UNIVERSITY OF READING SCHOOL OF LAW

IS THE PRACTICE OF BORDER CLOSURE COMPATIBLE WITH INTERNATIONAL REFUGEE OBLIGATIONS AND WHICH INTERNATIONAL BODY IS ABLE TO ASSESS THE LEGALITY OF THIS PRACTICE?

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This is a dissertation submitted to the School of Law as part of the requirements for the award of an LLM.

Statement of Original Authorship

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"We believe that human rights transcend boundaries and must prevail over state sovereignty."

José Ramos-Horta

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ABSTRACT

Persons who have been subjected to unwanted persecution in their country of origin or habitual residence might ultimately flee their country of origin or habitual residence and seek asylum to live in other countries in Europe, America or Australia for decades, to enjoy international protection from war and/or persecution. To this end, for persons trying to cross borders, some States are applying, *inter alia*, the practice of border closure for security reasons. The concept of "border" is a key element for a country concerned with identity and security. However, International Refugee Law protects refugees' rights at the international level. The 1951 Convention Relating to the Status of Refugees includes the principle of *non-refoulement*, which forbids States from sending individuals back to their country of origin or any other country where they would be exposed to persecution. For this reason, interpretation of the scope of the principle of *non-refoulement* is crucial to determining the legal rights of refugees as well as the obligations of States. Even though the principle of *non-refoulement* prohibits States from expelling or returning a refugee in any manner whatsoever to the frontiers of territories where there would be a risk of persecution, this issue is frequently ignored by States through the practice of border closure. The purpose of this paper is to argue that the principle of *non-refoulement*, as laid down in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as other international and regional refugee and human rights instruments dealing with the principle of *non-refoulement*, does indeed apply beyond the territory of the Contracting States. We analyse the contemporary phenomenon of the practice of border closure concerning its compatibility with the principle of *non-refoulement*, and highlight judicial organisations in terms of assessing the legality of the border closure practice.

ABBREVIATIONS

1951 Refugee Convention: 1951 Convention Relating to the Status of Refugees

1967 Protocol: Protocol Relating to the Status of Refugees

AALCO: Asian-African Legal Consultative Organisation

ACHPR: African Court of Human and People's Rights

ACHR: American Convention on Human Rights

AI: Amnesty International

Bangkok Principles: Bangkok Principles on the Status and Treatment of Refugees

Cartagena Declaration: 1984 Cartagena Declaration on Refugees

CAT: Committee against Torture

CE: Council of Europe

CIL: Customary International Law

CJEU: Court of Justice of the European Union

CMCE: Committee of Ministers of the Council of Europe

Committee: Human Rights Committee

Committee of Ministers: Committee of Ministers of the Council of Europe

Convention against Torture: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights

EU: European Union

ExCom: Executive Committee of United Nations High Commissioner for Refugees

IACHR: Inter-American Court of Human Rights

ICCPR: 1966 International Covenant on Civil and Political Rights

ICJ: International Court of Justice

ILC: International Law Commission

ILC's Draft Articles: International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts

IRO: International Refugee Organisation

OAS: Organisation of American States

OAU: Organisation of African Unity

OAU Convention: 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa

Statute: Statute of the Office of the United Nations High Commissioner for Refugees

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGA: United Nations General Assembly

UNHCR: United Nations High Commissioner for Refugees

USA: United States of America

INTRODUCTION

Refugee-related issues have, in general, become important point of discussion amongst states, local and international organisations, communities, scholars and the media, particularly in the aftermath of border closure practices. The fate of persons who have fled their countries of origin or habitual residence due to war, persecution, prejudice, paranoia, marginalisation, and many other related reasons, is at the mercy of the receiving countries. Apart from the usual reluctance of host countries to grant asylum due to social-economic, political and environmental contingencies, those fleeing their circumstances often experience a bitter reception at the hands of recipient governments and communities that are nominally expected to offer sanctuary in line with International Refugee Law. One such excruciating and despicable encounter takes place when asylum countries close their borders against incoming refugees, forcing them to tussle for protection and survival. In the 21st century, the practice of border closure has gradually become one the most increased post-Cold War trends, particularly with current circumstances amongst Western states due to a significant rise in the number of asylum seekers, in order to deter them; however, the number of persons fleeing their own countries for good reason – their lives being directly or indirectly threatened by domestic circumstances, for instance – is significantly increasing. Leaving one's own country and seeking asylum is a protected human right through the Universal Declaration of Human Rights,[1] because it is held to be one of the core human rights at the international level. However, the practice of border closure is clearly an obstacle to seeking asylum in a safe country. This application has a political background. States prefer not to allow refugees, especially where there is a mass influx, to come into their territories in order to protect their citizens' security, rights and welfare. The practice of border closure has led to the contemporary understanding of a refugee regime, which usually results in violation of the principle of *non-refoulement*.

