THE PRINCIPLE OF NON-REFOULEMENT: A REALITY?

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ABSTRACT

Refugee and asylum debates have never been more significant within international arena than they are today. At the end of 2016, three main crises -South-Sudanese, Syrian and Central-African refugee crisis have reached their peak and put unprecedented pressure on the international community along with United Nations High Commissioner for Refugees (UNHCR). The flight of such great numbers of refugees - 22.5 million[1], has made protection protocols difficult to implement. As refugee situations cannot be duly solved and the number of refugees assisted by the UNHCR is approaching a staggering number, it is essential to continuously discuss the subject of refugee protection, and to ensure that non-refoulement in the hosting states is an active policy. This paper seeks to dwell into the contours of non-refoulement- history, evolution and the current status. The principle of non-refoulement has been discussed in detail and its application in different eras has been analysed. Further, the evolution of the principle is traced and understood why it could not withstand the test of time during the European Migrant crisis. Various lacunas have been identified and accordingly, various proposals & solutions have been put forward.

Keywords: Non-Refoulement, Refugees, Asylum, UNHCR, Human Rights

WHO IS A REFUGEE?

The main victims of any armed conflict that occur in any nation are the people of that nation. These disturbances possess the capacity of transforming them from citizens to refugees and asylum seekers. In the simplest sense, refugees are innocent victims who are forced to flee from their countries to find peace and protection. Several attempts have been made to define as to who a refugee is and when a

[1]United Nations High Commissioner for Refugees, Figures at a Glance, http://www.unhcr.org/figures-at-a-glance.html (last visited on Nov. 4, 2017)

person does become a refugee.

One such attempt is the 1951 Convention Relating to the Status of Refugees[2] which states that a refugee is a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his or her nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country."[3]

To understand who a refugee is, it is important to analyse the definition given by the Convention of 1951. The definition given by the convention does not necessarily defines as much as it characterizes a refugee. It declares that a person possesses a fear of persecution. Fear refers to a state of mind, an apprehension. It is a human trait that is highly relative and depends upon the experiences, maturity, and way of comprehending situations that are a threat to their life. It completely owes to the subjectivity of a person's mind who is subjected to threat. The term 'well-founded' is intentionally used by the drafters to characterize the fear.[4] Again, it depends on the situation and personal experiences of the victim to assess whether his/her fear is well founded or not. The fear must be compared to the disturbances in the victim's country and it is only after this comparison that it should be judged whether his/her fear is well founded or not.

To characterize this fear more specifically, the definition conveys that the fear should be of persecution[5]. This implies that there is presence of hostility, ill-treatment, harassment, any kind of discrimination, abuse, torture and even killings. The definition also provides us with the reasons of

[2]Convention relating to the Status of Refugees, art.1A (2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention]Article 1A (2) of the Convention defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[3]Supra note 2

[4]A.G. v. Ward, [1993] 2 S.C.R. 689; (1993) 103 D.L.R. (4th) 1; 20 Imm. L.R. (2d) 85 (Sup. Ct., Can. June 30, 1993); Wang v. Min. for Immigr. & Multicult. Aff'rs, [2000] F.C.A. 1599 (High Ct., Austl. Nov. 10, 2000); Applicant A. & Anor. v. Min. Immigr. & Ethnic Aff'rs & Anor., [1997] H.C.A. 4; (1997) 190 C.L.R. 225; 142 A.L.R. 331 (High Ct., Austl. Feb. 24, 1997); Namitabar v. Can. (Min. of Employ. & Immigr.), Case A-1252-92, [1994] 2 Can. F.C. 42 (Fed Ct. T.D.); Fathi-Rad, v. Can. (Sec'y of St.), Case No. IMM-2438-93, [1994] 77 F.T.R. 41 (Fed. Ct. T.D., Apr. 13, 1994); Islam (A.P.) v. Sec'y St. Home Dep't, R. v. Immigr. Appl. Trib. & Anor. ex parte Shah (A.P.) (Conjoined Appeals) (U.K. H. Lords, Mar. 25, 1999); Mandla v. Dowell Lee, [1983] 1 Q.B. 1 (Q's Bench, U.K.); U.N.H.C.R

[5]UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, where "persecution" was defined as any threat to life or freedom, whose existence had to be assessed on the basis of both objective and subjective criteria. However, this definition of the term persecution remains unsatisfactory: on one hand, because it is still very broad and therefore difficult to be implemented; on the other, because it is contained in a non-legally binding document *available at* http://www.refworld.org/docid/4f33c8d92.html (last visited on Jan. 26, 2018)

persecution[6]. To fulfill the conditions of the definition, it is necessary that the fear of persecution must arise from the reasons namely - race, religion, nationality, membership of a particular social group, or political opinion[7]. The notions of race, religion, political opinions are some of the usual causes which result in disturbance and turbulence within and outside nations. Clashes of ethnic groups, social groups and political groups often tend to disturb the peace and security of people of the nation, thereby subjecting them to fear and threat to life & liberty[8]. Lastly, because of these factors, the person who possesses this fear is either forced to leave his/her nation or is unwilling to return to the same. This is the main characteristic which makes a person - a refugee.

GRANT OF ASYLUM: EARLY DAYS TO CONTEMPORARY TIMES

Long before the Refugee Convention was adopted, the practice of providing shelter & protection to people fleeing persecution has been an anachronistic practice of ancient civilizations of Greek and Roman origin.

We know this by the concept of Sanctuary City which was developed during the Greek and Roman era. Herodotus, a Greek historian had recorded in his "History of Herodotus[9]" the existence of a long-standing sanctuary at the mouth of the Nile River to which individuals often fled. The refugees had to pledge their devotion to demigod and then they could be accepted into his sanctuary. Once this was done, they came under the umbrella of protection. He had stated in the records that "if a servant of any man takes refuge there and is branded with certain sacred marks, delivering himself to the god, he may not be touched. "Even the role of temples, churches etc. was to protect and provide shelter to

[6]UN High Commissioner for Refugees (UNHCR), 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (UNHCR, 31 January 1994) *available at* http://www.refworld.org/docid/437b6db64.html (last visited on Jan. 26, 2018)

[7]Min. Immigr. Ethnic Aff'rs v. Guo & Anor. (Matter No. S151 of 1996), [1997] H.C.A. 22 (High Ct., Austl., June 13, 1997); R v. Sec'y St. ex parte Adan, [2001] 2 A.C. 477 (U.K. H. Lords, Apr. 2, 1998) (Slynn, L.)

