5(1) Strathclyde Law Review, 2022, 63-90
https://www.strathclydelawreview.com
Article

The Covid-19 Pandemic: To Refoul or Not to Refoul?

Gregorius Brian Sukianto[1]

Abstract

The obligation for States to guarantee the fundamental right to non-refoulement enshrined under Article 33(1) of the Refugee Convention prohibits States from refouling refugees and asylum seekers. However, the COVID-19 Pandemic has forced States to impose extensive measures that ultimately restrict human rights exercise. This article seeks to assess whether provisions under the 1969 Vienna Convention on the Law of Treaties enable States to terminate or suspend non-refoulement obligations and whether the circumstances precluding wrongfulness may justify failure to uphold non-refoulement during the COVID-19 Pandemic. The method used for this research is the normative legal research through secondary data, incorporating primary and secondary legal sources. The article refers to provisions, case judgments, commentaries, health regulations, and the critical analysis of previous studies. Overall, the article fuels a further contribution to the development of State responsibility during the COVID-19 Pandemic. Adding to the discussion, the findings have implications for the *jus cogens* nature of non-refoulement in which no derogation is permissible despite the COVID-19 Pandemic. On a more general level, this article would guide States to ensure compliance towards the non-refoulement principle. This research indicates that the defenses provided under the 1969 Vienna Convention on the Law of Treaties and the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts entail exceptionally high thresholds. Adding to this is the advancement of COVID-19 vaccination programs and new information constantly emerging. The defenses are unlikely to justify States from their misconducts; thus, States are encouraged to ensure the widest possible exercise to safeguard the fundamental rights of non-refoulement.

[1] Student at the Department of International Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.

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1. Introduction

Undoubtedly, the COVID-19 Pandemic has severely impacted the mobility and free movement of individuals. As the Pandemic progresses, the position of refugees remains further uncertain as States push for restrictions to address the situation. Restrictions imposed by States have prominently deprived refugees of fundamental rights guaranteed under customary international law, international human rights law, and refugee law.[2] Amongst impaired rights include the principle of non-refoulement, which essentially safeguards refugees against forcible removals from any State jurisdiction provided that a potential risk of harm exists in the receiving State.[3] The legal framework for the principle essentially derives from Article 14(1) of the Universal Declaration of Human Rights ('**UDHR**'), which provides that universal entitlement towards the right to seek and enjoy asylum from persecution in other States. Despite the UDHR's non-binding nature, the Declaration represents the umbrella for human rights instruments. Among various legal instruments is the 1951 Convention Relating to the Status of Refugees (**'Refugee Convention**'), evident under its preamble. In this sense, the non-refoulement principle reflected in the Refugee Convention by virtue of Article 33(1), which essentially prohibits States from expelling or returning refugees to territories where their life or freedom is at risk on account of race, religion, nationality, a specific social group, or political opinion. Such framework is further enforced in the 1967 Protocol to the Refugee Convention. Notably, the principle is also embodied in other international and regional human rights instruments.[4]

In October 2020, the United Nations Refugee Agency (UNHCR) reported a significant number of States blocking entry upon their frontiers due to the Pandemic, with no

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[2] UNHCR 'The principle of *non-refoulement* under international human rights law', Documents, 5 July 2018.
[3] Ibid.
[4]1984 Convention against Torture, and other Cruel, Inhuman or Degrading Treatment of Punishment (adopted 10 December 1984, entered into force on 26 June 1987) Article 3; 1969 American Convention on Human Rights (adopted 22 November 1969) Article 22(8); 1957 European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) Article 3(2); 1981 Inter-American Convention on Extradition (adopted 25 February 1981, entered into force 28 March 1992) Article 4(5).

further exceptions for refugees and asylum seekers.[5] Among others, the US enforced order in March 2020, which urged the immediate deportation of unauthorized refugees and asylum seekers at frontiers.[6] Additionally, States have pursued extensive restrictions, which include the limits of entry towards seaports.[7] Correspondingly, this indicates an alarming number of States have adopted similar measures in light of the COVID-19 Pandemic. Thus, consequently risking potential harm upon refugees and asylum seekers sent to their receiving States, therefore violating obligations under the principle of non-refoulement. Therefore, an important topic that gave rise to many discussions concerns the justification of the Pandemic as premises for States to disregard international responsibilities of non-refoulement.

To address this, this discussion is divided into three main sections. First, I will start by explaining the extra-territorial application of the non-refoulement principle. Second, I will discuss the grounds for inaction treaty under the Vienna Convention on the Law of Treaties ('**VCLT**'). Third, I will continue to assess the circumstances precluding wrongfulness under the International Law Commission (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('**ARSIWA**').

2. *Principle of non-refoulement: Extra-territoriality*

The extra-territoriality of the non-refoulement principle is deemed vital towards its application. This shall be assessed through the general rule of interpretation under Article 31 of VCLT through assessing the '*ordinary meaning to be given to the terms of the treaty in their context in light of its object and purposes*'.

[5] UNHCR Staff, 'COVID-19 crisis underlines need for refugee solidarity and inclusion' *UNHCR* (29 April 2021) <https://www.unhcr.org/news/latest/2020/10/5f7dfbc24/covid-19-crisis-underlines-need-refugee-solidarity-inclusion.html#:~:text=solidarity%20and%20inclusion-,COVID%2D19%20crisis%20underlines%20need%20for%20refugee%20solidarity%20and%20inclusion,people%2C%20says%20UNHCR%27s%20Gillian%20Triggs> accessed 29 April 2021.

[6] Centers for Disease Control and Prevention, 'Order Suspending Introduction Of Certain Persons From Countries Where A Communicable Disease Exists' (Atlanta Department of Health and Human Services 2020).

[7] Lorenzo Tondo, 'Italy Declares Own Ports 'Unsafe' to Stop Migrants Arriving' *The Guardian* (Palermo, April 8, 2020) < https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking> accessed 25 May 2021.

Further, Article 33(1) of the Refugee Convention provides that State parties are prohibited to '*expel or return ("refouler") a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened*.' The focus is centered towards the individual's final destination instead of the origin from the provision's wording.[8] In its ordinary meaning, 'return' is defined as 'to come or go back to a previous place'.[9] This provides no understanding of its limitation to refugees within State territory.

Moreover, Dr. Paul Weis has clarified that in Belgium and France, the term 'refoulement' is applied to circumstances of non-admittance by the frontier.[10] The application of the teleological approach further justifies the extra-territorial nature of Article 33 of the Refugee Convention. In light of the Convention's object and purposes, paragraph 2 of the preamble establishes its purpose to *assure refugees the widest possible exercise of these fundamental rights and freedoms*.[11] In this sense, *in any manner whatsoever* is to be construed in light with the object and purposes of the Convention per Article 31 of VCLT. Therefore, limiting the non-refoulement principle from the extra-territorial application is deemed inconsistent with the Refugee Convention's object and purposes, since ensuring adequate protection of refugees would require application within State territory and its frontiers.[12] Consequently, a restrictive interpretation of Article 33(1) would prevent fulfillment of the Refugee Convention's object and purposes. In this manner, Article 33(1) of the Refugee Convention shall provide various measures to ensure refugee protection, including admission at frontiers,[13] further affirming its extra-territorial nature.