The practice of border closure is inherently related to the principle of *non-refoulement*, which was used in the 1951 Convention Relating to the Status of Refugees[2] to guarantee the right of

[1] The Universal Declaration of Human Rights, adopted by the United Nations General Assembly, 217 A(III) on 10 December 1948. (Hereafter UDHR).

[2] 1951 United Nations Convention Relating to the Status of Refugees, adopted on 28 July 1951 and entered into force on 22 April 1954 (hereafter 1951 Refugee Convention), amended by 1967 Protocol Relating to the Status

asylum seekers and to prevent their return to their country of origin or any other country where they might be exposed to persecution.

This practice arises as a political preference and it is against refugees' basic human right to seek asylum. States rely on the term of 'State Sovereignty' when they apply this practice because they assume that refugees will cause instability, both economically and in terms of security. This application results in great dilemma between state sovereignty and humanitarianism. In the 21st century, however, the notion of human rights *must* have priority over Sovereignty, but states still deny the refugees' right to seek asylum by practising these types of measures. Therefore, Refugee Law's provisions and state's practices must be controlled at the international level by independent and impartial international bodies. Regarding the 1951 Refugee Convention, there is, in fact, no an exclusive judicial organisation to observe the applications of the Convention. The United Nations High Commissioner for Refugees (UNHCR) generally supervises the international refugee protections and guides countries towards behaviour that is compatible with the provisions of 1951 Refugee Convention and respecting refugee rights in certain circumstances. Even though UNHCR's role is not legally binding, those shed light on interpretations and applications of the Convention. In this case, a group of courts such as European Court of Human Rights (ECtHR)**,** The Court of Justice of the European Union (CJEU) and International Court of Justice (ICJ) have legally binding judicial power, which is important to assess the legality of this practice.

This paper consists of three chapters that discuss the compatibility of border closure practice with the principle of *non-refoulement.* The first chapter is about "the principle of *non-refoulement*" and focuses on the associated legal framework. This framework includes various international and regional treaties, as well as human rights treaties and the 1951 Refugee Convention and its 1967 Protocol, is the latter being recognised as the most comprehensive international instrument created to deal with refugee problems and to protect their rights. Additionally, the principle of *non-refoulement* is examined as a rule of customary international law.

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of Refugees, 31 January 1967 (hereafter 1967 Protocol) and 1951 Refugee Convention became applicable to all persons who became refugees due to events which have been occurred after 1 January 1951.

The second chapter focuses on "the compatibility of the practice of border closure with the principle of *non-refoulement*". For a number of reasons, including the war on terror, the contemporary world has witnessed the highest number of refugees in history, which has, at the same time, created many security problems for recipient states. For this reason, states are generally reluctant to accept refugees and have imposed a number of restrictive refugee policies that include border closure. Those policies contradict states' responsibilities arising from the principle of *non-refoulement*, as embodied in the 1951 Refugee Convention. This chapter examines the scope of the principle of *non-refoulement* in terms of its validity outside the recipient territory, which in this case determines the compatibility of border closure with this principle.

The third chapter involves a discussion of the authority of various organisations to assess the legality of the practice of border closure, in this case ICJ, ECtHR and CJEU are discussed regarding legally binding determinations. The UNHCR's non-binding responses are also mentioned, due to the lack of an exclusive court to oversee the applications of the Contracting States to the 1951 Refugee Convention.

LEGAL FRAMEWORK OF THE PRINCIPLE OF NON-REFOULEMENT

1. General Overview

International Refugee Law has a range of touchstones, of which the principle of *non-refoulement* is one. It is of crucial importance to the protection of refugees in the international arena. The term *"refoulement"* was used as the title of Article 33 of the 1951 Refugee Convention, and was derived from the French word "*refouler*", which means to drive back, to force back, or to refuse entry.[3] In accordance with Goodwin-Gill, *refouler* means "*to drive back or to repel as of an enemy who fails to breach ones' defences.*"[4] Weissbrodt and Hortreiter also have the same opinion as to the meaning of *refouler* and, according to their definition, it means "*to drive back or repel.*"[5] Considering both definitions, *refoulement*, in Refugee Law, means the expulsion of persons meeting the necessities to be recognised as refugees. According to Article 1(A)(2) of the 1951 Refugee Convention, 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 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.*"

The definitions of both 'return' and '*refoulement*' mentioned not only in the title but also in the provision of Article 33 of 1951 Refugee Convention are actually more complicated than they would seem. The phrasing of the article implies that these terms might be interchangeable and the expression, which supports the idea of interchangeability, of Mr.

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[3] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, 3 December 1951, The President recommended in respect to the previous Convention's application, *"refoulement"* that *"as a French word, should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text."*
Available at: http://www.unhcr.org/3ae68ceb4.html (Accessed: 15 June 2016)

[4] Goodwin-Gill GS, *The Refugee in International Law*, 2nd ed., Oxford Clarendon Press, (1996), p. 167.

