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NON – REFOULEMENT AS CUSTOMARY INTERNATIONAL LAW IN INDIA: A CONSTITUTIONAL & JURISPRUDENTIAL ANALYSIS

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ABSTRACT

The principle of *non-refoulement*, prohibiting the return of individuals to a territory where they face threats to life or liberty is the cornerstone of international refugee law. While traditionally enshrined in the Refugee Convention of 1951 and its Protocol of 1967, it has also evolved into a norm of customary international law. India is not a signatory to these instruments, yet has hosted diverse refugee populations over decades. This paper examines whether *non-refoulement* binds India as a customary international law norm, how Indian courts have interpreted it under the Constitution, particularly Article 21 and the tensions between humanitarian commitments and national security.

STATEMENT OF PROBLEM

India has historically hosted large refugee populations from Tibet, Sri Lanka, Afghanistan, Myanmar and elsewhere, despite not being a party to the Refugee Convention of 1951 or its Protocol of 1967. This creates a paradox: on one hand, India lacks a dedicated domestic refugee law while on the other, it remains confronted with repeated refugee inflows that raise pressing humanitarian and security concerns. Indian judicial pronouncements have fluctuated between affirming non-refoulement as part of Article 21 of the Constitution and treating it as a non-binding moral obligation. The absence of legislative clarification intensifies this uncertainty. The issue becomes even more complex when national security and demographic considerations are invoked by the executive to justify deportations as seen in the cases concerning Rohingya refugees.

INTRODUCTION

The refugee crisis has emerged as one of the most pressing humanitarian challenges of the twenty first century, compelling states to confront the delicate balance between national sovereignty and international human rights obligations. At the heart of international refugee protection lies the principle of *non-refoulement* which literally means “non-return” It is codified in Article 33(1) of the Convention Relating to Status of Refugees of 1951. “*No nation that is a party to this agreement shall expel or return (refouler) a refugee by any means to the borders of areas where their life or freedom would be endangered.*”¹

This issue has gained renewed urgency in light of Rohingya deportations,² refugees from Myanmar post 2021 coup³ and debated surrounding the Citizenship Amendment Act, 2019.

India’s position is uniquely complex. Although it is not a signatory, India continues to host one of the largest populations in South Asia, including Tibetan, Afghan, Sri Lankan and Rohingya refugees. Despite the absence of dedicated domestic refugee law, India has extended varying degrees of protection to displaced persons, often relying on ad hoc executive decisions and constitutional safeguards. Indian courts, particularly the Supreme Court has played a pivotal role in interpreting the right to life and personal liberty under Article 21 of the Constitution to occasionally incorporate the principle of *non-refoulement*. However, the judicial approach remains inconsistent, wavering between humanitarian commitments and considerations of national security and demographic stability.

NON-REFOULEMENT AS CUSTOMARY INTERNATIONAL LAW

For a norm to attain customary law status two elements must be satisfied as given under Article 38(1)(b) of the Status of International Court of Justice:

I. State Practice

Many states outside the Refugee Convention framework, including India, Bangladesh and Pakistan have historically hosted refugee populations without forced repatriation in most cases.⁴ Regionally, instruments like the OAU Refugee Convention of 1969 and Cartagena Declaration of 1984 expressly codify *non-refoulement*, reflecting broad

¹ Convention Relating to Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S 137

² Mohammad Salimullah v. Union of India, 2021 10 SCC 100

³ Dongh Lian Kham v. Union of India, 2015 SCC OnLine Del 9806

⁴ B.S. Chimni International Refugee Law: A reader (Sage, 2000)

acceptance.⁵

II. Opinio Juris

Repeated recognition in UN General Assembly resolutions, UNHRC Executive Committee Conclusions and incorporation into human rights treaties such as the ICCPR (Article 7) of 1966 and the CAT (Article 3) of 1984 strengthen *non-refoulement* as a mandatory standard.⁶