[8]Persecution of Jews in Nazi Germany; partition of India in 1947 and the subsequent movement of Hindus and Muslims between India and Pakistan; the conflict over Palestine and the creation of Israel in 1948, creating a Palestinian diaspora in the Middle East and beyond; Nepali-speaking southern Bhutanese who are living as refugees in Nepal and India, and whose claim to Bhutanese citizenship is rejected by the authorities of that country; the ethnic Vietnamese population of Cambodia, thought to consist of around five per cent of the country's 10 million people; Bidoons (an Arabic expression derived from a phrase meaning 'without nationality'), long-term but stateless residents of Kuwait, many of whom are now to be found in Iraq and other countries in the Persian Gulf; black Africans from Mauritania living as refugees in the neighbouring country of Senegal; Kurds in Syria, many of whom became stateless as a result of a 1962 census which withdrew Syrian citizenship from people who had allegedly entered the country illegally from Turkey; the Rohingya people of western Myanmar, a largely stateless Moslem minority group consisting of some two million people, a small proportion of whom are accommodated in refugee camps in Bangladesh; the Banyarwanda and Banyamulenge peoples of eastern Zaire, ethnic Tutsis with a previously disputed claim to Zairean citizenship.

[9]George Rawlinson, The History of Herodotus *available at* http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=GreekFeb2011&getid=1&query=Hdt.%202.113 (last visited on Nov. 4, 2017)

those who came for help. Temples and churches were sacred lands; weapons in these places were strictly prohibited. Eventually spaces in and around temples became holy lands called "asulia" where weapons became prohibited and harm could not be inflicted on the individuals residing there.[10] And this was a reason why people found protection and security in such places. Another evidence of refugee asylums can be found in the books of a legal historian named Karl Shoemaker. His book '*Sanctuary and Crime in the Middle Ages, 400-1500'* had mentioned how early churches began to provide sanctuary to those who sought refuge in return of goods, payment of fine or by performing a penance.[11] There is more evidence to qualify that certain individuals also received special protections such as granting of safe conduct, right to burial, grant of inviolability etc.[12] On the other end of the spectrum, refugees who were unfortunate enough to not land at a sacred place where their body was protected, fled to neighboring kingdoms and faced a worse fate. One such instance is when Roman kingdoms began abusing their refugees. In 376 A.D., migrants known as the Goths arrived at the banks of Rome's Danube frontier seeking sanctuary from 'the Huns' who were one of the cruelest warriors during that time. The Roman kings left them to the responsibility of a group of troops. The Goths were barbarically exploited by the Romans to increase their national treasures. Consequently, riots broke out which lead to a brutal war between the Goths and the Eastern Roman Empire that went on for a couple of generations.[13]And so the mistreatment, the exploitation and the ignorance towards refugee protection led to a bloodshed that could have been prevented.

As far as the grounding of the modern refugee regime is concerned, it is on the same footing as that of the ancient customs of granting asylums as far as protection to persons who flee persecution is concerned- persons seeking protection approached the sanctuary, temple or church or the place of refuge and they were granted the means to survival. However, this is only "protection to body" that we are talking about. After the development of the international human rights law, the refugee law has been a witness to expanding facets, new dimensions and different applications. Post the ancient era, there are numerous examples of refugee crisis such as the Balkan Wars in 1912-1913 that made 800,000 people to flee their homes[14], the large-scale evacuations from war zones made during the

[10]Sarah Bond, Defending The Ancient Concept Of The Sanctuary City, https://www.forbes.com/sites/drsarahbond/2017/03/28/defending-the-ancient-concept-of-the-sanctuary-city/#27be2ffb3aaa(last updated on March 28, 2017)

[11]Shoemaker, K., *Sanctuary and crime in the middle ages, 400-1500*, New York: Fordham University Press (2011).

[12]Phillipson Coleman, The International Law and Custom of Ancient Greece and Rome, *available at* https://ia800209.us.archive.org/11/items/internationallaw00phil/internationallaw00phil.pdf (last visited on Nov. 4, 2017)

[13]Harrison Searles The Fall of Rome Began with the Abuse of Refugees, June 28, 2016, *available at* https://fee.org/articles/the-fall-of-rome-began-with-the-abuse-of-refugees/

[14]Gilbert Jaeger, On the history of the international protection of refugees, 83 The International Review Of Red Cross (2001), *available at* https://www.icrc.org/ara/assets/files/other/727_738_jaeger.pdf (last visited on Nov. 4, 2017)

Spanish Civil War in 1936[15], the Angolan Civil War[16] (1975–2002) that displaced thirteen million people internally and forced another 435,000 Angolans to flee the country. Another instance is when one million Armenians had fled Turkey between 1915 and 1923 to escape persecution while hundreds of thousands became homeless and stateless refugees[17]. To speak more of it, in the aftermath of the Boko Haram's increased violent attacks across the border in Cameroon along with the humanitarian crisis in the north of Nigeria, thousands of refugees fled into neighboring cities in Niger and Cameroon[18]. Adding more to the list, the refugees of the 2011 Libyan civil war fled from persecution to nearby areas of Tunisia, Egypt and Chad, as well as to European countries, across the Mediterranean, in boats[19] The most recent crisis that the world is currently dealing with is the Syrian Refugee crisis that has prompted the largest refugee migrations since World War II.

But why is it important for us to cite these instances at all? It is because these individual crisis situations that the world has witnessed will help us to analyse how exactly the International Law of Refugees was established. The tracing of such instances is important for us to track how and when the machinery for refugee protection concretized in the international scenario. Starting from the ancient civilizations to the modern regime, we noticed that initially the state had the role to protect persons fleeing persecution and providing them with shelter and food in exchange for devotion to the place of refuge which was a temple, a church or a sanctuary. Gradually the protection offered by states has changed its character from providing basic survival surroundings, giving a means to earn a living (that has been a matter of criticism lately) to assuming their responsibility of protecting the lives of the refugees which involves discharging its human rights obligations. So, what we see is that the protection didn't pertain to just giving food and a roof anymore, but also, finding solutions to prevent the persecution and accepting a responsibility to cater to the crisis.