[5] Weissbrodt D, Hortreiter I, *"The Principle of Non-refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties"* Buffalo Human Rights Law Review Vol. 5 (1999) pp: 1-73. Available at: http://scholarship.law.umn.edu/faculty_articles/362 (Accessed: 15 June 2016)

Hoare, the Representative of the United Kingdom, in the drafting period, declared that the English word *'return'* has the closest meaning to *refoulement*.[6]

In fact, these terms reflect entirely different meanings. First of all, the term *refoulement*, which is a French word arising from French and Belgium law, embraces rejection at the border. However, *'return'* represents the meaning of "*the mere physical act of ejecting from the national territory a person residing therein who has gained entry or is residing regularly or irregularly.*"[7] The word *return*, unlike the term *non-refoulement* can just be useable in particular circumstances of persons succeeding in penetrating the country from where they are forced to go back.[8]

As an International Refugee Law term, *non-refoulement* represents a prohibition on states returning a refugee or asylum seeker to any other country if this may cause the threat of persecution.

2. Refugee Law Documents Dealing with the Principle of Non-Refoulement

2.1. International Instruments Regarding the Principle of Non-Refoulement

a) 1951 Convention Relating to the Status of Refugees and its 1967 Protocol

The 1951 Convention Relating to the Status of Refugees and its amending 1967 Protocol are key instruments in International Refugee Law. As of April 2015, either or both instruments have been confirmed by 148[9] states amongst the 192 members of the United Nations (UN).[10] The 1951 Refugee Convention went in effect in 1954, and has a reputation for having the most contracting parties amongst all refugee treaties, and remaining central to the protective activities of the UNHCR.

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[6] *Supra* note 4.

[7] UN Ad-Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness, United Nations, August 1949, Lake Success - New York*, 1 August 1949, E/1112; E/1112/Add.1.
Available at: http://www.refworld.org/docid/3ae68c2d0.html (Accessed 15 August 2016)

[8] Grahl-Madsen A, *"Commentary on the Refugee Convention 1951 Articles 2–11, 13–37"* Published by the Division of International Protection of the UNHCR, (1997), p.136.

[9] UNHCR, State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.
Available at: http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (Accessed: 15 June 2016)

[10] Goodwin-Gill G S, *"Convention Relating to the Status of Refugees. Protocol Relating to the Status of Refugees"*, United Nations Audiovisual Library of International Law, 2008.
Available at: http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf> (Accessed: 16 June 2016)

The 1951 Refugee Convention does not oblige states to accept refugees to their own territories. It does, however, contain specific provisions to limit this discretion. Article 33 of the 1951 Refugee Convention, which is one of the articles to which Contracting States cannot make a reservation[11], involves the most remarkable limitation of the principle of *non-refoulement.* In accordance with Article 33: "*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 account of his race, religion, nationality, membership of a particular social group or political opinion.*"

The principle of *non-refoulement* is of particular relevance to those assigned the status of asylum seekers, who might subsequently acquire refugee status. The principle of *non-refoulement* has been grounded as a fundamental principle by the international refugee protection system thanks to this principle; asylum seekers cannot be sent back or removed from a territory until their circumstances have been properly determined.

The acts that result in the infringement of the principle of *non-refoulement* are not curbed by the definition in this article inasmuch as the expression "*in any manner whatsoever*" indicates that *refoulement* can be applied by any other behaviour. Thus, the principle of *non-refoulement* encompasses any behaviour of forcible return that causes the removal or rejection of persons who are at stake of persecution in their country of origin.[12] In consequence, Article 33 entails the interdiction of *refoulement* that might be carried out by "*deportation, expulsion, extradition, informal transfer or "renditions" and non-admission at the border in the circumstances,*"[13] as will be explained in the following sections.

[11] 1951 Refugee Convention, article 42. Other articles which cannot be entered a reservation that 1(definition), 3(non-discrimination), 4(religion), 16(1) (access to courts), and 36-46 inclusive.

[12] Lauterpacht Sir E, Bethlehem D, *"The Scope and Content of the Principle of Non-Refoulement: Opinion"* Feller E, Turk V, Nicholson F (eds), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, (2003), p. 112.

Available at: http://www.refworld.org/docid/470a33af0.html (Accessed: 16 June 2016).

[13] UNHCR, *"Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol",* 26 January 2007, Geneva.

Article 33 of the 1951 Refugee Convention provides protection for persons who fulfil the requirements of gaining refugee status, as referred to in Article 1(A)2 of the 1951 Refugee Convention (the "inclusion" criteria),[14] and do not meet one of its exclusion provisions.[15]

Assuming that a person satisfies the criteria mentioned in the definition of refugee, it should be noted that, in fact, the recognition of refugee status is only declaratory as nobody 'gains' the status of refugee through such acknowledgement; it is merely *recognised* that he or she is a refugee.[16] For this reason, the principle of *non-refoulement* applies both to those who have been officially recognised refugees and to those who have met refugee criteria but have not been recognised as such formally.[17] Also, not only does it prohibit sending refugees back to

[14] This article is coordinated the article 1 of the 1967 Protocol, so refugee status can be applied to those who *"as a result of events occurring before 1 January 1951 and 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."*

[15] Exclusion provisions prevent any person from recognising refugee status so they cannot benefit from the protection of 1951 Refugee Convention. For instance article 1(D) of 1951 Refugee Convention states that *"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."* If any person benefits protections of any other UN body rather than UNHCR he or she cannot be in the scope of 1951 Refugee Convention. Likewise, article 1(E) forbids such persons to benefit from this Convention by stating that *"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."* If any persons has been recognized by any other country's authorities he or she will be out of protection 1951 Refugee Convention. Article 1(F) of the 1951 Refugee Convention has a set of reasons as well, according to that *"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"*. These categories are accepted that those persons do not deserve a protection at international level.

