

# The limits of refugee protection in mass influx situations: Are there exceptions to non-refoulement?

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## Introduction

This decade has witnessed a staggering, unprecedented rise in the number of forcibly displaced persons worldwide, with a current record high of over 70 million people on the whole.<sup>1</sup> Among this group are almost 30 million refugees, the majority of whom hail from countries<sup>2</sup> where exceptionally high levels of persecution are rife. Millions are in search of a haven in which they can enjoy an abundance of rights conferred on them by international law. One of these rights is that of *non-refoulement*, which dictates, in general terms, that no refugee or asylum seeker is to be returned to any territory where he or she may face persecution, torture, or other ill-treatment.<sup>3</sup> This fundamental obligation of a customary nature<sup>4</sup> is enshrined in numerous instruments<sup>5</sup>, the foremost of which for the purposes of refugees being in Article 33 (1) of the 1951 Convention Relating to the Status of Refugees (1951 Convention).<sup>6</sup> Affirmations of the significance of this principle are contained in a plethora of United Nations High Commissioner for Refugees (UNHCR) Executive Committee Conclusions and other reports.<sup>7</sup> A substantial body of international human rights law (IHRL) jurisprudence<sup>8</sup> further solidifies the doctrine's indispensable nature. Despite the fact that states, since the inception of the 1951 Convention, have expressed an acceptance of the non-refoulement obligation<sup>9</sup>, a sharp disparity has perceptibly emerged between their respective statements and actions.

As displacement worldwide has been developing predominantly in a mass-flow manner, the mass exoduses from some countries have naturally resulted in a mass influx into others. While it is not a legal term of art, a mass influx situation may be understood as one in which states are faced with a suddenness of arrival<sup>10</sup> of individuals on a large-scale, and includes the situations of states 'which host large refugee populations over many years'.<sup>11</sup> It is in these direst of times that states have been flagrantly acting in breach of their *non-refoulement* obligations, imperiling countless lives in consequence. While never explicitly expressing non-acceptance of the rule, the apparent theme among states is a refusal to admit or permit the prolonged stay of asylum seekers for an array of indefensible reasons.

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<sup>1</sup> UNHCR 'Global Trends: Forced Displacement in 2018' available at <<https://www.unhcr.org/5d08d7ee7.pdf>>.

<sup>2</sup> Ibid 3.

<sup>3</sup> Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, OUP 2007) 201.

<sup>4</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UN doc. HCR/MMSP/2001/09 (2002) [4] in UNHCR, 'Agenda for Protection' (2003).

<sup>5</sup> European Convention on Human Rights (3 September 1953) art 3; Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45, art 2 (3); American Convention on Human Rights (22 November 1969), art 22 (8); International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171, art 7; Cartagena Declaration on Refugees of (22 November 1984) Conclusion III (5); Council Directive 2011/95/EU of 13 December 2011 for a uniform status for refugees or for persons eligible for subsidiary protection [2011] OJ L 337/9, Chapter VII, art 21; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85.

<sup>6</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33.

<sup>7</sup> See, e.g., UNHCR Executive Committee Conclusion No. 6, 'Non-Refoulement' (1977); UNHCR Executive Committee Conclusion No. 22, 'Protection of Asylum Seekers in Large-Scale Influx' (1981); UNHCR, 'The scope of international protection in mass influx: The scope of international protection in mass influx', EC/1995/SCP/CRP.3 (1995); UNHCR Executive Committee Conclusion No. 79 (XLVII), 'General Conclusion on International Protection' (1996); UNHCR Executive Committee Conclusion No. 85, 'Conclusion on International Protection' (1998).

<sup>8</sup> See, e.g., *Ireland v UK* (1978) 2 EHRR 25; *Soering v UK* (1989) 11 EHRR 439; *Chahal v UK* (1996) 23 EHRR 413; *Selmouni v France* (2000) 29 EHRR 403; *MSS v Belgium & Greece* (2011) 53 EHRR 28.

<sup>9</sup> See Declaration on Territorial Asylum UNGA Res 2312 (XXII) (14 December 1967); UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/12 (1991); Declaration on the Protection of All Persons from Enforced Disappearance UNGA Res 47/133 (18 December 1992).

<sup>10</sup> Jean-Francois Durieux and Jane McAdam, 'Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies' (2004) 16 IJRL 4, 17.

<sup>11</sup> UNHCR, 'Mechanisms of International Cooperation to Share Responsibilities and Burdens in Mass Influx Situations' (2001) UN Doc EC/GC/01/7.

