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Crisis Without Borders: What Does International Law Say About Border Closure in the Context of Covid-19?

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This paper is assessing the legality of border closures decided by a vast number of countries with the view of limiting the spread of Covid-19. Although this issue has raised diverging interpretations in relation to International Health Regulations and regional free movement agreements, international human rights law provides a clear-cut answer: the rule of law stops neither at the border nor in times of emergency. Against this normative framework, border control can and must be carried out with the twofold purpose of protecting public health and individual rights, whereas border closure is unable to do so because it is by essence a collective and automatic denial of admission without any other form of process. This paper argues that blanket entry bans on the ground of public health are illegal under international human rights law. They cannot be reconciled with the most basic rights of migrants and refugees, including the principle of *non-refoulement* and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination. The paper concludes on the ways to better integrate at the borders public health and human rights imperatives in due respect with the rule of law. In both law and practice, public health and migrant's rights are not mutually exclusive. They can reinforce each other within a comprehensive human rights based approach to health and migration policies.

Keywords: COVID-19, migration, border closure, entry ban, human rights, refugee, migrant

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INTRODUCTION

Borders have always played a symbolic and political function in times of crisis. As a powerful expression of state's sovereignty, immigration control provides a typical avenue for governments to reassure their citizens and bolster a national sense of belonging, while providing an ideal scapegoat for their own failure or negligence. The Covid-19 pandemic is no exception.

Unsurprisingly, governments have swiftly imposed travel limitations with the view of mitigating the spread of contagion from abroad. As of 21st August 2020, a total of 219 countries or territories have issued 85,034 travel restrictions of various types (IOM, 2020b). Many states have taken the most radical one by closing their borders unilaterally.[1] Whether entry bans are exclusively grounded in health considerations or follow other purposes remains an open question. Banning entry of nationals from specific countries has been heavily influenced by broader considerations, be they diplomatic, economic or political. In some instances, it has even been decided as a countermeasure against denials of admission of their own nationals (see e.g., Reuters, 2020). Covid-19 also offers a formidable pretext for populists to experiment their nationalist agenda of border closure, as exemplified by Trump's gesticulation in the US.

To be clear, in the current context of the pandemic, states have the right and indeed the duty to protect public health and carry out migration control accordingly. Yet border control does not mean border closure. The former regulates and monitors admission to the territory through immigration processing, identity check and, if needed, health assessment, whereas the latter is a categorical ban of entry against any non-nationals or those coming from specific countries. Although the distinction between controlling and closing borders is frequently blurred in political discourse, it has key implications at both the policy and normative levels.

From a policy angle, border closure is counterproductive and even dangerous in addressing the pandemic for two main reasons. First, it encourages irregular migration without any health assessment and follow-up (Guadagno, 2020; Sanchez and Achilli, 2020; UN Network on Migration, 2020b). Second, it deprives the states of a much-needed human resource as a large percentage of migrants work in sectors considered essential to address the pandemic (health; agriculture; delivery services; cleaning; care for children, persons with disabilities, or older persons) (Gelatt, 2020; ILO, 2020).

The distinction between "travel bans" and "travel restrictions" has been at the heart of the recommendations adopted by the World Health Organization to address the current pandemic. The UN agency observes that, on the one hand, "travel bans [. . .] are usually not effective in preventing the importation of cases but may have a significant economic and social impact" (World Health Organization, 2020). On the other hand, instead of blanket bans, travel restrictions "may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a careful risk assessment, be proportionate to the public health risk, be short in duration, and be reconsidered regularly as the situation evolves" (World Health Organization, 2020).

From a normative angle, the legality of border closure has raised legal debates and diverging interpretations in relation to its compatibility with International Health Regulations (Burci, 2020; Foster, 2020; Habibi et al., 2020) and regional free movement agreements, such as in the European Union (Carrera and Luk, 2020; Hruschka, 2020; Thym, 2020). By contrast, international human rights law provides a clear-cut answer: the rule of law does not stop at the border or in times of pandemic. It provides an authoritative and flexible legal framework to protect public health without undermining the most fundamental rights.

Following this stance, border controls can and must be carried out with the twofold purpose of protecting public health and individual rights. However, border closures are unable to do so because banning entry to any foreigners or those of a particular nationality is, by definition, a collective and automatic denial of admission without any other form of process. This paper argues and demonstrates that closing borders on the ground of public health is illegal under international law. It violates the most basic rights of migrants (section Border Closure and Human Rights of Migrants) as well as the rights of refugees to access protection and asylum procedures (section Border Closure and Access to Refugee Protection).

