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# **“THE NOTION OF REFOULEMENT AS A NECROPOLITICAL PRAXIS: THE FATE OF ASYLUM SEEKERS IN CONTEMPORARY TIMES.”**

AUTHORED BY - KIBIRIGE HASSAN<sup>1</sup>

## **Abstract**

The principle of non-refoulement prohibits states from returning refugees to territories where their lives or freedoms may be threatened. This principle is considered a core tenet of international refugee law, binding on all states regardless of whether they are party to the 1951 Refugee Convention. However, the COVID-19 pandemic saw many states close borders and turn away asylum seekers, raising concerns about refoulement.

This paper examines whether public health emergencies allow states to derogate from the non-refoulement principle. It outlines the legal framework establishing non-refoulement as a jus cogens norm in international law, with limited exceptions on national security grounds. Regional conventions in Africa also affirm expansive protections.

The paper analyzes recent state actions that potentially violate non-refoulement, such as Pushbacks in Europe, the Migrant Protection Protocols by the US, and deportations from India. It argues these measures are often discriminatory and expose refugees to grave dangers. Finally, it concludes that while states have sovereign rights to control borders, non-refoulement remains binding even amid health emergencies. More consistent adherence to this peremptory norm and recognition of its customary legal status is needed.

## **Introduction**

In the course of the pandemic every nation closed its boarders in order to restrain the rapid spread of COVID-19, without listening to any person be it their citizens nor the asylum seekers, this left many stranded on the boarders especially those who were running away from war zones like the Syrians, those in Mali and other countries. Whereas the accurate number of those who got affected by the lockdowns especially the Asylum seekers is not well dyed-in-the-wool, the UN High

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Commission for refugees estimates that over 167 countries closed their borders either fully or partially in a view of containing the surge and 57 made no exceptions for people seeking asylum. Most of these nations used this as an opportunity to refool the Asylum seekers, basing on the recent developments some of these countries are now allowing people entry but on a strict criterion, most of these include COVID vaccination cards, and other official documents as set by any nation as it deems fit. However, since most Asylum seekers lack these credentials some use illegal methods of entry. An example is the 15 Rohingya refugees that were deported from India, this followed a 'Supreme court' ruling of deporting the Rohingya refugees from India, over 6 refugees died of cold conditions on the Polish-Belarus borders and many are still stranded till date, African asylum seekers denied entry in Greece, inter alia. The most disturbing part of this is that refolement is in most cases based on race, religion, nationality, membership, of a particular group or political opinion. These rises a question of 'Whether a public health emergency can grant any government a right to derogate from the principle of non-refoulement?'

Over 8,000 Rohingya and Bangladeshi asylum seekers and migrants were a floated in the Andaman sea and Bay of Bengal in May 2015 on the basis of ethnography, after Thailand, Malaysia and Indonesia pushed back the boats rebuffing them into their coastlines after delivering fuel and food, Thailand's forcible repartition of 45,000 Cambodian refugees at Prasant Preah Vihear in 1979 on the basis of political affiliation. And also, the 109 Uighurs-The Turks ethnic group deported by the Thai government in 2014 on the basis of religion. However, this is not the first time when countries are deporting or refusing entry to asylum seekers on the basing of sex, religion, race or ethnicity, During the Trump administration Mexicans were denied entry into the U.S and others deported on the basis of ethnicity. Since every nation is sovereign and free to allow in any persons as it deems fit, this raises a question on the responsibility of states to Asylum seekers.

The present study is intended to focus upon the effects of refolements to international human rights. The study will examine the legality of the concept of non-refoulement in relation to International Humanitarian laws and municipal laws, the relevance of non-refoulement as a jus Cogen of International law. Besides, the study will also endeavor to connect the dots between the use of COVID-19 international guidelines (Public Health Emergencies) and refolement. The research project will be addressed with clear examples and empirical evidence from authentic sources.

