

# COVID-19: The Effect on Refugees

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## Overview

- The COVID-19 pandemic is likely to exacerbate the global refugee crisis.
- National and international responses to the COVID-19 pandemic must include provision for the most vulnerable in societies, including millions of refugees and others affected by wars, persecution and disasters.
- The principle of non-refoulement is a fundamental tenet of international law protecting refugees. Governments should find ways to reconcile entry restrictions imposed in response to COVID-19 with this principle.
- The United Nations High Commissioner for Refugees (the “UNHCR”) has launched a global appeal to raise US\$255 million for its urgent push to curb the risk of COVID-19 outbreaks in these vulnerable communities.
- Governments should remain cognisant of their obligations under international law and should seek to include refugees and asylum seekers in plans to combat the spread of COVID-19.

*If you have any questions concerning this memorandum, please reach out to your regular firm contact, the following authors or our COVID-19 task force directly by clicking [here](#).*

*For more information, please consult the [COVID-19 Resource Center](#).*

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## Introduction

Although the COVID-19 pandemic may be the most recent crisis to strike the international community, the global refugee crisis is ongoing and critical. Many individuals with valid, non-COVID-19-related, grounds continue to seek asylum or refugee status in countries the world over.

COVID-19 is likely to exacerbate what is already a humanitarian emergency. Not only are refugees and asylum seekers at a high risk of contracting the virus and experiencing severe symptoms, but they may also encounter increased difficulty in seeking asylum due to measures imposed by governments in response to the pandemic. In addition, the pandemic places further strain on governmental attention and resources.

*“As the pandemic spreads, our response must encompass the most vulnerable in our societies, including millions of refugees and others affected by wars, persecution and disasters.” - UN High Commissioner for Refugees, Filippo Grandi.*



## The right to seek asylum

A refugee is a person who “owing to a 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country”.<sup>1</sup>

An asylum seeker is someone who is seeking international protection. Asylum seekers who succeed in their claims for asylum are recognised as refugees in the jurisdiction that has provided refuge.

Although states are generally free to decide who enters their territories, Article 14 of the Universal Declaration of Human Rights (the “UDHR”) provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”.

## The rule against expulsion

Article 32(1) of the [1951 Convention Relating to the Status of Refugees](#) (the “Convention”) provides that:

*“The Contracting State shall not expel a refugee lawfully in their territory save on grounds of national security or public order.”*

A decision to expel a refugee must be taken in accordance with due process of law. To fulfil this requirement, refugees must be allowed to submit evidence to clear themselves, and to appeal to and be represented for the purpose before the competent authority or its representative.<sup>2</sup> Following a decision to expel, a refugee must be allowed a reasonable period within which to seek legal admission into another country.<sup>3</sup>

## The principle of non-refoulement

The principle of non-refoulement is a fundamental tenet of international law. It protects refugees from being returned to countries where they have reason

to fear persecution. The principle is now considered a rule of customary international law and is entrenched in Article 33 of the Convention: *Prohibition of expulsion or return (“refoulement”).*

Article 33(1) of the Convention provides that:

*“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.”*

Although the principle of non-refoulement is seen as a central principle of international law, like many legal principles, it is not absolute. Article 33(2) of the Convention provides that:

*“The benefit...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 final judgment of a particularly serious crime, constitutes a danger to the community of that country.”*

## Reconciling border closures and international lockdowns with the principle of non-refoulement<sup>4</sup>

The COVID-19 pandemic has seen the introduction of restrictions on entry into states and even border closures the world over. States are, of course, entitled to take measures to manage risks to public health. But how can this be aligned with the principle of non-refoulement?

The UNHCR has advocated for observance of the principle of proportionality with regard to the

<sup>1</sup> Article 1, the Convention Relating to the Status of Refugees, 1951 (the “Convention”). The Convention is seen to be the foundation of international refugee law.

<sup>2</sup> Article 32(2), the Convention.

<sup>3</sup> Article 32(3), the Convention.

<sup>4</sup> The principle of non-refoulement also applies extraterritorially, where the state in question is acting outside its territory and has effective control over a person. Therefore, it applies also to a state’s conduct with regard to a refugee at its border (and as such not technically inside that state).

Convention and, specifically, Article 33.<sup>5</sup> This is generally held to mean that measures taken must: have a legitimate objective; be effective to achieve their objective; go no further than is necessary (the “necessity test”); and survive the “balance of interest” test.

