A STATE OF NECESSITY TO JUSTIFY STATES' CLOSURE OF THEIR BORDERS TO PREVENT A MASSIVE INFLUX OF ASYLUM-SEEKERS

Ana Tskipurishvili

ABSTRACT

A large-scale influx of asylum-seekers is a serious concern of the international community. People migrate for many different reasons, including economic, social, political ones. It is indisputable that a sudden massive influx of asylum-seekers is likely to threaten essential interests of any State. The closure of State borders and the concept of a "state of necessity" are closely related issues. It is therefore important to determine whether a State is entitled to invoke a "state of necessity" in order to prevent a massive influx of asylum-seekers. This article does not advocate to expand the reasons for a plea of necessity and thus to allow States to avoid international obligations in the name of protecting their interests against a grave and imminent peril. International law should apply notwithstanding States' individual self-interests.

INTRODUCTION

While the "doctrine of necessity" as a justification for precluding the wrongfulness of an international act may be applicable in relation to the non-fulfilment by States of international obligations, it is equally important to balance competing interests. This paper offers a critical analysis of the issue whether a "*state of necessity*" may be invoked to justify a State's closure of its borders to avert a massive influx of asylum-seekers.

In this connection, it is appropriate to review widely accepted multilateral treaties and thereby to examine the question whether international law imposes an obligation on States not to repel asylum-seekers from entering their countries. If it is concluded that international law prohibits exposing asylum-seekers to persecution if borders are closed even in case of a large-scale influx of migrants, a plea of necessity will be explored. The criteria for invoking a "*state of necessity*", provided for in Article 25 of the Articles on State Responsibility of the International Law Commission, and the legal consequences of its application will then be discussed.

The following analysis illustrates that a State should not be entitled to close its borders in invoking a "*state of necessity*" when that State acts out of purely parochial concerns.

1. STATE OBLIGATIONS TO ADMIT ASYLUM-SEEKERS WITHIN THEIR BORDERS UNDER INTERNATIONAL LAW

A "*state of necessity*" constitutes a ground for precluding the wrongfulness of an act that is not in conformity with an international obligation.[1]

[1] International Law Commission, Yearbook of the International Law Commission (2001), 80.

The notion of a *"state of necessity"* is part of customary international law – "*The International Court of Justice (ICJ) considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation.*"[2]

The possibility of invoking a *state of necessity* arises if international law imposes an obligation on States not to reject asylum-seekers seeking to cross their borders. Consequently, it is necessary to explore whether States are obliged not to repel asylum-seekers from their borders under international law.

The 1951 Convention Relating to the Status of Refugees states that "*no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened …*"[3]

The Convention against Torture and Other Cruel and Inhuman Treatment or Punishment (CAT) provides that "*no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*"[4]

The International Covenant on Civil and Political Rights (ICCPR) does not contain a specific provision of *non-refoulement* but in its article 7 states that – "*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*."[5] To be more precise, according to the Human Rights Committee, States parties "*must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their … refoulement.*"[6] Neither the Refugee Convention nor the Torture Convention explicitly state that the duty of *non-refoulement* includes the obligation not to reject asylum-seekers at a State border.

Academic scholars point out that non-rejection at the border in view of the principle of *non-refoulement* constitutes a customary norm.[7] The Office of the United Nations High Commissioner for Refugees (UNHCR) espoused the same approach and confirmed its customary law status. The Executive Committee of the UNHCR has held that border closures that prevent asylum-seekers from finding peace and

---

[2] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia),* 1997, ICJ, ICJ Reports 7, para. 51.

[3] 1951 Convention Relating to the Status of Refugees, last modified December 13, 2019, https://www.unhcr.org/en-lk/1951-refugee-convention.html.

[4] 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, last modified December 13, 2019, https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

[5] 1966 International Covenant on Civil and Political Rights, last modified December 13, 2019, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[6] UN Human Rights Committee, General Comment No. 20 (1992), para. 9.

[7] Guy S. Goodwin-Gill, The Refugee in International Law (1996), 196.

safety may result in a breach of the principle of *non-refoulement.*[8] As the concept of *non-refoulement* prohibits rejection at the border, consequently the principle of *non-refoulement* must prohibit closure of the border as well. In addition, it reaffirms that "*the fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State - of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.*"[9] It was further elaborated that,[10] the principle of *non-refoulement* equally applies to cases of mass influx and individual cases.[11]

2. A "STATE OF NECESSITY" AS A DEFENCE AGAINST THE CLOSURE OF STATE BORDERS

"Necessity defence" is one of seven circumstances that preclude wrongfulness enumerated in the ILC's Articles on State Responsibility.[12] This ground is an "*exceptional one*"[13] and strictly defined conditions must be cumulatively satisfied.[14] Under Article 25 of those Articles, two sets of questions should be addressed in determining whether a State may validly invoke the plea of necessity.