## **Refoulement as A Discriminatory Policy and its Effects on Human Rights.**

After the extreme prohibition of refoulement as a free practice among states, the next thing that the international community should look into is the issue of scrutinization of asylum seekers admissions into different states, most states are using this as an excuse for denying ‘the some’. The neoteric case is the denial of first entry into Poland to the Africans and Indians from Ukraine, those who were granted plus those who were later granted have all not enjoyed Asylum privileges in Poland since there is associated discrimination.<sup>2</sup> Most of these issues are created by the weak policies among states and communities, some are not even literally supported by the government. The same avenues have been adopted elsewhere in Europe to restrain the influx of Asylum seekers in the region, different practices of deflection including the physical deterrence i.e. erection of boarder fences, push backs at the sea and offshore processing, plus the procedural difference i.e. the limitations on procedural fairness, accelerated procedures, at-sea screening and reductions in legal assistance which can restrict access to territory.<sup>3</sup> Though one’s access to territory is of course, no guarantee of fairness or justice but most deflections have become more acute after the Syrian crisis with over 4 million people now displaced outside Syria. Some countries have adopted ‘closed door’ policy, which is very strict on Syrians and Africans depending on the region.

Recent state actions provide alarming examples of the continued failure to uphold the principle of non-refoulement. In October 2021, India deported 15 Rohingya refugees to Myanmar despite ongoing ethnic violence against this minority, leading human rights groups to decry the decision as a violation of India's non-refoulement obligations.<sup>4</sup> At the Polish-Belarus border, aggressive pushbacks left at least 6 migrants dead of hypothermia in the frigid woods during November 2021 after being denied entry to Poland's territory.<sup>5</sup> Discrimination also underlies the refoulements, as evident in Greece where authorities refused to allow nearly 470 asylum seekers from Africa entry in March 2022, though Ukrainians were allowed refuge.<sup>6</sup> The loss of life and denial of basic

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<sup>2</sup> Mehdi Chebil, ‘Pushed back because we’re black: Africans stranded at Ukraine-Poland Boarder.’ France24, see also; Lorenzo Tondo in Przemysl and Emmanuel Akinwotu, ‘People of color fleeing Ukraine attacked by polish nationalists.’, TheGuardian. (2022).

<sup>3</sup> A., Brasseur, (President of the Parliamentary Assembly of the Council of Europe), ‘Europe slamming its’s doors on Refugees: Is this really What Europe is About?’ Press Release, Council of Europe. (2016).

<sup>4</sup> Human Rights Watch. “India: Rohingya Deported to Myanmar Face Danger,” March 31, 2022.

<sup>5</sup> BBC News. “Migrants Freezing to Death on Belarus-Poland Border,” September 23, 2021.

<sup>6</sup> The New Humanitarian. “Hot and Cold: Greece’s Treatment of Ukrainian and Non-Ukrainian Refugees,” August 16, 2022. Available at; <https://www.thenewhumanitarian.org/news-feature/2022/08/16/Greece-refugees-Ukraine-asylum-system-application>.

refugee protections demands greater accountability. States must align practices with their binding duty of non-refoulement through all means, including judicial oversight and sanctions.

These concerning cases reveal an alarming discriminatory bias underlying many states' refoulement actions, often targeting groups based on ethnicity, race, or nationality. The deportation of Rohingya refugees to Myanmar occurred despite ongoing genocidal violence against this persecuted Muslim minority.<sup>7</sup> Poland's pushbacks focused on migrants from the Middle East and Africa attempting to enter from Belarus.<sup>8</sup> Greece refused refuge only to arrivals from Africa, while admitting Ukrainians.<sup>9</sup> Even the U.S. Remain in Mexico policy exposing Central American asylum seekers to danger is predicated on ethnicity and nationality, as no such returns occur for Canadian asylum seekers.<sup>10</sup> Such differentiation fundamentally violates Article 3 of the Refugee Convention prohibiting discrimination in applying the treaty based on factors like race, religion, and country of origin.<sup>11</sup> As refugees flee grave harm, their need for protection remains irrespective of ethnic or national background. Upholding non-refoulement necessitates ending its selective, prejudicial application.

