

THE LEGALITY OF MUSLIM BAN AND THE PRINCIPLE OF NON-REFOULEMENT OBLIGATION UNDER PUBLIC INTERNATIONAL LAW

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Non-refoulement principle in the light of interrelation of Refugee law and Human rights treaty norms

Throughout the 20th century, the international community gathered a series of guidelines, laws and treaties to ensure proper treatment of refugees and protect their human rights¹.

The process began under the League of Nations in 1921². In July 1951, a diplomatic conference in Geneva adopted the Convention relating to the Status of Refugees ('1951 Convention'), which was later amended by the 1967 Protocol³. These documents clearly spell out who is a refugee and the kind of legal protection, other assistance and social rights a refugee is entitled to receive. It also defines a refugee's obligations to host countries and specifies certain categories of people, such as war criminals, who do not qualify for refugee status.⁴ Initially, the 1951 Convention was more or less limited to protecting European refugees in the aftermath of World War II, but the 1967 Protocol expanded its scope as the problem of displacement spread around the world. These two documents, which enjoy near universal ratification, define "a refugee" as a person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law⁵. Non-refoulement is a principle of international law that precludes states from returning a person to a place where he or she might be tortured or face persecution. The principle is inter alia stipulated in Article 33 of the 1951 Refugee Convention⁶. In essence, *non-refoulement* provides that a government should not eject a refugee from its state-territory or borders and 'refouler' that person to a place (country of origin or otherwise) where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

¹ See UNHCR, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, <http://www.unhcr.org/4ec262df9.pdf>

² See On the History of the International Protection of Refugees, by Gilbert Jaeger, https://www.icrc.org/eng/assets/files/other/727_738_jaeger.pdf

³ See Convention Relating to The Status of Refugees, <http://legal.un.org/avl/ha/prsr/prsr.html>

⁴ Ibid

⁵ See UNHCR Note on the Principle of Non-Refoulement, <http://www.refworld.org/docid/438c6d972>.

⁶ See Legal and Protection Policy Research Series, The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence, Division of International Protection, September 2012, <<http://www.refworld.org/pdfid/50474f062.pdf>>

The Convention Relating to the Status of Refugees has been ratified by almost 150 states and remains one of the most widely accepted treaties in refugee law¹. Article 42(1) of the Refugee Convention confirms that the provision relating to *non-refoulement*, contained in Article 33, is non-derogable, which means states cannot make reservations to this article².

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. James C. Hathaway identifies two main tests that are applicable in assessing whether the asylum seeker or refugee is a danger to the national security of the asylum state³. The first test requires a high level of proof for the determination that the person is a danger to the security of the asylum state, in that there must be 'reasonable grounds' for this conclusion. The asylum state must demonstrate that the refugee's continued presence in the state constitutes a threat to the security of the state. Secondly, the refugee may be excluded if, 'having been convicted by a final judgment of a particularly serious crime', he or she constitutes a danger to the community in the asylum-state.

Concerns about threats to the safety and security of an asylum state should be factored into the protection decision, instead, through an exception to the duty of states not to expose a refugee to the risk of return to persecution, the duty of non-refoulement⁴. Article 33(2) of the Convention authorizes a government to refuse to protect a refugee whose presence threatens its most basic interests⁵. A receiving state may even return a dangerous refugee to face the risk of persecution in his or her state of origin, but only if the risk to national security or communal safety is established on the basis of a more demanding standard of proof.

The principle of non-refoulement has arguably reached a status of *jus cogens* (i.e. a fundamental rule of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted)⁶. Thus (as a part of *customary and treaty law*), all countries are legally bound by the prohibition of returning refugees in any manner whatsoever to countries or territories where their lives or freedom may be threatened because of their race, religion, nationality, membership of a particular social group or political opinion, which is the cornerstone of

¹ See UNHCR, States Parties to The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, <http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>

² Ibid.

³ See Cornell International Law Journal, Framing Refugee Protection in the New World Disorder by James C. Hathaway Colin J. Harvey, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1488&context=cilj>

⁴ "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Id. art. 33(1), 189 U.N.T.S. at 176.

⁵ The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country

⁶ See The Jus Cogence Nature of Non-Refoulement by Jean Allain, https://www.researchgate.net/publication/31412200_The_jus_cogens_Nature_of_non-refoulement

international protection. Beyond the 1951 Convention, non-refoulement protects fundamental rights in numerous international human rights treaties. At that, exceptions to the norm are found only in the Conventions. The Convention Against Torture (CAT) contains an absolute prohibition on refoulement in torture cases, subject to no exceptions¹. Likewise, the International Covenant on Civil and Political Rights (ICCPR)² and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³ protect individuals from refoulement in cases of torture or cruel, inhuman or degrading treatment without exception.