In the *Paquete Habana* case, the United States Supreme Court observed, “international law is a part of our law” unless there is a contrary legislative or executive act.⁷ This principle established that customary international law forms part of domestic legal systems unless expressly excluded. Applied to India, which has no codified refugee law, the doctrine implies that *non-refoulement* as a customary norm can be read into the Indian legal system. Indian courts have followed a similar interpretive approach, relying on international norms to expand constitutional protections under Article 21 of the Constitution.⁸

Therefore, as a rule of customary international law, non-refoulement binds all states regardless of whether they are parties to Refugee Convention.⁹ India, though not a signatory is bound by this principle through its obligations under ICCPR (ratified in 1979) and partially under CAT (signed in 1997 but not ratified).¹⁰ Indian jurisprudence has recognized the concept in *Ktaer Abbas Al Qutaifi v. Union of India*, the court held that *non-refoulement* prevents deportation where refugees face persecution.¹¹ In *NHRC v. State of Arunachal Pradesh*, the Supreme Court directed protection of Chakma refugees, affirming that Article 21 safeguards apply equally to non-citizens.¹²

INDIA’S INTERNATIONAL OBLIGATIONS

India has ratified several human rights treaties such as Universal Declaration of Human Rights¹³, International Covenant on Civil and Political Rights (ICCPR), International

⁵ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; Cartagena Declaration on Refugees, 1984

⁶ ICCPR, Art. 7; CAT Art. 3; UNGA Res 51/75 (1996)

⁷ *The Paquete Habana*, 175 U.S. 677 (1900)

⁸ *Vishaka v. State of Rajasthan* (1997) 6 SCC 241

⁹ Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* (Oxford Univ. Press, 3RD ed, 2007)

¹⁰ Ratification status: United Nations Treaty Collection (ICCPR & CAT)

¹¹ *Ktaer Abbas Al Qutaifi v. Union of India* (1999) 1 GLR 213

¹² *NHRC v. State of Arunachal Pradesh* (1996) 1 SCC 742

¹³ G.A Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)

Convention on Economic, Social and Cultural Rights (ICESCR)¹⁴ and the Convention on the Rights of the Child (CRC)¹⁵ which prohibit arbitrary deprivation of life or exposure to torture. While none expressly use the term *non-refoulement*, their protections overlap with its core. The United Nations Human Rights Commission (UNHRC) considers *non-refoulement* to be a **norm of jus cogens**, meaning no derogation is permitted.¹⁶ Although South Asia lacks a regional refugee convention, India participates in UNHRC Executive Committee (ExCom) Meetings and has generally aligned with ExCom conclusions, many of which reaffirm *non-refoulement*.¹⁷ These pronouncements, while not binding, create persuasive authority that influence domestic policy and judicial interpretation.

Despite its recognition as customary law, enforcement of *non-refoulement* remains inconsistent in practice. India maintains that refugee admission and deportation fall within the realm of sovereign prerogative. In cases involving Rohingya refugees (2017-2021), the government argued that non-citizens have no absolute right to remain in India, particularly where national security is concerned. The Supreme Court in *Mohd. Salimullah v. Union of India*, 2021 recognized India's international obligations but refrained from granting blanket protection, prioritizing security concerns over *non-refoulement*.¹⁸

Furthermore, the *SS Lotus* case articulated that states possess sovereignty to act freely unless restricted by international law.¹⁹ While India asserts sovereign discretion in refugee admission and deportation, its sovereignty is circumscribed by the binding force of customary international law. Since *non-refoulement* has attained the status of *jus cogens*,

India's discretion cannot extend to refouling refugees to territories where they risk persecution or torture. Thus, the *Lotus Principle*, read together with contemporary developments in international refugee law actually strengthens the claim that India is legally bound to respect *non-refoulement*.

