De Lege Ferenda (2021) Vol III, Issue i, 57–75

Non-Refoulement in International Human Rights Law – India's Legal Obligation to Protect Refugees

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I. Introduction

The rise in authoritarian regimes has led to instability in the world order. Implementation of inhumane and life-threatening policies has forced millions of people to flee their homes and seek refuge in other parts of the world. Fleeing collectively, these asylum seekers are not welcomed by States and are left without support, often stranded in between seas and oceans. As States do not entertain asylum seekers, multiple non-profit organisations have now come up to assist them. The most recent example of such help is Banksy's search and rescue ship called Saint Louis.[1] Coloured in pink graffiti, the ship roams around in the Mediterranean Sea to look out for stranded asylum seekers. These rescued people, however, have to be taken to ports or borders of States for their rehabilitation. Unfortunately, in response to the asylum seekers' request, State often shut their doors. The United Nations High Commissioner for Refugees (UNHCR) has requested States to let the persons rescued by Saint Louis inside their territory since the ship has reached its maximum capacity, but to no avail. This is merely one example of how States treat refugees who knock on their doors. With the advent of the COVID-19

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[1] Lorenzo Tondo and Maurice Stierl, 'Banksy Funds Refugee Rescue Boat Operating in Mediterranean' (*The Guardian*, 27 August 2020) <www.theguardian.com/world/2020/aug/27/banksy-funds-refugee-rescue-boat-operating-in-mediterranean> (accessed 27 August 2020).

pandemic, multiple other challenges have cropped up and now asylum seekers are more vulnerable than ever.

This article will analyse the obligation of *non-refoulement* under international human rights law (IHRL). The general analysis applies to all states that have ratified international human rights treaties and conventions but are not parties to the 1951 Refugee Convention. The main focus of the article would remain India's responsibility under the principle of *non-refoulement*. I first give a context of the refugee situation and law in India and then move on to check the relevance of international law as a source in the Indian Constitution. Part A of Section IV analyses the contribution of the 1915 Refugee Convention towards the protection of refugees and asylum seekers, Part B focuses on IHRL regime, while Part C concludes that *non-refoulement* is customary international law. In Section V, I argue that India wrongly perceives *non-refoulement* as a non-obligatory principle. Section VI concludes.

II. Refugee Influxes after Independence and the Citizenship Amendment Act, 2019

The enactment[2] of the Citizenship Amendment Act (CAA), 2019 by the Indian Government had created a pandemonium in the nation. Nationwide protests erupted against the enactment of the CAA, with the longest being women-led Delhi's *Shaheen Bagh* protest. The selectivity in granting fast-track Indian citizenship to certain groups of refugees has been 'unwelcomed' by different groups of people for different reasons. With the insertion of a proviso for section 2(l)(b) in the 1955 Act, the CAA removes the 'illegal immigrant' status of people belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before 31 December 2014. This proviso excludes the Muslim community and thus violates article 14 of the Constitution by creating a differentiation on the ground of religion.

The Act has been opposed by the general population because it goes against the right to equality and the Constitution.[3] However, the Assamese indigenous population has opposed it out of fear[4] of the Bangla-speaking population

[2] In January 2020, the Citizenship Amendment Act, 2019 (CAA) came into force, amending the Citizenship Act, 1955.

[3] Roshni Sinha, 'Issues for Consideration: The Citizenship (Amendment) Bill, 2019' (*PRS Legislative Research*, 9 December 2019) <www.prsindia.org/billtrack/citizenship-amendment-bill-2019> (accessed 12 August 2020).

[4] PTI, 'It's not about religion, it's about Assam & Assamese pride: AASU advisor on anti-CAA protests' (*The Print*, 21 December 2019) <https://theprint.in/india/its-not-about-religion-its-about-assam-assamese-pride-aasu-advisor-on-anti-caa-protests/338982/> (accessed 12 August 2020).

overpowering them through a fast-track citizenship access.[5] During the British rule, Bengali administration governed Assam which led to an increase in Bengali speaking population in the State. With Bengali garnering more importance, and the Bengali speaking population taking over agriculture, the influx of Bangladeshi migrants during the 1970s caused agitation in Assam. As a settlement, the Assam Accord was signed in 1985 which set March 24, 1971, as the cut-off date of detection and determination of illegal migrants. The protesters in Assam say that the CAA violated the Assam Accord and that it threatens indigenous identity.

