subject to criticism.

Greece has in recent times, been severely criticised for its pushbacks of asylum seekers and migrants to the Turkish side of its border, in violation of the prohibition on mass expulsions as well as the principle of *non-refoulement*.[100] It has been reported that in the past year Greece has expelled more than a thousand asylum seekers escorting them to the edge of their territorial waters and abandoning them on inflatable life rafts.[101] Italy closed its ports and stated that its ports would not be able to meet the requirements of "Place of Safety" under the Hamburg Convention on search and maritime rescue, for entire duration of health emergency due to COVID-19 virus,[102] in violation of its obligations under international as well as EU law.[103] Cyprus pushed back asylum seekers with no regard for its humanitarian obligations and jeopardising the life of hundreds in the process.[104] Hungary and Spain suspended their asylum application process and Belgium closed its arrival centre for asylum seekers.[105]

---

[99] *Supra* note 68.

[100] "Greece: Rights violations against asylum seekers at Turkey-Greece border must stop – UN Special Rapporteur" *available at:* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25736&LangID=E (last visited on March 31, 2021).

[101] Patrick Kingsley and Karam Shoumali, "Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea" *available at:* https://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html (last visited on March 31, 2021).

[102] Andrea Maria Pelliconi, "Covid-19: Italy is not a 'place of safety' anymore. Is the decision to close Italian ports compliant with human rights obligations?" *available at:* https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/ (last visited on March 31, 2021).

[103] The UN Convention on Law of the Sea, art. 98, the Charter of Fundamental Rights of the European Union, art. 19 and *Hirsi Jamaa* v. *Italy*, Application no. 27765/09 (ECtHR).

[104] Andrew Connelly, "Cyprus pushes Syrian refugees back at sea due to coronavirus" *available at:* https://www.aljazeera.com/news/2020/3/30/cyprus-pushes-syrian-refugees-back-at-sea-due-to-coronavirus (last visited on March 31, 2021). See also "Cyprus: Asylum Seekers Summarily Returned" *available at:* https://www.hrw.org/news/2020/09/29/cyprus-asylum-seekers-summarily-returned (last visited on March 31, 2021).

[105] International Commission of Jurists, Briefing Paper- The impact of COVID-19 related measures on human rights of migrants and refugees in the EU, *available at:* https://www.icj.org/wp-content/uploads/2020/06/Covid19-impact-migrans-Europe-Brief-2020-ENG.pdf (last visited on March 31, 2021).

Some of the countries of the EU have acted in a more responsible manner compliant with international law, EU law and human rights obligations despite the COVID-19 struggles. Germany and Sweden, for instance, allowed new applications for asylum as well as permitted entry to seek asylum.[106] Luxembourg automatically extended the status of persons who were already in the process of applying for protection and Portugal considered eligible for healthcare and public services, persons who applied for international protection and considered them to be in the country regularly.[107]

Now, EU guidelines on COVID-19 response *vis-à-vis* temporary restriction on non-essential travel, do provide for a possibility of refusal of entry to "non-resident third country nationals where they present relevant symptoms or have been particularly exposed to risk of infection and are considered to be a threat to public health" under the Schengen Borders Code in the face of "threat to public health".[108] However, it also states that the refusal of entry must be "proportionate, non-discriminatory" and must respect human dignity.[109] Additionally, the Commission added that any such restrictions must take into account the *non-refoulement* obligations under international law.[110] Evidently, this last part has been ignored by several of the EU members and asylum seekers were refused entry *en masse* without pausing to reflect on the proportionality, non-discrimination or violation of right to human dignity.