[16] 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, paragraph 28.

[17] Executive Committee(ExCom) of UNHCR has affirmed this situation by its Conclusion No 6 (XXVIII) "Non-refoulement" (1977), paragraph (c) that *"the fundamental importance of the observance of the principle of non-refoulement-both at the border and within the territory of a State of persons who may be subjected to*

their country, which is their former habitual residence for stateless persons, but it also prohibits sending to any other place where such persons might be at risk as defined in the 1951 Refugee Convention.[18]

The *non-refoulement* principle is binding all Contracting States party to the 1951 Convention and/or its 1967 Protocol; furthermore, the requirements of the principle of *non-refoulement* do not have territorial constraints, as they also prevent sending refugees to wherever the state from which they are at risk of persecution exercises jurisdiction.

aa) Exceptions to the Principle of Non-Refoulement in the 1951 Refugee Convention

The principle of *non-refoulement* is an irrevocable right that provides protection for refugees; however, it is not an *absolute* right in the concept of the 1951 Refugee Convention. Article 33(2) of the 1951 Refugee Convention has a set of categories that constitute the exceptions to the *non-refoulement* principle.

In accordance with Article 33(2) of the 1951 Refugee Convention: "*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*" Accordingly, if he or she represents a form of risk to the host state's security, or if he or she has been convicted of a serious crime by a final judgement, this would constitute enough evidence that he or she is a danger to the recipient state's community. In this instance, such an individual would not be entitled to protection against *refoulement.*

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persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees." The ExCom is a partner of UNHCR intergovernmentally and non-governmentally. In the current situation has 85 members and United States of America is one of them. ExCom is authorized to review and approve the bugdet and programmes of UNHCR. It also makes recommendations UNHCR related to its protection duty. Even though not binding internationally or individually for States, ExCom publishes Conclusions which consist of its opinion to be a guide of application of the protections of international refugee regime.

Available at http://www.unhcr.org/publications/legal/41b041534/compilation-conclusions-adopted-executive-committe-international-protection.html (Accessed 16 June 2016).

[18] Weis P, *The Refugee Convention, 1951: The Travaux Preparatoire Analysed with a Commentary by Dr. Paul Weis* Cambridge University Press, Cambridge, (1995), p. 341.

Article 33(2) of the 1951 Refugee Convention states a set of reasons under which a refugee is not entitled to protection from *refoulement*; however, it does not specify all reasons *numerus clauses,* so, therefore, there is a margin for states to appreciate. This appreciation nevertheless depends on the substantiating the level of risk, the threshold for which is high. For instance, a person attempting to illegally overthrow a government, or threatening a country's territorial integrity or peace, the independence of the state or constitutional order of the host country, and so forth, would be accepted as a danger to the community and would not enjoy the protection of the principle of *non-refoulement.*[19] This exception was applied by the Canadian Supreme Court in the case of *Suresh v. Canada.*[20]

With regard to the second exception, according to Bruin and Wouters, this exception is clearly regarding serious crimes and represents the concept of "*future risk.*"[21] Hathaway and Harvey claim that this exception has one more feature, in that constituting a danger to the community of the state in which is the individual is located must be justified by the nature of their conviction, as well as other stipulations. Since being a danger is related to the personality of the individual, it is not important where the crime has been committed; this could be the state of origin, a transit country or the host country.[22]

b) 1967 Declaration on Territorial Asylum

The United Nations General Assembly (UNGA) has made declarations to address refugee issues, particularly the principle of *non-refoulement*, in its efforts to supplement the 1951 Refugee Convention. The 1967 Declaration on Territorial Asylum[23] constitutes an exception to the concept of the principle of *non-refoulement* due to overbearing factors of public security or so as to protect the community of the host country, as in the case of a mass influx

[19] Grahl-Madsen A, *The Status of Refugees in International Law*, Sijthoff, (1996), pp: 235-236.

[20] *Suresh v Canada* (Minister of Citizenship and Immigration), (2002) 1 S.C.R. 3, 2002 SCC 1, Canada: Supreme Court, 11 January 2002. Available at: http://www.refworld.org/docid/3c42bdfa0.html (Accessed: 21 June 2016)

[21] Bruin R, Wouters K, *"Terrorism and the Non-derogability of Non-refoulement",* International Journal of Refugee Law, Vol. 15, No. 1, (2003), pp: 5-29.