Furthermore, in Africa also there are some refoulement policies like in South Africa, the recent Xenophobic riots and massacre that saw over seven people man-slaughtered, immolation, and hush assaults, was blamed onto the weak government policies and institutions that did fail to curb the situation down later on strict and discriminative policies have been adopted to restrain the situation.<sup>12</sup> In the Middle East whereas, the 'fortress' mentality is arguably less pronounced and asylum seekers are able to enter neighboring countries, but they often have fewer rights and face numerous challenges including lack of security of status and residence.<sup>13</sup>

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<sup>7</sup> Human Rights Watch. "India: Halt All Forced Returns to Myanmar," March 10, 2021. Available at; <https://www.hrw.org/news/2021/03/10/india-halt-all-forced-returns-myanmar>.

<sup>8</sup> Agnieszka Pikulicka-Wilczewska. "Fears of Migrant Deaths Rise after Bodies Found in Eastern Poland." Reuters. Reuters, January 13, 2023. Available at; <https://www.reuters.com/world/europe/fears-migrant-deaths-rise-after-bodies-found-eastern-poland-2023-01-13/>.

<sup>9</sup> Oxfam International. "'A Two-Tier Refugee Response': Greece's Welcome of People Fleeing Ukraine Stands in Stark Contrast with Others Seeking Safety | Oxfam International," May 25, 2022. Available at; <https://www.oxfam.org/en/press-releases/two-tier-refugee-response-greeces-welcome-people-fleeing-ukraine-stands-stark>.

<sup>10</sup> PBS NewsHour. "'Remain in Mexico' Reinstated, Sends Asylum Seekers across the Southern Border." PBS NewsHour, December 11, 2021. Available at; <https://www.pbs.org/newshour/show/remain-in-mexico-reinstated-sends-asylum-seekers-across-the-southern-border>.

<sup>11</sup> Article 3 and Article 33, UN General Assembly. (1951). Convention Relating to the Status of Refugees. Available at; <https://www.unhcr.org/sites/default/files/legacy-pdf/4ca34be29.pdf>

<sup>12</sup> 'South Africa: Failing asylum system is exacerbating Xenophobia.' Amnesty.org. (2019), see also; 'Living in Limbo: Rights of asylum seekers denied.', Amnesty International.Org. (2019).

<sup>13</sup> O'Sullivan M., & Dallal S., 'States, the law Access to Refugee Protection: Fortresses and Fairness', 65, HART. 9 (2017). See also; D. Stevens & L. Baldassar, 'Refugees Protection and the role of law.' Cambridge University Press. (2014).

Over 57,000 asylum seekers in 2019 were refouled to Mexico from U.S.A in the Trump administration scheme popularly referred to as 'Migrant Protection Protocols (MPP) Project or remain in Mexico'.<sup>14</sup> A scheme that is alleged of creating interminable court hearing waitings in some of Mexico's most dangerous border towns. U.S has also adopted some coast guards to prevent the arrival of vessels bearing likely asylum seekers and also a wall was constructed to restrict Mexicans for seeking Asylum in U.S.A. Human rights activists accused the White House of exposing asylum seekers to 'life-threatening dangers' after documenting 636 causes of kidnapping, rape, torture, assault, and violent attacks those returned to Mexico, including a nine-year old disabled girl and her mother, who were kidnapped and raped after being sent back to Tijuana.

The COVID-19 pandemic saw many states refuse refugees entry and summarily expel asylum seekers under the guise of public health restrictions, despite the lack of any lawful basis. Countries across Asia, Africa, the Americas, and Europe denied refugees access, at times forcing boats of Rohingya and others back to sea, citing stopping COVID's spread as justification.<sup>15</sup> However, legal guidance affirms public health emergencies do not permit derogation from fundamental non-refoulement duties. The WHO expressly called on states to respect refugee protections during the pandemic.<sup>16</sup> UNHCR emphasized that blanket border closures and pushbacks violate international law.<sup>17</sup> As Article 33 of the Refugee Convention contains no exceptions, even on health grounds, denying entry and returning refugees under the cover of COVID-19 contort states' international obligations. Upholding non-refoulement requires assessing refugee claims through proper individual procedures, not blanket exclusions that instrumentalize the pandemic at refugees' expense.