Further, specifically in the COVID-19 context, the UNHCR has sought to remind states that their measures must be non-discriminatory vis-à-vis non-nationals arriving at their borders.<sup>6</sup>

As such, the COVID-19 pandemic raises some important questions:

- Is a complete shutdown of borders in conflict with Article 33 of the Convention?
- Would a lockdown that permits entry to asylum seekers and refugees only if they pass a health screening be a more proportionate response, with those who fail such screening not being permitted entry into a country?<sup>7</sup>
- Should countries with sufficient resources provide social distancing and/or medical facilities at their borders enabling asylum seekers and refugees to self-isolate for 14 days, following which (provided they do not exhibit symptoms of COVID-19) they are permitted entry?
- Will countries that have resources choose to direct them towards helping asylum seekers and refugees during this pandemic? Are they under any obligation to do so?
- How can countries ensure that the measures they put in place are not discriminatory and instead actively address the uniquely challenging situation faced by asylum seekers and refugees?

<sup>5</sup> UNHCR, “A guide to international refugee protection and building state asylum systems”, *Handbook for Parliamentarians*, No. 27, 2017, p. 66, <https://www.unhcr.org/en-us/publications/legal/3d4aba564/refugee-protection-guide-international-refugee-law-handbook-parliamentarians.html>.

<sup>6</sup> UNHCR, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response”, 16 March 2020, <https://www.refworld.org/docid/5e7132834.html>.

These are all difficult questions and they invite a multitude of responses. On the one hand, insisting on health screenings prior to entry aligns with the emergency laws being laid down in many countries for the protection of their citizens. On the other hand, a complete denial of effective opportunities to seek asylum is discriminatory and contrary to non-refoulement obligations.

Moreover, while refoulement of asylum seekers as a result of entry restrictions may well meet the first two limbs of the proportionality test, it is hard to see how such measures could meet the “necessity” and “balance of interest” limbs if less restrictive means such as isolation, testing or treatment are (or become) available.

What constitutes a proportionate response not only depends heavily upon the circumstances and resources of the state in question, but is also almost certain to evolve as the pandemic continues.

### National security as justification

Where Article 33(2) of the Convention provides that the non-refoulement obligation does not apply in cases where a refugee is regarded as a danger to the security of the country he is in, under Article 32 of the Convention, Contracting States are permitted to expel refugees on grounds of national security or public order.

Could it be argued that border closures, and therefore any associated refoulement of those seeking asylum, can be justified on the basis that the spread of COVID-19 poses a threat to national security?

Historically, concerns related to health were not considered as rising to the level of a national security concern. Since the beginning of the 21<sup>st</sup> century, however, policy-makers have started to consider the potentially significant negative impact that health

<sup>7</sup> Consider, for example, the border screening measures that were put in place in countries such as Australia, Canada, and Singapore in response to the severe acute respiratory syndrome (“SARS”) pandemic of 2003. For a discussion of the efficacy of border screening measures for infectious disease control, see LA. Selvey, C. Antão and R. Hall “Evaluation of Border Entry Screening for Infectious Diseases in Humans” *Emerging Infectious Diseases* Vo.21(2): 2015, February 2015, 197–201, [https://wwwnc.cdc.gov/eid/article/21/2/13-1610\\_article](https://wwwnc.cdc.gov/eid/article/21/2/13-1610_article).

crises can have on national interests.<sup>8</sup> Arguably, the COVID-19 pandemic is bringing this into stark relief.

Nonetheless, it is questionable whether such justification would be considered morally acceptable. Also questionable is the practicality of relying on such justification, certainly in the case of the provision under Article 32 of the Convention given the requirement for expulsion decisions to be made in accordance with due process of law (including an opportunity to submit evidence and be represented before a competent authority) and the requirement to allow the refugee a reasonable period within which to seek legal admission into another country. Dedicating the time needed to fulfil these requirements may simply not be practicable in the COVID-19 context.

As such, it seems unlikely that a Contracting State would attempt to use Article 32 of the Convention to expel refugees on the basis that to allow them entry would risk furthering the spread of COVID-19 within that Contracting State.

### No penalties for illegal entry

Article 31 of the Convention prohibits any Contracting State from imposing penalties for illegal entry on refugees coming from territories where their life or freedom was threatened. It further stipulates that restrictions on the movement of such refugees must not go beyond what is necessary and must only apply until their status is regularised or they obtain admission to another country.

<sup>8</sup> See R. Katz and D. Singer, “Health and security in foreign policy”, *Bulletin of the World Health Organization*, Vol. 85:2007, March 2007, 161-244, <https://www.who.int/bulletin/volumes/85/3/06-036889/en/> and J. Hodge and K. Weidenaar, “Public Health Emergencies as Threats to National Security”, *Journal of National Security Law & Policy*, Public Health, Vol. 9 No. 1, September 2016, [https://jnslp.com/wp-content/uploads/2017/04/Public\\_Health\\_Emergencies\\_as\\_Threats\\_to\\_National\\_Security\\_FINAL.pdf](https://jnslp.com/wp-content/uploads/2017/04/Public_Health_Emergencies_as_Threats_to_National_Security_FINAL.pdf).