Whether the influx of refugees poses a burden on the host state or a severe strain on its resources by the prospect or fact of their admittance into the territory is immaterial. It is submitted that there can be no viable grounds on which to derogate from the cornerstone of refugee protection<sup>12</sup> owing to its foundational, imperative nature. *Non-refoulement* is of paramount significance to the 1951 Convention and complementary forms of protection. Its non-derogable nature in the Convention aside, any exceptions to the cardinal rule could foreseeably lead to its complete depreciation and consequent disintegration of the entire protection framework. Since *non-refoulement* extends through time<sup>13</sup>, even when a state has no capacity to provide the asylum seekers with a durable solution, it must grant them, at minimum, temporary protection. Where some writers<sup>14</sup> have peculiarly argued for a derogation regime in times of mass influx, this article seeks to illustrate the centrality of the principle to the refugee protection framework, thereafter assessing the implications of exempting states from observing the obligation in times of large-scale refugee movements.

## **The centrality of *non-refoulement* to the international legal framework for the protection of refugees**

### **The 1951 Convention: A Mass Influx Instrument**

To examine whether there can be exceptions to *non-refoulement* in mass influx situations, one must first consider the historical context in which the 1951 Convention was drafted. In the aftermath of World War II, millions of people had been displaced as a result of one of the greatest tragedies in history. Prompted by a sense of both moral and practical urgency, the United Nations General Assembly (UNGA) resolved<sup>15</sup> to convene to draft what is now the 1951 Convention. The influx of millions, rather than individuals in limited numbers, served as the impetus for the creation of such a multilateral treaty. It is thus argued that the 1951 Convention sought to deal primarily with mass influx situations and envisioned this circumstance as the one in which it would most likely be activated.

Moreover, despite the individual dimension to the refugee definition in Article 1(A)(2)<sup>16</sup>, most of the grounds on which one could establish a well-founded fear of being persecuted are evidently of a group composition; namely, race, religion, nationality, and membership of a particular social group.<sup>17</sup> As Durieux<sup>18</sup> highlights, the *travaux préparatoires* reveal an understanding of refugeehood as one that is intrinsic to belonging to a category of peoples.<sup>19</sup> If it is indeed these precise conditions that the drafters of the 1951 Convention envisaged as predominantly triggering the application of the protection regime, and it is in these circumstances that states are in quest of a circumvention of the customary rule, one would naturally question the consequent utility of the Convention as a whole.

Furthermore, it is important to recall what a mass influx situation is typically indicative of. In the mid-20<sup>th</sup> century, it was patent that the large-scale movement of peoples was a response to systematic persecutions and mass atrocity crimes. The exigencies of those fleeing clearly required an immediate and sufficient response, which entailed the prohibition of their return or rejection. Similarly, 54% of refugees today have fled from a mere three countries<sup>20</sup>, but ones in which persecution is rampant. The term 'mass influx' necessarily suggests a situation where there is a heightened risk of persecution and a necessity for at least preliminary protection, and therefore the expulsion of individuals from putative

<sup>12</sup> UNHCR, 'Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the [1951 Convention] and its 1967 Protocol' (2007).

<sup>13</sup> Durieux and McAdam (n 10) 4.

<sup>14</sup> *Ibid* (see n 69).

<sup>15</sup> UNGA Res 429 (V) (14 December 1950).

<sup>16</sup> 1951 Convention (n 6).

<sup>17</sup> See Ivor Jackson, *The Refugee Concept in Group Situations* (The Hague 1999) 464-465. .

<sup>18</sup> Durieux and McAdam (n 10) 9.

<sup>19</sup> *Ad Hoc* Committee on Statelessness and Related Problems, 'Summary Record of the 18<sup>th</sup> Meeting' (31 January 1950) UN Doc E/AC.32/SR.

<sup>20</sup> UNHCR (n 1).

host states would directly contradict the purposes of the 1951 Convention, for this is the very backdrop against which international refugee law was developed.<sup>21</sup>

### ***Non-Refoulement as a Jus Cogens Norm***

Since the conception of the 1951 Convention, strong support has emerged for the classification of the *non-refoulement* obligation as one belonging to the realm of *jus cogens*; a peremptory norm of international law from which no derogation is permitted.<sup>22</sup> To determine whether the rule has attained such a status, one must consider relevant state practice and a dual *opinio juris*<sup>23</sup>, comprising both the belief in a legal obligation not to *refouler* and that this obligation is of a *jus cogens* nature.