(b) United States

The United States, in March 18, 2020, declared that working with UNHCR and International Organisation for Migration, it would suspend its refugee admission and resettlement program for the duration of the pandemic.[111] The Centres for Disease Control and Prevention (CDC) issued an order on March 20, 2020 under sections 362 and 365 of the Public Health Service

[106] *Id.*, at 3.
[107] *Ibid.*
[108] European Commission, COVID-19: Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, *available at:* https://ec.europa.eu/home-affairs/sites/default/files/what-we-do/policies/european-agenda-migration/20200327_c-2020-2050-report.pdf(last visited on March 31, 2021).
[109] *Ibid.*
[110] European Commission, COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement, *available at:* https://www.refworld.org/docid/5e99707d4.html (last visited on March 31, 2021).
[111] Priscilla Alvarez, "Refugee admissions to the US temporarily suspended", *available at:* https://edition.cnn.com/2020/03/18/politics/us-refugee-admissions-coronavirus/index.html (last visited on March 22, 2021).

(PHS) Act, suspending introduction of persons into the US "travelling from" Canada or Mexico, irrespective of their country of origin.[112] Citing the prevention of spread of the coronavirus, the US reached an agreement with Mexico and Canada restricting all non-essential travel.[113] The illegal immigrants, as referred to by the Department of Homeland Security (DHS), were to be returned to the country from where they entered, i.e., Canada or Mexico or failing that, to their country of origin.[114]

Since these declarations there have been around half a million expulsions from the US in pursuance of Title 42 of the US Code section 265 alone.[115] US defended its *refoulement* policy by arguing that "non-self-executing treaties" will not having a binding effect unless incorporated into domestic law.[116] This is a legally untenable argument as the US Constitution holds "all treaties" made "under the authority of the United States" as supreme law of the land.[117] Moreover, non-self-executing treaties entered into by the US do create binding international law obligations irrespective of their incorporation into domestic law.[118]

However, such arguments are unnecessary as the US has incorporated the obligations of *non-refoulement* into domestic law by legislating the Refugee Act, 1980 as well as the Foreign Affairs Reform and Restructuring Act, 1998 which implements article 3 of the Torture

---

[112] Federal Register 85(59) Notices, *available at:* https://www.govinfo.gov/content/pkg/FR-2020-03-26/pdf/2020-06327.pdf (last visited on March 22, 2021).
The order applied to a certain category of aliens DHS has informed CDC that persons who are traveling from Canada or Mexico (regardless of their country of origin), and who must be held longer in congregate settings in POEs or Border Patrol stations to facilitate immigration processing, would typically be aliens seeking to enter the United States at POEs who do not have proper travel documents, aliens whose entry is otherwise contrary to law, and aliens who are apprehended near the border seeking to unlawfully enter the United States between POEs. This order is intended to cover all such aliens.

[113] Acting Secretary Chad Wolf, Statement on Non-Essential Travel, *available at:* https://www.dhs.gov/news/2020/04/20/acting-secretary-chad-wolf-statement-non-essential-travel (last visited on March 22, 2021).

[114] Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus, *available at:* https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus (last visited on March 22, 2021).

[115] See Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, *available at:* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (last visited on March 22, 2021) and U.S. Border Patrol Monthly Enforcement Encounters 2020: Title 42 Expulsions and Title 8 Apprehensions, *available at:* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020(last visited on March 22, 2021).

[116] See Email, *available at:* https://foreignaffairs.house.gov/_cache/files/1/5/15b9fb59-24f7-44e1-a8dd-b438072a8cc7/40C6CAE6BA2441181901371E291682E4.april-24-opinion.pdf (last visited on March 22, 2021) cited in Oona Hathaway, "The Trump Administration's Indefensible Legal Defense of Its Asylum Ban: Taking a Wrecking Ball to International Law" *available at:* https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/ (last visited on March 22, 2021).

[117] The Constitution of the United States of America, art. VI.

[118] Oona Hathaway, Sara Solow *et. al.* "International Law at Home: Enforcing Treaties in U.S. Courts" 37(1) *Yale J. Intl. L.*76-77 (2012).

Convention *via* regulations promulgated under it. If one accepts the argument that *non-refoulement* is part of customary international law and that *non-refoulement* at least *vis-à-vis* the prohibition against torture has achieved the status of *jus cogens*, then too the expulsions and rejections at frontiers conducted under the authority of the US government without examination on a case-to-case basis violated international law. So, technically, the US appear to be in violation of its binding international obligations.