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[8] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17 International Journal of Refugee Law 542, 553.
[9] See: *Cambridge Dictionary*, available at: https://dictionary.cambridge.org/dictionary/english/return
[10] UNHCR, 'The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis,' 1990, 210.
[11] Fabiane Baxewanos, 'Non-Refoulement and Extraterritorial Immigration Control – The Case Of Immigration Liaison Officers', *Seminar in International Law* (2013) 10-11.
[12] UNHCR, 'UNHCR Note on the Principle of Non-Refoulement' (1997).
[13] Sir 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), par. 78-79.

Prominently, in the *Sale* case, the United States has intercepted Haitian asylum seekers at sea, forcibly sending them to their State of origin.[14] The United States government was convinced that the non-refoulement principle is strictly applicable towards refugees located within their jurisdiction. The Supreme Court further declared that Article 33(1) of the Convention, in light of its negotiating history, shall not apply extra-territorially.[15] Such interpretation is deemed inconsistent with the United Nations High Commissioner for Refugee (UNHCR) *amicus curiae* brief on the present case which asserts the extra-territorial nature of the non-refoulement principle.[16] On the same manner, the Inter-American Commission on Human Rights further argued that Article 33 is not limited geographically which would justify its enforcement within the high seas.[17] Correspondingly, the UNHCR has affirmed the extra-territorial application through its Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('**Advisory Opinion**').[18]

In essence, an understanding of the extra-territorial application further provides that States may be held responsible for breaching non-refoulement obligations through the non-admittance of refugees and asylum seekers at frontiers. This understanding is crucial towards understanding the following sections that revolve around the State conduct of the non-admittance of refugees and asylum seekers at State frontiers.

3. *Termination and Suspension during the COVID-19 Pandemic*

A. *Overview*

[14] The *Haitian Centre* for *Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).
[15] Oxford University Press, 'The Haitan Refoulement Case: A Comment' (1994) 6 International Journal of Refugee Law 103, 104.
[16] Brief Amicus Curiae of the Office of the United Nations High Commissioner for Refugees in Support of Respondents, Sale v. Haitian Centers Council, Inc.
[17] The *Haitian Centre* for *Human Rights et al. v. United States,* Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997); Andrew Brouwer and Judith Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide, 21(4) Refuge: Canada's Journal on Refugees, 16.
[18] 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' (26 January 2007).

Under the VCLT, Articles 61 and 62 address unforeseen circumstances hindering the performance of a treaty. Similarly, both provisions represent legal premises to terminate or withdraw from a treaty. In its 1966 Draft, the ILC stressed the importance of distinguishing "*impossibility of performance*" (Article 61) and "*fundamental change of circumstances*" (Article 62). Despite acknowledging the tendency for both provisions to overlap, the ILC highlighted differences in criteria amongst the two provisions.[19] Essentially, Article 61 concerns the execution of a treaty in the event of the supervening impossibility of performance. Meanwhile, Article 62 generally addresses the fundamental change of circumstances to terminate or withdraw from a treaty.

As the COVID-19 Pandemic has impacted refugees' enjoyment of rights under Article 33 of the Convention, this section seeks to explore the possibility for States to escape international obligations by assessing criteria bestowed under Articles 61 and 62 of the VCLT.

B. Article 61 VCLT

Article 61 generally adheres to the *ad impossibilia nemo tenetur* legal principle[20] , which provides that '*nobody is held to the impossible*'.[21] A highly debated issue concerns the distinction between the VCLT and the ARSIWA regarding the supervening impossibility of performance. Evident from the ILC's efforts to distinguish the following instruments, such debate has no concrete answer. Further, Article 61 is deemed the law of treaties equivalent to Article 23 of the ARSIWA on *force majeure* as a circumstance precluding the wrongfulness of State responsibility.[22] From the provision, it is safe to infer that impossibility may be invoked strictly if it results from '*the permanent disappearance of destruction of an object indispensable for the execution of the*

[19] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 256.
[20] Oliver Dorr and Kirsten Schmalenbach, 'Vienna Convention on the Law of Treaties: A Commentary' (2018) Springer, 1052.
[21] Aaron Xavier Fellmeth and Maurice Horwitz, 'Guide To Latin In International Law' (2009) Oxford University Press, 19.
[22] Ibid.

treaty'.[23] This, however, shall not be grounds to invoke impossibility in the event where '*impossibility is the result of a breach by that party*'.[24]

In light of the COVID-19 Pandemic, 'impossibility of performance' may often result from a plethora of reasons extending from financial difficulties or preventing the international spread of the virus. Notably, in the *Gabčikovo-Nagymaros* Case, the ICJ referred to the Conference in which the VCLT adopted where a proposal was sought to include financial restraints within the scope of 'impossibility'. However, such a proposal was not accepted as States were not ready to allow such circumstances to terminate or suspend a treaty.[25] Thus, the impossibility of performance to admit refugees and asylum seekers may not be invoked by States on the premises of financial restraints; however, States may opt to invoke a medical emergency instead. Therefore, it is crucial that '*impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty*.'[26] In essence, it is prudent that a direct connection exists between the object and the Treaty's execution. However, the term 'object' is not limited to a physical object, extending towards a legal regime deemed indispensable for the execution of the Treaty.[27] Considering COVID-19, no 'object' prudent towards the Treaty's implementation has disappeared nor is destructed, therefore rendering the provision inapplicable. This threshold indicates that Article 61 is a complex provision to meet since it requires the temporal disappearance or destruction of an object that is highly challenging to meet in the context of the non-admittance of refugees.

In addition, it is crucial to account whether the impossibility is the result of the invoking State's violation of a treaty obligation. Pursant to Article 61(2) of VCLT, in the event where the invoking State is responsible for the impossibility circumstance, Article 61 of VCLT is inapplicable. Ultimately, an essential requirement to invoke

[23] VCLT, Article 61(1).
[24] VCLT, Article 61(2).
[25] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7, par. 102.
[26] VCLT, Article 61(1).
[27] VCLT Commentary (n 19) 256.