The first set includes the questions whether (i) an "*essential interest*" is at stake, whether (ii) the threat to such an interest rises to the level of "*grave and imminent peril*," whether (iii) the State had other means of safeguarding its interest, and (iv) the issue of balancing the interests involved. The second set of questions addresses the exceptions to the resort of the *necessity defence* under special circumstances.

Thus, even when the first set of questions is resolved in favour of the violating State, the necessity defence will be unavailable where (i) the international obligation in question excludes the possibility of invoking necessity or (ii) the State has contributed to the situation of necessity.

Essential interest. How "*essential*" a given interest may be, depends on the totality of the conditions in which a State finds itself in a variety of specific situations[15] and that "in *all circumstances*."[16] Facing a sudden large-scale influx of asylum-seekers may be deemed to threaten the essential interests of the State, threatening the State's national security and public order.

---

[8] UN High Commissioner for Refugees' Executive Committee, Note on International Protection (1997), 7.

[9] *Ibid.*

[10] Hailbronner Kay, Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking? The New Asylum-seekers: Refugee Law in the 1980s (1988), 123.

[11] UN High Commissioner for Refugees' Executive Committee, Conclusion No. 22 (1981), para. 2.

[12] 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, last modified December 13, 2019, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[13] *Supra* note 1, 80.

[14] *Supra* note 2, para. 51.

[15] International Law Commission, Yearbook of the International Law Commission) (1980), 19.

[16] *Supra* note 1, 83.

Grave and imminent peril. The "*peril*" must be objectively and duly established at the relevant point in time and must go far beyond risk and possibility.[17] The determination of the gravity and imminence of the peril is fact specific. Consequently, it must be determined on a case-by-case basis. It could thus be concluded that a massive influx of asylum-seekers could result in a grave and imminent peril to an essential interest of the asylum State.

The only means. The International Court of Justice (ICJ) highlighted in the *Gabčíkovo-Nagymaros Project* case the means available to Hungary to respond to the specific situation other than suspension or abandonment including negotiation by stating that this "*might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it*."[18]

State practice in World Trade Organization (WTO) jurisprudence on the "*reasonably available nature*" of alternative means reflects a development in the customary rule on necessity, namely that under the term of "*reasonably available only means*", practical and possible means should be taken into account.[19] This assumption is further supported by WTO's approach in the "*Continental Casualty versus Argentina* " case.[20] It is undeniable that border closure is a drastic and severe measure to safeguard against a threat posed to a State by a large-scale influx of asylum-seekers. There are situations in which a State would have other means of coping with such a grave and imminent peril. For example, it is conceivable that a State could set up camps for asylum-seekers; provide for durable solutions such as resettlement in third States and enable individuals to rebuild their lives in dignity and peace. Closing its frontiers in such a case is not the "*reasonably available*" only means and the State would be required to take measures that are available even if they may be "*more costly or less convenient*."[21]

Balance of interests. The interests relied on must outweigh all other considerations, not merely from the point of view of the acting State but also based on a reasonable assessment of competing interests, whether these are individual or collective.[22] "*It is a matter of relation of proportion, rather than of absolute value*."[23]

Even though the duty of non-refoulement is not among the obligations cited in the

---

[17] *Supra* note 2, para. 54.

[18] *Ibid.*, para. 57.

[19] Ismailov Otabeck, "Interaction of International Investment and Trade Regimes on Interpreting Treaty Necessity Clauses: Convergence or Divergence?" 48 Georgetown Journal of International Law 556 (2017), at 552.

[20] *Continental Casualty Company* v. *The Argentine Republic*, 2008, ICSID, para. 199, last modified December 13, 2019, https://www.italaw.com/cases/329.

[21] *Supra* note 1, 83.

[22] *Ibid.*, 83-84.

[23] *Supra* note 16, 20.

ICJ's Barcelona Traction case's findings,[24] the principle of non-refoulement should still be considered as engaging the interests of States.