While this is not the first instance of refugee influx in India, such response of the State is surely a first. During partition, citizenship was granted to refugees in two waves.[6] In the first wave, Hindus and Sikhs returning from Pakistan were allowed inside without any limitation and were granted direct Indian citizenship. They were allowed to stay in the houses of Muslims who had initially left India to go live in Pakistan. However, the second wave brought back many of these Muslim families. With their houses being already occupied, these Muslims had nowhere to live. To address the scarcity of housing, the Indian Government decided to enact a permit system for further entry. Many were excluded in the cumbersome process of obtaining entry permits from the Indian High Commission in Pakistan. The influx of partition refugees was followed by the entry of Sri Lankan Refugees and the Afghan Refugees, who have also been granted Indian citizenship. Recently, the Union Finance Minister herself acknowledged that more than four lakh Sri Lankan Refugees and about a thousand Afghan Refugees have been granted citizenship in the last few years.[7]

While these groups opted for an Indian citizenship, many Tibetan refugees led by The Dalai Lama entered India after the Chinese invasion in Tibet in 1959. Out of approximately 80,000 refugees, many have decided to retain their refugee status as a symbolic move to protest against China for a free Tibet. From these instances, it is clear that India has been a melting pot of asylum seekers since

[5] Section 6 of the CAA replaces eleven years with six years, thus reducing the aggregate period of residence or service of Government in India for the people belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan. Citizenship Amendment Act 2019, s 6.

[6] Abhinav Chandrachud, 'The Origins of Indian Citizenship' (*BloombergQuint*, 26 December 2019) <www.bloombergquint.com/opinion/citizenship-amendment-act-the-unsecular-origins-of-indian-citizenship-by-abhinav-chandrachud> (accessed 15 August 2020).

[7] IANS, '2,838 Pakistanis, 914 Afghans given Indian citizenship in last six years: Sitharaman' (*Livemint*, 19 January 2020) <www.livemint.com/news/india/2-838-pakistanis-914-afghans-given-indian-citizenship-in-last-six-years-sitharaman-11579434722241.html> (accessed 27 August 2020).

Independence. Therefore, it becomes necessary to look at India's responsibility under international law for the protection of these groups.

III. International Law under the Indian Constitution

In order to ascertain which law would be directly applicable or would help in the interpretation of domestic law while creating binding legal obligations, looking into the sources of law is necessary. In India, the main source of law is the Constitution.[8] The Constitution of India in Article 51(c) directs the State to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Further, Article 253 states that only the Parliament has the power to make laws to effectuate any treaty obligations, pointing towards India's Dualist nature. The Supreme Court in *Jolly George Varghese v Bank of Cochin*,[9] had held that international law would have to be incorporated into municipal law to create a binding effect. However, it can be seen that Indian courts have not only been resorting to international law to interpret Fundamental Rights but also to enforce them, thus functioning as a rather Monist State. It has often been argued that although formally India is considered to be dualist, in the current era, Parliamentary approval is not required to incorporate international law in the domestic order. This has made India a functionally monist State since the Courts are not only incorporating international law through interpretation but also directly applying it to the domestic law.[10]

In one of the landmark cases the Supreme Court dealt with the basic structure doctrine in the Constitution, referring to Article 51 of the Constitution.[11] Justice Sikri resorted to the Universal Declaration of Human Rights for the interpretation of inalienability of fundamental rights.[12] A similar reliance on international law could be seen in the recent decision of the Supreme Court in *Justice KS Puttuswamy*

[8] 'Constitution' (*Supreme Court of India*) <https://main.sci.gov.in/constitution#:~:text=The%20fountain%20source%20of%20law,Legislatures%20and%20Union%20Territory%20Legislatures> (accessed 25 August 2020).

[9] *Jolly George Varghese v Bank of Cochin* 1980 AIR 470.

[10] Aparna Chandra, 'India and International Law: Formal Dualism, Functional Monism' (2017) 57 *Indian Journal of Intl Law* 25.

[11] *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461.

[12] ibid.

v Union of India.[13] Further, in *People's Union for Civil Liberties v Union of India*,[14] the Supreme Court had held that the provisions of the International Covenant on Civil and Political Rights (ICCPR) which help in effectuating the provisions of the Constitution are directly enforceable.

Extending this reference on international law merely for the purpose of interpretation and enforcement of rights, the Supreme Court has also incorporated international legal instruments in domestic law. In *Vishaka v State of Rajasthan*,[15] the Supreme Court went on to incorporate the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in Indian Law. Further, in *Vellore Citizens Welfare Forum v Union of India*,[16] Customary international Law was held to be automatically incorporated in the domestic law in the absence of any contrary municipal law. In *M.V. Elisabeth v Harwan Investment and Trading Pvt Ltd*,[17] the Court even applied treaties which have not been ratified by India. Therefore, it can be concluded that international law has always been a source of law[18] for the Indian legal system.[19]

IV. International Responsibility of States

Right after experiencing the wrath of WWII, the UN General Assembly established the UNHCR in 1950 for helping displaced Europeans. Realising the importance of a legal framework and following the legacy of Fridtjof Nansen, who introduced the 'Nansen Passport' which is the first-ever legal instrument for the protection of refugees' rights, the 1951 Refugee Convention and the 1967 Refugee Protocol were adopted. A total of 148 States are Parties to either or both the Convention as well as the Protocol. India is one of the non-signatory States.

