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Author: Mitchell Hill

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The Cornerstone No Longer? The Growing International Problem of Refugee Refoulement

Mitchell Hill[1]

Abstract

Non-refoulement prevents States from expelling or returning a refugee to any location where they may face any form of discriminate persecution. This internationally-renowned rule is often referred to as the cornerstone of refugee protection. Despite this, States can be seen adopting a variety of measures which both explicitly and implicitly undermine (or in some instances, wholly violate) the operation of this rule. This situation has become visibly worsened as a result of the COVID-19 pandemic. With this in mind, this paper seeks to determine the extent to which non-refoulement truly remains the cornerstone of refugee protection.

Fundamentally, this paper aims to contribute to ongoing discourse within the field of public international law, more particularly international refugee law. Thus, it aims to bring together both the theoretical and factual scene underpinning the non-refoulement principle, assessing this in light of measures arising both before and after the emergence of COVID-19.

Introduction

Those presently seeking (and those who have successfully sought) asylum in another State find themselves in one of the most objectively harrowing situations fathomable. To do so means to exile oneself from your home country through absolute fear for your own life and safety – whether caused by ongoing war or conflict, genocide, widespread torture, general

[1] Mitchel Hill is an International Law LLM student at the University of Edinburgh

persecution, or oppression.[2] Beyond this, however, to seek asylum means to place oneself in a position of inherent vulnerability, not only in terms of physical safety, but also in terms of legal status.[3] Both have now been exacerbated by the additional effects arising from the ongoing global pandemic.[4]

Nevertheless, before this paper begins with any substantive discussion, an important definitional distinction must be noted. Namely, the difference between an asylum seeker and a refugee. Whilst the term "asylum seeker" is left largely under-defined by large swathes of public international law, the term "refugee" is not.[5] Thus, the over-riding law on this topic (the 1951 Refugee Convention) defines a refugee as anyone who finds themselves outside of their country of nationality owing to a well-founded fear of discriminate persecution (based upon race, religion, nationality, membership of a particular social group, or political opinion) and as a result of this persecution is unwilling or unable to avail themselves of the protection of their host State.[6] In comparison, an asylum seeker is simply understood as someone who says they are a refugee, but whose claim has not yet been definitively evaluated.[7] Therefore, 'not every asylum-seeker will ultimately be recognised as a refugee, but every refugee is initially an asylum seeker'.[8]

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[2] Susan Martin, Sanjula Weerasinghe and Abbie Taylor, *Humanitarian Crises and Migration* (1st edn, Routledge 2014).

[3] UNGA Res 71/1 (19 September 2016) UN Doc A/RES/71/1, paras 12 and 23; UNHCR, 'Migrants in Vulnerable Situations: UNHCR's Perspective' (*Refworld*, June 2017) <https://www.refworld.org/pdfid/596787174.pdf> accessed 30 March 2021.

[4] UN Foundation, 'A Virus that Respects No Borders: Protecting Refugees and Migrants During the COVID-19' *(World Health Organization*, 25 March 2021) <https://www.who.int/news-room/feature-stories/detail/a-virus-that-respects-no-borders-protecting-refugees-and-migrants-during-covid-19> accessed 30 March 2021.

[5] Guy Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long and Nando Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014). Though it should be noted that numerous international legal instruments do explicitly indicate the existence of a right to claim asylum, while still leaving the term "asylum-seeker" undefined. These include: Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 23 March 1976) UNGA Res 217 A(III) (UDHR) Article 14; United Nations Declaration on Territorial Asylum (adopted 14 December 1976) UNGA Res 2312 A(XXII) Article 1.

[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Article 1A(2), as amended by the Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) Article 1(2).

[7] UNHCR, *Protection Training Manual for European Border and Entry Officials* (UNHCR 2011) 1.

[8] ibid, 3.

At the crux of ensuring the effectiveness of international refugee law, States must be prevented from (actually or essentially) forcibly returning those escapees to any location where they may once again face similar threats to their life or safety. As will become clear, this is the principle of non-refoulement.[9] Despite there being a clear need for a strict (almost unequivocal) principle of non-refoulement within this body of law, a troublesome combination of the policies and operations carried out by various States,[10] as well as a toxic mix of legalised derogations without any real authoritative oversight,[11] has led non-refoulement down a path that it simply cannot be labelled as the 'cornerstone' of refugee protection any longer. Furthermore, in light of the manner in which States have responded to the COVID-19 pandemic – which range from border closures to claiming a lack of available safe harbour – this situation appears to have become even more entrenched into normality.[12] Non-refoulement simply does not carry the force which its drafters intended; it is no longer the cornerstone of refugee protection.

In support of this stance, an overview of the relevant public international law shall be provided, while the context of refugee non-refoulement will also be noted. Following on from this, consideration will then be given to those views supporting the assertion that non-refoulement remains key to refugee protection, whilst also seeking to demonstrate where the importance of this principle derives from. Subsequent to this, a more practical-focused discussion will take place, where this paper will analyse and assess the challenges that non-refoulement faces in the modern world. These challenges include: 'Safe States', 'Push-back Policies', 'Diplomatic Assurances', and permissible derogations. They demonstrate clear reasons why non-refoulement presently offers less protection to refugees than one might be led to believe. This will be followed by a consideration of how these occurrences have become increasingly present and problematic following many States' responses to the COVID-19 pandemic, showing how non-refoulement has become ignored by State leaders. A short conclusion will then draw together that which has been considered.

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[9] 1951 Refugee Convention (n 6) Article 33.

[10] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (OUP 2007) 374-390; James Hathaway, *Reconceiving International Refugee Law* (The Hague: Kluwer Law International 1997).

[11] Katie O'Byrne, 'Is there a Need for Better Supervision of the Refugee Convention?' (2013) 26(3) J.R.S. 330, 332-334, 345.

[12] Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection' (2020) 20(20) International Journal of Refugee Law 1.