¹⁴ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3

¹⁵ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3

¹⁶ UNHRC, Note on Non-Refoulement (1977); UNHRC Advisory Opinion (2007)

¹⁷ UNHRC ExCom Conclusion No. 6 (1977); Conclusion No. 25 (1982)

¹⁸ *Mohd. Salimullah v. Union of India* (2021) 10 SCC 330

¹⁹ The Case of *S.S. Lotus* (France v. Turkey), PCIJ Ser. A No. 10 (1927)

SECURITY EXCEPTIONS AND LIMITATIONS

While the principle of non-refoulement is widely regarded as a peremptory norm of international law, it is not absolute. Customary international law and treaty practice recognize limited exceptions when the presence of a refugee or asylum seeker poses a legitimate threat to the host state's national security or public order. Article 33(2) of the Refugee Convention of 1951 clearly states that "a refugee cannot invoke the right to non-refoulement if there are reasonable grounds to consider them a threat to the country's security or if they have been definitely convicted of a serious crime that poses a risk to the community."²⁰

International jurisprudence, particularly the European Court of Human Rights has clarified that while states may invoke security exceptions, such measures must remain consistent with the absolute prohibition of torture and inhuman treatment as outlined in Article 3 of the European Convention on Human Rights.²¹ Thus, security concerns cannot justify returning an individual to a place where they face real risk of torture or persecution.

Indian jurisprudence has grappled with this balance between humanitarian protection and sovereignty. In the matter of *Ktaer Abbas Habib Al Qutaifi v. Union of India* (1999), the Gujarat High Court recognized non-refoulement as an integral component of Article 21 of the Indian Constitution but also acknowledged that national security considerations can override this protection.²² This approach was echoed in the Supreme Court interim orders concerning Rohingya refugees, where the Court permitted deportations on the grounds of national security, while simultaneously affirming that constitutional protections continue to apply to all persons within the territory of India.²³

The Indian stance reflects a dualist balancing act. While, the judiciary leans towards humanitarian obligations, the executive often asserts sovereign prerogatives to restrict refugee protection. This mirrors broader state practice, where invocation of national security serves as a limitation on *non-refoulement*, albeit one that must narrowly construe and exercise in line with proportionality and necessity.

Therefore, India's recognition of security exceptions to *non-refoulement* reflects the global

²⁰ 1951 Refugee Convention, Article 33(2)

²¹ *Chahal v. United Kingdom*, App. No. 22414/93, European Court of Human Rights (1996)

²² *Ktaer Abbas Habib Al Qutaifi v. Union of India* (1999) AIR Guj 213

²³ *Mohd. Salimullah v. Union of India* (2021) SCC OnLine SC 281

understanding that while refugee protection is fundamental, it must coexist with legitimate concerns of state security and public order. The challenge lies in ensuring that these exceptions do not become the norm, undermining the customary status of *non-refoulement*.

COMPARATIVE SOUTH ASIAN PERSPECTIVES ON SECURITY EXCEPTION

Bangladesh

Bangladesh like India, is not a party to the Refugee Convention of 1951 or the Protocol of 1967. Nevertheless, it has hosted over one million Rohingya refugees since the 2017 crisis.²⁴ The government officially refers to them as “Forcibly Displaced Myanmar Nationals” rather than refugees, reflecting reluctance to confer legal refugee status. While Bangladesh initially adhered to *non-refoulement* in practice, security concerns such as terrorism, cross border trafficking and demographic strain have prompted call for repatriation.²⁵ Deportation threats and relocation to Bashan Char Island have been justified by the government on grounds of national security and public order, showing parallels to India’s stance.

Nepal

Nepal is also not a signatory to the Refugee Convention but has historically hosted Tibetan refugees since 1950.²⁶ While, it generally respects *non-refoulement*, there have been documented cases of refoulement of Tibetans to China under security pressures. Unlike India, Nepal has no constitutional jurisprudence expanding refugee rights, its refugee policy remains entirely executive driven.²⁷ Security exceptions dominate refugee management, reflecting vulnerability to geopolitical influence from China.