[22] Hathaway J C, Harvey C, *"Framing Refugee Protection in the New World Disorder",* Cornell International Law Journal, Vol. 34, No. 2, (2001), pp: 257-320.

[23] Declaration on Territorial Asylum, GA. RES. 2312 (XXII), 22 UN. GAOR Supp. (No.16) at 81, UN. Doc. A/6716, adopted by the UNGA (14 December 1967).

of persons.[24] However, it prohibits expulsion of refugees and rejection at the border through Article 3(1), which states "*No person referred to in Article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.*"[25]

In an attempt to balance the principle of state sovereignty and the right of refugees to *non-refoulement*, the 1967 Declaration provides for a state to invoke the exception provision by Article 3(3) "*it shall consider the possibility of granting to the persons concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.*"

In the face of the 1951 Refugee Convention, it can be said that the Declaration on Territorial Asylum reflects a wider concept for the principle of *non-refoulement*, since the latter's approach explicitly encompasses rejection at a frontier. Otherwise, the act would constitute an infringement of the principle of *non-refoulement.*

2.2) Regional Instruments Relating to the Principle of Non-Refoulement

a) 1969 Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa

At the regional level, Africa is seen as a world leader with regards to refugee protection by virtue of the 1969 Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa.[26] OAU Convention Article 1(2) has additional justification, besides those of the 1951 Refugee Convention, for persecution, which are "*external aggression, occupation, foreign domination or events seriously disturbing public order*";

[24] Article 3(2) of the 1967 Declaration on Territorial Asylum.

[25] See also Committee of the Ministers of Council of Europe (CMCE), *Resolution (67)14: Asylum to Persons in Danger of Persecution*, 29 June 1967, 14, 1967, paragraph (2) recommends that member States should *"ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion".*

Available at: http://www.azil.rs/doc/166.pdf (Accessed: 17 June 2016)

[26] Organisation of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, entered into force 20 June 1974. (Hereafter OAU Convention).

under such circumstances, persons have the right to be granted refugee status. Here, the definition of a refugee is broader than allowed for by the 1951 Refugee Convention.

Concerning the principle of *non-refoulement*, it is enshrined in Article II(3) that "*No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.*"

The OAU Convention offers a much wider definition of refugee and *non-refoulement* obligations than the 1951 Refugee Convention, where "*fear of persecution*" is not a compulsory factor; additionally, whilst the 1951 Refugee Convention has five specific reasons for leaving country, the OAU Convention has considerably increased this number. Moreover, violation of the principle of *non-refoulement* is not tolerated in any situation and, with the exception of any reason explicitly stated by the OAU Convention, it also prohibits rejection at the border. In the African countries, the refugee problem is not uncommon. For this reason, there has been the necessity of a specific convention to apply to the African continent. It is worth noting that unlike many other legal documents and the practices of states, the OAU Convention explicitly states that if there is any situation of overburdening due to refugees then help must be called for, with assistance being a further obligation of other states.[27]

The OAU Convention is of utmost importance, which by its Article II(1) broadens the responsibility of receiving refugees across all member states of Organization of African Unity, regardless of being signatory to the OAU Convention or otherwise.

b) 1984 Cartagena Declaration on Refugees

The 1984 Cartagena Declaration on Refugees[28] was adopted by representatives from various governments and experts at a Colloquium held in Cartagena, Colombia. Article III(5) states that "*To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of*

[27] Kuruk P, *"Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees"* Stanford Journal of International Law, Vol. 35, (1999), pp: 313-315.

[28] 1984 Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984. (Hereafter Cartagena Declaration).

refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens."

Similar to the OAU Convention, the Cartagena Declaration clearly prohibits rejection at a frontier, and therefore also broadens the concept behind the principle of *non-refoulement*. Unlike the 1951 Refugee Convention, however, the Cartagena Declaration does not have any exceptions to the principle of *non-refoulement*. Even though it is not binding, the Cartagena Declaration's provisions have been followed by many states in Latin America.

3. Human Rights Documents Regarding the Principle of Non-Refoulement

Previously, there was an understanding that any international human rights treaties do not have protection in favour of asylum seekers, or more specifically the principle of *non-refoulement,* for those who are not included in the scope of the 1951 Refugee Convention or 1967 Protocol. This deficiency triggered a need for a jurisprudential construction within the European regional framework[29] and then other international human rights treaties have included the same context which provides a protection for asylum seekers.[30] This development resulted in the consolidation of the principle of *non-refoulement* under international human rights instruments. As well as the 1951 Refugee Convention, a set of international human rights treaties have a prohibition on *refoulement*. In this section, these instruments will be examined and, where necessary, will be compared to the 1951 Refugee Convention.

a) European Convention for the Protection of Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms[31] is of an international nature, and was drafted in 1950 by the Council of Europe[32] to protect

[29] Einarsen T, *"The European Convention on Human Rights and the Notion pf an Implied Right to de facto Asylum",* International Journal of Refugee Law, Vol. 2, No. 3, (1990), pp: 361–389.