First, it is well-established that *non-refoulement* has crystallized into a rule of customary international law<sup>24</sup>, signifying that evidence of both state practice and the first of the *opinio juris* elements has been satisfied. As for the second, exploring the Conclusions adopted by the UNHCR Executive Committee is key. The Conclusions, while having no binding force, are of considerable importance in that they express the opinions and consensus of states, thus contributing to the formulation of *opinio juris*.<sup>25</sup> The first contention of *non-refoulement* as a norm of *jus cogens* appeared in Conclusion No. 25 of 1982, in which members of the Committee described the principle as one which 'was progressively acquiring the character of a peremptory rule of international law'.<sup>26</sup> Many Conclusions thereafter<sup>27</sup>, in light of frequent breaches of the rule, reiterated this position. Notably, the view of *non-refoulement* as having *jus cogens* status was confirmed in the 1996 Conclusion, which stated that 'the principle of *non-refoulement* is not subject to derogation'.<sup>28</sup> Further evidence of *opinio juris* appears in the 1984 Cartagena Declaration, which, significantly, propounds that the principle 'should be acknowledged and observed as a rule of *jus cogens*'.<sup>29</sup>

Furthermore, what *non-refoulement* seeks to preclude, namely, torture and other forms of ill-treatment, is proscribed in a number of international legal instruments that supplement the 1951 Convention, further underscoring the weight of the rule. The core principle in relation to torture and ill-treatment finds expression in, *inter alia*, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>30</sup>, Article 3 of the European Convention for Human Rights (ECHR)<sup>31</sup>, Article 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>32</sup>, and Articles 15 (b) and 21 of the European Union (EU)'s Qualification Directive.<sup>33</sup> More importantly in this regard, the prohibition of torture is a peremptory norm.<sup>34</sup> Arguably, challenging the notion of *non-refoulement* as *jus cogens* risks leaving the peremptory norm prohibiting torture open to repudiation accordingly.

Further support for the recognition of *non-refoulement* as a *jus cogens* norm stems from its non-derogable nature in the 1951 Convention. The absolute prohibition on torture in the ECHR aside<sup>35</sup>, Article 33 allows for no reservations.<sup>36</sup> According to Orakhelashvili, the non-derogability of a right serves

<sup>21</sup> See Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller et. al, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 119.

<sup>22</sup> Vienna Convention on the Law of Treaties (23 May 1969) 115 UNTS 331, art 53.

<sup>23</sup> Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 533, 538.

<sup>24</sup> Declaration of States Parties (n 4).

<sup>25</sup> Allain (n 23) 539.

<sup>26</sup> UNHCR Executive Committee Conclusion No. 25, 'General Conclusion on International Protection' (1982).

<sup>27</sup> (n 7).

<sup>28</sup> Ibid.

<sup>29</sup> (n 5).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> *Prosecutor v Furundžija* (Judgment) ICTY-95-17-T Ch (10 December 1998) [153].

<sup>35</sup> ECHR (n 5) art 15 (3).

<sup>36</sup> 1951 Convention (n 6) art 42 (1).

to substantiate its belonging to the *jus cogens* realm.<sup>37</sup> While the fact of a provision's non-derogability is not dispositive of the question of its *jus cogens* status, it provides support.

Today, a departure from the entrenched rule is manifest in the practice of states. With inter-state deals to 'manage' migratory trajectories and the forcible deportations of refugees to so-called 'safe zones'<sup>38</sup>, one might impugn the *jus cogens* nature of *non-refoulement*. What is important for the purposes of ascertaining its peremptory status is the question of whether these acts are treated as breaches rather than indications of an emergence of a new rule.<sup>39</sup> As the International Court of Justice in the *Nicaragua* case elaborated, when a state resorts to justifications for its conduct that is ostensibly inconsistent with a recognized rule, that may in fact act to strengthen the rule.<sup>40</sup> Accordingly, states seeking to justify their conduct that is incompatible with *non-refoulement* may serve to confirm its peremptory character.<sup>41</sup>

Finally, it is critical that the *jus cogens* status of *non-refoulement* is insisted upon, as Allain contends<sup>42</sup>, for in so doing states and international entities alike are precluded from implementing policies contrary to the essential rule. Additionally, the implication of a norm being a peremptory one is that it automatically establishes *erga omnes* obligations. All states have a duty to prevent breaches of *jus cogens* norms, a duty which entails cooperation on the multilateral level to bring the serious breaches to an end and the exercise of domestic, and perhaps even universal<sup>43</sup>, jurisdiction over them.<sup>44</sup>

## Public emergencies & national security

States may wish to derogate from the obligation not to turn away refugees on two ostensible grounds: a) that the arrival of refugees *en masse* will cause a public emergency<sup>45</sup> and b) that the mass inflow will pose a threat to national security. Invoking either of these grounds to depart from *non-refoulement* is demonstrably untenable.