## **Legal Framework on Refoulement and The Way Forward.**

Critically, the prohibition on refoulement has attained the status of customary international law, binding on all states regardless of treaty ratification. Although enshrined in the 1951 Refugee Convention, non-refoulement today constitutes a peremptory norm under customary law that even

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<sup>14</sup> John Kennedy, 'Refoulement as a Biopolitical Praxis: Subalternity, Ethnography, and Ethics at the Mexico-Guatemala Border.', Cornell University. (2021)

<sup>15</sup> Evan J. Criddle and Evan Fox-Decent, 'The Authority of International Refugee Law.', 62 Wm. & Mary L. Rev. 1067 (2021).

<sup>16</sup> Michael Garcia Bochenek. "The Persistent, Pernicious Use of Pushbacks against Children and Adults in Search of Safety" 12(3) 34. (2023).

<sup>17</sup> UNHCR. (2020, March 31). Key legal considerations on access to territory for persons in need of international protection in the context of the COVID-19 response. Available at; <https://www.refworld.org/docid/5e7132834.html>

non-signatories must uphold.<sup>18</sup> The International Court of Justice affirmed its status as customary law in the Congo-Uganda case, noting its incorporation in a diverse array of treaties reflects acceptance by the international community as a whole.<sup>19</sup> As one of the most universally embraced human rights principles, with likely over 95% state adherence, non-refoulement carries the weight of jus cogens that no state can derogate from or violate.<sup>20</sup> This customary law foundation provides a powerful basis to demand all states honor their duties of refugee protection and prohibit refoulement in all forms. No country can justify policies disregarding such an established, fundamental rule.

The refugee convention<sup>21</sup> puts an exemption to the notion of non-refoulement under Art. 33(2) provides the ‘The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country.’ Thus, most states do set policies and condition Asylum seekers for entry into their territories, of which the act is not against the law but the problem lies in the way of implementation of the screening policies since some state are discriminative in nature (refer to examples provided herein). The concept of refoulement is highly prohibited across the globe taking an example of the warning to Australia for refouling the Sri Lanka asylum seekers and China for refouling asylum seekers back to North Korea, in most indicates the concept is condemned as a whole yet the loopholes in it are discriminatory, most states ‘deny territory access’ on grounds of disguisedly in-capabilities.

It is further provided under the Art.9<sup>22</sup>, Convention Against Torture (CAT), that ‘No state party shall expel, return (refouler) 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.’ The keyword here is ‘substantial grounds’, the term in question is further detailed under Art. 33(2)<sup>23</sup> which does provide an exception to the principle of non-refoulement on grounds of security threat and acquittal to serious crimes making him a danger to the community of the country. It must be also

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<sup>18</sup> Allain, J. (2001). ‘The jus cogens nature of non-refoulement.’ *International Journal of Refugee Law*, 13(4), 533-558.

<sup>19</sup> ICJ. (2005). *Armed activities on the territory of the Congo (Democratic Republic of the Congo vs. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

<sup>20</sup> Musalo, K., Moore, J., & Boswell, R. A. (2011). *‘Refugee law and policy: Cases and materials.’*, Durham: Carolina Academic Press.

<sup>21</sup> UN General Assembly, (1951), *Convention Relating to the Status of Refugees*, and its 1967 Protocol.

<sup>22</sup> UN General Assembly, (1984), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>23</sup> UN General Assembly, (1951), *Convention Relating to the Status of Refugees*, and its 1967 Protocol.

noted that under the Declaration on Territorial Asylum (1967), Art. 3(1)<sup>24</sup> generally forbids rejection at the frontier, Art. 3(2)<sup>25</sup> provides an exception on grounds of overriding reasons of national security or in order to safeguard the population, in the case of a mass influx of persons.