Pakistan

Pakistan, hosting millions of Afghan refugees for decades, has allowed refugees to remain on humanitarian grounds but without a formal refugee law. The government often frames Afghan refugees as security and economic burden, leading to arbitrary arrests, deportations and harassment.²⁸ In recent years, security concerns such as terrorism and cross border militancy

²⁴ UNHRC, “Rohingya Emergency” (2022)

²⁵ Md. Jahid Hossain Bhuiyan, “The Principle of Non-Refoulement and the Rohingya Crisis”, Asian Journal of International Law, 2020

²⁶ Human Rights Watch, “Lost in Transition: Tibetan Refugees in Nepal, 2014”

²⁷ Tibet Justice Center, Tibet’s Stateless Nationals: Tibetan Refugees in Nepal, 2016

²⁸ S. Khan. “Afghan Refugees in Pakistan and the Principle of Non-Refoulement”, Refugee Survey Quarterly, 2019

have led to intensified crackdowns and threats of large-scale deportations. Similar to India, Pakistan uses claims of sovereignty and national security to restrict refugee protections, although its commitment to *non-refoulement* is varied.²⁹

Across South Asia, a common pattern emerges, states are not party to the Refugee Convention of 1951 often reply on ad hoc executive discretion rather than codified refugee law. While humanitarian gestures have been made such as hosting Tibetans, Afghans and Rohingyas, security exceptions dominate policy. India's approach mirrors this regional trend where *non-refoulement* is acknowledged in principle but overridden by concerns of terrorism, demographic change and national security. Importantly, India distinguishes itself slightly by having a more developed constitutional jurisprudence.

RECCOMENDATIONS

India lacks a dedicated refugee statute which leads to ad hoc executive decisions in matters of deportation. A clear legislative framework could define what constitutes a “serious crime” or “national security threat”, preventing arbitrary state action. Such law could incorporate due process guarantees (notice, judicial review, hearing) before invoking the security exception.

Indian courts should insist on strict scrutiny whenever the government invokes national security to justify deportation. Borrowing from international jurisprudence like *Chahal v. United Kingdom*,³⁰ courts can mandate that even in security cases, return must not expose the individual to torture, arbitrary detention or persecution.

Any limitation on non-refoulement must satisfy the principles of proportionality and necessity. Deportation ought to be considered only after all other options such as internal relocation, temporary detention or resettlement through UNHRC have been thoroughly explored.³¹

Security determinations should not rest solely with the executive. Independent expert committees, possibly with judicial oversight should evaluate whether a refugee genuinely poses a threat to India's security. This would reduce political misuse of the exception.

²⁹ UNHRC Pakistan, “Afghan Refugees in Pakistan: Protection Concerns and Solutions”, 2022

³⁰ *Chahal v. United Kingdom*, App. No. 22414/93, ECtHR (1996)

³¹ UNHRC, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations, 2007

Even when a person is considered a security threat, humanitarian considerations such as family, unity, medical vulnerability and risk of torture should guide the decision-making process. Deportations in such case should be prohibited.

South Asia lacks a regional refugee framework. India could take the lead in initiating a SAARC level protocol that standardizes when and how security exceptions to non- refoulement can be applied, thereby reducing inconsistencies in state practice.

CONCLUSION

The principle of *non-refoulement* occupies a unique and delicate position at the intersection of humanitarian imperatives and sovereign discretion. Its essence lies in ensuring that no individual is returned to territory where they face a real risk of persecution, torture or other irreparable harm. Even though India has not ratified the Refugee Convention of 1951, the judiciary has nevertheless breathed life into this principle by interpreting Article 21 of the Constitution to encompass the right to life and personal liberty for all persons irrespective of nationality. This reflects India's broader commitment to international customary law and the universality of human rights.

For India, the path forward requires a twofold strategy, legislative codification and consistent judicial enforcement. A dedicated refugee protection law would provide clarity, consistency and due process safeguards, ensuring that decisions on deportation or asylum are not left solely to executive discretion. Simultaneously, courts must adopt a rights centric approach that interprets constitutional protections in harmony with international law, thereby reaffirming India's role as a responsible member of the international community.

Ultimately, recognizing *non-refoulement* as an enforceable legal obligation would not only align India with evolving global standards but also reinforce its constitutional ethos rooted in justice, liberty, equality and dignity. By doing so, India would send a powerful message that humanitarian protection is not a matter of charity or discretion but a fundamental duty owed to every individual. In an era marked by increasing displacement, conflict and forced migration, India's stance on *non-refoulement* will determine whether it upholds its legacy as a civilizational leader that balances sovereignty with compassion or whether it risks retreating into a narrow conception of national interest at the cost of universal human rights.