<sup>9</sup> In the UK, for example, the continued detention of those being held in immigration removal centres is currently the subject of a legal challenge in light of COVID-19. The basis for such challenge is that, pursuant to UK law, detention is only permitted when deportation of a detainee is “imminent” but, in the context of travel restrictions and

During the COVID-19 pandemic, the ordinary rules of international law will still apply in cases of illegal entry. Governments should swiftly consider their options for ensuring that, where illegal entry continues to occur, it is managed in a way which best minimises the likelihood of the spread of COVID-19. Further, amid calls for those in detention centres to be released,<sup>9</sup> governments should consider the best course of action to protect detainees from the risk of COVID-19 and comply with their legal obligations.

### Enabling refugees to fight COVID-19

Measures such as social distancing and self-isolation have been enforced by governments across the world to slow down the spread of COVID-19. But to what extent are refugees and asylum seekers able to comply?

- Overcrowded living conditions and poor access to food and water make self-isolation or even social distancing virtually impossible for those living in refugee camps.
- Information on symptoms and how to prevent the spread of COVID-19 may not be readily accessible.<sup>10</sup>

It is a harsh reality that, once COVID-19 makes its way into refugee camps or shelters, the spread will be rapid and uncontrolled. Those currently held in migrant detention centres are also at risk. The concern is all the more acute because asylum seekers and refugees are more likely to have underlying health conditions that have gone untreated.<sup>11</sup>

border closures, it is unlikely that any deportation could be deemed “imminent”.

<sup>10</sup> There are, however, efforts to combat this. The NGO *Médecins du Monde* (“MDM”) is working to enable migrant, refugee and asylum-seeking communities to access information on the virus in a language they understand. In the UK, for example, MDM has translated the NHS guidance into 34 languages and is working on translations of the government publications. Also in the UK, Public Health England has provided “stay at home” guidance in a number of languages.

<sup>11</sup> For information on the health complications and healthcare challenges surrounding migrant communities notwithstanding COVID-19, see T. Schilling *et al*, “Migrants and Refugees in Europe: Challenges, Experiences and Contributions”, *Visceral Medicine*,

## International co-operation needed to fight the spread of COVID-19 amongst refugees

A global crisis requires a global response. In the words of UN Secretary-General, António Guterres, “COVID-19 is menacing the whole of humanity – and so the whole of humanity must fight back. Individual country responses are not going to be enough.”

The UNHCR has launched a global appeal to raise US\$255 million for its urgent push to curb the risk of COVID-19 outbreaks in refugee communities. This is part of a wider UN Global Humanitarian Response Plan seeking US\$2.01 billion.

On 25 March 2020, the World Health Organization published [Interim guidance for refugee and migrant health in relation to COVID-19](#). In essence, this guidance is intended to be used by national health authorities to guide actions taken by healthcare providers for refugees and migrants in relation to the novel coronavirus (COVID-19) outbreak.

Supporting the need for an international response to this pandemic, the UNHCR reminds states of their ordinary course obligations with regard to persons seeking international protection<sup>12</sup> and warns against sending such individuals “into “orbit” in search of a State willing to accept them”.<sup>13</sup>

## Conclusion

There are no simple solutions during unprecedented times like these, but the impact of the COVID-19 pandemic on the global refugee crisis should not be ignored. It is the responsibility of the international community to work together to ensure that refugees and asylum seekers are not forgotten or stigmatised during this pandemic.

In unprecedented times like these, governments should remain cognisant of their obligations under international law and seek to include refugees and asylum seekers in plans to combat the spread of COVID-19. In doing so, it is important to be mindful

of international obligations as well as the harsh realities faced by these vulnerable groups. In responding to the COVID-19 pandemic, governments should seek to strike a balance between competing interests. Morality, legality, and common sense dictate that this is the best approach to protect a global public interest.

To quote Dr Santino Severoni, Special Adviser on Health and Migration and Director ad interim of the Division of Health Systems and Public Health at WHO/Europe, “if, during this pandemic we leave behind the most vulnerable, we fail not only them, but all of us. COVID-19 is challenging us as a community, and we must answer as one.”

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2017:33, 295-300, <https://www.karger.com/Article/Pdf/478763>.

<sup>12</sup> Such obligations include the provision of information in a language that the asylum seeker can understand and an opportunity for the asylum seeker to contact the UNHCR.

<sup>13</sup> UNHCR, “Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response”, 16 March 2020, <https://www.refworld.org/docid/5e7132834.html>.