I. The Law Relating to Non-Refoulement

Arising as a direct consequence of the endorsement by the General Assessmenbly of the United Nations (UNGA) that no refugee should be compelled to return to their country of origin,[13] the modern-day pre-eminent recital of a State's non-refoulement obligations is codified by the 1951 Refugee Convention (as amended by its associated 1967 Protocol).[14] Together, these international instruments affirm that State parties cannot expel or return a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of one of the types of discriminate persecution listed therein.[15] These are race, religion, nationality, membership of a particular social group, or political opinion.[16]

Importantly, there exists no general derogation clause within the 1951 Convention or its associated 1967 Protocol. The only manner through which this non-refoulement provision can ever be lawfully sidestepped arises where a particular refugee is either (i) a danger to the security of the country or (ii) has been convicted of a particularly serious crime, and therefore constitutes a danger to the community of the host country.[17]

Nevertheless, as Goodwin-Gill neatly summarises, the international law of refugee protection comprises of more than just the 1951 Convention.[18] In fact, there exists a range of universal and regional conventions, rules of customary international law, general principles of law, national laws, and the constantly developing standards of States and international organisations.[19] Taking this into consideration, Article 3 of the UN Declaration on Territorial Asylum goes one step further in its explicit refoulement prohibitions, indicating that not only should no State expel or return an asylum seeker to another State where they may face persecution, but they should also not reject them at the frontier when doing so would have the same outcome.[20] This instrument is not legally binding, but the United Nations High Commissioner for Refugees (UNHCR) still considers it to hold significant importance insofar

[13] UNGA Res 62(I) (15 December 1946) UN Doc A/Res/62(I)-(II).
[14] 1951 Refugee Convention (n 6) Article 33; 1967 Protocol (n 5).
[15] ibid.
[16] 1951 Refugee Convention (n 6) Article 1; 1967 Protocol (n 5).
[17] ibid, Article 33(2).
[18] Goodwin-Gill (n 5) 2.
[19] ibid.
[20] Declaration on Territorial Asylum (n 5).

as it outlines the standard upon which States have agreed to act.[21] Similar (legally binding) provisions are also found at regional levels.[22]

Beyond international refugee law and into broader international human rights law, States are duty-bound not to transfer any individual (including asylum seekers and refugees) to another State if doing so would expose them to serious human rights violations.[23] This is a form of non-refoulement protection. In line with existing international treaties, this applies most notably in terms of the right not to be arbitrarily deprived of your life,[24] the right to live freely from torture (or other cruel, inhuman or degrading treatment),[25] and the right to freedom from enforced disappearance.[26] Furthermore, this broadening of non-refoulement into wider human rights law has developed international understandings of discriminate persecution and in-turn closed numerous previously-existing 'protection gaps' where initial interpretations may have led to injustices.[27] As a result, refugee non-refoulement has now been interpreted to extend to a broader variety of additional rights-based infractions beyond traditional persecution, such as denial of a fair trial,[28] prolonged solitary confinement,[29] and degradation in mental illness or medical condition.[30]

Lastly, it must be noted that non-refoulement should (where operating correctly) apply not only to the return, expulsion, or border-post rejection of refugees and asylum seekers, but also

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[21] UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Refworld, 26 January 2007) para 23, available at <https://www.refworld.org/docid/45f17a1a4.html> accessed 20 June 2021.

[22] For example: Organisation for African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa (Adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, Article III(3); American Convention on Human Rights "Pact of San Jose, Costa Rica" (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Article 22(8).

[23] *Chihat Ng v Canada,* Communication No 469/1991, Views of the Human Rights Committee of 7 January 1994; Emanuela-Chiara Gillard, 'There's No Place Like Home: State's Obligations in Relation to Transfers of Persons' (2008) 90(871) International Review of the Red Cross 703, 704.

[24] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[25] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention).

[26] International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (ICPPED), Article 16(1).

[27] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP, 2009).

[28] *Othman (Abu Qatada) v United Kingdom* App No 8139/09 (ECtHR 17 January 2012) para 235, 258.

[29] Human Rights Committee, General Comment No. 31, para 12.

[30] *A.H.G v Canada* App No 2091/2011 (Human Rights Committee, 5 June 2015) para 10.4; *D v UK* (1997) 24 EHRR 423.

to extra-territorial rejection.[31] With the UNGA reaffirming this stance as recently as 2016.[32] This is the case for two reasons. Firstly, 'it is an established principle of international refugee law that [asylum seekers] should not be returned … pending a final determination of their status'.[33] Secondly, refugee status is merely declaratory. Indeed, '[one does not] become a refugee because of this recognition, but recognised because he is a refugee'.[34] Thus, wherever effective control over an individual is, or would be, transferred from one State to another, non-refoulement should apply.[35] Furthermore, the application of these non-refoulement provisions have also been determined to include a prohibition of chain refoulement, meaning that a refugee cannot be transferred to any State where there are reasonable grounds to believe that, in doing so, they will subsequently be transferred back to their origin State.[36]

II. The Conceptual Importance of the Non-Refoulement Principle

Before one can adequately discuss why non-refoulement is being undermined, consideration must go towards the major reasons in support of its fundamental status. Though they are seemingly unreciprocated in practice, these arguments demonstrate why, in this writer's opinion, non-refoulement should be the cornerstone of refugee protection.

First and foremost, it would be an understatement to say that non-refoulement was an important issue to the drafters of the 1951 Convention.[37] During deliberations, for example,

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[31] See, Europe: *Xhavara and Others v Italy and Albania* (ECtHR 11 January 2001); Australia: *Plaintiff M61 and Plaintiff M69 v Commonwealth of Australia* [2010] HCA 41; Americas: Inter-American Commission of Human Rights, *The Haitian Center for Human Rights v United States* (1997) Case 10.675, Report No 51/96. See also: UNHCR, *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* (31 January 1994) Para 14-15, available at <https://www.refworld.org/docid/437b6db64.html> accessed 20 June 2021.