Article 61 would require that the impossibility is not caused by the invoking State's breach of international obligations.[28]

C. Article 62 VCLT

Article 62 is highly acknowledged by scholars as the *rebus sic stantibus* doctrine.[29] Put simply, the doctrine enables the termination or withdrawal from a treaty obligation in the presence of fundamental changes in circumstances. As contracts may be deemed inapplicable under domestic law, treaties may also be inapplicable in the same way.[30] Correspondingly, Article 62 provides that the termination or withdrawal from a treaty may not be invoked unless the requirements are met, ultimately implying the high threshold to invalidate a treaty on the premises of a fundamental change in circumstances.[31] The criteria to be fulfilled encompasses: (1) fundamental change of circumstances: (2) must not be foreseen by the parties; (3) if the existence of the circumstances constituted an essential basis of consent; and (4) if the effect of the change is radically to transform the extent of obligations still to be performed.[32]

In his second report on the law of treaties, Special Rapporteur Fitzmaurice provided that an essential change shall be an objective change in factual circumstances of the Treaty and its operation instead of a subjective change of the parties' attitude upon the Treaty.[33] Moreover, the fundamental change shall establish a relationship with the circumstances existing at the time of the Treaty's conclusion. Thus, the change in circumstances shall render impossible the objects and purposes of the Treaty or a particular obligation concerned.[34] Paul Reuter has previously stressed how the change shall be qualitative and quantitative to be deemed as a fundamental change in circumstances. In a qualitative context, the change shall impact the facts on which the

[28] Oliver Dorr (n 20) 1060.
[29] Ibid 366.
[30] Ibid.
[31] Naomi Hart and Mubarak Waseem, 'Escaping State Responsibility Under International Law During the COVID-19 Pandemic' (2020) Essex Court Chambers Barristers, 5.
[32] Oliver Dorr (n 20) 1084-1089.
[33] ILC 'Second Report on the Law of Treaties, by Mr GG Fitzmaurice, Special Rapporteur' (1957) vol.II, UN Doc A/CN.4/107, 32–33.
[34] Ibid.

parties' consent is based, as enshrined under Article 62(1)(a). Meanwhile, quantitatively the change shall be severe to the extent that it alters the conditions of the Treaty and its *raison d'être* as required by Article 62(1)(b).[35] Ultimately, the COVID-19 Pandemic is arguably a fundamental change if the conditions under Article 62 of VCLT are successfully met.

A fundamental change of circumstance may not be invoked if the parties had foreseen it during the Treaty's conclusion. Further explained by Special Rapporteur Fitzmaurice, the change shall not be anticipatable by the parties with reasonable foresight.[36] In this sense, it may be argued that COVID-19 did not exist at that time where the Refugee Convention was concluded, nor was it envisaged with reasonable foresight. The element is fulfilled since COVID-19 did not exist during the conclusion, rather they changed later.[37]

The essential basis of consent is linked with the object and purpose of the Treaty. Article 62(1)(a) compares the new circumstances with the initial circumstances present during the Treaty's conclusion, which provides an essential basis for the parties' consent to be bound. It is further essential to assess whether the party would have concluded the Treaty, given that they have envisaged the change of circumstances.[38] Considering the object and purpose of the Refugee Convention is to '*assure refugees the widest possible exercise of these fundamental rights and freedoms*', the term '*widest possible exercise*' suggests that ensuring the fundamental rights and freedoms of refugees and asylum seekers shall be sought extensively. Although the State parties may not have envisaged the COVID-19 Pandemic, they have implied the obligation to ensure the '*widest possible exercise*' of guaranteeing the rights and freedoms of refugees and asylum seekers. Depriving refugees and asylum seekers of their fundamental human rights would contradict the object and purpose of the Refugee Convention. Evident under Article 9 of the Refugee Convention, States are prevented from taking measures

[35] Paul Reuter and others, 'Introduction To The Law Of Treaties' (1995) Kegan Paul International, 189.
[36] ILC (n 33) 33.
[37] Mark E. Villiger, 'Commentary on the 1969 Vienna Convention on the Law of Treaties' (2009) Brill, 773.
[38] Ibid 774.

contradictory to obligations under the Refugee Convention. However, the provision may applied in the event where national security is threatened and shall be assessed on a case by case basis. Drafters of the Refugee Convention have further expressed that health concerns would fall beyond the scope of national security.[39] From this, it is safe to say that emergency medical situations have been envisaged be the drafters of the Refugee Convention. It may be inferred that the strict limitation towards national security is in line with enforcement of the Refugee Convention's objects and purposes to ensure '*widest possible exercise*'. In tandem, this suggests that even if the State parties have envisaged the Pandemic, the State parties have knowingly concluded the Refugee Convention with full awareness of the provisions to reflect the object and purposes.

Moving on to assess the radical transformation of the obligation, the ICJ established in the *Fisheries Jurisdiction* Case that the change should impair the fulfillment of the object and purposes of the Treaty or impact the performance of treaty obligations essentially different than initially intended.[40] The ICJ provided that the radical transformation does not need to establish impossibility, however, requiring the change to amount towards an increased burden of obligations.[41] Altogether, it is necessary to prove the increased burden of the fulfillment of the objects and purposes of the Refugee Convention since the obligation of non-refoulement under Article 33 is hindered by the COVID-19 Pandemic. The issue here concerns the threshold of '*excessively burdensome and unreasonable'* to fulfill the objects and purposes of the Refugee Convention. To assess the threshold, the obligations under the Refugee Convention shall be '*so radically transformed that the affected party can no longer be reasonably expected to fulfill it*'.[42] Although it is possible to argue that States may face an increased burden of obligations by accepting refugees and asylum seekers, arguing

[39] James Hathaway, 'The Rights of Refugees Under International Law' (2005) Cambridge University Press, 11; Kate Ogg and Chanelle Taoi, 'COVID-19 Border Closures: A Violation of Non-Refoulement Obligations in International Refugee and Human Rights Law?' (2021) Australian Yearbook of International Law (Forthcoming), ANU College of Law Research Paper No. 21.24, 6.
[40] *Fisheries Jurisdiction* (*United Kingdom v. Iceland*) (Judgment) [1973] ICJ Rep 3, par. 43.
[41] Oliver Dorr (n 20) 1088-1089.
[42] Ibid.

that such obligations '*can no longer be reasonably expected to fulfill*' is illogical since States may respond with other means to prevent the spread of COVID-19. Affirming this, the ICRC, in its Note on the Protection of Migrants in light of the COVID-19 Pandemic, ascertained that the opening of channels for asylum seekers towards international protection should be guaranteed.[43] Thus, an increased burden to uphold the principle of non-refoulement is not justifiable with the existence of a health risk in which health measures such as screening and quarantines are pursuable.[44]

4. *Circumstances Precluding Wrongfulness*

A. *Overview*

The law on State responsibility has progressed in light of the ARSIWA established by the ILC and adopted under United Nations General Assembly Resolution 56/83 (A/RES/56/83). Although established as soft law, scholars have argued that its form as draft articles may infer that the provisions are equivalently well-established as a form of customary international law.[45] Nevertheless, the law on State responsibility is not included under the VCLT as it entails a different scope. State responsibility falls into a different domain, further evident by Article 73 of VCLT, which provides that the VCLT shall not prejudge, *inter alia,* issues arising from State responsibility. Moreover, Article 2 of the ARSIWA provides the criteria to determine the presence of an internationally wrongful act, which requires that the conduct: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation.