CONCRITIZATION OF LAW FOR REFUGEES

Armed conflicts and wars, at times, create situations that are difficult to solve, so much so, that even an entire nation becomes incompetent to resolve issues. Restoration of peace and order becomes

[15]The Spanish Civil War www.limun.org.uk, https://limun.org.uk/FCKfiles/File/Spanish_Civil_War_Source_2.pdf (last visited Nov 4, 2017)
[16]Human Rights Watch, The War is Over: The Crisis of Angola's Internally Displaced Continues (2008), Available at https://www.hrw.org/legacy/backgrounder/africa/angola/2002/angola-idps.pdf (last visited on Nov. 4, 2017)
[17]Adalian, R. P., Armenian Genocide Encyclopedia of Genocide *available at* http://www.armenian-genocide.org/genocide.html
[18]CNA Corporation's Strategic Studies (CSS) division, Diagnosing the Boko Haram Conflict (CNA Corporation) (2015), https://www.cna.org/cna_files/pdf/DOP-2014-U-009272-Final.pdf (last visited on Nov. 4, 2017)
[19]Opinion Libya's Forgotten Refugees Nytimes.com, *available at* http://www.nytimes.com/2011/10/30/opinion/sunday/libyas-forgotten-refugees.html?mcubz=3 (last visited on Nov. 4, 2017)

difficult to the extent that people must abandon their homes and flee from their country in search of peace, safety and protection. At this very stage, the importance of International Community becomes relevant and the International Humanitarian Law becomes the need of the hour. Establishment of concrete machinery in a sovereign state is a very subjective concept. The state of affairs and the codification of laws decided what was concrete for a state or a kingdom. It is the codification, implementation and observance of law that decides the extent to which a law is concretized. A concrete law is the one that is implemented effectively, accepted faithfully and followed rigorously. Recognition and Acceptance of law by the governed is what makes a law concrete[20]. The refugee law is a subject matter of the international law. The concept of international community was developed with the establishment of League of Nations. International Law is based on "State recognition". The international recognition for refugees was first granted by the League of Nations.[21] Post the collapse of the Ottoman Empire and the Russian Revolution, tragic events had caused mass displacements and migrations[22]. Hence, several institutions[23] were created to address the issue under High Commissioner for Russian Refugees[24].The League of Nations had categorically divided refugees in relation to their country of origin. Until 1950, numerous international organisations were created to address the issue. The International Refugee Organization (IRO) was United Nation's one such organisation. The General Assembly decided to replace the IRO with "The Office of the United Nations High Commissioner for Refugees" (UNHCR) in 1952.[25]The work of UNHCR is safeguarding the rights of refugees and ensuring their well-being. The commission strives to provide humanitarian relief on an entirely non-political footing. Subsequently, refugees were granted international recognition in

[20]James C. Hathaway and R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, University of Michigan Law School Scholarship Repository (1997)
[21]Erika Feller, *Statement by Erika Feller, Director, Department of International Protection, UNHCR*, 23 Refugee Survey Quarterly 327-333 (2004), https://law.wustl.edu/harris/documents/p129_Feller.pdf (last visited on Nov. 4, 2017)
[22]Joshua A. Sanborn, *Unsettling the Empire: Violent Migrations and Social Disaster in Russia during World War I*, 77 The Journal of Modern History 290-324 (2005), http://file:///C:/Users/Rathi/Downloads/Sanborn.pdf (last visited on Nov. 4, 2017)
[23]The Nansen International Office for Refugees (1931-1938), The Office of the High Commissioner for Refugees coming from Germany (1933-1938), The Office of the High Commissioner of the League of Nations for Refugees (1939-1946) and the Intergovernmental Committee on Refugees (1938-1947).
[24]Gilbert Jaeger, On the history of the international protection of refugees, The International Review Of Red Cross (2001), *available at* https://www.icrc.org/ara/assets/files/other/727_738_jaeger.pdf (last visited on Nov. 4, 2017)
[25]supra note 13

various conventions.[26] Moreover, the international community was vested with the responsibility of providing immediate care[27] and approaching the crisis as an agent of humanitarian relief.

PRINCIPLE OF NON- REFOULEMENT - A REFUGEE'S RIGHT

Refugees, like all other persons, are entitled to certain human rights. Since they are displaced, forced to flee and are in search of protection and safety, they become vulnerable to further violations and abuses. Hence, there are certain human rights that are specifically vested upon refugees such as the Freedom of movement within the host country[28], Right to life and liberty[29], Right to seek and enjoy asylum and the prohibition on penalization for illegal entry or stay[30], Right to a safe asylum[31] etc. Among these rights, the principle of non- refoulement is the most important right conferred upon refugees[32] and is the cornerstone of all the rights[33]. This principle flows from the right to seek and enjoy asylum in other countries from persecution.

The term 'refoulement' is derived from French word 'refouler' meaning drive back or repel. It prohibits states from returning refugees, in any manner whatsoever, to countries or territories in which their lives or freedom may be threatened. This principle is very broad and covers in its ambit many dimensions. The principle is codified under Article 33 of the 1951 Convention Relating to the Status of Refugees[34] which states that:

1. *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on*

[26]Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. DocA/RES/217(III) art. 14(1) (Dec. 10, 1948); American Convention on Human Rights art. 22(7), Nov. 21, 1969, 1144 U.N.T.S. 143; Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Feb 18 2003, OJ L. 50/1-50/10; 25.2.2003, (EC) No 343/2003; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 ; Convention on the Rights of the Child art. 22, Nov. 20, 1989, 1577 U.N.T.S. 3; *African Charter on Human and Peoples' Rights ("Banjul Charter")* art. 12(3), June 27 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); American Declaration of the Rights and Duties of Man art. 27 May 2 1948

[27]Furtak FT, *The Refugee Crisis - A Challenge for Europe and the World*, Journal of Civil & Legal Sciences (2016)

[28]International Covenant on Civil and Political Rights, art. 12, 16 December 1966, United Nations Treaty Series, vol. 999, p. 171 and Convention Relating to the Status of Refugees, art. 26, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137

[29]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948)

[30]Convention Relating to the Status of Refugees, art. 31(1), 28 July 1951, United Nations Treaty Series, vol. 189, p.137

[31] Ibid

[32]Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come*, 18 INT'L J. REFUGEE L. 509, 511 (2006) at pg 523 (calling non-refoulement "the most fundamental of all international refugee law obligations")

[33]Reinhard Marx, *Non-refoulement, Access to Procedure and Responsibility for Determining Refugee Claims* in Selina Goulbourne, Law and Migration, Edward Elgar Publishing, Cheltenham, 1998, p. 96.

[34] Convention relating to the Status of Refugees, art.33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150

account of his race, religion, nationality, membership of a particular social group or political opinion.

2. *The benefit of the present provision may not, however, be claimed by a refugee for whom there are reasonable grounds for regarding him as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*[35]

The Article aptly explains the law that in any circumstances (except for national security), no state can return any refugee and asylum seeker to borders of the territories where his/her life and liberty are put at stake. The principle of non-refoulement addresses one of the most immediate need of every refugee - a safe shelter. It ensures a situation where a refugee is free from an immediate threat to his/her life and liberty. Apart from the 1951 Refugee Convention, the principle of non-refoulement has also been reiterated and given a legal foundation in Article 7 of the 1966 International Covenant on Civil and Political Rights[36] and in Article 3 of the European Convention on Human Rights[37] which state that no person can be subjected to danger, torture and inhumane treatment.