The protection of asylum-seekers' rights and freedoms should be considered as being in the international community's interest and therefore should not be outweighed by the merely individual interest of a State. However, the individual interest of a State should not necessarily be regarded inferior to the interests of the asylum-seekers and thus be ignored. Therefore, the entire international community should assist the affected State to cope with its international obligations in order not to suffer alone the adverse consequences to its essential interest. A conflict of interest should be reconciled in favour of the asylum-seekers and the violations of their rights should not be taken lightly.

Exclusion of the possibility of invoking necessity. The International Law Commission states that a treaty that does not exclude explicitly a "*state of necessity*" may be intended also to apply in "*abnormal situations*" and that "*the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule*."[25] Based on a careful examination and analysis of existing treaty provisions addressing or relevant to *non-refoulement*, it should be noted that none of them necessarily prevent a State from border closures on "necessity" grounds.[26]

Thus, the Refugee Convention specifically states that the principle of *non-refoulement* is not absolute.[27] The ICCPR permits limited derogations from certain obligations assumed under the Covenant in extraordinary circumstances.[28] Contribution to the situation of necessity. The ICJ rejected Hungary's necessity defence in the *Gabčíkovo-Nagymaros Project* case because it had "*helped*" to bring about the situation in question.[29] The Court argued that the contribution to the situation of necessity must be "*sufficiently substantial and not merely incidental or peripheral*."[30] In the *National Grid versus Argentina* case, the Tribunal, on the one hand, placed on a respondent the burden of proof of stating that it did not contribute to the situation of necessity.[31] On the other hand, the Tribunal placed on a claimant the burden of proof of establishing that Argentina had contributed to cause the severe crisis faced by the

[24] *Barcelona Traction, Light and Power Company, Limited* (*Belgium* v. *Spain*), ICJ, ICJ Reports 1970, para. 33, last modified December 13, 2019, https://www.icj-cij.org/en/case/50/judgments.

[25] *Supra* note 1, 84.

[26] Boed Roman, "State of Necessity as a Justification for Internationally Wrongful Conduct," 3 Yale Human Rights and Development Journal (2000), 36.

[27] *Supra* note 3, Article 33(2).

[28] *Supra* note 5, Articles 4 and 7.

[29] *Supra* note 2, para. 57.

[30] *Supra* note 1, 84.

[31] *National Grid P.L.C* v. *The Republic of Argentina*, 2008, ICSID, para. 260, last modified December 13, 2019, https://www.italaw.com/cases/732.

country.[32] Whether such an exception would apply to border closure to prevent a mass-influx of asylum-seekers must be determined on a case-by-case basis and cannot be answered *in abstracto*.

3. LEGAL CONSEQUENCES OF THE APPLICATION OF THE NECESSITY DOCTRINE

As a *state of necessity* is recognized as a circumstance precluding wrongfulness, invoking customary "necessity defense" would result in the preclusion of the wrongfulness of the internationally unlawful act. To be more precise, a State would be allowed to close its borders in the face of a large-scale influx of asylum-seekers due to fear of grave and imminent peril to an essential interest with no adverse consequences for that State. It is undeniable that through such an act a State would expose countless persons to grave risks of persecution, violations of human rights and freedoms. The ICJ in the *Gabčíkovo-Nagymaros Project* case noted that Hungary "*expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner*."[33] While not the same in nature, the aforementioned case demonstrates that remedial action has to be taken to alleviate harm caused.

CONCLUSIONS

In view of the foregoing considerations, a State cannot simply and successfully plead "necessity" in justification of the closure of its borders to avert a massive influx of asylum-seekers. The interests of the people who have endured harsh conditions before leaving their country and to reach peace and safety elsewhere should not be treated as merely "individual" ones and should not be ignored. Allowing a State to invoke the doctrine of necessity across the board would contribute to a situation of confusion and chaos. Therefore, for States to close their borders to asylum-seekers arriving *en masse* should not be deemed morally and politically acceptable and approved by international law and the international community.

The international community's interest in upholding the respect of the principle of *non-refoulement* should not be outweighed by a State's interest, without a particularly grave situation to its existence being invoked by the latter. Furthermore, to extend the responsibility for the fate of asylum seekers/migrants to all members of the international community and to arrange for burden-sharing is of utmost importance. There is a need for putting into place suitable mechanisms to that effect at the international level. Without sharing responsibility, the protection of human rights can hardly be honoured.

---

[32] *LG&E Energy Corp. LG&E Capital Corp. LG&E International Inc.* v. *The Argentine Republic*, 2006, ICSID, para. 256, last modified December 13, 2019, https://www.italaw.com/cases/621.

[33] *Supra* note 2, para. 48.