Chapter V of the ARSIWA entails various provisions which provide for circumstances precluding the wrongfulness of States. In essence, successfully invoking a circumstance precluding wrongfulness may theoretically relieve States of the

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[43] ICRC, 'Note on the Protection of Migrants in the Face of the COVID-19 Pandemic' (2020) 3.
[44] Sassi Selma, 'Pandémie du Covid-19 et droit international des réfugiés: vers une remise en cause du principe fondamental denon-refoulement? Covid-19 pandemic and refugees international law: towards a questioning of the fundamental principle of non-refoulement?' (2020) 58 Revue Algeriennedes Sciences Jurisdiqueset Politiques 970, 979.
[45] Elena Baylis, 'The International Law Commission's Soft Law Influence' (2019) 13 FIU Law Review 1007, 1011.

violation of an international obligation.[46] However, it is crucial to account for Article 26, which prevents invoking circumstances under Chapter V if it contradicts a *jus cogens* norm. Therefore, this section seeks to discuss States may escape obligations of non-refoulement through assessing the following provisions: (1) Article 23 (*force majeure*); (2) Article 24 (distress); and (3) Article 25 (necessity); and (4) Article 26 (peremptory norms) of the ARSIWA.

B. Force Majeure

The ILC declared that *force majeure* is invokable to '*justify involuntary, or at least unintentional, conduct*.'[47] Consequently, its *involuntary* element distinguishes *force majeure* from situations of distress or necessity.[48] However, the threshold to invoke *force majeure* is lower than invoking supervening impossibility under Article 61 of VCLT. It is further prudent to account for the distinct features between Article 23 of ARSIWA and Article 61 of VCLT. While *force majeure* precludes wrongfulness from the non-performance of an international obligation during the *force majeure* situation, supervening impossibility allows the termination or suspension of the Treaty.[49] A circumstance of *force majeure* shall satisfy the following: (a) act in question must be brought about by an irresistible force or an unforeseen event: (b) beyond the control of the State concerned; and (c) materially impossible in the circumstances to perform the obligation.[50]

The ILC has provided that the element 'irresistible force' is defined as an event resulting in impacts State cannot avert.[51] Moreover, the element 'unforeseen event' shall amount to events *neither foreseen nor of an easily foreseeable* kind. In tandem, the mentioned elements are linked to a materially impossible circumstance.

[46] ILC 'Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries' (2001) 71
[47] Yearbook, ILC 22 (1979) 123.
[48] ARSIWA Commentary (n 46) 76.
[49] Ibid 71.
[50] Ibid 76.
[51] Ibid.

Through the first World Health Organization (WHO) International Health Regulations Emergency meeting addressing the COVID-19 outbreak on 23 January 2020, the Emergency Committee have simultaneously assessed the gravity of the virus and containment efforts.[52]

Subsequently, on 30 January 2020 the WHO have declared COVID-19 as a Public Health Emergency of International Concern (PHEIC) on 30 January 2020.[53] The WHO importantly classified COVID-19 as a Pandemic on 11 March 2020.[54] Altogether, the WHO's assessments indicate that States were aware of COVID-19 and its consequences since January 2020, therefore COVID-19 does not classify as an 'unforeseen event'. While the initial emergence of the novel coronavirus in China may indeed satisfy 'unforeseen event,' other States are likely to have envisaged the spread of COVID-19 following its initial emergence[55]; thus, the element 'unforeseen event' is not satisfied. It is is evident that States have resorted to various measures amounting to closing of borders and travel bans during the start of the Pandemic.[56] Nevertheless,

[52] WHO, 'Statement on the first meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCov)' *who.int*, 2020 < https://www.who.int/news/item/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)> accessed on 7 February 2022.

[53] WHO, 'Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCov)' *who.int*, 2020 <https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)> accessed on 7 February 2022.

[54] WHO, 'WHO Director-General's Opening Remarks At The Media Briefing On COVID-19 - 11 March 2020' *who.int*, 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 on 12 May 2021.

[55] Lily Kuo, 'China confirms human-to-human transmission of coronavirus', *The Guardian*, (Beijing, 12 January 2020) <https://www.theguardian.com/world/2020/jan/20/coronavirus-spreads-to-beijing-as-china-confirms-new-cases>; News Desk, 'Indonesia issues travel warning for Hubei, Wuhan as coronavirus death toll rises' *The Jakarta Post*, (Jakarta, 28 January 2020) <https://www.thejakartapost.com/news/2020/01/28/indonesia-issues-travel-warning-for-hubei-wuhan-as-coronavirus-death-toll-rises.html>; Prime Minister, Minister for Health, 'Extension of travel ban to protect Australians from the coronavirus', *Prime Minister of Australia* (13 February 2020) <https://www.pm.gov.au/media/extension-travel-ban-protect-australians-coronavirus>; Leslie Josephs and Kevin Breuninger, 'Trump imposes travel restrictions, mandatory quarantines over coronavirus outbreak', *CNBC*, (31 January 2020) <https://www.cnbc.com/2020/01/31/white-house-to-hold-briefing-on-coronavirus-friday-afternoon.html>

[56] Ibid.

COVID-19 have managed to spread, satsifying the 'irresistible force' element. Subsequently, the element "*beyond the control of the State*" shall be fulfilled to invoke *force majeure.* While States may impose strict measures to prevent the spread of COVID-19, eventually the spread may be considered beyond States' control if the measures prove ineffective.[57] This is apparent as most States were affected by COVID-19 as of March 2020, despite having States implementing the most preventative measures. Ultimately, the next element 'beyond the control of the State concerned' is fulfilled.

Lastly, the situation shall be '*materially impossible in the circumstances to perform the obligation*'.[58] The ILC highlights that such criteria shall '*not include circumstances in which the performance of an obligation has become more difficult*'.[59] In this sense, the ILC further stressed that the following should, *inter alia,* not include circumstances concerning financial or political emergencies.[60] Thus, States may instead opt to invoke *force majeure* based on a medical emergency instead of financial emergencies in the context of COVID-19. Further assessing the *materially impossible* criteria is questionable since States may impose strict measures according to the special provisions for travelers enshrined under the WHO International Health Regulations ('**IHR**'). Article 31 of the Guidelines provides that imposing health measures encompassing medical examinations and vaccinations may lawfully be imposed based on an evident public health risk through applying the least intrusive and invasive approach to prevent the international spread of the disease.[61] The recent vaccination programs and advancements would make it unreasonable to declare the non-admittance of refugees and asylum seekers with '*materially impossible*' grounds. Vaccines are essentially deemed effective in preventing more people from contracting COVID-19[62], thus declaring the situation *materially impossible* with the availibility of vaccines is