In considering the possibility that a mass inflow situation could *precipitate* a public emergency, one must first decipher the meaning of such a subjective concept. In the ECHR, for instance, the phrase is followed by '...threatening the life of a nation'.<sup>46</sup> To Fitzpatrick, such an emergency 'must imperil some fundamental element of statehood' such as the functioning of, for instance, the legislature or judiciary.<sup>47</sup> To propose that a sudden and large-scale arrival of refugees could provoke such detriment is unsustainable.

As regards national security concerns, the 1951 Convention allows for derogation in 'exceptional circumstances' in the interests of national security.<sup>48</sup> However, nothing in the instrument suggests the applicability of such a *stricto sensu* derogation<sup>49</sup> to the inviolable rule of *non-refoulement*. In fact, perhaps owing to the essentially subjective nature of determining what constitutes a threat to national security and the propensity for its frequent abuse, the drafters of the 1951 Convention rejected the inclusion of a general derogation clause.<sup>50</sup>

<sup>37</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 59.

<sup>38</sup> See section III, part B.

<sup>39</sup> *Military and Paramilitary Activities in and against Nicaragua* (27 June 1986) (merits) ICJ Reports 1986 [186].

<sup>40</sup> *Ibid.*

<sup>41</sup> Allain (n 23) 541.

<sup>42</sup> *Ibid.*

<sup>43</sup> (n 34) [156].

<sup>44</sup> See ILC, 'Report of the International Law Commission on the Work of its 70<sup>th</sup> session' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

<sup>45</sup> See Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention' (2012) 13 MJIL 1, 35.

<sup>46</sup> (n 35).

<sup>47</sup> Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Pennsylvania 1994) 56.

<sup>48</sup> 1951 Convention (n 6) art 9.

<sup>49</sup> See Rosalyn Higgins, 'Derogations under Human Rights Treaties' (1976) 48 BYBIL 281.

<sup>50</sup> James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 261.

In the interest of self-preservation, states may desire to rely on *Salus populi suprema lex esto*, which Cheng contends constitutes a general principle of international law.<sup>51</sup> The maxim, found in Cicero's *De Legibus*<sup>52</sup>, proclaims that the 'welfare of the people should be the supreme law', which, in this context, would imply that refugee inflows would be prejudicial to the people of the putative host state. In contemporary international law, this rationale must be interpreted with regard to the normative framework in which it exists. Since the mid-20<sup>th</sup> century, the world has witnessed a revolutionary endeavour to foster appreciation for human rights, resulting in the establishment of various multilateral treaties affirming their inalienability. Within these instruments, provisions categorically prohibiting the breach of the most vital of rights<sup>53</sup>, the most notable of which for refugee protection being *non-refoulement*, were included. IHRL prohibits *refoulement* to ill-treatment in all circumstances. As discussed above, this norm rose to the top of the hierarchy, overriding treaty, custom, and general principles of international law like that of *Salus populi suprema lex esto*.

## Coping mechanisms

Owing to the centrality of *non-refoulement*, and considering the pressure exerted on states, coping mechanisms have been developed which enable host countries to adequately respond to mass-inflows comprising refugees entitled to international protection without having to deprive them of the very core right thereof, while maintaining the efficiency of asylum procedures. The first of these devices is the customary international norm<sup>54</sup> of temporary protection, which the UNHCR characterizes as:

a means, in situations of mass outflow, for providing refuge to groups...of persons recognized to be in need of international protection...since it is conceived as an emergency protection measure of hopefully short duration, a more limited range of rights [are] offered in the initial stage than would customarily be accorded to refugees granted asylum under the 1951 Convention and the 1967 Protocol.<sup>55</sup>

The doctrine was later elaborated by the UNHCR as a 'a practical device for meeting urgent protection needs in situations of mass influx...ensuring protection from *refoulement*'.<sup>56</sup> The concept has both been endorsed by the UNGA<sup>57</sup> and in Executive Committee Conclusions, No. 22 of which states explicitly that in situations of large-scale influx, states with which the asylum seekers first made contact should admit them at minimum on a temporary basis in scrupulous observance of *non-refoulement*.<sup>58</sup> It follows that, despite the colossal demands intrinsic to a mass influx situation, states may only have the discretion, subject to certain conditions, to grant temporary protection, implicit in which is the requirement to honour *non-refoulement*.