The development of international refugee law got a head start with the creation of the UNHCR and the adoption of the Refugee Convention. However, obligations to protect refugees existed even before that, in instruments like the International Refugee Organisation Constitution and the Universal Declaration

[13] (2017) 10 SCC 1. In Part J of the judgement, the Court analysed India's commitments under International Law while referring to Article 51 of the Constitution. It held that constitutional provisions have to be interpreted in conformity with an international mandate.

[14] *People's Union for Civil Liberties v Union of India* AIR 1997 SC 568.

[15] *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

[16] *Vellore Citizens Welfare Forum v Union of India* 1996 5 SCR 241.

[17] *M.V. Elisabeth v Harwan Investment and Trading Pvt Ltd* AIR 1993 SC 1014 (Supreme Court of India).

[18] Guy S. Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Law' (2020) 69 ICLQ 1.

[19] cf Chandra (n 10) 41.

of Human Rights (UDHR).[20] Moreover, post its adoption, multiple other human rights instruments were also adopted which protect several rights of asylum seekers, refugees and statelessness persons.

A. Member state responsibility under the refugee convention

Protection under the Refugee Convention is granted in *two levels*. The *first* is that a person should fulfil the conditions given under Article 1 of the Convention to qualify as a 'refugee'. The *second level* is that the person has to be declared a 'refugee' by the State in which they want to seek refuge.[21] It means that the under the Convention, a person could already be a refugee, but the State or UNHCR need to declare them as a 'refugee'. The moment a person fulfils the Convention definition requirement, they become a refugee and are entitled to the rights therein. However, to seek those rights from a State where they want asylum, a declaration of their refugee status is needed. While most rights are given at the *first level*, some specific rights are given in the *second level* i.e., when the person becomes a "lawful refugee".

Under Article 1, the Convention has a rather narrow definition of 'refugee' since it applies only to events occurring in Europe before 1951. Thus, the Protocol was adopted in 1967 to remove its geographical and temporal limits. So, combining both instruments, a 'refugee' is a person who has a "well-founded fear" of "persecution" "for reasons of race, religion, nationality, membership of a particular social group or political opinion", as a result of which they are "unable" or "unwilling" to return to a country of which they are nationals or were "former habitual residents". While the Convention does not define the necessary elements of this definition, there is ample of literature such as UNHCR publications, decisions of national and international adjudicatory bodies and other scholarly work, available for interpretation.

The UNHCR and domestic courts have observed that this "fear" has subjective as well as objective elements.[22] By subjective, it means that a person has to have a feeling of fear (of persecution) in their minds on returning to their country. An objective requirement means that the person's subjective fear has to fit in the overall factual scenario. If the subjective fear is not coupled with the

[20] Guy S. Goodwin-Gill and Jane McAdams, *The Refugee in International Law* (3rd edn, OUP 2007) 19–20.

[21] UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' (Geneva 1992)

[22] James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 91–92.

objective element of fear, then the asylum request of the person can fail. The assessment of the nature of the element is done on the basis of facts of the case. Due to the lack of a definition of "persecution" in the Refugee Convention or Protocol, the assessment of whether a case would fall under the ambit its ambit is highly subjective. Hathaway and Foster*23* have bifurcated "persecution" into two elements – 'serious harm' and lack of protection against that 'serious harm' in the domestic law of the person's country of origin. Linking Article 1 of the Convention to Article 33(1), this 'serious harm' would mean a threat to the life or freedom of the person. For the interpretation of what would constitute 'serious harm', violation of human rights has to be considered. On "former habitual residence", scholars[24] have observed that it provides relief to those persons who were already not living in their country of origin and thus would be stateless after not being able to return to their "country of former habitual residents".

The refugee status of a person is lost once they attain the nationality of any State, including their own State, or when the circumstances owing to which they had attained their refugee status cease to exist.[25] The Convention does not apply to persons who get "rights and obligations" similar to a national of that country where they are currently residing.[26] In order to maintain its function, Article 1E was inserted which says that a person who at that time, enjoys the "rights and obligations" like the nationals of that country have, then they would not be given the refugee status under the Convention or Protocol. It has been observed that such a treatment is given to persons prior to their attaining nationality, so this Article applies to the buffer period. Further, "rights and obligations" does not mean only fundamental rights and obligation, but all other rights which a national of that country normally enjoys. However, a few exceptions to these rights would be permissible. For example, Article 1E also excludes from its ambit, persons who have committed war crimes or crimes against humanity, or serious non-political crimes, or persons guilty of committing acts contrary to the principles of the UN. These exclusionary provisions were inserted in the Convention in order to make States accept the Convention. This provision has been added in the Convention because

[23] ibid 182–186.