This Principle of non-refoulement is applicable to all the migrants regardless of their status, race, color, creed, sex etc[38]. They have a right to seek a safe place and are entitled to an asylum in a country to which they migrate. With regard to this, it has been reiterated at the global platform through the Human Rights Committee of International Covenant on Civil and Political Rights[39]that: "*The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party."* Furthermore, it is also settled that the application of non- refoulement and the protection that it seeks to provide is independent of a migrant's ability to gain or maintain refugee

[35]Supra note 16

[36]International Covenant on Civil and Political Rights, art.7, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. Art.7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

[37]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 3, Nov 4 1950, ETS 5. Art 3 Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[38]UN High Commissioner for Refugees (UNHCR), 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (UNHCR, 31 January 1994) (last visited on Jan. 26, 2018)

[39]Para 10 Human Rights Committee, General Comment 31 Nature of the General Legal Obligation on States Parties to the Covenant Adopted 29 March 2004 *available at*http://www.unhcr.org/4963237716.pdf (last visited on Nov. 4, 2017)

status[40]. This means that the protection against refoulement is available to anyone who meets the requirements of the refugee definition. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition but is recognized because he or she is a refugee. It follows that the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared[41].

All the states are under an obligation to allow a refugee to enter and seek asylum as long as the risk at the native country continues. This obligation is not only on the states that are signatories of this international instrument but other states as well[42]. They are duty bound to follow this principle due to its customary origin[43]. However, at times, situations may arise where an alternative path may be followed such as transfer of migrants to a safe third country or provision of effective protection outside the territory of the host State etc[44]. These alternative measures are within the ambit of the principle. The basic aim is that the refugees are provided with a safe harbor and are free from the prevailing risks that forced them to leave their territories.

Non-refoulement "applies to the actions of States, wherever undertaken, whether at the land border, or maritime zones, including the high seas." Thus, its functional "jurisdiction" is not restricted to any territorial limit of the State, but it also includes cases where the State acts outside its territories[45]. The

[40]ECtHR, *Ahmed v. Austria*, Application No. 25964/94, Judgment 17 December 1996, at 42, 47, stating that the applicant lost refugee status because of criminal conviction, but was granted non-refoulement. IACtHR, *Caso Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, 25 November 2013, Series C No. 272, at 135, stating that the Inter American system recognizes the right of every foreign person regardless of legal or migratory status, and not only of asylum seekers and refugees, not to be returned to a place where his/her life, integrity and/or liberty risk being violated. See also Convention Against Torture (CAT), *Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, U.N. Doc. A/49/44, at 2.5, 9.7; CCPR, Hamida v. Canada, Communication No. 1544/2007, 11 May 2010, U.N. Doc. CCPR/C/98/D/1544/2007, at 8.7, 9.

[41]UNHCR, UNHCR Executive Committee Conclusions No. 6 (XXVIII), *Non-refoulement* (1977), Para. (c), available at http://www.unhcr.org/cgibin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on Nov. 4, 2017)

[42]Guy S., Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 167; Sandra Lavenex, *Safe Third Countries* (Central European University Press, Budapest, 1999) 12

[43]Executive Committee, Conclusion No. 25 (XXXIII) 1982, at para. (b). In Conclusion No. 79 (XLVII) 1996, the Executive Committee emphasized that the principle of non-refoulement was not subject to derogation

[44]E. Lauterpacht and D. Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), para. 76

[45]In a decision which addressed the applicability inter alia of Article 33(1) of the 1951 Convention to the return to Haiti of persons intercepted on the high seas by U.S. coast guard vessels, the United States Supreme Court determined that Article 33(1) of the 1951 Convention is applicable only to persons within the territory of the United States (Sale, Acting Commissioner, Immigration and Naturalization Service, et al., *Petitioners v. Haitian Centers Council*, Inc., et. al., 509 U.S. 155 (1993)). For the reasons set out in this advisory opinion, UNHCR is of the view that the majority opinion of the Supreme Court in Sale does not accurately reflect the scope of Article 33(1) of the 1951 Convention.

duty to ensure the rights of refugees extends to every place where the State through its agents or otherwise, operating outside its territory, exercises control and authority.

The principle also prevents a state from expelling refugees to a second State where they might again face similar risks and thus, be forced to leave for a third State. This phenomenon will give rise to a vicious circle leading to the violation of human rights. States cannot do away with their responsibility in garb of such a process of "indirect refoulement" by proposing to return a refugee to a "relatively safe" area of the receiving State. This concern was raised in the international arena due to its rising trend at the global face. The Human Rights Committee stated that the "obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[46]

However, all the international instruments for the protection of rights of the refugees recognise certain exceptions. Deviance from the principle of non-refoulement is allowed if the refugee poses threat to the security of the country or has been convicted for any serious crime. However, the Human Rights Committee has stated to prevent the abuse of this exception that the non-refoulement principle "should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of."[47]

EXCEPTIONS TO THE PRINCIPLE

The Principle of Non-refoulement is subject to certain exceptions which are provided within the 1951 Refugee Convention itself. Article 1F[48] of the Convention excludes the following persons to any right to safe asylum:

a) A person who has committed a war crime, or a crime against peace, or humanity.
b) A person accused of committing a serious non-political crime outside the country of refuge

[46]Para 12 Human Rights Committee, General Comment 31 Nature of the General Legal Obligation on States Parties to the Covenant Adopted 29 March 2004 *available at* http://www.unhcr.org/4963237716.pdf (last visited on Nov. 4, 2017)
[47]Fanny De Weck, Non-Refoulement Under the European Convention On Human Rights And The Un Convention Against Torture (Brill Nijhoff) (2014) page 54
[48]Convention relating to the Status of Refugees, art.1F, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. Art 1 F The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

before arriving into the host country.

c) A person accused of committing acts against the principles of the United Nations.

Articles 1D[49] and 1E[50] of the 1951 Convention mentions two more categories of persons on whom the principle does not apply. They are

a) A person already receiving United Nations assistance,
b) A person who is not in need not of international protection (i.e. those who have access to national or other protection).

Hence, the Principle of Non-Refoulement is a customary principle that has been provided the status of an International Law. Obligation to this principle marks the commencement of protection of human rights of refugees and asylum seekers.

JUDICIAL PRONOUNCEMENTS

Establishing international organisations and bodies and codifying laws for refugee protection is just a part of concretization. Numerous precedence and case laws have been developed in nations states based on which a national recognition has been provided to the principle of non-refoulement and human right obligation of states. There are multiple cases where Art 33 of the refugee protection has been widely interpreted as a human right obligation of states.