(c) India

India is not a party to the 1951 Convention or its 1967 Protocol[119] so it is not bound by the international refugee (treaty) law obligations per se, and it does not have a national asylum framework either.[120] However, there remains some ambiguity around a few points. *First*, would it be accurate to posit that article 21 of the Indian Constitution subsumes a right to *non-refoulement*?[121] *Second*, whether India could be considered bound by those refugee law obligations which have been considered to have achieved the status of customary international law, such as the principle of *non-refoulement*? *Third*, could India be bound by the principle of *non-refoulement* due to its obligations under the human rights treaties it is a party to?

Indian government announced a twenty-one-day nation-wide lockdown (subject to subsequent extensions), including a lockdown of its territorial borders on March 22, 2020 to contain the spread of coronavirus.[122] Now, India provides refuge to a number of minorities from neighbouring and non-neighbouring States and deals differently with different refugee groups respecting the principle of *non-refoulement* for those who hold UNHCR

[119] UNHCR, "India" *available at*: https://www.unhcr.org/4cd96e919.pdf (last visited on April 04, 2021).
[120] Roshni Shanker and Prabhat Raghavan, "The Invisible Crisis: Refugees and COVID-19 in India", *available at:* https://www.kaldorcentre.unsw.edu.au/publication/invisible-crisis-refugees-and-covid-19-india (last visited on April 4, 2021).
[121] Omar Chaudhary, "Turning back: An assessment of *non-refoulement* under Indian Law" 39(29) *EPW* 3257-3264 (2004).
[122] See "Government of India issues Orders prescribing lockdown for containment of COVID-19 Epidemic in the country", *available at:* https://www.mha.gov.in/sites/default/files/PR_NationalLockdown_26032020_0.pdf (last visited on April 07, 2021). See also Nistula Hebbar, "Coronavirus | PM's address to the nation updates: lockdown extended to entire country for next 21 days, says Modi", *available at:* https://www.thehindu.com/news/national/prime-minister-narendra-modi-live-updates-march-24-2020/article31153585.ece (last visited on April 04, 2021). Also see "Coronavirus: India enters 'total lockdown' after spike in cases", *available at:* https://www.bbc.com/news/world-asia-india-52024239 (last visited on April 04, 2021).

documentation.[123] While refugees from Tibet, Sri Lanka, and Chakmas from Bangladesh's Chittagong Hill Tracts (CHT) have seen favourable treatment from India,[124] the same cannot be said for the Rohingya from Myanmar, whom the government even refuses to acknowledge as refugees, and instead addresses them as "illegal immigrants".[125]

The same was put in an affidavit by the government before the Apex Court in 2018 and the Court allowed deportation of seven Rohingya back to Myanmar[126] on the ground that Myanmar has accepted them as its citizens and agreed to take them back,[127] which would be bizarre on Myanmar's part since Myanmar has consistently denied the citizenship of Rohingya and even excluded them from its 2014 census.[128] Most recently, during the pandemic, India has decided to deport a hundred and fifty Rohingya found to be living illegally in Jammu and Kashmir. The matter was raised before the Supreme Court but the Court, while acknowledging the threats faced by the Rohingya in Myanmar, decided that the deportation is according to procedure established by law.[129]

Since India does not have refugee protection laws in place, the cases are usually dealt under the country's immigration laws such as Passport (Entry into India) Act of 1920, the Registration of Foreigners Act of 1939, the Foreigners Act of 1946, the Foreigners Order of