Customary nature of Non-refoulement Principle

For all persons, regardless of their legal status, the principle of non-refoulement is a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the ICCPR, Article 3 of the UN Convention against Torture and Article 3 of the ECHR as interpreted by the European Court of Human Rights.⁴ Such provisions do not allow for any derogation, exception or limitation. UNHCR is of the view that the prohibition of refoulement of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by non-refoulement obligations under international human rights law, constitutes a rule of customary international law⁵. In this wider field of application, non-refoulement now extends to prohibit the return of *anyone* to a situation in which he or she runs the risk of torture, cruel or degrading treatment or the risk of a violation of the right to life. Regional and international human rights treaties⁶ as well as a number of other international instruments⁷ contain prohibitions of refoulement. The principle of non-refoulement not only prohibits the removal, expulsion or extradition to a country where a person may be at risk of persecution or other serious harm (direct refoulement) but also to countries where individuals would be exposed to a serious risk of onward removal to

¹ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, art. 3, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force 26 June 1987)

² See International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>

³ See European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁴ See Scope of the principle of non-refoulement in contemporary border management: evolving areas of law, available at: < file:///C:/Users/asus/Downloads/fra-2016-scope-non-refoulement_en.pdf >

⁵ See: 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 <http://www.refworld.org/publisher,UNHCR,POSITION,DEU,437b6db64,0.html>

⁶ As part of the prohibition of torture: cf. Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 7 of the 1966 International Covenant on Civil and Political Rights and its interpretation by the UN Human Rights Committee in its General Comment No. 20 (1992), Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 22(8) of the 1969 American Convention on Human Rights; or explicitly as in Article 19(2) of the 2000 Charter of Fundamental Rights of the European Union.

⁷ See Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the UNGA Resolution 2132 (XXII), Article II(3) of the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Section III(5) of the 1984 Cartagena Declaration and Article 3(2) of the 1957 European Convention on Extradition, Article 4(5) of the 1981 Inter-American Convention on Extradition.

such a country (indirect refoulement).¹ Under the 1951 Refugee Convention, non-refoulement not only refers to returns or expulsions of people who are already within a host state's territory, but also encompasses rejection at the borders.

The lack of ratification of the Convention does not mean that States do not incur protection obligations. The normative evolution after the adoption of the Geneva Convention, practical necessities, and policy considerations combined to create additional safeguards for refugees.² Even though Lebanon, Jordan and other countries (Iran, Ethiopia, Kenya, Uganda, Democratic Republic of Congo, Chad, Turkey, Pakistan) are not Contracting States to the Geneva Convention, they still have obligations towards refugees.³ This, together with the fact that the State parties to the Convention formally acknowledged non-refoulement as a principle 'whose applicability is embedded in customary international law' and its wide acceptance as a norm of fundamentally norm-creating character, has led many scholars and UNHCR to conclude that it forms part of customary international law today.⁴ As such, it is binding on all States, including those, which have not yet become party to the 1951 Convention and/or its 1967 Protocol. In this regard, UNHCR notes, inter alia, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations.⁵

The compatibility of so called “Muslim Ban” with corresponding international obligations of the United States of America

On January 27, 2017, the US President issued Executive Order 13769, “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”).⁶ Citing the terrorist attacks of September 11, 2001, and stating that “numerous foreign-born individuals have been convicted or implicated in terrorism related crimes” since then, the Executive Order declares that “the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles.”⁷ The Executive Order made several changes to the policies and procedures by which non-citizens may enter the United States.⁸ Three are at issue here. First, section 3(c) of the Executive Order suspended for 90 days the entry of aliens from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen. Second, section 5(a) of the Executive Order suspended for 120 days the United States Refugee Admissions Program. Third, section 5(c) of the Executive Order

¹ Ibid

² See The obligations of states towards refugees under international law: Some reflections on the situation in Lebanon, available at: < <https://www.nrc.no/globalassets/pdf/reports/obligations-of-state.pdf>>

³ See AfricaNews, Ethiopia, Uganda, DRC, Kenya and Chad in top 10 refugee friendly nations-Amnesty, available at: < <http://www.africanews.com/2016/10/04/ethiopia-uganda-drc-kenya-chad-in-top-10-refugee-friendly-nations-amnesty/>>