[32] UNGA Res 71/1 (n 3) para 24.

[33] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Reissued 2019, UNHCR 1979) page 17 para 9.

[34] ibid.

[35] Emanuela-Chiara Gillard, 'There's No Place Like Home: State's Obligations in Relation to Transfers of Persons' (2008) 90(871) International Review of the Red Cross 703, 712.

[36] *T.I. v The United Kingdom* App No 43844/98 (ECtHR, 7 March 2000) 15.

[37] Gilad Ben-Nun, 'The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention' (2014) 28(1) Journal of Refugee Studies 93, 95.

delegates from France, Israel, Denmark, and the United States all expressed a clear motivation to establish a provision restricting the return of refugees.[38] These opinions were voiced in an attempt to avoid a reoccurrence of the clear failure of nations to adequately protect German-Jewish refugees throughout the inter-war period.[39] Several academics claim that the importance of this principle can now be demonstrated through its effects, as (when operational) non-refoulement serves to protect refugees from the violations of human rights that caused them to flee in the first place, thereby allowing absolute safety and freedom from targeted persecution.[40] Thus, if we were to use the more modern example of the plight of the Rohingya in Myanmar, it is clear that an effective non-refoulement principle would operate to protect wider human rights, as reports show evidence of systemic abuse which involve, *inter alia*, torture.[41] It would therefore be reasonable for one to argue that non-refoulement could (and should) be the cornerstone of refugee protection, as it is one of the only elements within the 1951 Refugee Convention (and within wider international law) that sees multiple legal domains coincide. These are international refugee law, international human rights law, and international humanitarian law.[42]

This argument closely aligns with further assertions regarding the importance of non-refoulement, namely that refugee protection would offer significantly less certainty, efficiency, and effectiveness for refugees without non-refoulement.[43] Martin and others demonstrate throughout their work that human rights abuses are a major cause of migration.[44] Thus, without an effective non-refoulement principle, many refugees could face removal based on an array of potentially questionable grounds, such as a State's economic position or simply because the State does not want to allow entry to refugees. However, when the principle does operate, positive duties are placed on that State to at least offer some degree of

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[38] UNHCR, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary by Dr Paul Weis* (UNHCR, 1990) 234-235.

[39] Clare Frances Moran, 'Strengthening the Principle of Non-Refoulement' [2020] International Journal of Human Rights 1, 2.

[40] Thomas Gammeltoft-Hansen and James Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 15(2) Columbia Journal of Transnational Law 235, 239.

[41] 'Myanmar Rohingya: UN Condemns Human Rights Abuses' *BBC News* (London, 28 December 2019) <https://www.bbc.co.uk/news/world-asia-50931565> accessed 31 December 2019.

[42] Seline Trevisanut, 'The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection' [2008] 12 Max Planck Yearbook of UN Law 205, 214.

[43] ibid.

[44] Martin, Weerasinghe and Taylor (n 1).

protection.[45] Non-refoulement should, therefore, embody the humanitarian essence of the entire convention.[46]

Lastly, one final argument contends that the non-refoulement principle must be the cardinal element of refugee protection in light of its status as a peremptory norm of international law (a norm of *jus cogens*).[47] Achieving *jus cogens* status represents the cornerstone nature of any principle of public international law simply because it means that it carries such importance that no derogation would ever be deemed permissible.[48] In the context of refugees, Goodwin-Gill defended the presence of a strong jurisprudential basis supporting non-refoulement's achievement of this status.[49] Allain has also asserted that the notion of consistent State practice (accompanied by regional transitions of refugee law away from intergovernmentalism into supranationalism) as demonstrating both its importance and general acceptance of *jus cogens* status.[50] If it were to achieve this status, it would be the fundamental element of refugee protection because it would operate above both State sovereignty and State consent, thus providing absolute and unqualified protection to refugees.[51]

Nevertheless, this essay will demonstrate why it is the case that non-refoulement achieves neither its intended objectives nor *just cogens* status, and so cannot be considered the cornerstone of refugee protection.

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[45] Seline Trevisanut, 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea' (2014) 27 LJIL 661, 669.

[46] Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Erika Feller, Volker Turk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 107.

[47] Sigit Riyanto, 'The Refoulement Principle and its Relevance in the International Law System' (2010) 7(4) Indonesian Journal of International Law 695, 707.

[48] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan 1980) 115 UNTS 331 (Vienna Convention) Article 53.

[49] Guy Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23(3) IJRL 443, 452.

[50] Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 IJRL 533, 547-548.

[51] ibid, 547.

III. The Modern Practical Challenges Faced

a. Safe Countries and International Agreements

The first practical challenge faced by the non-refoulement principle is the legal-political concept of the 'Safe State'. Significant criticism has been put forward by the academic community around the concept of so-called 'safe' countries within international relationships, with many going as far as to describe the entire safe country notion as a complete 'legal fiction' founded upon a 'misconceived assumption' of common refugee protection standards.[52] In legal terms, international law recognises numerous divisions of Safe States, which broadly fall into two distinct categories: 'Safe Countries of Origin' (SCOs) and 'Safe Third Countries' (STCs).[53]

In line with present definitions, a country is "safe" in the refugee context if it is determined as being a non-refugee producing country in which individuals can enjoy asylum without any real danger.[54] For 'SCOs' this means that the country from which the refugee has fled should be free from persecution, torture (or other cruel, inhuman, or degrading treatment or punishment) as well as any threats of indiscriminate violence (whether caused through internal or international armed conflict).[55] Likewise, 'STCs' should satisfy those same criteria, while also demonstrably respecting both the non-refoulement principle and the right of migrants to at least request refugee status.[56] This latter concept also encompasses the 'First Country of Asylum' principle, whereby refugees are returned to the first "safe" country in which they entered.[57]

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[52] Satvinder Juss, 'The Post-Colonial Refugee, Dublin II, and the End of Non-Refoulement' (2013) 20(2) International Journal on Minority and Group Rights 307, 312.