Goodwin-Gill describes this practice as a 'trade-off'<sup>59</sup>, whereby states withhold 'all but the most immediate and compelling protections provided by the [1951] Convention'.<sup>60</sup> The range of rights that would typically be accorded to an asylum seeker under the 1951 Convention are 'sacrificed'<sup>61</sup> to the apodictic *non-refoulement* obligation. Edwards posits that Articles 8 and 9 serve as the legal basis for

<sup>51</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953) 25.

<sup>52</sup> Marcus Tullius Cicero, *De Legibus* (Heidelberg, Kerle 1963 (originally written circa 60 BC)).

<sup>53</sup> ICCPR (n 5) art 6, 7; (n 36).

<sup>54</sup> Joan Fitzpatrick Hartman, 'The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict' in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff 1988) 87.

<sup>55</sup> UNHCR, 'Note on International Protection' (1994) UN Doc A/AC.96/830, [46].

<sup>56</sup> UNHCR, 'Global Consultations' UN Doc EC/GC/01/4, [13].

<sup>57</sup> See Report of the United Nations High Commissioner for Refugees, UN Doc A/RES/37/195 [4]; Office of the United Nations High Commissioner for Refugees, UN Doc A/RES/44/137 [3]; Office of the United Nations High Commissioner for Refugees, UN Doc A/RES/49/169 [7].

<sup>58</sup> (n 7) Conclusion II.

<sup>59</sup> Goodwin-Gill and McAdam (n 3) 336.

<sup>60</sup> Durieux and McAdam (n 10) 13.

<sup>61</sup> *Ibid.*

such derogation of other rights, although within strict confines.<sup>62</sup> Not only must the derogations be of an 'exceptional and temporary nature'<sup>63</sup> only lasting for the duration of the emergency, but the large-scale influx too must reach a certain threshold so as to legitimize the invocation of 'exceptional measures'.<sup>64</sup> An additional legal basis exists, according to Edwards, in the form of an implied derogation clause resulting from subsequent agreements between states with respect to mass influx circumstances.<sup>65</sup>

The second mechanism originating from the need to meet high standards of protection is that of *prima facie* recognition of refugee status. While normally the determination process by which an asylum seeker is accorded refugee status is one which is conducted on an individual basis, the conceivable impracticality of employing this method in the face of mass influxes has led States to adopt different approaches.<sup>66</sup> The UNHCR Handbook affirms states' recourse to 'group determination' whereby each individual member of the group is considered *prima facie* a refugee.<sup>67</sup> An individualized assessment of the subjective fear of persecution in this context would be redundant given the normally apparent factors triggering the mass displacement.<sup>68</sup> In this sense, the device serves as a means of alleviating the burden of asylum procedures to cope with the large-scale arrival of refugees.

## **Permitting exemptions from *non-refoulement* in mass influx situations: The implications**

Durieux and McAdam have argued for the creation of a derogation regime authorizing states confronted by a mass inflow to depart from *non-refoulement*.<sup>69</sup> One of the rationales provided in support of such an arrangement is that it will allow limitations to the rule only within a strictly regulated framework, which, in their view, is preferable to the *ad hoc* mechanisms resorted to by states today that result in setting aside the 1951 Convention.<sup>70</sup> Some of the probable consequences of this proposition will be examined in this section.

## **The disintegration of the protection regime**

To derogate from a law has been defined as to 'destroy and impair the force and effect of...' it.<sup>71</sup> A derogation from substantive protection rights relays that it is 'necessary...and *lawful*'<sup>72</sup> to do so. One must sequentially contemplate the result of this if applied to *non-refoulement*.

Waldron, who compellingly sets out a demonstration of the effects of tampering with the absolute prohibition of torture, presents a reversed 'slippery slope' argument where the core value is at the bottom, above which lie other, less fundamental ones.<sup>73</sup> The assertion is that rights of lesser centrality are built on top of what rests at the bottom, being of a most consequential nature, which also informs us of the importance of these other rights.<sup>74</sup> Applying this logic to *non-refoulement*, undermining its rudimentary nature risks unravelling the entire international protection regime. *Non-refoulement* has been described as the cornerstone of refugee protection<sup>75</sup>, without which the protection framework

<sup>62</sup> Edwards (n 45).

<sup>63</sup> Ibid, citing 'General Comment 29', UN Doc CCPR/C/21/Rev.1/Add.11, [2].

<sup>64</sup> Edwards (n 45) 35.

<sup>65</sup> Ibid 30.

<sup>66</sup> See Durieux and McAdam (n 10) on the practices of the OAU and Austria.