⁴ See Declaration of State Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of states Parties, Geneva, 12-13 December 2001, UN doc. HCR/MMSP/2001/09, 16 Jan. 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para 4, adopted on 18 Dec. 2001

⁵ Supra note 26

⁶ See Business Insider, Politics, <http://www.businessinsider.com/trump-executive-orders-memorandum-proclamations-presidential-action-guide-2017-1/#executive-order-january-27-immigration-ban-11>

⁷ See Executive Order: Protecting The Nation from Foreign Terrorist Entry Inti The United States, <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

⁸ See United States Court of Appeals for the Ninth Circuit, <http://edition.cnn.com/2017/02/09/politics/travel-ban-9th-circuit-ruling-full-text/>

suspended indefinitely the entry of all Syrian refugees. Federal lawsuits were filed in New York, Massachusetts, Virginia and Washington on behalf of travelers who were detained in airports in the United States¹. After the judicially challenged rollout of President Donald Trump's initial executive order on refugees and immigration from Muslim-majority countries, the White House has put forth a revised version. Soon, after the first Executive order, on March 6, 2017, US President Donald Trump signed a new executive order that bans immigration from six Muslim-majority countries, dropping Iraq from January's previous order, and reinstates a temporary blanket ban on all refugees².

President Donald Trump's Executive Order, commonly referred to as the "Muslim Ban," has generated significant discussion of its discriminatory and Islamophobic nature, but not enough about the plight of refugees. Too little attention has been paid to the way this executive action violates long-standing, core U.S. obligations to protect refugees and to ensure no one is sent to a country where he faces a real risk of torture or persecution. This is not only a matter of international law, of course, as the United States has incorporated its obligations directly into domestic law. As discussed above, the rules against torture and *refoulement* are norms of the highest and most binding nature, and the prohibition on ill-treatment is non-derogable, meaning it cannot be limited under any circumstances, even in times of emergency³. The 1951 Convention Relating to the Status of Refugees ("Refugee Convention") also includes a substantive *non-refoulement* protection and related procedural rights that bind the United States under the Protocol⁴. As it is mentioned above, the Convention prohibits states from transferring individuals to countries where they face a serious risk of persecution. Moreover, determination of refugee status requires an individualized analysis with both an objective and subjective component, and entails due process guarantees to ensure that analysis can take place. What refers to Article 33(2) of the Refugee Convention, it excludes from the protection of Article 33(1) individuals about "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." These exclusion clauses must be construed narrowly, and must be made on an individualized basis—which the Executive Order does not. Even when this exclusion is applicable, individuals retain the protection against *refoulement* to other risks, including the risk of torture and cruel treatment under international human rights law, which contains no exceptions.

Risks of *Non-refoulement* resulting from the Executive Order The Executive Order violates the United States' international *non-refoulement* obligations. Every individual arriving in the United States must be given a fair opportunity to make a claim that he or she is at risk of torture or persecution. Reports suggest that Customs and Border Protection is not advising individuals of their right to claim asylum, much less conducting credible fear interviews⁵. If this is the case, the United States is in breach

¹ See abcNews, A timeline of Trump's immigration executive order and legal challenges, <http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741>

² See BBC News, Trump signs new travel ban directive, <http://www.bbc.com/news/world-us-canada-39183153>

³ Supra note 18

⁴ Supra note 3

⁵ See Protest at JFK Airport over Trump's refugee ban, <http://www.aljazeera.com/news/2017/01/protest-jfk-airport-trump-refugee-ban-170128193014041.html>

of its *non-refoulement* obligations when it expels such individuals. Moreover, many of those entering the United States who have been granted refugee status have already made out *refoulement* claims in the course of their application for visas. The violations relating to *non-refoulement* are plain: when they fail to conduct credible fear screenings, U.S. agents violate procedural guarantees, and when they turn away refugees who face persecution if returned, they violate the substantive norm.

Since September 11, 2001, states that host refugees have been imposing stricter anti-terrorism measures¹. Many of those policies come at the expense of refugee protection. The United States, for instance, relies heavily on the language in Article 33(2) of CRSR to exclude from protection individuals suspected of having links to terrorism².