[24] Guy S. Goodwin-Gill, 'The International Law of Refugee Protection' in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona (eds), *Oxford Handbook of Refugee and Forced Migration* (OUP 2014).

[25] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1C.

[26] UNHCR 'UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees' (Geneva 2009).

refugee law aims to protect persons who do not normally have the protection of any State or any basic rights.

The Convention and Protocol impose certain obligations on the State Parties and grants rights to the refugees after they qualify as 'refugees' under the *first level*, as mentioned above. All these rights and obligations do not have the same standard, and the Convention has divided them into three categories[27] – national treatment,[28] most favoured treatment[29] and treatment "accorded to aliens generally".[30] National treatment means that the rights granted to the refugees are similar to the standard accorded to the nationals of that country. Right to practice religion, access to courts, exemption from *cautio judicatum solvi* (exemption from the payment of bond-money) are some examples. In rights relating to intellectual property, rationing, elementary public education, public relief, social security, the standard is similar to what is accorded to the nationals of the country of their habitual residence. The standard of most favoured treatment means that the refugee would be given the rights as other people who are in the same circumstances as them. This standard applies to the right of association and right to work. Lastly, treatment "accorded to aliens generally" standard ensures the minimum standard of protection of the rights of aliens under international law. These rights generally include the right to life and property.

In addition to the above-mentioned categorization of rights, the Convention also imposes on the States, absolute obligations of *non-refoulement*[31] (explained in the next section), non-expulsion[32] and non-penalisation for unlawful entry.[33] The principle of non-expulsion applies to "lawful refugees" and says that they cannot be expelled from the State Party without a "decision reached in accordance with due process of law".[34] Expulsion means that once a State Party has lawfully allowed the request of the refugee for asylum, the State cannot expel a "lawful refugee" for any wrongful acts committed by them. It can do so only if it finds that the State's national security and public order is being threatened by allowing the refugee to

27 Paul Weis, 'Transnational Legal Problems of Refugees' (1982) 3 Mich. J. Int'l L 27.

28 Norwegian Refugee Committee and ICLA, 'The Obligation of States towards Refugees under International Law: Some Reflections on the Situation in Lebanon' (*NRC*, June 2016) <www.nrc.no/globalassets/pdf/reports/obligations-of-state.pdf> (accessed 25 August 2020).

29 ibid.

30 Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (UNHCR 1990).

31 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.

32 ibid art 32.

33 ibid art 31.

34 UNHCR 'Note on Expulsion of Refugees' (24 August 1977) UN Doc EC/SCP/3.

stay. Here, expulsion does not mean sending the refugee back only to their origin country, but anywhere in the world. Since a refugee is a person who does not have the protection of any State, expelling under Article 32 in the name of national security and public order has to be the last resort. The provision also allows the State to adopt internal measures to take actions against the acts committed by the refugee in consideration. Such international measures have to it to be proportionate to the acts committed by the refugee in question. Further, the order of expulsion has to be passed only as per the due process of law, meaning that the refugee has to be given a sufficient chance to present their case before courts. In case the refugee is ordered to be expelled, sufficient time has to be provided to them to find another country to seek refuge in.

(i) Non-Refoulement under the Refugee Convention

Under the Convention, the principle of *non-refoulement* means that a refugee must not be sent back to territories where their life or freedom would be threatened because of their "race, religion nationality, membership of a particular social group or political opinion". Although the principle comes with an exception, *non-refoulement* is considered a non-derogable[35] and absolute obligation under the Convention. Its non-derogable nature has been affirmed in the Protocol under Article VII(1). Since *non-refoulement* "embodies the humanitarian essence"[36] and is one of the core principles of the Convention, Article 42(1) prohibits reservation of the State Parties to Article 33. One of the most important aspects of the principle of *non-refoulement* is that it is applicable at *level one* i.e. without the refugees being formally declared as 'refugees' by a State.[37] It therefore applies to declared 'refugees' as well as asylum seekers.[38] This view has also been affirmed by the Executive Committee of the UNHCR and the UN General Assembly.[39]

The obligation of *non-refoulement* is for all States Parties of either the Convention or Protocol. Breaking down the elements of Article 33, the obligation is not limited by a territorial application.[40] This means that State Parties are

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

[36] ibid.

[37] ibid 116–18.

[38] ibid.

[39] UNGA Res 52/103 (9 February 1998) UN Doc A/RES/52/103; UNGA Res 53/125 (12 February 1999) UN Doc A/RES/53/125.