<sup>67</sup> UNHCR, *Handbook for Emergencies* (3<sup>rd</sup> edn 2007).

<sup>68</sup> UNHCR (n 56) [18].

<sup>69</sup> Durieux and McAdam (n 10).

<sup>70</sup> Ibid 23.

<sup>71</sup> Orakhelashvili (n 37) 73.

<sup>72</sup> Emilie Hafner-Burton, Laurence Helfer, and Christopher Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 IO 673 (emphasis added).

<sup>73</sup> Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 CLR 1681, 1734.

<sup>74</sup> Ibid.

<sup>75</sup> UNHCR (n 12).

ostensibly would cease to exist. States would have no obligation to shelter asylum seekers against ill-treatment, let alone grant them other rights accruing by the fact of their refugeehood. Considering audacious attempts to circumvent this obligation, Allain asserts that *non-refoulement* 'must act as the final bulwark of international protection'.<sup>76</sup> If this final bulwark were to corrode, the entire regime would arguably crumble. This is especially due to the fact that rights of contestably lesser importance are perched atop the foundational block. The block over which they rest is the very basis for their subsistence. One must ponder what would become of the rights of asylum seekers pertaining to, *inter alia*, access to the courts, welfare, and employment<sup>77</sup> if *non-refoulement* is presented as amenable. The right to temporary protection would too be deprived of any meaning without corroborative *non-refoulement* protection. Whether these rights would retain any relevance is questionable, given that their underlying rationales are informed by *non-refoulement's* significance. There is less confidence in these rights of lesser importance as is. In this sense, the foundational rule serves as a 'point of reference for sustaining these other...beliefs.'<sup>78</sup>

Since *non-refoulement* appears not in its most robust form in the 1951 Convention, one must also consider the repercussions on IHRL of undermining the pivotal rule. This field's jurisprudence demonstrates an equivocal commitment to upholding the absolute nature of the prohibition on torture. In addition to the above discussed legal instruments that outlaw *refoulement*, the European Court of Human Rights (ECtHR) has stressed on many occasions that, notwithstanding the circumstances, there are no exceptions to torture or inhuman or degrading treatment or punishment.<sup>79</sup> No individual can ever lawfully be subjected to any of these acts. Evidently, asylum seekers who have their *non-refoulement* rights violated are at risk of facing all or any of these persecutory measures. The effects of derogating in international refugee law could potentially render the peremptory prohibition of torture susceptible to pliability, ultimately undermining the entire international human rights framework so painstakingly developed<sup>80</sup> since the end of the Second World War.

In essence, an exception such as the one Durieux and McAdam<sup>81</sup> have suggested licenses states to dispose of asylum seekers' right not to be exposed to ill-treatment when their movement coincides with many others in a similar situation. To argue to the contrary would be to invalidate the humanity of refugees arriving *en masse*. It is vital to recall that respect for human dignity underpins *non-refoulement*, and it is this very concept on which the entire framework is built.

## State Compliance?

The proposition that a system enabling states to discard *non-refoulement*, albeit in a monitored manner, would supposedly enhance refugee protection is predicated entirely on the assumption that states would exhibit compliance. Given that states today through their actions have demonstrated a brazen unwillingness to honour *non-refoulement*, it is implausible that a derogation regime sanctioning limitations to the rule would improve compliance in any manner whatsoever.

Turkey, which hosts the largest refugee population worldwide<sup>82</sup>, has of late been accused of forcibly repatriating refugees to Syria, where mass atrocity crimes have plagued the country for almost a decade. According to Human Rights Watch and Amnesty International, Turkish authorities have arbitrarily detained in immigration removal centres<sup>83</sup> and consequently deported hundreds of refugees

<sup>76</sup> Allain (n 23) 533.

<sup>77</sup> 1951 Convention (n 6) Chapters II, III, IV.

<sup>78</sup> Waldron (n 73) 1735.

<sup>79</sup> See (n 8).

<sup>80</sup> See generally Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 HRQ 932.

<sup>81</sup> Durieux and McAdam (n 10).

<sup>82</sup> UNHCR (n 1) 3.