[123] UNHCR, "India" *available at*: https://www.unhcr.org/4cd96e919.pdf (last visited on April 04, 2021).
[124] B. S. Chimni, "The Legal Condition of Refugees in India" 7 *J. Ref. Stud.* 378 (1994) and *National Human Rights Commission* v. *State of Arunachal Pradesh*, 1996 SCC (1) 742.
[125] Vijaita Singh, "Rohingya are illegal immigrants, not refugees: Rajnath", *available at:* https://www.thehindu.com/news/national/rohingya-are-illegal-immigrants-rajnath/article19726476.ece (last visited on April 04, 2021).
[126] Krishnadas Rajagopal, "SC throws out plea to restrain govt from deporting 7 Rohingya to Myanmar", *available at:* https://www.thehindu.com/news/national/sc-allows-deportation-of-seven-rohingya-from-assam-to-myanmar/article25119615.ece (last visited on April 04, 2021).
[127] "Seven Rohingya Deported to Myanmar After SC Upholds Label of Illegal Immigrants", *available at:* https://thewire.in/rights/seven-rohingyas-deported-myanmar-sc (last visited on April 04, 2021).
[128] "Myanmar Rohingya: What you need to know about the crisis", *available at:* https://www.bbc.com/news/world-asia-41566561 (last visited on April 04, 2021).
[129] Reuters, "India begins deporting more than 150 Rohingya refugees to Myanmar", *available at:* https://edition.cnn.com/2021/03/08/asia/india-deport-rohingya-intl-hnk/index.html (last visited on April 04, 2021). See Supreme Court Allows Deportation of Rohingyas to Myanmar As Per Procedure Prescribed *available at:* https://www.livelaw.in/top-stories/supreme-court-allows-deportation-of-rohingya-refugees-to-myanmar-as-per-procedure-prescribed-172302 (last visited on April 08, 2021). The Court also observed "Possibly that is the fear that if they go back to Myanmar, they will be slaughtered. But we cannot control all that. We are not called upon to condemn or condone genocide. We are certain that there should be no genocide in[sic] earth". See *Mohammad Salimullah* v. *Union of India*, order passed on interlocutory application 38048/2021 in WP(C) 793/2017, *available at:* https://main.sci.gov.in/supremecourt/2017/27338/27338_2017_31_1502_27493_Judgement_08-Apr-2021.pdf (last visited on April 08, 2021).

1948 and the Citizenship Act of 1957.These Acts provide sweeping powers to the government to detain or deport immigrants even when it goes against the principle of *non-refoulement.*[130] Now, article 21 of the Indian Constitution guarantees the right to life and personal liberty to citizens as well as non-citizens and this right cannot be derogated except according to procedure established by law.[131] Meaning, it is *not* a non-derogable right and can be violated if there is a law in place. The procedure, of course, has to be just, fair and reasonable.[132] In *NHRC* v. *State of Arunachal Pradesh,*[133] the Supreme Court observed:

> We are a country governed by the Rule of Law. Our Constitution confers contains rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus, the State is bound to protect the life and liberty of every human-being, be he a citizen or otherwise, and it cannot permit anybody or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons; it is duty bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its Constitutional as well as statutory obligations.

That being said, State interests such as national security and criminal law have always been given priority over refugees' life and personal liberty including the principle of *non-refoulement.*[134] This can hardly be considered surprising since even the 1951 Convention accommodates the national security exception. So, while, optimistically, article 21 can be considered to protect the life and personal liberty of refugees, the reality is that the protection it affords can be easily set aside by the courts if the government is able to convincingly argue that the refugees pose a threat to national security or have been involved in criminal activities. It, by no means, makes way for a non-derogable right to *non-refoulement*.

---

[130] See e.g., The Foreigners Act, 1946 (Act 31 of 1946), s.3.
[131] The Constitution of India, art. 21.
[132] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597.
[133] *National Human Rights Commission* v. *State of Arunachal Pradesh,* 1996 SCC (1) 742.
[134] *Mohd. Sadiq* v. *Union of India*, ILR 1978 Delhi 557, *Khadija* v. *UOI* (Crl. WP No. 658 of 1997), *Ktaer Abbas Habib Al Qutaifi* v. *Union of India* [1999] CriLJ 919, *Dongh Lian Kham* v. *Union of India*, [WP (CRL) 1884 of 2015, decided on 21.12.2015]. See also *Nandita Haskar* v. *State of Manipur,* W.P.(Crl.) NO. 6 OF 2021 where the Manipur High Court acknowledged that article 21 of the Constitution of India would encompass the right of *non-refoulement* subject to the national security exception.