[53] Cathryn Costello, 'Safe Country? Says Who?' (2016) 28(4) IJRL 601, 604.

[54] UNHCR, 'Background Note on the Safe Country Concept and Refugee Status: EC/SCP/68' (UNHCR, 26 July 1991)<https://www.unhcr.org/uk/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html> accessed 30 March 2021.

[55] This is in line with the most in-depth understanding of the 'Safe Country of Origin' concept, as found within EU Legislation. It is provided by: Annex 1 of Directive 2013/32/EU (Recast Asylum Procedures Directive)

[56] This again follows the most in-depth understandings of the 'Safe Third Country' concept. Again, see: Article 38(a)-(e) of Directive 2013/32/EU (Recast Asylum Procedures Directive).

[57] For example, the Dublin Regime within the European Union: European Parliament and Council Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining and application for international protection lodged in one of the Member States by a Third-Country National or a stateless person (recast).

The UNHCR seems to be of the opinion that these two concepts do not generally undermine the non-refoulement principle, provided that proper assessments take place to ensure that refugees are not denied the correct degree of access to proper protection procedures.[58] With this in mind, while one could potentially argue that some countries are indeed safer than others, or for that matter are potentially non-refugee creating, this is not where the substance of the problem actually lies.

Rather, the concept of the 'Safe State' is too susceptible to political manipulation, so much so that each list will often involve the State's closest allies, trading partners, and neighbours.[59] It seems reasonable to argue that this latter assertion is more persuasive than both that of the UNHCR and of those defending non-refoulement's cornerstone status. In an issue exacerbated by the absence of an authoritative interpreter overseeing the 1951 Convention, too much discretion is afforded to States and regional bodies in determining what is considered as "safe" for non-refoulement to still contain the force it once did.[60] Ultimately, this leads to vastly differing opinions within the same State regarding whether a country is safe for the transfer of refugees[61] and a dubious list of countries considered to be "safe".[62] In that regard, the United Kingdom Home Department has asserted that States such as Pakistan and Jamaica are to be considered safe, only to later have those determinations quashed by the judiciary.[63]

Similarly, bilateral agreements (such as the European Union-Turkey Action Plan and the Canada-Unites States Refugee Cooperation Agreement)[64] as well as the concept of forcing refugees and asylum seekers to apply to their first State of arrival (as in the Dublin Regime)[65]

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[58] UNHCR EXCOM General Conclusion on International Protection No 87 (L) (1990).
[59] Jeff Crisp and Nicholas Van Hear, 'Refugee Protection and Immigration Control: Addressing the Asylum Dilemma' (1998) 17(3) Refugee Survey Quarterly 1, 14.
[60] Tom Clark, 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation' (2004) 16(4) IJRL 584, 590.
[61] Costello (n 53) 609.
[62] Guy Goodwin-Gill, 'Safe Country? Says Who?' (1992) 4(2) IJRL 248, 248.
[63] *R (Javed) v SSHD* [2001] EWCA Civ 789; *R (on the Application of Jamar Brown(Jamaica)) v The Secretary of State for the Home Department* [2015] UKSC 8.
[64] 'EU-Turkey Joint Action Plan' *European Commission* (Brussels, 15 October 2015) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860> Accessed 24 June 2021; Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (adopted 5 December 2002, entered into force 29 December 2004) CTS 2004/2.
[65] Dublin Regime (n 57).

have an equally damaging effect. Indeed, they cause an ensuing decline in procedural safeguards, which in turn damages the integrity of existing non-refoulement protection.[66] Using Turkey as an example, non-refoulement now offers little protection to the *bona fide* refugee against deportation from the European Union (to Turkey), despite many claiming that Turkey possesses a seriously poor human rights record.[67] The same can be said for the United States' recent systematic detention and imprisonment of numerous asylum seekers.[68] Critically, both of these examples are particularly problematic given the previously discussed proliferation of non-refoulement into the field of human rights. Despite 'emanating from a theory of human rights that recognises rights fulfilment requires states to protect those within their jurisdiction from [violations] perpetrated by third parties', modern-day non-refoulement now seemingly fails to do just that.[69]

Bringing this together, it is submitted that both of these situations undermine non-refoulement in the refugee context by using legal concepts and agreements to justify the movement of refugees to areas where they may still face some form of persecution, whether this be of a similar kind to that which led to their initial movement or otherwise.

b. Push-back Policies

Another occurrence that can be used to demonstrate the ever-weakening nature of non-refoulement arises through the use of so-called 'push-back' policies and the subsequent rejection of refugees both at the maritime frontier and on the high seas. An action which, in spite of consistent criticism by the UNHCR, is still continuing on a large scale.[70] On this note, migratory flows of refugees by sea are not a new phenomenon. Since both the 1970s Vietnamese 'Boat People' crises and the in-flow of sea-bound African migrants into the

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[66] Nadine El-Nany, 'The "New Europe" and the "European Refugee": The Subversion of the European Union's Refugee Law by its Migration Policy' in Satvinder Juss (ed.) *The Ashgate Research Companion on Migration Law, Theory, and Policy* (Ashgate 2013) 14-15.

[67] Costello (n 53) 611.

[68] *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 (Federal Court).

[69] Vijay Padmanabhan, 'To Transfer or Not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulment' (2011) 80 Fordham Law Review 73, 81.

[70] UNHCR, 'Desperate Journeys: Refugees and Migrants Arriving in Europe and at Europe's Borders' (Geneva 2019) 5.