1. **Non-Refoulement is a surrogate protection-** The Federal Court of Canada had stated that surrogate is someone who acts for or takes the place of another and the notion of 'surrogacy' can serve as a useful introduction to the system of international protection. In the refugee law perspective, the word succinctly means - what happens when an international organization or a State steps in to provide the protection which the refugee's own State, by definition, cannot or will not provide. It was identified as a 'fundamental principle', that international protection is to serve as 'surrogate protection' when national protection cannot be secured[51].

[49]Convention relating to the Status of Refugees, art.1D, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. Art.1D This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

[50]Convention relating to the Status of Refugees, art.1E, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. Art. 1E This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[51]Attorney General v. Ward [1990] 2 FC 667, 67 DLR (4th) 1

On appeal, the Supreme Court of Canada also noted: *"Except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant. This presumption, while it increases the burden on the claimant...reinforces the underlying rationale of international protection as a surrogate, coming into play where no alternative remains to the claimant."*[52] What can be gathered from this is that the state of origin will always be considered the protector of the people unless there is a complete breakdown of the state machinery whatsoever. In that situation, it is the protection offered by the other states that come to the rescue of the refugee. Hence, the primary protection of the people will always be vested in the state. When that protection ceases to exist, it is the protection of the surrounding nations or the 'international protection' that becomes the alternative left to the refugee. Hence, it is a surrogate protection.

2. **Refugee is a rights-holder-** as regard to this facet, the court was of the opinion that "*With the progressive evolution of refugee law and doctrine comes authority for the view today that such local or territorial protection has become an integral part of the refugee definition and the determination that a well-founded fear of persecution exists"*.[53] What can be gathered from this proposition is that when a person seeks refuge in a territory on account of fear of persecution, it is not a matter of 'state's choice' rather it is by way of 'right' that he gets protection from the threat to his/her life and liberty. A refugee is vested with rights that are directly derived from the 1951 Refugee Convention among other things.

3. **Adequate protection and real-risk of suffering-** The Court in UK House of Lords' judgment, it was held that *"to avoid expulsion the applicant needed to establish not only that he or she would be at real risk of suffering serious harm from non-State agents, but also that the country of origin did not provide 'a reasonable level of protection against such harm' for those within its territory.*"[54] What can be understood from the aforementioned is that threat to life and fear of persecution is not sufficient to obtain protection from other states. The factor that the protection provided by the state of origin was not adequate or reasonable also plays a vital role in enabling a refugee to claim protection in a different state. A real risk of suffering

[52]Attorney General v. Ward [1993] 2 SCR 689

[53]See Lord Carswell in Januzi and Others v. Secretary of State for the Home Department [2006] UKHL 5, [2006] 2 WLR 297, §66, citing Fortin, A., 'The Meaning of "Protection" in the Refugee Definition', 12 IJRL 548 (2001), but finding a shift in meaning. On the 'accountability' and 'protection' approaches, see also Kälin, W., 'Non-State Agents of Persecution and the Inability of the State to Protect', 15 Georgetown Immigration Law Journal 415 (2001).

[54]R. (Bagdanavicius) v. Secretary of State for the Home Department [2005] 2 WLR 1359, [2005] UKHL 38, Para. 30.

> and a lack of state protection, when combined, will leave no choice for the state but to provide refuge.

Apart from the above settled principles, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) have developed ample amount of jurisprudence in refugee law and asylum protection. It is for this reason that the European Union is governed by its own laws and self-established legal recognition of refugee law[55].

In the case of B and D, the CJEU highlighted that the provisions of Article 21(2)[56] of the Qualification Directive reflect those of Article 33(2) of the 1951 Refugee Convention: "It is appropriate to point out that, within the system of [the QD], any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration … [inter alia under] Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – to return a refugee to the country from where he has fled where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State." (para.101)[57]

In the landmark case of *M.S.S. v. Belgium and Greece*[58]the ECHR held that Greece had violated Article 3[59]of the European Convention on Human Rights, as well as Article 13[60], on the right to an effective remedy, because of flaws in Greece's asylum procedures. The Court found that Belgium

[55]Common European Asylum System (CEAS); Asylum Procedures Directive; ECHR European Convention on Human Rights ECmHR European Commission of Human Rights etc

[56]Council Directive 2004/83/EC April 29 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC
Article 21 ('Protection from refoulement')
1. Member States shall respect the principle of non-refoulement in accordance with their international obligations. 2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State. 3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to which paragraph 2 applies.

[57] Bundesrepublik Deutschland v. B and D, CJEU, C-57/09 and C-101/09(Nov. 9 2010).

[58]M.S.S. v. Belgium and Greece, App. No. 30696/09 ECHR (Jan. 21, 2011) Available at http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609 (last visited Dec 13, 2017)

[59]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 3, Nov 4 1950, ETS 5. Art 3 Prohibition of torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

[60]European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 3, Nov 4 1950, ETS 5. Art 13 Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

also had violated Article 3[61], because the applicant's transfer to Greece exposed him to harsh living conditions and to flawed Greek asylum procedures.

From the aforementioned account of resources, it can be gathered that the protection of refugees has evolved gradually. The same is reflected from the jurisprudence of international law and the Institutions formed to implement the laws dealing with refugees. What the ancient practices sought to achieve is no longer the motive that drives the international refugee law today. The international refugee law has a different motive from what it had when it was a mere customary principle of providing safe haven to those who come searching for it (As has been discussed in the section- Grant Of Asylum: Early Days To Contemporary Times). Starting from the ancient times, the refugee laws slowly turned to a different perspective, a changed intention which is – Human Right Protection. The development of principle of Non-Refoulement has shown that refugee law has become more refugees oriented than what it was before. Many rights have been conferred on the refugees over the years and gradually they have now become entitled to certain basic rights which the section has already dealt with.

NON-REFOULEMENT, EUROPEAN MIGRANT CRISIS AND THE CHALLENGES

Europe has been struggling with the not so recent migrant crisis and is constantly been overburdened by the mass inflow of victims seeking refuge. The numbers of persons seeking asylums have been increased considerably due to the ongoing conflicts in the Middle East countries. According to the statistics of the International Migration Organisation an approximate figure of one million refugees entered Europe, most of them travelling from Syria, Afghanistan and Iraq. Most of them have travelled across the Mediterranean Sea.