A norm becomes customary international law if States implement it from a sense of legal obligation and ExCom has time and again asserted the fundamental nature of the principle of *non-refoulement* which is progressively acquiring the status of a peremptory norm,[135] and since India has been part of the ExCom since 1995,[136] it remains questionable why India would not consider itself bound by this principle. Putting this argument aside, the law of the land remains that even if *non-refoulement* is considered as customary international law, the presence of domestic legislations to the contrary would make the domestic courts side with domestic law rather than customary international law or even treaty law (unless the treaty has been made part of the municipal law by an Act of the Parliament).[137]

India is party to human rights treaties such as the ICCPR,[138] Convention on the Rights of Child (CRC),[139] signatory to the CAT.[140] The Protection of Human Rights, Act, 1993 defines human rights as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India".[141] With effect from 2006, International Covenants mean "the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"[142] It is argued that by this logic and accommodating the dualist approach, the rights contained in ICCPR have been incorporated in municipal law, i.e., the Human Rights Act, 1993. Therefore, India must consider itself to be bound by the non-derogable nature of articles 6 and 7 of ICCPR with the latter including a right against torture or inhuman

[135] *Supra* note 80.
[136] Executive Committee's membership by year of admission of members, *available at:* https://www.unhcr.org/40112e984.pdf (last visited on April 04, 2021).
[137] Kuldeep Singh, J. "It is almost an accepted proposition of law that the rules on customary international law which are *not contrary to the municipal law* shall be deemed to have been incorporated in the domestic law and shall be followed by the courts of law…" (emphasis added) in *Vellore Citizen Welfare Forum* v. *Union of India* (1995) 6 SCC 647. See also *Jolly George Verghese* v. *The Bank of Cochin,* AIR 1980 SC 470 where it was observed by the Court that unless a treaty entered into by India has been incorporated into municipal under article 253 of the Constitution, the municipal law would prevail. However, the Supreme Court appears to have digressed from this doctrine of dualism in two landmark cases, *Vishaka* v. *State of Rajasthan* (1997) 6 SCC 241 and *National Legal Services Authority* v. *Union of India* (*Transgenders' case*) (2014) 5 SCC 438.
[138] Acceded in 1979.
[139] Acceded in 1992.
[140] Signed in 1997.
[141] S. 2(1)(d).
[142] S. 2(1)(f).

treatment or punishment even by way of deportation or *refoulement.*[143] Additionally, India has acceded to the CRC and has enacted legislations such as Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice (Care and Protection of Children) Act, 2015, due to obligations arising out the CRC. Article 22 paragraph 1 of the CRC reads:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Clearly, this article imposes a positive duty to provide humanitarian assistance to the refugee child and impliedly yet obviously prevents the State parties to the CRC from sending a child back into the arms of danger giving expression to *non-refoulement.* However, as per reports India attempted to deport a Rohingya minor girl back to Myanmar which was unsuccessful as Myanmar refused entry to the girl citing inappropriate situation for receiving her.[144]

It must also be noted that article 26 of the Vienna Convention on Law of Treaties (VCLT), 1969, states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" and article 27 states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty…" Simply put, since India has acceded to both ICCPR and CRC, it is a party to both the treaties, which are in force, it may not cite contrary domestic laws as a justification for not performing treaty obligations. A weaker argument may be made apropos article 3 of the CAT that since India is a signatory to the convention, it is at least morally obliged to honour the spirit of the convention.[145]

---

[143] *Supra* notes 59-65.

[144] "Myanmar refuses to accept Rohingya girl deported by India: Report", *available at:* https://www.aljazeera.com/news/2021/4/2/myanmar-refuses-to-accept-rohingya-girl-deported-by-india-report (last visited on April 04, 2021). See also "Assam tries to deport Rohingya girl, Myanmar refuses to accept" *available at:* https://www.hindustantimes.com/world-news/assam-tries-to-deport-rohingya-girl-myanmar-refuses-to-accept-101617361454413.html (last visited on April 04, 2021).

[145] UN, Glossary of terms relating to Treaty actions, *available at:* https://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#signaturesubject (last visited on April 04, 2021).