Art. 14<sup>26</sup>, of the Universal Declaration of Human rights provides that, 'Everyone has the right to seek and enjoy in other countries Asylum from persecution.' The word 'Every one' expressly implies without discrimination attached. The 1967 protocol<sup>27</sup> extends the convention's protection to all refugees irrespective of the location or date of their displacement, and importantly, requires it's 146 states parties to abide by the convention regardless of whether they are separately party to it.

With all the foresaid statutes, this makes the principle of non-refoulement a jus Cogen of International. A principle that even states that are non-signatories to the refugee convention have an onus to. In most cases, its not the case of whether a state is a signatory or entitled to the principle but its implementation structures and policies most states tend to act the contrary but in disguise of the laws provided.<sup>28</sup> Some states like aforementioned are discriminative in implementation of these laws, some restrain the accessibility within their policies.

In the case of *Sale V. Haitian Centers Council, Inc.*,<sup>29</sup>...instructions to mandate immediate return to Haiti without screening were changed. Supreme court rejected the challenge to such returns, founded on Art. 33, Refugees convention and it's implementing provisions in U.S. law. And also, in the case of *Nishimura Ekiu V. United States*,<sup>30</sup>...it is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereign and essential to self-prevention, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may deem fit to prescribe...'. The American society of International Laws Project<sup>31</sup> stated that the governments' burden is to put forward some rational basis for the differentiation relevant to the purpose that is sought to be achieved.' However, it must also be the 'reasonable and proportionate test' does not appear in the UN Human Rights Committee General

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<sup>24</sup> UN General Assembly, (1967), Declaration on Territorial Asylum.

<sup>25</sup> Ibid 11.

<sup>26</sup> United Nations. (1948). Universal Declaration of Human Rights.

<sup>27</sup> UN General Assembly, (1951), Convention Relating to the Status of Refugees', and its 1967 Protocol.

<sup>28</sup> The principle of non-refoulement as a norm of customary international law. Responses to the questions posed to UNHCR by the federal Constitutional Court of the Federal Republic of Germany in cases 2BvR 1938/98, 2BvR 1953/93, 2BvR 1954/93. See also; Dr. Sigit Riyato 'The Refoulement principle and its relevance in the international legal system.',7, (2010).

<sup>29</sup> U.S. 155 (1993)

<sup>30</sup> 142 U.S., 651, 658 (1892).

<sup>31</sup> L., B., John & T., Buergenthal (eds), 'The movement of persons Across Borders.' 18. (1992).

Committee No.18, Non-Discrimination.<sup>32</sup> Buergerthal in the same report states that ‘...formulation better reflects the real-world application of the anti-discrimination norm to immigration laws and restriction because domestic and international tribunal in fact tend to apply highly differential review to such distinctions...’<sup>33</sup> After the suicide of a Mexican who was ‘refouled’ from the U.S.A, many human rights activists accused the ‘white house’ of exposing Asylum seekers to life threatening dangers.’, and after documenting 636 causes of kidnapping, rape, torture, assault and other violent attacks those returned to Mexico. The Human Rights first researcher Kennji Kizuki stated that ‘...with schemes such as ‘Remain in Mexico’, the Trump administration was moving to essentially shut down asylum and refugees across to U.S...’, He further provides that ‘...All these policies are edging us closer and closer to aero refugees or asylum seekers (being) admitted to the U.S... It all just grows out of the Xenophobia of the administration at the base...’<sup>34</sup>

On grounds of whether a public health emergency can grant a government a right to derogate the principle of non-refoulement, the Refugee convention is silent about the implementations of the principle in the conditions of emergencies but some regional conventions have come out to elaborate on the question. Under the Kampala Convention, a refugee arguably cannot be returned to a country that has failed to control COVID-19 as return to such country would place the refugee’s life and health at risk. The Organization of African Union Convention Governing the Specific Aspects of Refugees Problems in Africa<sup>35</sup> also employs expansive language towards the same, stating that ‘[N]o person shall be subjected by a measure such as rejection at the frontier, return or expulsion which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened. However, Rodolfo Marquez<sup>36</sup> notes that neither African court on Human and People’s Rights nor the African has had the opportunity to determine the dimension of [non-refoulement] within their jurisdiction. The International Health Regulations confirms that no person shall be refouled even in Public Health Emergencies.<sup>37</sup>

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<sup>32</sup> Ibid 18, see also; UN Human Rights Committee (UNHRC), (1992), (CPR General Comment No. 20): Article 7 (Prohibition of Torture or other cruel, inhuman or degrading Treatment or punishment).