The International Organization for Migration(IOM) has published data which discloses an appalling number of migrations via the Mediterranean and even more horrifying number of deaths caused during the migrant crisis. IOM reported an estimate of 204,311 migrants and refugees who entered Europe by sea in 2016 arriving in Italy, Greece, Cyprus and Spain and had reported a total of 2,443 known deaths. As of 2015, an estimated number of 91,860 arrivals were reported whereas the deaths were as high as 1,828 by the eastern, central and western Mediterranean routes. The arrivals by sea as of 2017 were 3831 and deaths are at an estimate of 244. The latest data of 2018 reveals that the influx continues. Around 4742 refugees are reported to arrive in Italy, Spain, Greece and Cyprus and around 206 refugees are either dead or have gone missing.[62]

[61] Supra note 48

[62]https://www.iom.int (Last visited on Jan. 26, 2018)

However, while some countries have welcomed the victims seeking refuge in various countries, it is alleged that some have refused to provide a safe shelter for refugees. It was reported that more than a hundred refugees had to face persecution in Khartoum which is the capital city of Sudan wherein it was alleged by the victims that they were forcefully deported from Jordan. They were subjected to brutal treatment and most of them went missing.[63] Greece was also criticized by the European Commission of neglecting its obligation to manage its borders better and to slow the current wave of refugees. A report from the European Commission said there were "serious deficiencies" in the way Greece has guarded the European Union's external frontiers from migrants. It said Greek authorities did not properly register and fingerprint new arrivals, to see whether identity documents were genuine [64] Asylum seekers and migrants in Greece had to face chaotic registration procedures, serious obstacles to applying for asylum, and inadequate reception conditions.[65] The same was denied by the Greek Government. Adding insult to injury, a country like Turkey that has been one of the largest host countries to Syrian refugees had also violated the International Law. Reports have shown that Turkey has driven back Syrian refugees and asylum seekers back to the borders of Syria illegally and in absolute inhumane manner[66]. What is pertinent to note here is that the migrants entered the European borders in such volumes that it became inconvenient and burdensome for the states to handle the inflow. But who is to be blamed at this stage? The crisis is enormous so much so that it has tested both the International Law and the Countries.

Whilst much of the criticism of Europe's management of the refugee crisis is warranted, member states face many genuine challenges – in policy and practical terms – in instituting a more effective response.

- The practical challenge presented by the **sheer scale of the crisis** should not be underestimated. The volume of people moving, the diversity of their profiles, countries of origin and vulnerabilities and the dynamic nature of their routes of entry and the clandestine means they often use all present an incredibly complex and demanding situation. For Italy,

[63]*Sudanese refugees forcibly deported from Jordan fear arrest and torture*, The Guardian (last visited Nov. 4, 2017), http://www.theguardian.com/world/2016/jan/19/sudanese-refugees-forcibly-deported-from-jordan-fear-arrest-and-torture

[64]*Schengen: Greece warned it faces expulsion from passport-free zone,* Independent (last modified Jan. 27, 2016), http://www.independent.co.uk/news/world/europe/refugee-crisis-greece-warned-it-faces-expulsion-from-schengen-passport-free-zone-a6837711.html

[65]*EU/Greece: Share Responsibility for Asylum Seekers,* Human Rights Watch (last modified Jan. 28, 2016), https://www.hrw.org/news/2016/01/28/eu/greece-share-responsibility-asylum-seekers

[66]*Turkey 'acting illegally' over Syria refugees' deportations,* BBC News (last visited Nov. 4, 2017), http://www.bbc.com/news/world-europe-35135810

Greece, Croatia and Hungary – the EU countries on the frontline – the volume and speed of the influx has simply overwhelmed their asylum systems at a time when their economies are particularly weak.

- **Identifying those in need of international protection** and those who are not is complex. Whilst the refugee status of people fleeing Syria or other conflicts is more clear-cut, others needing international protection may not fit within the legal definition of a refugee. For many of these people the line between 'forced' and 'voluntary' international migration is increasingly blurred: their migration is driven by an array of overlapping 'push' factors relating to chronic poverty, inequality, environmental degradation and the effects of climate change, as well as 'pull' factors including real and perceived economic and educational opportunities in Europe. The complex nature of contemporary global migration patterns and drivers is presenting huge challenges to existing international, regional and national legal and policy frameworks[67]. Notwithstanding specific legal protections for refugees, the current use of simplistic categories of 'forced' and 'voluntary' migration risks creating a two-tiered system of protection and assistance in which the rights and needs of those not qualifying as 'refugees' under the legal definition are effectively disregarded.
- In addition to dealing humanely and appropriately with large number of people arriving through irregular channels, whose individual claims for asylum are subsequently rejected, is resource-intensive as it requires concentrating a lot of effort in going through all the applications. Receiving governments also face major challenges in the **process of returning failed asylum-seekers**, including unsafe conditions in countries of origin or a refusal by their respective governments to accept those being returned.
- There is a substantial **financial cost** to countries receiving large-scale influxes of refugees and others granted international protection in terms of integration support (e.g. housing, education, health and other welfare services). Given the slow economic recovery in many EU states, this is not a cost that all are willing to bear. There are also concerns about how long refugees will remain in Europe, and thus how long they will need such support. Certainly, global trends suggest that many arrivals may have to remain for years: of the total global refugee population in 2014, more than half had been displaced for more than ten years[68]. The financial costs of integration can be offset against longer-term economic and other gains and, as past experience has shown, the earlier the provision of adequate integration support, the quicker refugees can

[67]R. Zetter, *Protection in Crisis: Forced Migration and Protection in a Global Era*, Washington, DC: Migration Policy Institute. (2015)
[68]N. Crawford, *Protracted Displacement: Uncertain Paths to Self-reliance in Exile*, London: ODI.(2015)

become self-sufficient, gain employment and contribute taxes[69]. However, many governments are more concerned about the immediate strain on welfare services, perceived competition over jobs and the possible impact on social cohesion.

- The onward movement of refugees and other migrants within the EU is a key concern for many governments. Most refugees and asylum-seekers have endured multiple rounds of displacement even before their arduous journey to Europe, and with early and adequate integration support they may be more likely to invest in building a life in the country where they were formally relocated or resettled. Inevitably, however, there are individuals who want to move on to other countries where they have relatives or where they believe their economic opportunities will be better, either through employment or welfare support. The significant discrepancies between standards of protection and assistance provided by national asylum systems and integration programmes within the EU exacerbate this.
- **Public opinion** in Europe on international migration is highly divided, affecting both government policies and integration prospects for refugees and other migrants. Media images conveying the terrible risks refugees from Syria are taking to get to Europe have to a degree altered the public discourse, but anti-immigration policies remain a key theme in right-wing politics across Europe. It is unclear how long public sympathy for Syrian refugees will last, or whether it extends to refugees and other forced migrants from countries with a lower profile in European media. Even governments that have been more welcoming has found winning their voters around to a more measured approach to migration an on-going challenge.
- Finally, obtaining a **coherent approach from all 28 European Union members** is proving extraordinarily difficult. Although in recent months there has been growing recognition of the need for an EU-wide response, the crisis has also compounded underlying political and economic divisions within Europe. Some Central and Eastern European states have rejected what they perceive as a domineering attitude from Germany; arguments over movement across their shared border have reignited tensions between Serbia and Croatia[70].