[40] Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 Mich. J. Int'l L 223.

obligated not only when the refugees are on the territory or border of the State Party but at every stage when that State takes action to remove the refugee. This might be even when the refugee has not reached the border of the State and the action is precautionary. Further, it also obligates a State when the refugee comes under their effective control or gets affected by the acts of the officers of that State.[41] In the context of State responsibility, the principle also applies to organs and agents of the State. It also extends to acts done by the State through another State(s).

The principle of *non-refoulement* prohibits actions of State Parties which make refugees go to the "frontiers of territories" where their life or freedom is at risk of persecution. From this, it can be gathered that the principle not only stops States from sending refugees back to their country of origin but anywhere where they might face a risk of persecution. An important aspect related to *non-refoulement* in this regard is the situation where a refugee is being sent to a third country by the sending State Party and whether that would be a violation of *non-refoulement*. Scholars have observed that the Convention imposes an obligation on the States not only with respect to direct action but also indirect action.[42] However, this does not mean that sending refugees to a third country is prohibited. It merely means that the State has to make sure that after sending the refugee to a third country, that country would ensure that the refugee's life or freedom is not at risk.[43] It also demands the assurance of the third country that it would not send the refugee back to their country of origin, thus exposing them to the risk of persecution.[44]

Since *non-refoulement* is a right available to persons whose refugee status is not declared, the exception to its application is narrower than the exceptions available under Article 1F of the Convention. Article 33(2) states that non-refoulment "may not" apply to those persons who have been "convicted by a final judgement" for a "serious crime" in either the country of origin or the place they want to seek refuge in. As opposed to the wording of Article 1F – "shall not", Article 33 gives a choice to the State to decide whether or not to apply the exception. The provision has been drafted keeping in mind the importance of the principle of *non-refoulement* under international law. Article 1F also does not require the "conviction" of the person but only "serious reasons" to believe that such person has committed serious crimes. Whereas, Article 33 requires "conviction" by the apex court of law. Further, the provision says that such a person should be perceived as a threat

41 ibid.

42 cf Lauterpacht and Bethlehem (n 35) 122–123.

43 ibid.

44 ibid.

to the community or the security of that country.[45] This requirement imposes an additional layer for taking away the protection of *non-refoulement*. A convict of serious crimes does not automatically get excluded, but the State has to have reasons to believe that they pose a threat to the security of the country or community. According to Lauterpacht and Bethlehem, Article 33 has a higher threshold than Article 1F because it requires a future threat, whereas Article 1F works on the basis of past actions. It has been argued that even after the application of Article 33, the excluded person has to be sent to a safe place.[46]

B. Non-member state responsibility with special focus on India

Since the Refugee Convention and Protocol apply only to those persons who satisfy the conditions laid down under Article 1, persons who do not come under its ambit are left excluded. In order to protect refugees not governed by refugee law, *non-refoulement* of refugees, asylum seekers and stateless persons is governed by IHRL. IHRL creates binding obligations for protecting refugees, many of which have a wider application than obligations under international refugee law.

The UDHR is called the foundation of IHRL. Laying down non-derogable human rights itself, the UDHR has also influenced other human rights instruments. The Constitutions of many countries, including India, have been drafted on similar lines as the UDHR. India has ratified the International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). It has not ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) but is a signatory. Apart from these instruments, India is also a party to the Geneva Conventions, which form international humanitarian law (IHL). Many obligations under these instruments have now taken the form of customary international law.

IHRL gives rise to certain rights which have to be protected by the States at all cost. These rights being most fundamental, have also been incorporated in the Constitutions of many States, India being one of them. Therefore, while

[45] ibid 129.
[46] ibid 131–134.

interpreting these rights under the domestic law of India, IHRL jurisprudence also helps while dealing with the questions of refugee protection.[47]

(i) Non-Refoulement under International Human Rights Law

While other human rights instruments do not have specific provisions for *non-refoulement*, the CAT under Article 3 specifically prohibits it. It states that the prohibition from torture is absolute and the right against torture is non-derogable. In this respect, no State can send any person to another State where there are "substantial grounds" for believing that they would be subject to torture.[48] The CAT also takes care of situations where persons are sent to a third State by the receiving State.[49] Interpretation of *non-refoulement* under the CAT not only ensure the right against torture but also the right to dignity to persons. It has been observed that such persons, if not being sent to another territory, should also not be detained by the State in question.[50]

Article 6 of the ICCPR ensures the right to life for everyone. It says that no one can be arbitrarily deprived of their life. Article 4 of the ICCPR states that the right to life is a non-derogable right, which sets a higher threshold than being an absolute right. The Human Rights Committee in its General Comment No. 31[51] and 36[52] has interpreted the principle of *non-refoulement* as an extension of the right to life.[53] The Committee observed[54] that it is obligatory for the States to ensure compliance with the Covenant and not to "extradite, deport, expel or otherwise remove" persons from their territory when there are "substantial grounds" to believe that those persons would face a "real risk of irreparable harm" to their right to life and right against torture as a consequence of their removal. Elaborating further,[55] the Committee held that the obligation of *non-refoulement* under the ICCPR is broader than what it is under international refugee law, since

47 cf Goodwin-Gill (n 18) 11.