<sup>83</sup> Gerry Simpson, "'Repatriation' of Syrians in Turkey Needs EU Action" (*HRW*, 7 November 2019) <<https://www.hrw.org/news/2019/11/07/repatriation-syrians-turkey-needs-eu-action>>.

back to Syria.<sup>84</sup> In these centres, Syrian refugees were violently coerced to sign ‘voluntary repatriation’ forms.<sup>85</sup> Despite the testimonies of Syrians<sup>86</sup>, Turkey maintains that all returns are voluntary and that it is committed to observing *non-refoulement*.<sup>87</sup> The refugees have been deported to so-called ‘safe zones’ that Turkey claims it has established in northern Syrian cities.<sup>88</sup> This geographical region, however, is the site of continuous, widespread violence; as of April 2019, over 1,000 civilians have been killed in Idlib alone.<sup>89</sup> Even the creation of safe zones would not constitute a lawful basis on which to return refugees.<sup>90</sup> Indeed, ‘refugees’ are by definition ‘unrepatriable’.<sup>91</sup> Bangladesh and India have engaged in similar conduct vis-à-vis Rohingya refugees,<sup>92</sup> whom face a genocidal onslaught if returned.

Another example of a stark failure to observe the international obligation is manifested in the deal between the EU and Turkey which aims to limit the influx of refugees into the former’s territory by ‘redirecting’ asylum seekers who arrive at the Greek islands irregularly to Turkey. The deal, which results in collective expulsion<sup>93</sup>, plainly violates *non-refoulement* in many respects. First, the agreement necessarily entails the retention of refugees on the Greek islands pending their transfer to Turkey, where the conditions of the camps are the very embodiment of ill-treatment. In Lesbos, where Moria camp has exceeded its hosting capacity, refugees live in egregious conditions.<sup>94</sup> A harrowing report from Médecins Sans Frontières (MSF) revealed that its mental health clinic on the island is overwhelmed with cases of depression, anxiety, and trauma, including those resulting in self-harm.<sup>95</sup> These individuals are then sent back to the same bleak tents and containers they have been forced to inhabit.<sup>96</sup>

Second, the deal operates on the basis that Turkey satisfies the notion of a ‘safe’ third country where, *inter alia*, an asylum seeker’s right to *non-refoulement* and freedom from torture and cruel, inhuman or degrading treatment is fully respected.<sup>97</sup> As discussed, Turkey has committed itself to a new policy whereby refugees are directly returned to the very reason for their flight. Accordingly, Syrian asylum seekers taken from Greece to Turkey and subsequently sent to Syria would be victims of indirect *refoulement* at the hands of the EU.<sup>98</sup> As the ECtHR has emphasized, it is incumbent upon the state sending a refugee elsewhere to seek credible assurances relating to the safeguarding against ill-treatment.<sup>99</sup>

The deal between Italy and Libya, under which the Libyan coastguard intercepts boats carrying refugees and returns them to the North African state, is an equally alarming deviation from the *jus cogens* norm.

<sup>84</sup> ‘Turkey: Syrians illegally deported into war ahead of anticipated ‘safe zone’ (Amnesty International, 25 October 2019) <<https://www.amnesty.org/en/latest/news/2019/10/turkey-syrians-illegally-deported-into-war-ahead-of-anticipated-safe-zone/>>.

<sup>85</sup> Ibid.

<sup>86</sup> Dorian Jones, ‘Many Syrian Refugees in Turkey Want to Stay, Despite Erdogan Plan to Force Their Return’ (VOA, 31 October 2019) <<https://www.voanews.com/europe/many-syrian-refugees-turkey-want-stay-despite-erdogan-plan-force-their-return>> .

<sup>87</sup> Simpson (n 83).

<sup>88</sup> Ibid.

<sup>89</sup> ‘Turkey: Syrians Being Deported to Danger’ (HRW, 24 October 2019) <<https://www.hrw.org/news/2019/10/24/turkey-syrians-being-deported-danger>>.

<sup>90</sup> See Hathaway (n 50) 917-953.

<sup>91</sup> Aman Vijayaraghavan and Hamsa Vijayaraghavan, ‘The Illusion of Consent – Voluntary Repatriation or Refoulement?’ (International Law Blog, 25 September 2019) <<https://internationallaw.blog/2019/09/25/the-illusion-of-consent-voluntary-repatriation-or-refoulement/>>.

<sup>92</sup> Srihari Gopal, ‘Rohingyan Repatriation and the Principle of Non-Refoulement’ (OHRH, 18 August 2018)

<<https://ohrh.law.ox.ac.uk/rohingyan-repatriation-and-the-principle-of-non-refoulement/>>.

<sup>93</sup> ECHR (n 5) Protocol 4, art 4.

<sup>94</sup> See Holly Young, ‘Desperate refugees face up to closure of Moria Camp’ (Aljazeera, 27 November 2019) <<https://www.aljazeera.com/news/2019/11/desperate-refugees-face-closure-moria-camp-191127125846160.html>>.