THE GROUND REALITY AND BEYOND THAT

The International law as we know of it is a soft law, a weak one. The binding force behind all treaties, pacts and conventions adopted is ‘common consensus’. It is the consent of the member states that provide a backbone to principles of International Law. However, being a weak and a soft branch of

[69]OECD, *Living Up to History by Addressing the Humanitarian Migration Crisis in Europe*, Paris: OECD. (2015)
[70]*The EU wants to set “mandatory” quotas to resettle 160,000 refugees, with penalties if countries refuse*, Quartz (last visited Nov. 4, 2017), https://qz.com/498174/the-eu-wants-to-set-mandatory-quotas-to-resettle-160000-refugees-with-penalties-if-countries-refuse/

law, international law is non-coercive in nature. Hence, it is up to the member states to decide whether to abide by such principles on the cost of their Sovereignty and National Security. This is what has exactly happened in Europe. The ongoing crisis has led to migrations on an extremely high level that it is becoming difficult for Europe to bear such a burden. Hence, the members of the European Union have been unsuccessful in maintaining a balance between obeying to the principle of non-refoulement and protecting their National security.

PROPOSALS FOR CHANGE

The principle of Non-Refoulement has failed to cater to the needs of the refugees of the Syrian crisis. It is for this reason that law needs to be amended accordingly. At the other end of the spectrum the principle has still facilitated the protection of human rights of many. An improvement in law is therefore the need of the hour. Any new or revamped refugee system however, needs to retain non-refoulement as its foundation. But we need a 'consistent, universal definition' of non-refoulement.[71] In other words, we need to define the parameters. It is therefore necessary to consider, in a practical manner, the best way of achieving this objective.

1. Changes to the refugee system should be made

Changes could be made in various ways. Some have suggested that a protocol to the Refugee Convention could be the way forward. One could even go further and create an entirely new Refugee Convention, which properly deals with new developments like temporary protection and the safe third country idea. Another option would be a General Assembly resolution clarifying the grey areas of non-refoulement. For those concerned that the current international climate would dictate that any revision of the Refugee Convention would result in a severely limited system, this would seem to be the safest option. Another possible change is to draft a new Convention. Not only would this provide with, ideally, a workable and enforceable instrument, but also it would involve having a conference, or a series of meetings, where the views of all states on the refugee issue could be aired. This is incredibly important, as recent efforts have illustrated that there are not just fundamental debates occurring between refugee advocates and states, but also amongst the states themselves. This also would ideally provide us with a global solution. Although moves are being made to harmonise refugee systems, such as temporary protection, on a regional level, the global nature of the refugee problem means that any solution to the current problems needs to be consistent the world over.

[71]Robert L. Newmark, *The Concept Of State Jurisdiction And The Applicability Of The Non-Refoulement Principle To Extraterritorial Interception Measures,* Extraterritorial Immigration Control (2014)

2. A New Non-Refoulement Provision

At the core of the new Convention should be a re-formulated non-refoulement principle. The current provision has clearly not been effective in providing states and advocates with sufficient direction regarding their rights and obligations. A new provision should clearly state what the parameters of the non-refoulement provision are.

- *Reasons for fleeing home country should be extended*

Currently, the 1951 Refugee Convention only applies to persons who fear persecution based on their 'race, religion, nationality, and membership of a particular social group or political opinion'. The narrow nature of this definition has caused major headaches for states and refugee organisations alike and is partly responsible for the development of temporary protection systems. The UNHCR and some regional organisations have recognised the fact that many of today's refugees are indeed in grave danger, though not for the reasons specified above. It has also been accepted that the non-refoulement provision applies to all refugees, regardless of whether they fit the Convention definition. We would therefore suggest that the new provision should recognise this and give a broader range of reasons for which persons might flee from their home & seek refuge.

- *The provision should apply to refugees 'wherever found'*

It is imperative that any new provision also settle the issue of extraterritorial application of the Principle of Non-Refoulement. Refugees can be found anywhere, even in international water or on the high seas and states may intercept the vessels of migrants and asylums which is a possible consequence of mass influx. The United Nations Convention on the Law of the Sea (UNCLOS)[72], grants jurisdictional rights to States and can be exercised in all maritime zones. This jurisdiction would trigger their human rights obligations including the application of the non- refoulement principle.[73] This would imply that where there is jurisdiction there will be application of Non-Refoulement. This is a fundamental issue as it determines at what point a state becomes responsible for refugees. But the problem here is that the state practice in this area is inconsistent and states do take advantage of the lacunae in the law. Irrespective of whether refugees are within the territory or not, they need to be protected. The purpose of the non-refoulement principle is to protect refugees from being returned to a place where their lives could be endangered. Allowing states to turn refugees away at the borders would completely undermine this purpose. From a practical perspective, it needs to be clear from the outset as to who is responsible for a refugee or group of refugees.

[72]UN General Assembly, Convention on the Law of the Sea, 10 December 1982

[73]Shabnam Haji Ali Mohammadi *Extraterritorial Application Of Non-refoulement And Extraterritorial Jurisdiction available at* http://arno.uvt.nl/show.cgi?fid=135425 (last visited on Nov. 20, 2017)

- *The provision should incorporate the necessity test*

States have used a raft of reasons to justify their refusal to admit asylum-seekers. It would be impractical to try and create a non-derogable non-refoulement provision as, not only would states be unlikely to accept it, but there are clearly certain circumstances in which violation of the non-refoulement principle would be justified. The new provision should contain a test which states can apply in order to ascertain whether or not their particular reason for wanting to refuse entry is actually valid at international law.

- *Provision should explicitly state that both direct and indirect refoulement is illegal*

Although most states generally accept that they would be violating international law if they contributed, either directly or indirectly, to the refoulement of a refugee, it is arguable that the wording of the provision needs to be changed to make this clearer. As opposed to the current wording, which refers to the 'frontiers of states' and 'in any manner whatsoever', the new provision should specify that a country is liable if their actions result, either directly or indirectly, in the return or refoulement of refugees to a place where his or her life or freedom would be threatened. It should be clear that a state is equally culpable when they 'pass the buck' to another state, who then returns the refugee, as they would be had they directly returned them themselves. It is because states may resort to practice of transferring refugees to such territories from where the refugees may get deported back to the country from where they fled. Here it is pertinent to mention that the term "in any manner whatsoever" in Art.33 of the convention is too vague and the states can easily get rid of their responsibility and impose obligations on other neighboring states when it comes to controlling the refugee influx. However, if the term "directly or indirectly is included" it will specifically target those states who try to resort to practices of transferring refugees to such territories from where the refugees may get deported back to the country from where they fled. This is an extremely possible lacuna in the provision.