BORDER CLOSURE AND HUMAN RIGHTS OF MIGRANTS

Although states enjoy a broad margin of discretion in controlling their borders, access to a territory does not operate in a legal vacuum. The movement of persons across borders is governed by a rather rich and complex network of international legal norms, whether grounded on universal and regional conventions or enshrined in customary international law (for an overview see Plender, 2015; Chetail, 2019). Most of these norms and instruments may be subjected to lawful restrictions and/or derogations to address the current pandemic, whereas others are absolute and do apply in any circumstances, including in times of health emergency.[2]

This last category of absolute guarantee concerns a few albeit fundamental principles of international law that prevail over any other considerations. They include, most notably, the principle of *non-refoulement*, when there is a real risk of torture, inhuman or degrading treatment, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination. Their continuing applicability in the context of Covid-19 has been reaffirmed by many stakeholders, including the United Nations High Commissioner for Refugees (UNHCR, 2020a), the International Organization for Migration (IOM) (IOM and UNHCR, 2020), the Office of the High Commissioner for Human Rights (OHCHR, 2020a), and UNICEF (2020), to quote a few.

[1] According to IOM data, entry restrictions represented the highest share of total restrictions but, since the beginning of August 2020, they have been following a decreasing trend. As of 24th August 2020, they still represent 40% of total restrictions, whereas medical measures are the most common restriction with 48%. In parallel to existing travel restrictions, 177 countries, territories or areas have issued 715 exceptions enabling mobility despite blanket travel restrictions (see IOM and UNHCR, 2020). Notwithstanding these exceptions, UNHCR further noticed that border restrictions "are impacting heavily on asylum-seekers and refugees, preventing many across the world from seeking asylum and safety" and a significant number of states "are making no exception for people seeking asylum" (IOM and UNHCR, 2020).

[2] For further discussion about absolute rights, lawful restrictions and derogations in the context of migrant's rights and Covid-19 (see Chetail, 2020).

As detailed in my book *International Migration Law* (Chetail, 2019), these core rights at the borders have four key characteristics in common. First, they are legally binding for all states under customary international law and reinforced by a broad range of widely ratified conventions. Second, they apply to any migrants regardless of their documentation status and nationality. Third, they are applicable both within the territory—including at the border—and outside the territory when migrants are under the effective control of a state. Fourth, they are absolute and cannot suffer from any exception or derogation under any circumstances, including in times of emergency.

Against this normative background, border closure is inherently in contradiction with the most elementary rights of persons on the move. No public health consideration can justify a denial of access to a territory without proper safeguards to guarantee the best interests of the child and to protect against *refoulement*, collective expulsion and discrimination. Whether it applies to all foreigners or targets those of a particular nationality, border closure is by essence an automatic and collective entry ban and cannot be reconciled with these core individual rights of migrants.

As confirmed by an extensive case law, the general prohibition of collective expulsion requires that any rejection at the frontier, interception or removal be taken on the basis of a reasonable and objective examination of the particular case of each migrant.[3] Because of its collective nature, border closure is *ipso facto* incompatible with such an individual assessment. Similarly, because the best interests of the child shall be a primary consideration in all situations, including at the border, this basic duty of international law cannot be fulfilled without assessing the individual situation of migrant children (see e.g., Committee on the Rights of the Child Committee on the Protection of the Rights of All Migrant Workers Members of Their Families, 2017; Guttentag, 2020; UNICEF, 2020).

The same conclusion comes from the prohibition of *refoulement*. Due respect for this absolute principle entails an individual and rigorous scrutiny of the risk of torture, inhuman or degrading treatment, before taking any decision of non-admission or forcible removal.[4] The principle of *non-refoulement* further retains a particular relevance in the context of Covid-19. Returning someone to his or her own country, where the health care system is broken or not available, may in some exceptional circumstances amount to an inhuman or degrading treatment. This has been notably acknowledged in the jurisprudence on medical cases of the UN Committee against torture and the European Court of Human Rights.[5]

BORDER CLOSURE AND ACCESS TO REFUGEE PROTECTION

Denying access to territory and asylum procedure also goes in blatant contradiction with the Geneva Convention relating to the Status of Refugees of 1951 and its Additional Protocol of 1967. Although the Geneva Convention pays tribute to public order and national security of state parties, none of its provisions allows banning access to refugee protection in the context of Covid-19.