48 Committee against Torture, 'General Comment No. 4' in 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22' (9 February 2018).

49 ibid.

50 ibid.

51 Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13.

52 Human Rights Committee, 'Article 6: Right to Life' (3 September 2019) CCPR/C/GC/36.

53 Most recently, the Human Rights Committee held that the mental health of a person, including suicidal tendencies, would also be a deciding factor in whether their life would be at risk if sent back to the country of origin, *QA v Sweden*, Human Rights Committee, CCPR/C/127/D/3070/2017 (20 February 2020).

54 cf HRC (n 51).

55 cf HRC (n 52).

it also applies to "aliens not entitled to refugee status".[56] It also imposes a duty on the State to take special measures to protect the right to life of displaced persons, asylum seekers, refugees and stateless persons. General Comment No. 20[57] talks about the nature of the obligation of *non-refoulement* and it was observed that States should not impose any exceptions on the application of the principle.

The Constitution of India grants the right to life under Article 21. This right is granted to Indian citizens as well as to foreigners. Recently, in *P Ulaganathan v Government of India*,[58] the Madras High Court held that even refugees and asylum seekers have the right to life under Article 21 of the Constitution. With respect to *non-refoulement*, the Gujarat High Court in *Ktaer Abbas Habib Al Qutaifi v Union of India*[59] had held that *non-refoulement* is "encompassed"[60] in Article 21.

In the context of non-discrimination, the CEDAW under Articles 1 and 2 ensures that State Parties condemn discrimination against women and maintain gender equality. While interpreting these articles in light of Article 14 of the UDHR, Article 3 of the CAT and Article 7 of the ICCPR, the CEDAW (Committee) observed[61] that *non-refoulement* is enshrined in the CEDAW (Convention). It observed that the Refugee Convention does not identify gender as a ground for discrimination under Article 1 or Article 33. The CEDAW obliges States to not engage in any act or practice that would expose women to a "real, personal and foreseeable risk of serious forms of discrimination". The Committee concluded that such risk would mean a threat to the personal integrity, liberty and security of a woman, including the risk of suffering serious forms of discrimination, gender-based persecution or violence. This risk could be inside or outside the territorial boundaries of the sending State Party. The Committee also recommends the States to enact legislations to respect *non-refoulement* as per international law.

On similar lines as that of the CEDAW, the CRC (Committee) interpreted the principle of *non-refoulement* and its scope under the CRC (Convention). It observed that *non-refoulement* forms an element of the right to life under Article 6

56 *Ioane Teitiota v New Zealand,* Human Rights Committee, CCPR/C/127/D/2728/2016 (7 January 2020).

57 Human Rights Committee, 'Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment' (10 March 1992).

58 *P Ulaganathan v Government of India* Writ Petition (MD) No 5253 of 2009.

59 *Ktaer Abbas Habib Al Qutaifi v Union of India* 1999 CriLJ 919.

60 ibid.

61 Committee on the Elimination of Discrimination Against Women, 'Gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (5 November 2014) CEDAW/C/GC/32.

and right against torture under Article 37 of the CRC.[62] It further held that no child should be sent back from the border or from within the territory of a State if they face a "real risk of irreparable harm". The Committee also observed that the State could be held responsible for direct as well as indirect actions, and also the acts of non-State actors. This was concluded by the CEDAW also.

Even under international humanitarian law, which applies during an international or non-international armed conflict, the Fourth and Third Geneva Convention create an obligation of *non-refoulement*. While Article 45 of the Fourth Geneva Convention an express provision applying to all protected persons, Article 12 of the Third Geneva Convention applies only to prisoners of war. Under both these Geneva Conventions, the obligation of *non-refoulement* is absolute.[63]

C. *Non-refoulement* as customary international law

Customary international law is a source of international law which makes certain norms binding on all States. These rules are equivalent to traditional rules which survive the test of time and take the form of a custom. The determination of whether a norm has attained the status of a custom is not uniform, although the ICJ has given some clarity through various decisions. Two main requirements to identify a custom are – State practice and *opinion juris*. State practice means that the norm has been accepted by all States i.e. it is universally accepted. *Opinio juris* means that such States have accepted the norm because they consider it to be binding upon them and as a result, comply with it.