In sum, even though India is not a party to the 1951 Convention and its 1967 Protocol and may not consider itself to be bound by the customary nature of *non-refoulement*, it still holds the status of a non-derogable peremptory norm or *jus cogens* as far as there exists a risk of torture, cruel, inhuman or degrading treatment or punishment and no municipal law can stand in the way of that. Additionally, India is bound by the principle at least by way of its accession to certain human rights treaties which have been incorporated in the municipal law. Moreover, it has been interpreted by the Delhi High Court in *Dongh Lian Kham* v. *Union of India*,[146] that prohibition of deportation of refugees to countries where they will face persecution can be located under article 21 of the Constitution of India. Therefore, deportations to safe third countries, even in the face of threat to national security or their involvement in criminal activities, may be considered as viable alternatives and until then the deportations may be stayed. Therefore, there appears to be no justification for expelling Rohingya back to their country of origin, that too in the midst of a pandemic, where there exists a real risk of genocide for them, as has been affirmed by the International Court of Justice.[147]

VI. Conclusion and Suggestions

This paper has discussed the fundamental humanitarian nature of the principle of *non-refoulement* under international and regional refugee law. The scope of *non-refoulement* has been determined to extend to not only within a State's territory but also to the frontiers. The term 'security of the country' used in the 1951 Convention which is understood as 'national security' too has been analysed. It was extrapolated from analysing the usage in several contexts that it can no longer be related to only 'criminal' or conventional terrorism allusions and must take into account the repercussions of bio-terrorism and bio-warfare, *i.e.,* public health emergencies that include the spread of viruses. State actions countering such threats cannot *ex facie* be ruled as illegal and unjustified; however, such actions should reflect a judicious application of mind and not paranoia.

It has been demonstrated that while it may be contentious to declare *non-refoulement* under refugee law as customary international law, given the ostensible lack of consistent state practice or even *opinion juris*, it can undoubtedly be deduced that *non-refoulement* has

[146] WP (CRL) 1884 of 2015.
[147] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia* v. *Myanmar*), Provisional Measures, Order of January 23, 2020, I.C.J. Reports 2020.

achieved the status of a peremptory norm under international and regional human rights law when it prevents torture, cruel, inhuman, degrading treatment or punishment. No municipal law or policy can be allowed to make any exceptions in that context.

Border closures and other State actions resulting in *refoulement* in the States/region selected for analysis, have been demonstrated to be illegal in the cases of the European Union and the United States. In the case of India, for reasons already discussed, *refoulement* of the Rohingya to Myanmar would certainly violate India's obligations under international human rights treaties it has acceded to as it is well-known that Myanmar is perpetrating genocide against them. Arrest of asylum-seekers under immigration laws, labelling them as illegal immigrants and deporting them to their country of origin would still be in violation of the peremptory norm of *non-refoulement,* at least in the human rights context (for torture, cruel, inhuman, degrading treatment or punishment) where there is no national security exception either.

It is neither being proposed nor expected that States ignore their obligations towards citizens in public health emergencies. What is expected, though, is that States do not give in to paranoia and explore other viable alternatives to closure of borders for asylum-seekers, expulsions of those who have already entered and suspension of status determination and asylum activities. Setting up border screening, testing and quarantine facilities for all incoming asylum-seekers for fourteen days, with the assistance of UNHCR, other inter-governmental and/or non-governmental organisations is one such step to prevent the spread of COVID-19 along with ensuring compliance of international law.[148] Such facilities can have their own supply-chain catering to the healthcare requirements of asylum-seekers and nursing staff. Thereafter, cases can be evaluated individually and only legitimate asylum-seekers can be permitted further entry. Wholesale refusal of entry is inconsistent with international law, an unacceptable practice as well as wholly unpragmatic given that many of those refused entry might themselves be carriers and would end up spreading the virus even further in search for asylum.

[148] See generally Centre on International Cooperation, "Principles of Protection for Migrants, Refugees, and Displaced People During COVID-19", *available at:* https://cic.nyu.edu/publications/principles-protection-migrants-refugees-and-displaced-people-during-covid-19 (last visited on April 06, 2021).