The derogation clause contained in its Article 9 provides an archetypal instance of this balancing act between state sovereignty and refugee rights. It grants states parties the right to adopt temporary measures in times of emergency, without undermining access to refugee protection. According to Article 9, provisional measures may be taken provided that two cumulative conditions are met: they are necessary to face "grave and exceptional circumstances" and they must "be essential to the national security." Whilst the current pandemic is without any doubt a grave and exceptional situation on its own, whether it endangers the national security of a state is more debatable and context specific.[6]

Even by assuming that this would be the case, Article 9 does not allow suspending asylum procedures. On the contrary, the wording of this provision makes it clear that access to protection remains plainly binding even in such exceptional circumstances, for provisional measures do apply "pending a determination by the Contracting State that that person is in fact a refugee." Thus, while allowing states to adapt their response to Covid-19, temporary measures cannot bar access to asylum procedure. This would in turn violate the prohibition of *refoulement* under Article 33(1). This cardinal principle of refugee law prohibits rejection at the border and return "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The only legal ground for suspending access to protection may be found in the exceptions to the prohibition of *refoulement* under Article 33(2). In stark contrast with its human rights law counterpart, the principle of *non-refoulement* under the Geneva Convention is not absolute. In particular, its benefit cannot 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."[7] Although states retain a substantial margin of appreciation in assessing a danger to their own security, this does not give them a *carte blanche*. As with any exceptions to a principle (especially when fundamental rights are at stake), "it is clear that Article 33(2) exception must be interpreted restrictively."[8]

[3]See for instance: IACtHR, *Nadege Dorzema et al. v. Dominican Republic,* Series C No 251 (2012), para 172; ECtHR, *ECtHR, Hirsi Jamaa, and Others v. Italy,* Application no. 27765/09 (2012), para 184; ECtHR, Khlaifia, and Others v Italy, Application no 16483/12 (2016), para 238. See also in the context of Covid-19 (IOM and UNHCR, 2020; OHCHR, 2020a).

[4]See among many other similar restatements: *ECtHR, Jabari v Turkey, Application no 40035/98* (2000), para 50; *ECtHR, Gebremedhin v France, Application no 25389/05* (2007), para 66. See also in the context of Covid-19 (IOM and UNHCR, 2020; OHCHR, 2020a).

[5]See in particular Committee against Torture, *GRB v Sweden* (1998) Communication No 93/1997 UN Doc CAT/C/20/D/83/1997, para 6.7; ECtHR, D v The United Kingdom, Application no. 30240/96 (1997), para 54; and *ECtHR, Paposhvili v Belgium, Application no 41738/10* (2016), paras 181–193.

[6]See below the discussion on national security and Covid-19 in the context of Article 33(2) of the Refugee Convention.

[7]The second exception does not apply to Covid-19 as it focuses on the protection of the host society against criminality, when a refugee "having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

[8]*Court of Appeal of New Zealand, Attorney General v. Zaoui (2004) Dec. No. CA20/04*, para. 136.

When transposed to the Covid-19 context, the threshold of this exception remains particularly high. The very notion of national security is broader, but also more demanding, than the one of public health. It requires a threat to an essential interest of the state, its territory, institutions or population. National security has long been understood in other contexts than the one of health emergency. As Atle Grahl-Madsen underlined, "the meaning of this term is rather clear. [...] Generally speaking, the notion of 'national security' or 'the security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned" (Grahl-Madsen, 1997; see also in this sense Chetail, 2001; Hathaway, 2005; Wouters, 2009).

Obviously, the risk of contagion within the community of a host country may, in some circumstances, endanger the security of a whole state. Yet the causal link between the two must be established and substantiated. In other words, there is no automaticity between the risk of contagion and the danger to national security. As confirmed by a longstanding jurisprudence on Article 33(2), "the threat [to national security] must be 'serious,' in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible."[9]

Furthermore and more importantly, the very wording of Article 33(2) as interpreted in good faith does not allow blanket border closure and collective denial in access to asylum procedures. As noted by domestic courts, "[t]he wording of the provision ... requires the person him or herself to constitute a danger to national security."[10] Thus, because article 33(2) refers to an individual refugee, it cannot justify the general suspension of refugee status procedure for all asylum-seekers.

Likewise, it is hardly tenable in both law and practice that one single person is able to threaten the security of a whole country because he or she is affected by Covid-19. In any event, as mentioned above in section Border Closure and Human Rights of Migrants, any asylum seekers invoking a risk of torture, inhuman or degrading treatment are protected by the absolute principle of *non-refoulement* under international human rights law. In such cases, the exceptions of the Refugee Convention are literally neutralized.