<sup>33</sup> Ibid 18, see also; Bronner Hail K., ‘Non-refoulement and ‘Humanitarian’ refugees.’ Customary International law. (1986).

<sup>34</sup> Tom Phillips, ‘Mexican man kills himself after being refused entry to U.S.’ TheGuardian. (2020).

<sup>35</sup> Organization of African Unity. (OAU), (1969), Convention Governing the specific Aspects of Refugee problems in Africa (OAU Convention).

<sup>36</sup> Oona H, M, & Preston Lim ‘COVID-19 and International law: Refugees law. The principle of non-refoulement.’, JustSecurity, (2020).

<sup>37</sup> Refugees and migrants in times of COVID-19: Mapping trends of public health and migration policies and practices. World Health Organization. (2021).

## Conclusion.

Ensuring states uphold their non-refoulement obligations requires both strengthened monitoring and greater accountability for violations. As refoulement often occurs clandestinely, increased observation along borders and coastal areas by international organizations could deter unlawful expulsions.<sup>38</sup> States aiding or abetting refoulement must face consequences through international judicial bodies empowered to order protections for refugees and sanctions for breaches.<sup>39</sup> Additionally, regional multilateral agreements explicitly prohibiting refoulement carry promise in expanding protections. The 1969 OAU Refugee Convention unequivocally binds parties to outlaw returning refugees to territories where they face harm.<sup>40</sup> A new Asia-Pacific convention affirming non-refoulement would similarly codify the norm among states most impacted by forced migration flows.<sup>41</sup> With vigilance, enforcement, and regional frameworks fortifying states' commitments, the peremptory prohibition on refoulement can fulfill its purpose as a shield for the world's most vulnerable.

In a nutshell, a public health emergency does not grant the government a right to derogate from the principle of non-refoulement, the IHR provides no person shall be refouled even in Public Health Emergencies. The principle of non-refoulement is a jus Cogen of international meaning that every state is entitled to it regardless of whether parties to the refugee convention or not, this means that the implementation of this principle MUST be non-discriminative in nature. Every state has a responsibility not to discriminate and provide a right to territory to the refugees and if they can't they can just provide for them a free and safe passage to a safe state instead of refouling the Asylum seekers back to territories where there is possible execution or torture. States must follow their national laws when implementing these laws as long as they don't contravene with the principles of international laws and human rights principles, thus, the principle of non-refoulement is a must and must implemented non-discriminatively.

All states must abandon that selfish acts of refouling whom they want majorly on grounds of discrimination especially in terms of race, religion, affiliation and any other aspect.

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<sup>38</sup> Gammeltoft-Hansen, T. (2011). 'Access to asylum: International refugee law and the globalization of migration control'. Cambridge University Press.

<sup>39</sup> Durieux, J-F. 'The many faces of 'prima facie': Group-based evidence in refugee status determination. *Refugee. Canada's Journal on Refugees*, 25(2). (2008).

<sup>40</sup> Organization of African Unity (OAU). (1969). *Convention Governing Specific Aspects of Refugee Problems in Africa*.

<sup>41</sup> McAdam, J. 'From protection to persecution: The Australian-Cambodia refugee 'arrangement''. *Melbourne Journal of International Law*, 18(1), 273-287. (2017).

States must create policies that are fair and just to all individuals regardless of their affiliation or interest or at least provide a safe passage to the Asylum Seekers to states where there is possible safety.

The UNHRC must try to emphasis on the just implementation of the principle of non-refoulement since its loophole especially in overseeing system and policies have created room for any states to create up a discriminatory system among states.

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'Living in Limbo: Rights of asylum seekers denied.', Amnesty International.Org. (2019).

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