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[57] Federica I Paddeu, 'A Genealogy of *Force Majeure* in International Law' (eds) *British Yearbook of International Law*, 82(1), (Oxford University Press 2012), 394.
[58] ARSIWA, Article 23(1).
[59] ARSIWA Commentary (n 46) 76.
[60] Ibid.
[61] WHO, 'International Health Regulations' (2005) Article 31.
[62] CDC, 'Benefits of Getting Vaccinated' *CDC.gov*, 2022 < https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html> accessed on 5 February 2022.

groundless. Although such a situation may differ for States with inaccessibility towards COVID-19 vaccines, the IHR nevertheless provides various measures under Article 31 encompassing medical examinations and possibly additional health measures, including mandatory quarantine with public health observation.[63] A counterargument may perhaps be raised concerning the effectiveness of compulsory quarantines since States implementing such measures persist in suffering increased cases. Referring to the case of Indonesia, mandatory quarantines are imposed for a 5-day period on foreign travelers.[64] However, experts argued that such measures are not supported with scientific data and are ineffective, thus urging the Indonesian government to impose the 14-day quarantine period. This is further supported by Dicky Budiman, an epidemiologist of Griffith University, who conveys that successful States in containing the Pandemic have imposed strict quarantine mechanisms, with none of them imposing less than 10 days.[65] Moreover, States considered successful in containing the virus, including *inter alia* Australia and New Zealand, have imposed a 14-day mandatory quarantine period.[66] Such mechanisms are effective and supported by the WHO's Updated recommendation on the 'Criteria for releasing COVID-19 patients from isolation', which requires at least 10 days of quarantine for asymptomatic patients following a positive test for COVID-19 with the RT-PCR method. Meanwhile, demanding 10+3 additional days with no symptoms for symptomatic patients.[67] To further affirm, the UNHCR addresses that States may undertake measures to 'ascertain and manage risks to public health,' including mechanisms such as screening protocols and quarantines, which may extend up to two weeks when deemed necessary.[68]

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[63] IHR (n 61) Article 31.

[64] Ardila Syakriah, 'Indonesia's 5-Day Quarantine Rule Too Risky Amid Case Resurgence, New Variant: Experts' *The Jakarta Post*, (Jakarta, April 28, 2021) <https://www.thejakartapost.com/news/2021/04/28/indonesias-5-day-quarantine-rule-too-risky-amid-case-resurgence-new-variant-experts.html> accessed 6 May 2021.

[65] Ibid.

[66] Ibid.

[67] WHO, 'Criteria for releasing COVID-19 patients from isolation' (2020) COVID-19: Scientific briefs 17/2020 <https://www.who.int/publications/i/item/criteria-for-releasing-covid-19-patients-from-isolation> accessed 29 May 2021.

[68] UNHCR, 'Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response' (2020) 2.

Moreover, a Pandemic shall not be grounds to reject refugees and asylum seekers without further consideration of asylum claims as affirmed by renowned Professor of International at Yale Law School, Oona A. Hathaway.[69] Medical doctors Androula Pavli and Helena Maltezou further established that results of medical examination and screening protocols might not be grounds for deportation from a State.[70] In tandem, it is safe to infer that imposing quarantines following WHO and UNHCR recommendations for refugees and asylum seekers is effective; thus the element '*materially impossible*' is not fulfilled since the following element shall '*not include circumstances in which the performance of an obligation has become more difficult*'. Thus, while imposing vaccinations and health examinations on refugees may cause difficulties in upholding the principle of non-refoulement, the obligation's performance is still possible.

Invoking Article 23 of ARSIWA is inapplicable if Article 23(2) is not fulfilled. Thus, the following shall not apply if '*the situation of force majeure is due, alone or in combination with other factors, to the conduct of the State invoking it*.' The *Libyan Arab Foreign Investment Company and The Republic of Burundi,* as referred to by the ILC in the ARSIWA Commentary, notably illustrate this where *force majeure* was rejected because the situation was not steered by an unforeseen external circumstance or an irresistible force outside the State's control.[71] However, it shall be regarded that the *force majeure* situation shall be deemed "due" to the State's conduct. This indicates that *force majeure* may potentially be invoked when the invoking State has unintentionally contributed to the situation of *force majeure* in good faith.

Further, the second exception provides necessity inapplicable if *the State has assumed the risk of that situation occurring*. In the context of COVID-19, a feasible approach is to assess the contributing factors to the Pandemic. To this extent, it is necessary to weigh

[69] Oona A. Hathaway and others, 'The COVID-19 Pandemic and International Law' (2021) forthcoming 54(2) Cornell International Law Journal, 48.
[70] Androula Pavli and Helena Maltezou, 'Health Problems of Newly Arrived Migrants and Refugees in Europe' (2017) 24 J. Travel Med., 5.
[71] ARSIWA Commentary (n 46) 76.

various factors such as the State reaction and measures adopted in response to the Pandemic. Although the requirement under the ARSIWA is much lighter than the VCLT, in essence, severe actions conducted in good faith shall not exempt States from invoking this provision.[72]

C. Distress

Article 24 of the ARSIWA essentially concerns the '*specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care.*' Applicable towards the case of non-refoulement, the general population is under the care of the State. Article 24 entails various requirements as follows: (a) threat to life; (ii) relationship between the relevant individuals entrusted to the State organs care and the State organ (iii) no reasonable way; (iv) non-contribution; and (v) shall not cause comparable or greater peril.

Concerning the 'threat to life' requirement, the nature of the COVID-19 Pandemic automatically satisfies such element since the Pandemic can harm medical conditions that occasionally result in death. Therefore, it is safe to classify the Pandemic as a threat to life.

Proving the relationship between the State and the individuals concerned is further essential to establish distress. Historically, distress has prominently been invoked in numerous cases relating to aircraft and ships. However, the ILC stressed that Article 24 extends such cases.[73] In the *Rainbow Warrior* Arbitration case, distress is relied to "in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State."[74] In this manner, the threat to life towards the individuals concerned shall establish a relationship with the author, which shall apply towards the relevant State organ in the context of non-refoulement. Thus, provided

[72] Onur Inan, 'Can States Successfully Resort to the Customary International Defences against the Possible Claims Arising out of COVID-19 Measures?' (2020) 14 Romanian Arbitration Journal. 131, 140.
[73] ARSIWA Commentary (n 46) 79.
[74] *Rainbow Warrior* (*New Zealand v. France)* (Judgment) (April 30, 1990), 82 ILR 499, par. 78.

that the authority is authorized to impose regulations and measures to address COVID-19, the fate of the relevant population may be deemed within the authority's control.[75] However, it is important to note that the ARSIWA Commentary provides that the defense shall not be deemed applicable for more general emergencies that fall into the scope of necessity instead of distress.