Canary Islands, they have become increasingly well-known on the international scale.[71] More recently however, irregular migration of refugees by these means has established multiple common routes through which other potential refugees travel, leading to the emergence of extra-territorial border control at maritime frontiers such as FRONTEX (the European Border and Coast Guard Agency) that operates at the EU's external border.[72]

At their most crude, both maritime and land-based push-back policies (including those of border-post rejection) amount to a flagrant violation of the right to seek asylum.[73] Whilst this 'right' does not arise from a legally binding instrument, it demonstrates that the existence of these refugee rejection policies at the very least amounts to a derogation from previously agreed upon standards within international refugee (and international human rights) policy. Nevertheless, and more specifically in relation to the subject of this paper, it is crucial at this point to note that some still argue that non-refoulement has maintained its status as the cornerstone of refugee protection, as it has developed into an additional corollary principle of non-rejection on the high seas.[74] Though such a position does indeed align with that of the UNHCR,[75] it is clear that State practices in this area are more than questionable. This is owing largely to the prevalence rates of push-back policies throughout the world.[76] For example, States such as Italy and the United States have both been held to have fallen foul of non-refoulement via the use of push-back policies.[77] The Australian Federal Court also seemingly misconstrued the scope of non-refoulement by allowing ships to be rejected in the name of State Sovereignty.[78] As Coleman demonstrates, its proper operation should actually limit the ability of a State to exercise sovereignty in this manner, not the other way around.[79]

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71 A Lakshmana Chetty, 'Resolution of the Problem of Boat People: The Case of a Global Initiative' (2001) 1 ISIL Yearbook of International Humanitarian and Refugee Law 144, 144; Moran (n 38).

72 Trevisanut (n 45), 661 and 669.

73 UDHR (n 5) Article 14.

74 Lauterpacht and Bethlehem (n 46) 113; see text relating to n25.

75 UNHCR EXCOM Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981), para 2.

76 Guy Goodwin-Gill (n 49) 453.

77 *Hirsi Jamaa v Italy* App No 27765/09 (ECtHR, 23 February 2012); Inter-American Commission of Human Rights, *The Haitian Centre for Human Rights et al. v United States* (1997) Case 10.675, Report No. 51/96.

78 *Ruddock v Vardalis* [2001] FCA 1329, para 193.

79 Nils Coleman, 'Non-Refoulement Revised – Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law' (2003) 5(1) EJML 23, 41.

Following on from this, it is once again submitted that non-refoulement is heavily threatened and weakened by States' increasing use of push-back and extra-territorial rejection policies. A powerful argument can be advanced that these exact policies represent a willingness of States to circumvent the very rules of non-refoulement. Therefore, the arguments of those who assert the dangerous nature of maritime rejection ring more true than that of those who seek to defend non-refoulement's continuing cornerstone status within refugee protection. Hyndman argues that a consistent policy of push-back against migrants and refugees will inevitably lead to instances of refugees being refouled (ie. returned to persecution) because often the refugee will have nowhere to go other than back home.[80] Therefore, one cannot claim that non-refoulement is still a protector of wider human rights or a protector of the efficiency of refugee provisions. As such, it is increasingly difficult to view non-refoulement as the cornerstone of refugee protection.

c. Diplomatic Assurances

Another manner through which States have subverted the strictness of non-refoulement is through diplomatic assurances, which have become increasingly prevalent in (Western) democratic States. This is despite the claims of those who argue that such States are supposed to both uphold and encourage others to uphold human rights norms.[81] With this in mind, much has been written on the topic of diplomatic assurances in relation to potential victims of torture.[82] Nevertheless, in light of non-refoulement's growth into much of human rights law, it still bears a strong application to the plight of refugees. Indeed, many escapees of both discriminate violence and torture could become entitled to refugee status. Although "torture" may appear to be somewhat distanced from the plight of many refugees fearing general

[80] Patricia Hyndman, 'Asylum and Non-Refoulement – Are These Obligations Owed to Refugees Under International Law?' (1982) 57(1) Philippine Law Journal 43, 44.
[81] Lucia Bernatova, 'Standards of Diplomatic Assurances? A Comparative Study of the Impact of Diplomatic Assurances Against Torture on Risk Assessment in Refoulement Cases' (HR MA thesis, Central European University 2014) 56.
[82] Lucia Bernatova (n 81); Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and other ill-treatment' (2005) 23(4) Netherlands Quarterly of Human Rights 674; Lena Skoglund, 'Diplomatic Assurances Against Torture – An Effective Strategy?' (2008) 77(4) Nordic `Journal of International Law 319; Martina Salerno, 'Can Diplomatic Assurances, in their Practical Application, Provide Effective Protection Against the Risk of Torture and Ill Treatment? A Focus on the Evolution of the Pragmatic Approach of the European Court of Human Rights in Removal Cases of Suspected Terrorists' (2017) 8(4) NJECL 453.

persecution, the equal emphasis placed upon 'cruel, inhuman and degrading treatment' has extended its scope to cover many of the threats potentially experienced by displaced persons forced to return to places of persecution.[83]

The UNHCR has provided one of the most comprehensive definitions of diplomatic assurances used in the context of the transfer of refugees: any undertaking by the receiving State to the effect that the person concerned (ie. the refugee) will be treated in accordance with conditions set by the sending State or international human rights law more generally.[84] Considering this, international jurisprudence would suggest that States can only rely upon diplomatic assurances to transfer refugees and asylum seekers where the assurance constitutes a sufficient guarantee that the individual's rights will be respected and that they won't face the persecution on arrival that led to their flight.[85]

Nevertheless, the major criticism of diplomatic assurances (as an instigator of the diminishing value of non-refoulement) is that their application and use is having the exact opposite effect. Indeed, they can be seen as creating a parallel scheme of obligations which undermine the value of other more comprehensive duties arising from treaties, customary law, and case law.[86] Nowak suggests that this occurrence has been kickstarted by one State's implicit acceptance that another State may never comply with their wider obligations without some form of additional incentive.[87] Ultimately, it is submitted that the use of diplomatic assurances in this way has the effect of undermining non-refoulement because these agreements are generally a more simplistic reiteration of what a State should already be doing. When this is combined with an already questionable history of rights abuses,[88] it cannot be said to any degree of certainty that the receiving State will follow these obligations as well.[89] They are, therefore, a troublesome outcome waiting to happen.