Conclusion

Given the current concerns over terrorism worldwide, there is great potential for other states to follow the U.S. lead and weaken refugee protection by enacting broad policies based on the Article 33(2) exceptions. Yet this would be at odds with current state obligations under international law. By shutting the door to refugee admissions, whether temporarily or indefinitely, Trump's order flagrantly violates those core obligations. States increasingly want to avoid the particularized obligations that arise when refugees arrive at their territory. The arrival of refugees does not expose them to the risk of unilateral and undifferentiated legal responsibility. The goal of refugee protection as conceived in international law is instead to ensure the availability of solid and rights-regarding protection to refugees until and unless it is safe for them to return. For the best way to prevent a future refugee crisis is to avoid sending back millions of men, women and children to scarce resources and ruins. States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity.

ՄՈՒՏՈՒՄ ԱՆԱԿԱՆ ԱՐԳԵԼՔԻ ՕՐԻՆԱԿԱՆՈՒԹՅՈՒՆԸ ԵՎ ՉՀԱՆՁՆԵԼՈՒ ՊԱՐՏԱԿՈՐՈՒԹՅՈՒՆԸ ՄԻՋԱԶԳԱՅԻՆ ՀԱՆՐԱՅԻՆ ԻՐԱՎՈՒՆՔԻ ՏԵՍԱՆԿՅՈՒՆԻՑ

Անահիտ Պետրոսյան

«Ազգային ժողովի պատմագավորի օգնական»

Այս հոդվածի նպատակն է վերլուծել այսպես կոչված «Մուսուլմանական արգելքի» իրավականության խնդիրը միջազգային հանրային իրավունքի տեսանկյունից: Չնայած նրան, որ այս հիմնահարցն ունի բազմաթիվ խնդիրներ, հոդվածը կենտրոնանում է այն հարցի վրա՝ արդյոք ԱՄՆ գործադիր իրամանը խախտում է

¹ See NON-REFOULEMENT AND JUS COGENS: LIMITING ANTI-TERROR MEASURES THAT THREATEN REFUGEE PROTECTION, https://www.hrw.org/sites/default/files/related_material/Non-Refoulement%20and%20Jus%20Cogens%20Limiting%20Anti-Terror%20Measures%20That%20Threaten%20Refugee%20Protection_0.pdf

² Supra note 3.

միջազգային փախստականների իրավունքը՝ չհանձնելու պարտավորության տեսանկյունից: Ջինված բախումները և բռնության այլ դրսևորումներ հանգեցրել են հարկադիր տեղահանման սահմաններից դուրս: Փախստականները ձգտում են անվտանգության այլ երկրներում, երբ նրանք կանգնում են դեմ հանդիման հալածվելու սպառնալիքին և իրենց երկիրը չի ցանկանում կամ չի կարողանում պաշտպանել նրանց: Այնուամենայնիվ, նրանք ունեն իրավունքներ, որոնք պետք է հարգվեն ապաստան խնդրելու գործընթացից առաջ, ընթացքում և հետո:

ЗАКОННОСТЬ «МУСУЛЬМАНСКОГО ЗАПРЕТА» И ПРИНЦИП НЕДОПУСТИМОСТИ ПРИНУДИТЕЛЬНОГО ВОЗВРАЩЕНИЯ В СООТВЕТСТВИИ С МЕЖДУНАРОДНЫМ ПУБЛИЧНЫМ ПРАВОМ

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В статье рассматривается вопрос законности так называемого «мусульманского запрета» в соответствии с Международным публичным правом. Несмотря на то, что данная проблема включает множество аспектов, статья будет сфокусирована на вопросе о том, нарушает ли Административный указ США принцип недопустимости принудительного возвращения мигрантов. Ситуация с беженцами стала классическим примером взаимозависимости международного сообщества. Вооруженные конфликты и другие акты насилия привели к вынужденному перемещению населения через границы. Беженцы ищут безопасное убежище в других странах, в то время как их собственная страна не желает или не в силах их защитить. Однако их права должны быть соблюдены в данной ситуации.

Keywords: *Refugee, asylum, non-refoulement obligation, jus cogens, customary law, Convention relating to the Status of Refugees ('1951 Convention').*

Հիմնաբառեր – *Փախստական, ապաստան, չհանձնելու պարտավորություն, յուս կոգենս, սովորույթային իրավունք, փախստականների կարգավիճակի մասին կոնվենցիա, ('1951թ.-ի կոնվենցիա'):*

Ключевые слова: *беженцы, убежище, принцип недопустимости принудительного возвращения, императивные нормы, обычное право, Конвенция о статусе беженцев («Конвенция 1951 года»).*