<sup>95</sup> MSF, ‘Two years on, EU-Turkey deal creates misery and desperation for those stuck on Greek Islands’ (19 March 2018) <<https://reliefweb.int/report/greece/two-years-eu-turkey-deal-creates-misery-and-desperation-those-stuck-greek-islands>>.

<sup>96</sup> Ibid.

<sup>97</sup> Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/8, art 38 (1).

<sup>98</sup> *Hirsi v Italy* (2012) (Application no. 27765/09) [146].

<sup>99</sup> See, e.g., *Chahal* (n 8); *Saadi v Italy* (2008) 47 EHRR 17; *Othman v UK* (2012) 55 EHRR 1.



Libya, far from satisfying the criteria of a 'safe third country'<sup>100</sup>, is a failing state ravaged by armed conflict. The Libyan authorities adhere to a perpetual policy of detaining asylum seekers in the most deplorable conditions which has led to multiple deaths.<sup>101</sup> Many asylum seekers in the non-signatory state have been victims of torture, rape, forced labour, slavery, and human trafficking.<sup>102</sup> Like the EU-Turkey deal, this is a case of collective expulsion through which *non-refoulement* is breached. As was held in *Hirsi*, *non-refoulement* may be violated indirectly in the case of collective expulsions where no proper examination of asylum applications is undertaken, which increase the risk of *refoulement*.<sup>103</sup> Here, *refoulement* has fully materialized. Italy is turning away refugees and empowering former militiamen<sup>104</sup> to subject them to the most heinous of acts.

It can thus be deduced that any proposal to enable states to derogate from their *non-refoulement* obligations would not only be utterly futile, but also a blatant endorsement of putting refugees' lives in grave risk. Clearly, states are in no need of any newly formed legal mechanisms through which they may act reprehensibly at the detriment of those entitled to international protection.

## Conclusion

With the global refugee population having expanded extraordinarily, certain states have demonstrated a strong disinclination to embrace those arriving *en masse* considering the concomitant economic, social, and political implications thereof. Questions as to whether *non-refoulement*, the cornerstone of the international protection regime, is subject to any limits in mass influx situations have been raised.

This article has sought to demonstrate, however, the integral nature of the principle to the legal regime. In examining its centrality to the international legal framework for refugee protection, firstly, it established that the 1951 Convention envisaged mass influx situations as the paradigmatic circumstance in which the instrument's application would be activated, as evinced by the historical context in which it was adopted, the 'group' dimension to the grounds of persecution, and the ultimate purposes of the Convention. Second, a wealth of evidence supporting the categorization of *non-refoulement* as a peremptory norm is discernible, which would automatically establish the non-derogability of the principle. Third, mass influx situations could neither justify the invocation of public emergency nor national security concerns as derogation grounds, as their respective meanings do not plausibly encompass any potential risks connected with the arrival of refugees in such fashion. Lastly, given the seemingly credible concerns of nations faced with large-scale refugee inflows, lawful mechanisms through which states may cope with such situations were birthed out of the imperative to respect the fundamental obligation rather than as attempts to circumvent it. These devices include temporary protection and *prima facie* recognition of refugee status.

The proposition to allow states to derogate from their *non-refoulement* obligations within prescribed confines would accordingly be redundant, as the end result would be parallel to that of an *ad hoc* process by states through which the obligation is breached: the undermining of an indispensable right. To propose any exceptions to the essential right not to be returned to persecution or other ill-treatment is antithetical not only to the provisions in international refugee law and IHRL, but also to the precise purpose of these legal frameworks as they relate to asylum seekers. This article therefore outlined how *non-refoulement* constitutes the very basis on which all other refugee rights rest, without which the protection framework would ultimately deteriorate. In seeking to refute the presumption that states would comply with a monitored *refoulement* system, examples of flagrant violations of the cardinal rule

<sup>100</sup> (n 97).

<sup>101</sup> Sally Hayden, 'The U.N. is Leaving Migrants to Die in Libya' (*FP*, 10 October 2019) <<https://foreignpolicy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war/>>.

<sup>102</sup> *Ibid.*

<sup>103</sup> (n 98).

<sup>104</sup> Cecilia Butini, 'There's Still No Plan to Deal with Migrants in the Mediterranean' (*The National*, 1 November 2019) <<https://www.thenation.com/article/migrant-mediterranean-salvini-rescue/>>.

by a range of states were highlighted, with a view to underscoring the proposition's intrinsic incongruence with the legal regime. It is thus in mass influx situations that the operation of and respect for *non-refoulement* is of utmost importance, and cannot be forsaken.

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