Non-refoulement has been identified as a rule of customary international law. It has even been identified as a *jus cogens* norm. However, there is also wide disagreement in considering *non-refoulement* a *jus cogens* norm. Costello and Foster have also concluded that *non-refoulement* is customary international law and that it is also "ripe for recognition as a jus cogens norm".[64] Nevertheless, it is universally

[62] Committee on the Rights of Child, 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (1 September 2005) CRC/GC/2005/6.

[63] Jean Pictet (ed), *Commentary IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) 269.

[64] Cathryn Costello and Michelle Foster, '*Non-refoulement* as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015* (Asser Press 1988) 323.

accepted as customary international law, and also has links with other customary norms such as prevention from torture.

On the basis of the three elements given by the ICJ in the *North Sea Continental Shelf Case*,[65] Lauterpacht and Bethlehem have concluded that the principle of *non-refoulement* is customary international law.[66] Firstly, the norm creating a character of *non-refoulement* was identified by relying on various conventions and UNHCR Executive Committee conclusions. It was also concluded that all these instruments support each other in the interpretation of the principle.[67] Secondly, the universal character of *non-refoulement* was highlighted. They held that almost all Member States of the UN, including specially affected ones, are parties to various instruments which state the principle of *non-refoulement*.[68] They further observed that States which are not parties to any instrument have not specifically opposed the principle.[69] Lastly, consistent State practice and general recognition were established by heavily relying on the UNHCR Executive Committee Conclusion[70] which not only states that *non-refoulement* is a customary international law norm but also a *jus cogens* norm.[71] It was also noted that many States which have not signed the Refugee Convention or Protocol are in the Executive Council.[72]

While determining the content of the principle, they concluded that in the human rights context, State practice and *opinio juris* would also be of guidance. They linked the 'persecution or risk' element of *non-refoulement* to the customary prohibition of torture and inhumane treatment.[73] They concluded that implications of considering *non-refoulement* a customary norm would be imposing an absolute obligation on the States to respect the principle without any limitation or exception.[74] In cases of a threat to the national security of the receiving State, they

[65] *North Sea Continental Shelf Case (Federal Republic of Germany/Denmark)* (Judgement) [1969] ICJ Rep 3.
[66] cf Lauterpacht and Bethlehem (n 35) 162.
[67] ibid 141–142.
[68] ibid 143–146.
[69] ibid 147.
[70] UNHCR EXCOM Conclusion No 25 (XXXIII) 'General Conclusion on International Protection' (1982).
[71] cf Lauterpacht and Bethlehem (n 35) 141.
[72] ibid 96–98.
[73] ibid 128.
[74] ibid 163.

concluded that the principle can be derogated from only under the due process of law and safe admission to a third State.[75]

Goodwin-Gill has also concluded that *non-refoulement* is customary international law.[76] He clarified that *non-refoulement* is related to the assessment of the risks a person would face if removed from the State.[77] He this not only in respect of persons who come under the 'refugee' definition of the 1951 Convention but also with respect to climate refugees and victims of civil wars.[78] Most countries today are faced with the situation of mass influx of refugees.[79] It is often incorrectly considered that the exceptions to mass influxes can be imposed in situations of mass influx. States do have a binding obligation derived from "conventional and customary international law"[80] of *non-refoulement*, even in situations of mass influx. This has also been asserted by the UNHCR Executive Council in Conclusion No. 22[81] that *non-refoulement* has to be "scrupulously observed" in the cases of mass influx.

V. How India Perceives Non-Refoulement – a Critique

The Refugee Convention was underway at a very crucial time for India – the partition. The official reason as to why India has not signed the Refugee Convention or the Protocol is not known. Nonetheless, scholars have highlighted different plausible reasons – that the Convention did not protect the internally displaced or socially persecuted, it only granted protection against 'State-sponsored persecution'; India considering the partition as an 'internal matter' to avoid the interference of the UNHCR or other international actors; politics during the East-Pakistan war and lack of financial cooperation from UNHCR to manage the Bangladeshi (then East-Pakistan) refugees.[82]

Like most South Asian Countries, India receives a large number of asylum seekers.[83] Being a non-signatory to the Refugee Convention or Protocol, it has

75 ibid 164.

76 cf Goodwin-Gill (n 24).

77 ibid.

78 ibid.

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

80 Guy S. Goodwin-Gill, '*Non-refoulement* and the New Asylum Seekers' in David A. Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer 1988) 106.

81 ibid 108.

82 Ritumbra Manuvie, 'Why India is Home to a Million of Refugees but doesn't have a Policy for them' (*The Print*, 27 December 2019) <https://theprint.in/opinion/why-india-is-home-to-millions-of-refugees-but-doesnt-have-a-policy-for-them/341301/> (accessed on 15 August 2020).