[30] Gorlick B, *"Human Rights and Refugees: Enhancing Protection through International Human Rights Law",* Nordic Journal of International Law, Vol. 69, (2000), pp: 117-177; Gorlick B, *"The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees",* International Journal of Refugee Law, Vol. 11, (1999), pp: 479-495.

[31] European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted on 4 November 1950, entered into force on 3 September 1953. (Hereafter ECHR).

human rights and fundamental freedoms in Europe. On the basis of Article 19, the ECtHR was founded on the 21st January 1959, and is responsible for ensuring the monitoring of the States' applications undertaken by the Contracting States to this Convention and the Protocols.

It is clear that Article 3 of the ECHR has a much wider concept of the principle of *non-refoulement* than Article 33 of the 1951 Refugee Convention.[33] Article 3 of the ECHR states that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" In respect to this provision, it can be said that the article offers protection not only for persons who fulfil the requirements of 'refugee', but also for those who do not. Also, by contrast with the 1951 Refugee Convention, Article 3 does not have any exception to the protection of persons from torture or inhuman or degrading treatment or punishment. In spite of the fact that the ECtHR demands to be presented proof for a claim of *non-refoulement* to be acceptable, neither a clear link between the risk of torture or inhuman or degrading treatment or punishment nor one of the criteria to be granted refugee status required by the 1951 Refugee Convention have to be established.

The Parliamentary Assembly of the Council of Europe (PACE) ratified Article 3 of the ECHR in 1965 and by prohibiting inhuman treatment recommended the Committee of Ministers of the Council of Europe (Committee of Ministers) to guarantee refugees' right not to be returned to a country where their life or freedom would be threatened;[34] in other words, a recognition of the principle of *non-refoulement.* In 1978, before the first remonstrance came (*Ireland v. the United Kingdom*) the ECtHR declared that Article 3 has an unconditional structure "*the Convention prohibits in absolute terms torture and inhuman and degrading treatment or punishment, irrespective of the victim's conduct.*"[35] Unlike most of the

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[32] Council of Europe is responsible for promoting human rights and supremacy of law in Europe, founded in 1949, which has an international nature with its 47 members. (Hereafter CE).

[33] Lambert H, *"Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue",* International and Comparative Law Quartery, Vol. 48, No. 3, (1999), pp: 515-544.

[34] CE, Recommendation 434 (1965) *on the Granting of the Right of Asylum to European Refugees*, 1 October 1965, 434 (1965).

Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14471&lang=en

(Accessed: 19 June 2016)

[35] *Ireland v. United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, para. 163.

substantive clauses of the Convention, "*Article 3 makes no provision for exceptions and, under Article 15(2), there can be no derogation therefore even in the event of a public emergency threatening the life of the nation.*"[36]

The landmark case, *Soering v. the United Kingdom,* encompassed the extradition of a German national to Virginia in the United States of America (USA) where the death penalty applies for major offenses, reaffirmed that the return of Soering to Virginia, where he was likely to be exposed to treatment which was obviously against Article 3, would be against the intent and spirit of the article.[37]

The ECtHR also reaffirmed that, even in times of national emergency, Article 3 is non-derogable through the *Chahal judgement* of 1996.*[38]* According to the decision was made in this case, Article 33 of the 1951 Refugee Convention has a narrower concept of the *non-refoulement* principle than Article 3 of the ECHR.

b) 1969 American Convention on Human Rights

Article 22(8) of the 1969 American Convention on Human Rights[39] pointed out that "*In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.*"

The ACHR does not include any exceptions concerning the principle of *non-refoulement*, but does allow for derogation by Article 27. In accordance with the article in question, states can take measures derogating from their obligations under the ACHR "*in time of war, public*

Available at: http://www.refworld.org/docid/3ae6b7004.html (Accessed: 19 June 2016)

[36] *Ibid.*

[37] *Soering v. United Kingdom,* 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, para. 88.

Available at: http://www.refworld.org/docid/3ae6b6fec.html (Accessed: 19 June 2016)

[38] *Chahal v. The United Kingdom,* 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para. 80.

Available at: http://www.refworld.org/docid/3ae6b69920.html (Accessed: 20 June 2016)

See also, *Saadi v. Italy,* Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February. 2008. Available at: http://www.refworld.org/docid/47c6882e2.html (Accessed: 20 June 2016)

[39] Organisation of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, entered into force 18 July 1978. (Hereafter ACHR).

danger, or other emergency that threatens the independence or security of a State Party." Article 27(2), however, indicates a set of articles that cannot be derogated for the duration of a suspension, but the principle of *non-refoulement* is not included in these rights. Therefore, when one of the reasons for derogation arises, states party to ACHR can derogate their obligations to the principle of *non-refoulement.*

c) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[40] has the first provision, amongst all international human rights treaties, which explicitly states the principle of *non-refoulement*. The implementation of the Convention against Torture by Contracting States is monitored by the Committee against Torture (CAT) which is one of the UN-linked human rights treaty bodies. It analyses claims individually, extends protection to prohibit the removal of persons to any country from which they might be expulsed to a third country where there might be risk of torture for them.[41]

Article 3 of the Convention against Torture states that "*1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Unlike the 1951 Refugee Convention, the Convention against Torture does not include any exception to the principle of *non-refoulement*. This is guaranteed by Article 2(2) of Convention against Torture, which states that "*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*" Furthermore, though 1951 Refugee

[40] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UNGA, 10 December 1984, entered into force on 26 June 1987. (Hereafter Convention against Torture).