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[83] Caelin Briggs, *Non-Refoulement in the Context of Internal Displacement* (Norwegian Refugee Council and Internal Displacement Monitoring Centre 2017) 6.

[84] UNHCR 'UNHCR Note on Diplomatic Assurances and International Refugee Protection' (Geneva 2006).

[85] *Saadi v Italy* App No 37201/06 (ECtHR, 28 February 2008).

[86] Vassilis Pergantis, 'Soft Law: Diplomatic Assurances and the Instrumentalization of Normativity: Wither a Liberal Promise? (2009) 56(2) NILR 137, 158.

[87] Nowak (n 82) 687.

[88] As will logically be present where the sending State needs to establish a separate diplomatic agreement of this nature with the receiving State. If the receiving State were already ensuring the upkeep of human rights within its territory, no diplomatic assurance would be necessary.

[89] Skoglund (n 82) 334.

Pursuant to these criticisms, a small group of academics do still argue that diplomatic assurances have the effect of bolstering principles such as non-refoulement by ensuring that refugee-creating occurrences of persecution are removed at the source. As Jones argues, diplomatic assurances can potentially be more compelling than treaties as they are essentially a bilateral agreement made between a supposedly powerful State and a much weaker State, whereby the powerful State is able to use the threat of cutting future diplomatic ties in order to compel compliance.[90] However, one only has to look to the past to discover that this argument falls short of the truth as there have been numerous instances of States failing to comply with these agreements both within and outside of the refugee context. An example of this can be seen in *Ahmed Hussein Mustafa Kamil Agiza v Sweden*.[91] Hence, even Jones accepts that these diplomatic assurances are often weakened by lacking a legally binding nature.[92] While Salerno also asserts that the fact they can be merely verbal places them upon an even weaker foundation.[93]

As a result, it can no longer be asserted that non-refoulement in the refugee context is an absolute protector of wider human rights, as some have been shown to argue. Diplomatic assurances allow States to undermine the protections non-refoulement should afford to refugees. As a result, any suggestion that it is still the cornerstone of refugee protection is an increasingly weakened assertion.

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[90] Kate Jones, 'Deportations with Assurances: Addressing Key Criticisms' (2008) 57(1) The International and Comparative Law Quarterly 183, 188.

[91] (2005) 12 IHRR 958. The complainant ("Agiza") was an Egyptian national suspected of terrorist activities, detained in Egypt after being removed from Sweden. Despite a history of alleged torture by Egyptian authorities and a court martial sentencing Agiza *in absentia* to 25 years imprisonment without possibility of appeal, the Swedish government rejected the asylum application of Agiza and expelled him to Egypt following written assurances that he would: (i) Be exempt from the death penalty, (ii) be free from torture or ill-treatment, and (iii) be provided with a fair trial. Upon his return, Agiza was held incommunicado for five weeks and it was later alleged, by Swedish diplomats monitoring his situation, that he was tortured and/or ill-treated. This included being placed in a punitive isolation cell no bigger than 1.5 square metres, restricted access to drinking water, electrocution and physical beatings while blindfolded. In this instance, the UN Committee Against Torture held that Sweden's transfer of Agiza was incompatiable with international law and that the assurances received were insufficient to protect against the manifest risk. The diplomatic assurances had patently failed.

[92] Jones (n 90), 188-189.

[93] Salerno (n 82) 458.

d. Exclusion Clauses and Permissible Derogations

The penultimate discussion surrounds the exclusion clauses and permissible derogations to non-refoulement. As has been outlined previously within this paper, Article 33(2) of the 1951 Convention permits the refoulement of a refugee either where there are 'reasonable grounds' to regard that person as a security threat or where he/she has been convicted by final judgement of a 'particularly serious crime', and therefore constitutes a danger to the community of the host country.[94] Despite the fact that the UNHCR has consistently advocated for a balancing test to be applied,[95] both domestic and international jurisprudence points towards this provision providing States with an absolute right to expel refugees who fall within its scope.[96] Such an exception based upon similar personal factors does not feature in any other instruments relevant to this paper, save only for Article 3(2) of the Declaration on Territorial Asylum which cites as reasons for permissible refoulement (i) over-riding considerations of national security, (ii) to safeguard national security, and (iii) to protect the population.

Importantly, it is not submitted that the non-refoulement principle should be wholly without limitations to its application. Indeed, there are valid arguments for balancing both security and humanitarianism, most notably where terrorist affiliations have been discovered after the declaration of refugee status.[97] However, the language adopted within these derogation clauses leaves too much scope for judicial and governmental interpretation for non-refoulement to contain the certainty and effectiveness that those who support its cornerstone status proclaim.[98] O'Byrne writes that whilst there are a number of supervisory bodies and organs operating around the 1951 Convention, the lack of an authoritative supervisor heightens the risk of differing determinations within various broadly constructed

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[94] 1951 Refugee Convention (n 6).

[95] UNHCR, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' (4 September 2003) HCR/GIP/03/05; UNHCR, 'Note on Non-Refoulement (Submitted by the High Commissioner)' (23 August 1977) EC/SCP/2 para 14.

[96] *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556, 563; *T v Secretary of State for the Home Department* [1996] AC 742 (HL) 769; *INS v Aguirre-Aguirre*, 526 US 415, 425-428 (1999); *S v Refugee Status Appeals Authority* [1998] 2 NZLR 301 (HC) 314-319; *Malouf v Canada* [1995] 190 NR 230, 230 (Can FCA).

[97] Rene Bruin and Kees Wouters, 'Terrorism and the Non-Derogability of Non-Refoulement' (2003) 15(1) IJRL 5, 6.