As a result of this normative framework, UNHCR has concluded alongside IOM and OHCHR that "denial of access to territory without safeguards to protect against *refoulement* cannot be justified on the grounds of any health risk [...]. States have a duty vis-à-vis persons who have arrived at their borders, to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned" (see also Castellanos-Jankiewicz, 2020; Gilbert, 2020; IOM and UNHCR, 2020; Nicolosi, 2020; Ogg, 2020; OHCHR, 2020a; UNHCR, 2020a).

As exemplified above, denying access to refugee protection through border closure is a violation of Articles 9 and 33 of the Geneva Convention. When this measure is targeting asylum seekers from a particular country, this also violates the principle of non-discrimination under Article 3 of the Geneva Convention and many other similar provisions of human rights conventions (including articles 2 and 26 of the International Covenant on Civil and Political Rights).

CONCLUSION

Although the challenges of the current pandemic are huge and manifold, Covid-19 cannot be an excuse to close borders at the expense of the most basic rights of migrants and refugees. International human rights law draws a clear-cut dividing line between what states can do and what they must do to protect public health at their borders. While states enjoy a broad margin of appreciation in their response to Covid-19, a minimum standard of absolute guarantees does apply in any circumstances, including in times of pandemic.

Blanket entry bans on the ground of public health are irreconcilable with the core rights at borders, because they exclude any forms of individual processing to ensure due respect for the principle of *non-refoulement* and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child and the principle of non-discrimination.

By contrast, migration control can and must be adapted to integrate health and protection imperatives in due respect with the rule of law. The core rights at the border strengthen and underpin public health for they allow states to carry out, within their own immigration and asylum processing, health screening or testing at borders and, where required, quarantine. Following this stance, UNHCR (2020b) and IOM (2020a) have detailed a comprehensive set of practical recommendations addressed to states and their immigration and asylum authorities, with the view of protecting both public health and migrant rights at the borders.

Because Covid-19 is likely to become the new normal for some time, further systematic integration of health and protection calls for a comprehensive and ambitious human rights based approach to both health and migration policies. Accordingly, in some circumstances, mitigating the contagion of Covid-19 may justify lawful limitations to human rights, provided that they are necessary, proportionate, non-discriminatory and in accordance with law. This concerns primarily the right to freedom of movement within the territory of a state through community-based or home quarantine and other related temporary restrictions on movement.

In most instances, however, the same objective of public health cannot be achieved without fully implementing human rights. The prohibition of arbitrary detention offers a persuasive case.

[9]Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration) (2002) 1 SCR 3.* para. 90. See also: *Attorney General v. Zaoui* (2004), Dec. No. CA20/04, paras. 133 and 140; *NSH v. Secretary of State for the Home Department* (1988) Imm AR 410.

[10]Court of Appeal of New Zealand, *Attorney General v. Zaoui (2004) Dec. No. CA20/04.*, para. 148.

Providing non-custodial alternatives to immigration detention is not only a duty of states under human rights law,[11] it is also required to avoid contagion in overcrowded detention centers (OHCHR, 2020b; UN Network on Migration, 2020a; Working Group on Arbitrary Detention, 2020). The same observation should be raised with regard to the right to health. While access to primary health care for all migrants and refugees is a minimum core obligation under the International Covenant on Economic, Social and Cultural Rights (UN Committee on Economic, 2017; for further discussion see Chetail, 2019), it is in fact more needed than ever to avoid the spread of contagion (OHCHR, 2020a; UN Committee on Economic, 2020; UN Committee on the Protection of the Rights of All Migrant Workers Members of Their Families UN Special Rapporteur on the Human Rights of Migrants, 2020; UN Network on Migration, 2020c).

[11] See among many other restatements: Global Compact for Safe. Orderly and Regular Migration. A/RES/73/195. (2018), objective 13; Human Rights Committee, *C v Australia* (2002) Communication No 900/1999 UN Doc CCPR/C/76/d/900/1999., para 8.2 (UNHCR, 2012).

When assessed from the angle of the state's duties under human rights law, public health and migrant's rights are thus not exclusive but mutually reinforcing. They are bound to work in tandem within a continuum of protection. Both in pith and substance, taking seriously public health means more, than less, protection of migrants for the benefits of all.

DATA AVAILABILITY STATEMENT

The original contributions presented in the study are included in the article, further inquiries can be directed to the corresponding author.

AUTHOR CONTRIBUTIONS

The author confirms being the sole contributor of this work and has approved it for publication.

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