83 Hamsa Vijayaraghavan, 'Gaps in India's Treatment of Refugees and Vulnerable Internal Migrants Are Exposed by the Pandemic' (*Migration Policy Institute*, 10 September 2020) <https://www.migrationpolicy.org/article/gaps-india-refugees-vulnerable-internal-migrants-pandemic> (accessed on 17 November 2020).

always projected the image of a 'good country' which hosts refugees even without signing the Refugee Convention or Protocol. Most recently, India entirely refuted that it has any obligation of *non-refoulement*.[84] In the case of *Indian Union Muslim League v Union of India*[85] which challenges the constitutionality of the CAA, the Indian government in its counter affidavit submitted that *non-refoulement* is not customary international law and neither can its obligation be derived from the UDHR or the ICCPR. Clearly, India is misconceived that it does not need to protect the rights of refugees or uphold its obligation of *non-refoulement*.

As highlighted in the above sections, the Refugee Convention or Protocol are not the only legal instruments which create the obligation of *non-refoulement*. I argue that India has always had the obligation of *non-refoulement* by virtue of the human rights conventions it has signed and ratified, and also under customary international law. This means that although refugee law does not create any binding obligations on India, IHRL and customary international law do. Since the obligation of *non-refoulement* is wider and without any exceptions under IHRL, India, in fact, has more responsibility of *non-refoulement* than it would have had under refugee law.

As compared to the Refugee Convention and Protocol, IHRL has a wider definition of 'refugees' and 'persecution'. While the Refugee Convention definition is restricted to Article 1, IHRL jurisprudence has evolved. This is because, under the Convention, there is no provision for the establishment of a body empowered to decide individual cases. The Convention in that sense is a rigid document, the only change made is the Protocol. UNHCR is also merely a body more focused on policy framing, refugee assistance and giving recommendations, it has no adjudicatory power.[86] IHRL however, has multiple committees constituted which are tasked with the interpretation of the law.[87] Ever since the committees were formed, the jurisprudence revolving *non-refoulement* has substantially changed for good. Most recently, the Human Rights Committee while dealing with the asylum

[84] *Indian Union Muslim League v Union of India* Writ Petition (Civil) No 1470 of 2019 (Supreme Court of India).

[85] ibid.

[86] cf Goodwin-Gill (n 18) 40–41.

[87] While Article 28 of the ICCPR established the Human Rights Committee, Article 17 of the CEDAW establishes the Committee on the Elimination of Discrimination against Women. Further, Article 43 of the CRC establishes the Committee on the Rights of the Child.

request of a citizen of Kiribati, a small pacific island seriously impacted by climate change, held that persons facing the risks of climate change are refugees indeed.[88]

Further, IHRL grants protection in a very layered manner. This means that it distinguishes between multiple categories of persons who need extra protection by virtue of them being vulnerable persons. Women, children and disabled persons come under this category. As highlighted by the CEDAW (Committee), the Refugee Convention does not consider persecution risks related to gender.[89] In contrast to this, the CEDAW (Convention) and the CRC (Convention) provide layered protection, specific to the categories of persons.

Lastly, *non-refoulement* under customary international law is heavily influenced by IHRL interpretation. It creates a very broad and absolutely binding obligation on all the States. In the near future, this obligation would become absolutely non-derogatory since *non-refoulement* is on the verge of being identified as *jus cogens*.[90]

VI. Conclusion

Even without specific provisions on refugees or *non-refoulement*, Indian courts have been assessing individual asylum applications. From correctly recognizing *non-refoulement* a part of the right to life under Article 21 of the Constitution, to applying the principle to protect persons from persecution,[91] Indian courts have been using the current legal framework to its best ability. However, reliance on this framework is not enough. It is not enough to deal with the situations of mass influx, and more importantly, it is not enough to meet India's obligation of *non-refoulment* to the fullest.

It may be argued that with the passing of laws like CAA, India is granting citizenship to refugees and is doing more than what it is obliged to. However, the crucial aspect of *non-refoulement* is that it has little to do with citizenship. *Non-refoulement* deals with coming up with ways to protect persons from persecution or related risks to their lives. This includes permanent as well as temporary legal arrangements. The fact that India has thousands of refugee camps but no legal framework to ensure certainty and protection of refugees violates its obligation of *non-refoulement*. This, unfortunately, is the case not only with India but most South Asian countries. There is a dire need of a domestic, regional as well as an effective international legal framework specifically aimed at *non-refoulement*. Shared

88 cf Teitiota v New Zealand (n 56).

89 cf CEDAW (n 61).

90 cf Costello and Foster (n 64).

91 Dr Malvika Karlekar v Union of India Writ Petition (Criminal) No 583 of 1992 (Supreme Court of India).

responsibility of States to protect refugees in today's turbulent world regime is the need of the hour while the recognition of *non-refoulement* as *jus cogens* is necessary. Until then, States must individually respect the principle and apply it as obligated under refugee law, IHRL and customary international law.