The next element requires that the measure undertaken represents the 'only reasonable way' of saving the population's lives. Such element further enables the preclusion of wrongfulness when there is no other reasonable way of safeguarding the population. The following allows a '*flexibility regarding the choice of action.*' Thus, the element strives to '*balance between the desire to provide some flexibility in saving lives and the need to confine the scope of the plea having regard to its exceptional character.*'[76] This infers the flexibility allowed to satisfy the 'only reasonable way' where the State organ holds discretion in saving the relevant population, thus accounting for the lack of time or resources to conduct a thorough assessment before acting, limiting distress towards mere cases of emergencies. However, a reasonable belief is required instead of the psychological condition of the involved State organ.[77] Overall, a lower threshold is required than the 'only way' requirement under Article 25 of the ARSIWA on necessity. This additionally allows a more flexible approach; however, actions shall be reasonable.

Establishing whether an action is 'reasonable' shall depend on the circumstances and information known during the period where the action is pursued. In light of advancements in vaccinations and the capability of States to impose health measures through examinations and quarantines, the non-admittance of refugees and asylum seekers may be considered unreasonable. The advancement and accessibility of new information on the COVID-19 Pandemic shall further allow State organs to impose

[75] Inan (n 72) 131.
[76] ARSIWA Commentary (n 46) 80.
[77] Inan (n 72) 153.

appropriate measures. Therefore, the non-admittance of refugees and aslyum seekers shall not amount to a 'reasonable' action.

The requirement of non-contribution is essentially similar to the case of *force majeure*[78]; necessary actions to save lives shall be prioritized.[79] Meaning to say, if lives are at stake, States may reasonably act to mitigate such risk, despite its contribution. Essentially, the threshold for non-contribution is lower than the necessity defense.[80] Commonly, invoking States may have one way or another contributed to the circumstances, although indirectly. However, the standard for this is that the defense may not be invoked if the situation is inflicted, '*either alone or in combination with other factors, to the conduct of the State invoking it*.'[81] Overall, States may lawfully invoke distress notwithstanding good faith measures imposed by States to mitigate the COVID-19 Pandemic, which ultimately contributes to the severity of the Pandemic.

Finally, the measure taken shall not provide a '*comparable or greater peril*.' This attempts to weigh the measures undertaken and the other interests affected during the circumstances.[82] Thus, the distress defense shall be inapplicable if the measure undertaken threatens more lives or inflicts a heavier peril. This requirement shall be construed in line with the previous requirement under Article 24(1) of the ARSIWA concerning '*no other reasonable way.*'[83] In the context of border restrictions upon refugees and asylum seekers, undertaking such a measure tends to inflict a comparable or greater peril since violating the principle of non-refoulement potentially exposes the risk of torture and genocide for refugees and asylum seekers. Imposing border restrictions upon refugees and asylum seekers may not be deemed an effective measure to safeguard the spread of the COVID-19 Pandemic towards the general population. Further affirmed by the WHO, denying entry of individuals from affected areas is more than often ineffective in mitigating the international spread of

78 Ibid.
79 ARSIWA Commentary (n 46) 80.
80 Inan (n 72) 155.
81 ARSIWA Commentary (n 46) 80.
82 Ibid.
83 Ibid.

the virus. However, this may inflict a social and financial impact.[84] The critical issue here, however, concerns the impact on the lives of the population. Therefore, imposing border restrictions inflicts a greater peril as it exposes refugees and asylum seekers towards torture and genocide, ultimately posing a threat to life.

D. Necessity

Necessity is fundamentally reserved for exceptional cases representing the '*only way a State can safeguard an essential interest threatened by a grave and imminent peril*.'[85] The necessity defense, if successfully invoked, may relieve the invoking State of the non-performance of an international obligation in accordance with the terms enshrined under Article 25 of ARSIWA. Established by the ILC, the necessity defense is distinct from other defenses as the following arises from an inevitable conflict of a State obligation and a vital interest. Therefore, it is safe to infer the high necessity threshold to exempt States from an international obligation. Moreover, the following requirements shall be satisfied as follows: (i) essential interest; (ii) grave and imminent peril; (iii) the only way; and (iv) does not seriously impair an essential interest of another State or the international community as a whole; and (iv) non-contribution.[86]

The first element to be satisfied concerns the presence of a threat towards the essential interests of the State. Determining whether an interest is essential is dependent on the distinct circumstances of each case. Thus, the element is not defined in a concrete sense as it varies between cases.[87] The ILC, in its Commentary to the ARSIWA, emphasized the application of necessity to protect various interests, ranging from environmental interests towards the existence of the State in a public emergency or guaranteeing the

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[84] WHO, 'Updated WHO recommendations for international traffic in relation to COVID-19 outbreak' *who.int*, 2020 <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak> accessed on 29 May 2021.

[85] ARSIWA Commentary (n 46) 80.

[86] Applied by the Tribunal in the series of investment arbitration cases involving Argentina's financial crisis; *LG&E v. Argentina* Final Award, ICSID Case No. ARB/02/1; *Continental Casualty Company v. Argentina* Final Award, ICSID Case No ARB/03/09; El Paso Energy Int'l Co. v. Argentina Award, (ICSID Case No. ARB/03/15), par. 5-6.

[87] ILC, 'Second Report on State Responsibility, by Mr James Crawford, Special Rapporteur' Special Rapporteur, A/CN/4/498 and Add. 1-4, par. 282.

safety of a population.[88] In this sense, the COVID-19 Pandemic may easily be classified as a threat towards the State's existence in a public emergency, as anticipation efforts of the Pandemic aim to ensure civilians' safety. The WHO further enriched this by declaring the Pandemic as a Public Health Emergency of International Concern (PHEIC).[89] The following term is not to be used lightly and is defined under the IHR as an '*extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response*.'[90] The PHEIC status attained by the COVID-19 Pandemic is a clear indication of a public emergency that threatens the safety of civilians globally. Moreover, the right to life is a non-derogable right which, if threatened, will automatically impact other interests, including the State's financial and social circumstances.[91] Thus, the adverse global impacts of the Pandemic may amount to an essential interest of the invoking State.

Secondly, the presence of a grave and imminent peril shall be established. Roman Boed opines that any threat likely to destroy the possibility of realizing an essential State interest shall be considered a 'grave peril' situation.[92] Addressing the 'imminent peril' element, the ILC conveyed that the danger shall be extremely grave and 'a threat to the interest at the actual time.'[93] Concerning the 'imminence', the ICJ held in the *Gabčikovo-Nagymaros* Case that 'imminence' is similar with 'immediacy' or 'proximity' and shall be distinguished from the concept of 'possibility.'[94] Subsequently, 'peril' was construed as the presence of "risk" instead of 'material damage.'[95] With over 3,472,000

[88] Ibid 83.
[89] WHO 'COVID-19 Public Health Emergency of International Concern (PHEIC) Global research and innovation forum' (12 February 2020) <https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum> accessed 23 May 2021.
[90] IHR (n 61) Article 1.
[91] James Thuo Gathii, 'How Necessity May Preclude State Responsibility for Compulsory Licensing under the TRIPS Agreements' (2006) 31 N. C. J. Int'l L. 943, 961.
[92] Roman Boed, 'State of Necessity as a Justification of Internationally Wrongful Conduct' (2014) 4 Yale Human Rights and Development Law Journal, 28.
[93] ILC, 'Report of the International Law Commission on the Work of its 32nd Session' (5 May – 25 July 1980), Official Records of the General Assembly, 35th session, Supplement No. 10, Document A/35/10, 1980, vol. II(2), par.33.
[94] *Gabčikovo-Nagymaros* Case (n 25) par.54.
[95] Ibid.

confirmed deaths reported by the WHO as of 25 May 2021[96], such statistics suggest the presence of a threat of imminence and grave peril globally towards essential interests of the international community.