[41] Marks S, Clapham A, *International Human Rights Lexicon,* Oxford, Oxford University Press, (2005), p.373.

Convention does not include it, the Convention against Torture mentions extradition cases,[42] and it also offers protection from *refoulement* irrespective of whether or not they meet the requirements of gaining refugee status. However, Article 3 of the Convention against Torture offers more limited protection than the formula of Article 33 of 1951 Refugee Convention because it offers protection to those who would be at risk of torture[43], while the Article 33 of the 1951 Refugee Convention is interpreted to encompass any action which results in expulsion to a country where has a potential risk regarding freedom or life.

d) 1966 International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights[44] does not include an explicit provision concerning the principle of *non-refoulement*. In terms of applications of *non-refoulement*, Article 7 of the ICCPR has a pivotal role, which states "*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.*"

According to the Human Rights Committee[45], Article 7 of the ICCPR embraces a set of obligations such as not to extradite, deport, expel or otherwise remove a person from their territory, if there is a well-founded belief that there is a serious peril of irrecoverable harm, both in the country where removal is to be forced and in any country where the person may subsequently be removed.[46] It can be said that the principle of *non-refoulement* became a part

[42] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003, UN Committee against Torture (CAT), 24 May 2005. Includes elaborated consideration of torture in extradition cases.
Available at: http://www.refworld.org/docid/42ce734a2.html (Accessed: 20 June 2016)

[43] See, *Balabu Mutombo v. Switzerland*, CAT/C/12/D/013/1993, UN CAT, 27 April 1994.
UN CAT is of the Conclusion in this case that *"in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured."*
Available at: http://www.refworld.org/docid/3ae6b6784.html (Accessed: 21 June 2016)

[44] International Covenant on Civil and Political Rights, adopted by the UNGA, 16 December 1966, entered into force 23 March 1976. (Hereafter ICCPR).

[45] Human Rights Committee is a body of UN which comprises of independent 18 experts to monitor the application of ICCPR by the Contracting States. (Hereafter Committee).

[46] Related to the scope of responsibilities, see Committee, ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, pr Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, Para. 9. *"In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."*

of the ICCPR through case law and the interpretation of the Committee, which can consider more rights related to, for instance, family life, freedom of movement and/or efficient remedy. The Committee can also refer to the Second Optional Protocol[47] of the ICCPR, which clearly states that the death penalty is unlawful; in such circumstances, if there is a certain risk of the death penalty being implemented, the person cannot be returned.[48]

In the landmark case, *Kindler v. Canada*[49], the Committee explicitly mentioned that when a person is extradited, and there is an inevitable risk of violation of his or her rights as protected by the ICCPR, the state making the decision to extradite would be in violation of the ICCPR itself.[50]

As a result, it can be said that the Committee recognises the principle of *non-refoulement* through interpretation of Article 7, and refuses any possibility that Contracting States may put persons in danger by returning them through extradition or expulsion on *refoulement* to any other country where there is a threat of torture or cruel, inhuman or degrading treatment or punishment.[51]

Available at: http://www.refworld.org/docid/453883fb0.html (Accessed: 21 June 2016)

See also, Committee General Comment No. 31[80], The nature of the general obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 12.

Available at: http://www.refworld.org/docid/478b26ae2.html (Accessed: 21 June 2016)

Again, UN Committee on the Rights of the Child (CRC), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 27. Available at: http://www.refworld.org/docid/42dd174b4.html (Accessed: 21 June 2016)

[47] UNGA, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, adopted by UNGA, 15 December 1989, entered into force 11 July 1991, A/RES/44/128.

[48] Inglese C, *"The UN Committee Against Torture: An Assessment"* (The Hague/London/Boston), (2001), p.307.

[49] *Kindler v. Canada (Minister of Justice),* [1991] 2 S.C.R. 779, Canada: Supreme Court, 26 September 1991. Available at: http://www.refworld.org/docid/3ae6b6ed0.html (Accessed: 21 June 2016)

[50] *Kindler v. Canada,* CCPR/C/48/D/470/1991, UN Commission on Human Rights, 11 November 1993, para. 13.2. Available at: http://www.refworld.org/docid/51b6e4fc4.html (Accessed: 21 June 2016)

[51] UN, Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment 20, HRI/GEN/1/Rev.9 (Vol I) 27 May 2008 p. 201.