[98] Ben-Nun (n 37) 93.

provisions.[99] It is argued that the wide language used (in particular 'reasonable grounds' and 'particularly serious crime') creates too much risk that one State may adopt one meaning whilst another's may be entirely different.

There is much evidence that can be derived in support of this assertion. For example, some States advocate for a more expansive approach to the provision as a whole (e.g., the United States) whereas others have been willing to accept a more relaxed reading (like Canada).[100] It also goes without saying that general refugee policies differ from State to State.[101] Moreover, one can see that the exclusionary clauses exist without any examples or proper meaningful guidelines.[102] Due to this, some States have interpreted and applied the provision in Article 33(2) of the 1951 Convention without recourse to traditionally feminist dichotomy, such as holistic considerations behind the cause of the offence.[103] As a result, they can also be seen to apply overly harshly to some potentially deserving refugees.[104] Thus, the assertions that non-refoulement brings a degree of certainty and security to refugee protection do not ring true.

In addition, the very suggestion that non-refoulement is a norm of *jus cogens* is conceptually difficult to reconcile with the existence of permissible derogations, especially when those derogations are enshrined in treaty-based international law.[105] This is because the two are mutually exclusive. Indeed, a *jus cogens* norm can never be deviated from.[106] This same concern also rings true for non-refoulement within the context of broader human rights law, given that many of the rights to which non-refoulement applies are supposedly non-derogable.[107] Yet legalised derogations, at least within the context of refugees, do exist and are utilised by States.

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[99] O'Byrne (n 11) 332-334, 345.
[100] Ellen D'Angelo, 'Non-Refoulement: The Search for a Consistent Interpretation of Article 33' (2009) 42(1) Vanderbilt Journal of Transnational Law 279, 298-299.
[101] Achilles Skordas and Nicholas Sitaropoulos, 'Why Greece is not a Safe Host Country for Refugees' (2004) 16(1) IJRL 25.
[102] Scott Martin, 'Non-Refoulement of Refugees: United States Compliance with International Obligations' (1983) Harvard International Law Journal 357, 358-359.
[103] Kate Ogg, 'Separating the Persecutors from the Persecuted: A Feminist and Comparative Examination of Exclusion from the Refugee Regime' (2014) 26(1) IJRL 82.
[104] ibid.
[105] Padmanabhan (n 69) 85.
[106] Vienna Convention (n 48) Article 53.
[107] UNHCR (n 7) 3.

Clearly, the inclusion of these permissible derogations damages any assertion of peremptory status and leads us to conclude that non-refoulement is not so absolute.[108] Fundamentally, their wide scope for interpretation caters for the slippery slope effect, with some States likely to allow more offences to fall within the remit of the derogation clauses. This will lead to non-refoulement being of a less fundamental nature and it will offer less protection to refugees.

IV. Non-Refoulement and the COVID-19 Pandemic

Whilst the measures to be considered within this section have all arisen as immediate responses to the COVID-19 pandemic, they are better understood as an exacerbation of those underlying tendencies outlined above. They provide yet more evidence to suggest that non-refoulement is no longer the cornerstone of refugee protection.[109] Nevertheless, before one moves to discuss these measures, a number of legal matters must first be addressed.

Although not a derogation clause as such, Article 9 of the 1951 Convention tentatively affirms the right of State parties to adopt temporary measures in times of 'grave and exceptional circumstances' that are essential to national security.[110] These measures only apply 'pending determination … that the person is in fact a refugee'.[111] Thus, while an ongoing pandemic could foreseeably be a grave and exceptional circumstance, Article 9 cannot be invoked to justify large-scale rejection or expulsion of refugees and asylum seekers under that context.[112] Although the previously-considered derogation clause within Article 33(2) of the 1951 Convention permits refoulement under the same national security umbrella, its intended restrictiveness renders it, in all likelihood, non-applicable to the COVID-19 pandemic.[113] Simply put, a broad range of case-law makes it abundantly clear that the threatened harm

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[108] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (University of Lapland Publications in Law 1988) 261-262.
[109] Ghezelbash and Feith Tan (n 12).
[110] 1951 Refugee Convention (n 6).
[111] ibid.
[112] Vincent Chetail, 'Crisis Without Borders: What Does International Law Say About Border Closure in the Context of COVID-19?' (2020) 2 Frontiers in Political Science 1, 2-3.
[113] Court of Appeal of New Zealand, *Attorney General v Zaoui* (2004) Dec No CA20/04, para 136.

must be grounded in reasonable suspicion.[114] It is inherently unlikely however that one individual (who may not even be infected themselves) could reasonably be seen to risk the entire security of a nation.[115]

A similar sentiment rings true for international human rights law, within which States can derogate from a number of rights in times of such public emergencies (eg. a global pandemic).[116] Nevertheless, they cannot derogate from those rights which give rise to non-refoulement considerations - which remain applicable in any circumstance.[117] This particular factor is, of course, ever more important given non-refoulement's existence within a number of wider international human rights norms.

When the World Health Organisation (WHO) proclaimed that SARS-CoV-2 (COVID-19) had become a global pandemic, they did so citing concerns over the speed with which the virus was spreading across the globe.[118] Thus, they called upon all States to immediately implement measures to halt COVID-19 in its tracks.[119]

As a result, an Emergency Order was issued by the United States blocking entry via its shared borders with both Mexico and Canada for all individuals who required a border check.[120] Owing to the fact that this applied regardless of one's citizenship, it therefore applied irrespective of whether the person attempting to make the crossing sought to make a claim

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[114] ibid; *Attorney General v Zaoui (Zaoui II)* [2005] NZSC 38, para 44-45; Supreme Court of Canada, *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 1 SCR 3, para 90; *Kaddari v Minister for Immigration and Multicultural Affairs* [2000] 98 FCR 597, 601; *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54.