Addressing the 'only way' element under Article 25, it is necessary to establish whether the breach of non-refoulement obligations through imposing restrictions is the only way possible to control the spread of COVID-19. Moreover, the necessity defense is inapplicable provided that alternative measures are available, despite the possibility of exercising measures more inconvenient. Further, the WHO highlighted that evidence indicates the ineffectiveness of travel bans to affected areas or the denial of entry for individuals from affected States towards preventing the spread of COVID-19. Travel restrictions are only deemed effective at the start of an outbreak as it enables States to implement precautionary measures.[97] The ILC expressed that '*any conduct going beyond what is strictly necessary for the purpose will not be covered*.'[98] Therefore, imposing travel restrictions upon refugees or asylum seekers shall not provide grounds for necessity.

It is necessary to prove whether such a measure satisfies the 'only way' criteria. The *CMS Gas Transmission Company v Argentina* Case affirmed that the 'only way' criteria should not be satisfied if the invoking State may possibly undertake an alternate measure.[99] When imposed at the beginning of the outbreak, the WHO favored the travel bans, where information surrounding the virus was lacking, and no COVID-19 vaccines were ready. The vaccination programs signify the possibility of implementing other possible measures for capable States to safely allow entry for refugees and asylum seekers without compromising public health. In addition, other measures enshrined under the IHR, including quarantines and health examinations, may be conducted.[100] The ARSIWA Commentary provides that the 'only way' criteria

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[96] WHO, 'WHO Coronavirus (COVID-19) Dashboard' (*World Health Organization,* 2021) <https://covid19.who.int/> accessed 25 May 2021.
[97] WHO (n 89)
[98] ARSIWA Commentary (n 46) 83.
[99] *CMS Gas Transmission Co. v. Argentina* Award, (ICSID Case No.ARB/01/8), par.323.
[100] IHR (n 61) Article 31.

are not limited upon unilateral action, however extending towards cooperative action with other States or international organizations. For instance, the International Organization for Migration (IOM), alongside authorized institutions of the USA, has conducted vaccination programs since 2012 prior to resettlement.[101] This ensures the protection of refugees arriving in the United States from preventable diseases. The IOM further extends its collaboration with over 22 States in providing vaccinations.[102] Altogether, such a measure is a feasible approach towards mitigating the cross-border spread of COVID-19. For obvious reasons, accessibility towards vaccinations may vary between States. Nevertheless, this shall not justify the non-entry of refugees and asylum seekers in States lacking accessibility to vaccines. Through the IHR, the WHO urges the implementation of the IHR with respect to '*dignity, human rights and fundamental freedoms of persons*'.[103] The IHR generally strives for 'unnecessary interference with traffic and trade'; depriving human rights through the non-admittance and refoulement of individuals would potentially intefere with respect for human rights, and fundamental freedoms of persons.[104] Thus, screening measures and quarantines may be undertaken in a manner consistent with the principle of non-refoulement.[105]

Subsequently, the conduct shall not seriously impair an essential interest of another State or the international community. This urges the importance of balancing essential interests of the invoking State and the interests of other States involved. A violation of the non-refoulement principle as provided under Article 33(1) of the Refugee Convention may potentially threaten the lives and freedoms of refugees and asylum seekers '*on account of his race, religion, nationality, membership of a particular social group or political opinion*'. Human rights obligations, often comprising an erga omnes nature,

[101] International Organization for Migration 'Vaccination' (*International Organization for Migration*, 2021) <https://www.iom.int/vaccination> accessed 31 May 2021.
[102] Ibid.
[103] IHR (n 61) Article 3.
[104] Adam Ferhani & Simon Rushton, 'The International Heath Regulations, COVID-19, and bordering practices: Who gets in, what grets out, and who gets rescued?' (2020) Contemporary Security Policy, 465.
[105] Selma (n 44) 979.

are often regarded as an essential interest of the international community.[106] The International Criminal Tribunal for the former Yugoslavia (ICTY) *Furundzija* Case further elaborated *erga omnes* obligations as obligations owed towards the international community as a whole. Thus, '*the violation of such obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member*'.[107] Furthermore, to establish whether the breach of non-refoulement obligations may harm international community interests, its status as an *erga omnes* obligation shall be established. In discussing the *erga omnes* obligation, the ICJ Barcelona Traction Case is relevant and highly referred to.[108] The case provides various principles and obligations in which *erga omnes* obligations are owed to. Although the obligation of non-refoulement is not explicitly included, the case *inter alia* expressed the prohibition of torture and genocide, respectively.[109] Correspondingly, it is arguable that an *erga omnes* obligation is breached by the invoking State through a travel ban, ultimately risking torture or genocide of refugees and asylum seekers.

To successfully invoke necessity, Article 25 of the ARSIWA provides that the invoking State shall not contribute to the circumstance of necessity. Notably, the ICJ rejected Hungary's attempt to invoke the necessity defense in the *Gabčikovo-Nagymaros* Case as Hungary was declared to have contributed to the circumstance.[110] This is made clear by the ARSIWA Commentary, which provides that State contribution upon the circumstance of necessity shall be '*sufficiently substantial and not merely incidental or peripheral*.'[111] The *CMS Gas Transmission Company v Argentina* Case, a landmark case towards the development of necessity, further stresses the '*not merely incidental or peripheral*'[112] requirement. Additionally, the *CMS* Tribunal notably established that

[106] Cedric Ryngaert, 'State Responsibility, Necessity, and Human Rights' (2010) 41 Netherlands Yearbook of International. Law 79, 82.
[107] *Prosecutor v Furundzija* (Judgment) International Criminal Tribunal for the former Yugoslavia (10 December 1998) 38 ILM, 1999, par.151.
[108] Boed (n 92) 31.
[109] *Barcelona Traction, Light and Power Co. Ltd.* (*Belgium/Spain*) (Judgment) [1970] ICJ Rep 3, par.34.
[110] *Gabčikovo-Nagymaros* Case (n 25) par.57.
[111] ARSIWA Commentary (n 46) 84.
[112] CMS (n 99), par. 328.