It is clear that here we are dealing with the ramifications of the safe third country rule. This practice is proving incredibly useful for many states and it is unlikely that they will be willing to abolish the rule entirely. Any new non-refoulement provision should therefore, attempt to circumscribe limits to the rule. For a start, there should be a universally applicable standard that must be met before a state can be designated as 'safe'. This standard should incorporate both the requirements that the state has signed relevant human rights instruments, and have in place an effective and tested refugee screening system. Hopefully this would get around the dual problems of political motivations prompting states to recognise other states as safe and asylum-seekers being subjected to persecution in third states. There is still a remaining concern that some states may be unsafe for certain individuals. It should be

made possible for asylum-seekers facing transfer to a third state where they are afraid of persecution to make their case, ideally to a UNHCR official capable of preventing the transfer.

- *Exceptions need to be clearly specified*

It is likely that this aspect of the new provision will be the most problematic. It is necessary to balance carefully the needs of states to guard against criminal activity and internal disorder, with the needs of refugees to find safe-haven from whatever danger they have fled. The current provision, with its reference to 'danger to the security of the country' appears to be unnecessarily broad. It could be argued that if the necessity test advocated above is implemented, this would provide states with the discretion they need to protect their citizens. However, it is arguable also that the current exceptions with respect to crimes against humanity and serious, non-political crimes, should be retained as they are clearly valid reasons for exclusion. Furthermore, it would be overly cumbersome to expect states to revert to the necessity test every time they consider an asylum-seeker to be unsuitable.

3. Dealing with the rules for mass influx situation

Situations of mass influx often pose unique problems for states. It could therefore be suggested that it is unreasonable to expect the same rules to apply when one refugee is arriving as when 100,000 are. Although, on a practical level at least, such different situations require vastly different approaches, the basic rules should remain the same. With respect to non-refoulement, it has never been accepted that this rule ceases to apply in a situation of mass influx. On the contrary the Executive Committee of the UNHCR has expressly stated that in such cases 'the fundamental principle of non-refoulement must be scrupulously observed'. Given that the 1951 Convention itself was drafted in reaction to a mass refugee problem resulting from WWII, it seems strange to suddenly assume that these rules no longer apply in such situations. However, it is also arguable that the reasons behind, and nature of, large refugee flows, have changed considerably in the past fifty years and the new convention should reflect this.

Apart from the aforementioned discussion, some of the suggestions to implement the principle so as to effectively handle the current crisis situation in Europe at ground level can be - Integrations and overburden must be seriously regulated by the EU nations so much so that the influx of refugees is controlled effectively. The member states must agree on a fair distribution of refugees The EU should support all efforts of the international community to end wars and armed conflicts as the main reasons for displacement.[74]

[74]Furtak FT, *The Refugee Crisis - A Challenge for Europe and the World*, Journal of Civil & Legal Sciences (2016)

A new convention dealing with the rights and duties of refugees and states appears to be the best way to deal with the current pressures being placed on the system. The non-refoulement principle is at the heart of this system and should remain at the heart of any new system. However, the principle needs to be elucidated and clarified. Changes should be made in a way which takes full account of the limits on state resources, while still recognising the fundamental importance of protecting individuals from persecution. Any negotiations to create a new convention will not be easy and will undoubtedly involve concessions from both sides. It is not an impossible task, however, and is one which requires immediate attention.

CONCLUSION

There has been, without doubt, a major change in attitudes towards asylum-seekers. Where once they were viewed as innocent people to be protected and cared for, they are often now seen as a danger to a host states' economy and national security. The reasons for this change, which include increased numbers of refugees, a rise in international terrorism and the growing number of secessionist and ethnic conflicts, are unlikely to disappear soon. If anything, the refugee situation can only get worse. It is for this reason that the international community needs to seriously consider undertaking a review of the current international refugee laws. Recent responses to mass influx and the restrictive policies being implemented by many states illustrate the incompatibility of state practice with international rules. Most concerning is the threat posed to the founding principle of the refugee regime, non-refoulement. Ideas like temporary protection regimes and safe third country rules are severely increasing the risk that refugees could be expelled or returned to a place where they would be in danger of persecution.

Forbidding the states from returning the refugees to the place of persecution is a conscious effort to maintain harmony and activeness of the international community in the field of Human Rights. The current law has stood the test of time and failed in the backdrop of Syrian refugee crisis. Mass migrations at such a high scale have made the international community realise that an effective solution needs to be devised now because the current legal obligations have taken a toll on the national security of the states as well. And this is how non-refoulement is distinct from what it was before-ensuring national security. The very aspect of "national security" is an obligation of states that has to be adhered to as much as its Human Right obligations. As a result, this has been a matter of excuse on part of the nations that a weak law like that of an international origin cannot be used to compromise the security and sovereignty of nations. Amidst a constant loss of community and violation of Right to life, national security is also kept as a priority by the European nations. Continuous immigrations have pushed the nations to prioritize their National Security over the obligation of International Law.

If this is the situation, then it can be suggested that Europe may have an understandable reason of not fulfilling the claims of asylum seekers. Thus, approaches of non-entree were adopted to keep the refugees well of their boundaries without formally disobeying treaty obligations. The irregular migrations have exposed the faults in the International principle of Non Refoulement as well. Europe stands at an extremely critical stage. If the continuous tide of refugees doesn't slow down, it might lead to a major break down within Europe.

So, what now? How can any nation be expected to put its security and sovereignty behind and start catering to Human Right needs of the world? Can it be called the most practical path for the nation? Terrorism and threat to security of state are considered two most appalling issues because once ignited, they are difficult to stop and once crept in, they are difficult to identify, target and resolve. A minute threat to state's security can lead to further exploitation of human rights exploitation. What is preserved should be preserved. Human right violation must be prevented from reaching lands where there is safety, security, peace and protection. And for that human right obligations cannot be attended to, not until national security is ensured; because terrorism can creep in the dress of a refugee or a war victim. To the extent this does not happen, state is responsible for victims of terrorism. As for the secondary part, every nation has a capacity- it has limited land and limited resources. And that is why refugee influx has to be necessarily regulated. It is ultimately the physical capacity of the nation and the threat to its security that will determine the extent to which it will adhere to its human right obligation. States are sovereign, independent and autonomous entities. They possess the capability of serving victims of human right violation. But, there will always be a point where someone must draw the line.