[115] *Suresh* (n 113) para 90; UNHCR and IOM, 'COVID-19: Access Challenges and the Implications of Border Restrictions' (IASC 2020) <https://interagencystandingcommittee.org/system/files/2020-05/COVID%2019%20-%20Access%20Challenges%20and%20Implication%20of%20Border%20Restrictions%20%28UNHCR%20and%20IOM%29.pdf> accessed 30 March 2021.

[116] Most notably: ICCPR (n 24) Article 4(1).

[117] ibid.

[118] Dr Monique Eloit, 'WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020' (*World Health Organisation*, 11 March 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> accessed 19 May 2021.

[119] ibid; see also: 'Human Rights Dimensions of the COVID-19 Response' (*Human Rights Watch*, 19 March 2020) <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response> accessed 14 May 2021.

[120] The Public Health Service Act; Order Suspending the Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed Reg 17060 (March 26, 2020) (Centers for Disease Control and Prevention).

for asylum.[121] Hence, those entitled to non-refoulement may have experienced border-post rejection.

Furthermore, the European Council adopted what would colloquially become known as the EU Travel Ban.[122] Although subsequently-released guidance did in fact clarify that both refugees and asylum seekers remained eligible for entry, only a handful of States actually reiterated this themselves (Bulgaria, Ireland, Luxembourg and Romania).[123] Both Italy and Malta went entirely against this clarification, citing that they could no longer be considered as safe harbour for refugees entering via the maritime border.[124] Similar refugee-rejecting stances were adopted outside the Global North, including in Australia.[125]

Ultimately, these occurrences demonstrate a clear rising prevalence rate of non-refoulement violations, primarily through border-post rejections, extra-territorial rejections, and push-back policies.[126] Beyond this, they portray an ever-increasing willingness by State leaders to ignore the rights of refugees and asylum seekers, and to bypass once-considered norms of international law. Perhaps most alarmingly, particularly within the United States, these measures demonstrate how some State leaders have (and thus, could again in the future) used true crises as a blatant cover for controversial policy priorities which would have been impossible before the emergence of COVID-19.[127]

For many people, however, the health of a State's population represents a potentially justifiable reason to encroach upon (or suspend) certain rights. It is for this reason that certain areas of international law do permit derogations in times of such crises. As shown earlier

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[121] ibid; Salvo Nicolosi, 'Non-Refoulement During a Health Emergency' [2020] (EJIL:Talk!) <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency> accessed 9 May 2020.

[122] European Commission, 'Communication From the Commission: COVID-19: Temporary Restriction on Non-Essential Travel to the EU' COM(2020) 115 Final.

[123] European Union Agency for Fundamental Rights, 'Migration: Key Fundamental Rights Concerns' (FRA Quarterly Bulletin 2, 2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-migration-bulletin-2_en.pdf> accessed 11 May 2021.

[124] Nicolosi (n 120); see: International Convention on Maritime Search and Rescue (adopted on 27 April 1979, entered into force 22 June 1985) 536 UNTS 456.

[125] Prime Minister of Australia, Press Release (19 March 2020) <https://www.pm.gov.au/media/border-restrictions> accessed 10 May 2021; Department of Home Affairs, 'COVID-19 and the Border Travel Restrictions and Exemptions' (14 December 2020) <https://covid19.homeaffairs.gov.au/travel-restrictions> accessed 10 May 2021.

[126] See all case-law within footnote 29. See also: UN Declaration on Territorial Asylum (n 5); UNHCR (n 31); UNGA (n 32).

[127] Ghezelbash and Feith Tan (n 11); For a full discussion of emergency measures adopted as a result of the COVID-19 Pandemic, see this article.

within this section, however, neither the 1951 Refugee Convention nor any other instruments relevant to non-refoulement contain any such clause applicable to this scenario. These measures are therefore grievous violations of international law that go against the non-refoulement principle's very aim.[128] By refouling (and rejecting) refugees and asylum seekers during a pandemic, States not only expose those same individuals to the rights violations that led to their initial flight, but also to a plethora of additional ones. Possible violations include, but are by no means limited to, the right to an adequate standard of living and the right to access the highest attainable standard of health.[129] Both are at increased risk during a pandemic when refugees are rejected and forced either into over-crowded camps or to return back home.[130]

Concluding Remarks

Despite the potential importance of both non-refoulement and its primary codification in Article 33(1) of the 1951 Refugee Convention, the principle simply does not carry the strengths which its drafters clearly intended it to have. Further, it is not given adequate respect by Convention adopting States. For these reasons, this paper has argued that non-refoulement, in its current position, cannot be regarded as the cornerstone of international refugee protection.

As has been demonstrated through the above discussion, an effective principle of non-refoulement should prevent reciprocity occurring in the lives of current, returned, or rejected refugees, and uphold and promote a wide array of further human rights. By keeping refugees away from the States they once fled (or away from other States where they may face similar persecution), fewer persons will be exposed to rights violations.

Nevertheless, it is unfortunately clear that there are numerous ways in which non-refoulement is being heavily undermined on the international scale. Crucially, numerous States can increasingly be seen to adopt a plethora of policies that either act in a manner

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[128] See: Section 3.

[129] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) articles 11 and 12.

[130] Geoff Gilbert, 'Knowing All of the Law, All of the Time: Responding to COVID-19' (2020) 32(3) IJRL 502; Laura van Waas and Ottoline Spearman, 'The Life-or-Death Cost of Being Stateless in a Global Pandemic' (2020) 32(3) IJRL 498.

directly violating non-refoulement (such as the push-back policies discussed) or undermine its scope by allowing it to be subverted through international contracts (as is the case with both 'Safe States' and diplomatic assurances). These factors are exacerbated by unsupervised derogation clauses, which afford States the opportunity to entirely disregard the non-refoulement principle. In light of the COVID-19 pandemic, it is abundantly clear that a growing number of States are willing to ignore international obligations and potentially refoul a significant number of refugees without due consideration for their plight. These are the reasons why non-refoulement is no longer the cornerstone of refugee protection.