Argentina's financial emergency derives from internal and external variables, accounting for the regulations and policies in construing the State's contribution.[113] Ultimately, it is safe to infer that the necessity defense demands a higher threshold than distress under Article 24 of the ARSIWA. Thus, it could be argued that the lack of State efforts towards public healthcare measures may have contributed to the spread of the Pandemic. If sufficient funds and appropriate actions were allocated towards public health, the spread of COVID-19 in the population could have possibly been under control. In this case, although the novel coronavirus originates from China, internal factors such as the lack of State policies and health services may prevent invoking the necessity defense.

E. Compliance with Peremptory Norms

Putting aside whether the circumstances precluding wrongfulness under Chapter V of the ARSIWA may legitimately be invoked, an interesting issue derives from whether a conflicting obligation with a peremptory norm of general international law may hinder the application of Articles 23-25. The subject dwells from Article 51 of the VCLT, which provides a treaty void if a peremptory norm is violated. Further, Article 64 VCLT States that an earlier treaty contradicting a new peremptory norm shall, in the same manner, be deemed void.[114] The ILC emphasized the prevalence of an obligation deriving from a peremptory norm when a conflict arises concerning State obligations under a treaty, and a peremptory norm of general international law. Correspondingly, even if the previously discussed provisions may be invoked successfully, ultimately the compliance with peremptory norms of general international law shall prevail.[115]

Whether compliance with peremptory norms may hinder the application of the circumstances precluding wrongfulness, it is necessary to assess whether the principle of non-refoulement has attained the norm of *jus cogens* under international law. The

[113] Ibid 328-329.
[114] ARSIWA Commentary (n 46) 84.
[115] Ibid 85.

principle of non-refoulement is recognized as a fundamental human right to be guaranteed for refugees and asylum seekers.[116] The non-refoulement principle is also attributed towards the *jus* cogens norm of the prohibition of torture through imposing risks of torture through refoulement.[117] The non-refoulement principle is also subject to various arguments, affirming its *jus cogens* status by its nature.[118] According to Article 53 of the VCLT, the elements of establishing *jus* cogens are as follows: (1) acceptance and recognition of the international community of States as a whole; (b) norm to which no derogation is permitted. The classification of the non-refoulement principle as a *jus cogens* norm shall be construed in light of the following facts.[119] Notably, the UNHRC has declared in its Advisory Opinion that the principle of non-refoulement under Article 33 of the Refugee Convention and supplemented through various international human rights instruments fulfill the elements of customary international law.

States upholding the principle of non-refoulement extends beyond State parties of the Refugee Convention and its 1967 Protocol.[120] The non-refoulement principle is recognized in various legal instruments as having attained the *jus cogens* status.[121] Referring to the case of South America, the 1984 Cartagena Declaration of Refugees upholds the non-refoulement principle for its prominence in safeguarding refugees.[122] Thus, the Declaration provides that the principle shall be recognized as *jus cogens*,[123] which is well accepted by the Inter-American Commission Human Rights and the OAS General Assembly. Scholars have heavily relied on State practices to finally conclude that the non-refoulement principle may in fact be classified as *jus cogens*, as

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[116] Selma (n 44) 973.
[117] Advisory Opinion (n 18) 11.
[118] Cordula Droege, 'Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges' (2008) 90 Int. Rev. Red Cross 669, 670.
[119] Sigit Riyanto, 'The Refoulement Principle and Its Relevance in the International Law System' (2010) 7 IJIL 695, 706.
[120] Riyanto (n 119).
[121] Ibid.
[122] Jean Allain, 'The Jus Cogens *Nature of Non-Refoulement*' (2002) 13 International Journal of Refugee Law 533, 539.
[123] UNHCR, 'Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons: Regional Instruments' (1995) 206.

established by Harold Koh.[124] An affirmation of the non-refoulement principle of having attained the *jus* cogens norm is present in practices by the UNHCR.[125] Under Article 42(1), the Refugee Convention regards Article 33 as part of the non-reservable provisions, with various conclusions from the UNHCR Executive Committee in the 1980s which provide that the principle is essential and is within the process of attaining the *jus cogens* status.[126] Further, in 1996, the Executive Committee declared the principle of having attained the norm of *jus cogens* by establishing that the principle is indeed subject to no derogation.[127]

In tandem, the non-refoulement principle as a *jus cogens* norm is highly regarded by international law scholars and experts.[128] Pursuant to Article 38(1) of the Statute of the International Court of Justice ('**ICJ Statute**'), the teachings of international law scholars and experts may be deemed as a source of international law. As a result, States are obliged to adhere to non-refoulement in the event if a circumstance precludes wrongfulness.

5. Conclusion

Having assessed the two provisions as premises to terminate or suspend treaty obligations under the VCLT, it is safe to say that none of the provisions are likely to be successful in evading non-refoulement obligations. The impossibility of performance under Article 61 VCLT provides an extremely high threshold to fulfill as it requires the disappearance or destruction of an object. This is unlikely impossible to achieve in the context of non-refoulement since no object faces disappearance or destruction in relation to the execution of the Refugee Convention. Furthermore, the fundamental change of circumstances under Article 62 of the VCLT does not provide a reliable defense for terminating or withdrawing from a treaty since the drafting

[124] WHO (n 71), Allain (n 99) 540.
[125] Riyanto (n 119) 707.
[126] Ibid.
[127] Executive Committee Conclusion, 'General Conclusion on International Protection No. 79/1996' (1996) UN Doc A/AC.96/878 and 12A (A/51/12/Add.1).
[128] Riyanto (n 119) 707.

States have expressed the object and purpose of the Refugee Convention to ensure the widest exercise possible.

The advancement of COVID-19 vaccination programs and the dynamic nature of the virus calls for an arduous assessment of the circumstances precluding wrongfulness enshrined under customary international law. Amongst the defenses accessed, none of the defenses may be lawfully invoked to preclude the violation of non-refoulement. The threat to life potentially inflicted through refouling refugees and asylum seekers overall outweighs the interests sought by States through imposing non-entry on State frontiers. Moreover, the advancements in vaccinations and the developing information on mitigating the virus renders the defenses difficult to invoke as various alternative measures exist to prevent the international spread of the virus.

Even in the instance where the circumstances precluding wrongfulness may successfully be invoked, ultimately, the non-refoulement principle is an established *jus cogens* norm of international law in which shall allow no derogation at all costs. This is evident under Article 26 of the ARSIWA, which prevents the enforcement of the customary international law defenses should a *jus cogens* norm is threatened.

Conclusively, the fundamental rights of refugees and asylum seekers should nevertheless be protected at all means, despite the hurdles inflicted by the COVID-19 Pandemic. Although reports have evidently shown that an alarming number of States are violating non-refoulement during the COVID-19 Pandemic, it is worth underlining again that in contrary to other policies limiting the exercise of human rights, non-refoulement obligations shall be upheld at all costs.