Available at: www.ohchr.org/Documants/HRBodies/TB/HRI-GEN-1-REV-9-VOL-I_en.doc (Accessed: 21 June 2016)

4. The Principle of Non-Refoulement as a Rule of Customary International Law

The principle of *non-refoulement* has a well-founded position both in international refugee and human rights law and, also, in customary international law (CIL).[52] Attaching this status to the principle of *non-refoulement* in CIL is vitally important to those states which are not Contracting States to either the 1951 Refugee Convention or the 1967 Protocol, because through binding via CIL, all states are obliged to follow the basic rules of international refugee protection. Those are, in particular, projected to avoid of violation of the *jus cogens* norm of *non-refoulement*, not only in theory but also in practice. It is noteworthy that Refugee Law can be operated effectively when the obligations to protection of refugees are the same worldwide. If the principle of *non-refoulement* is not accepted as a rule of CIL, a transit country may not consider itself bound by any obligations to refugees, like Libya might appear to be collaborating with a destination country that undertakes burden shifting, such as Italy, in the event of Lampedusa in terms of expelling (*refoulement*) asylum seekers.[53] Asylum seekers were returned to the co-operator country, and were subsequently sent back to their country of origin even though there was a "*well-founded fear of persecution*" there.

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[52] Goodwin-Gill G S, *"The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement",* International Journal of Refugee Law, Vol. 23, No. 3, (2011), pp: 443–457.

[53] Lampedusa has become a main point of destination for boats which carried illegal refugees and asylum seekers from Libya to Italy in the year 2004 is far from Sicily 205 km and 300 km from Libya. Totally 10,497 refugees, including 412 minors and 309 women, were transited through Lampedusa in the same year. Refugees who generally left Libya in dinghies and undertook a risky sea travel whick took several weeks. After reaching the Italian territorial waters around Lampedusa they intercepted by Italian border guards and were sent to Lampedusa waiting center. Refugees were kept waiting several days from 5 to 45 days. Even though the majority of group were sent to Sicil yor Italy, the others were deported to Libya. There is no legal information known on the countries of origin or reason for refugees detained in Lampedusa. According to the UNHCR, there were refugees as well as asylum seekers amongst detained persons and also amongst persons who deported to Libya. However, the authorities of Lampedusa claim that they keep all third country national as "illegal migrants" in the center and there were no asylum seekers present amongst those who left Libya. There is a cooperation on illegal migration between Italy and Libya started in 2000 with a treaty to fight against terror and then this cooperation has been expanded by the agreement on re-admission. In respect these agreements, Italy is also supposed to train the police officers as well as border guards of Libya.
Andrijasevic R, *"How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya",* COMPAS, University of Oxford, Oxford, (2006), pp: 3-4.

Many scholars have indicated that the principle of *non-refoulement* took place amongst a set of legal instruments; hence this principle should become a rule of CIL.[54] Furthermore, the practices of most Contracting States demonstrate that the principle of *non-refoulement* should find a position in CIL.[55]

According to Lauterpacht and Bethlehem, the evidence for accepting the status of being a rule of CIL is that great majority of UN members are signatories to those conventions which have the principle of *non-refoulement* as an integral part.[56] They argue that "*the responsibility of a State will be engaged in circumstances in which acts or omissions are attributable to that State wherever these may occur*,"; for this reason, the principle of *non-refoulement* is recognized as a rule of CIL.[57]

Moreover, Judge Pinto de Albuqerque states, in the case of *Hirsi Jamaa and et al v. Italy*[58] that the fact that the principle of *non-refoulement* has a non-derogable status and there is no permit to enter reservation, therefore, it binds all states, regardless of being a Contracting State to either the 1951 Refugee Convention or 1967 Protocol.[59]

Additionally, as is known, Article 38(1)(b) of the Statute of the ICJ, which declares that "*international custom, as evidence of a general practice accepted as law*," has applicability in international law by ICJ. According to the ICJ's marked case of the *North Sea Continental Shelf Judgment*[60], being a component of CIL depends on the satisfying two criteria, which are

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[54] Mink J, *"EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-Treatment,* European Journal of Migration and Law*"*, Vol. 14, No.2, (2012), pp: 119-149; Goodwin-Gill G S, McAdam J, *The Refugee in International Law,* Oxford University Press, (2007), p. 354.

[55] Hathaway J, *The Rights of Refugees in International Law,* Cambridge University Press, (2005), p. 364.

[56] Lauterpacht E, Bethlehem D, (2003), p. 149.

[57] *Ibid,* p. 160.

[58] *Hirsi Jamaa and Others v. Italy,* Application no: 27765/09, CE: European Court of Human Rights, 23 February 2012. Available at: http://www.refworld.org/docid/4f4507942.html (Accessed: 26 July 2016)

[59]Expression of Judge Pinto de Albuqerque

Available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231 (Accessed: 26 July 2016)

[60] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* I.C.J. Reports 1969, p. 3, International Court of Justice (ICJ), 20 February 1969, Para. 63.

Available at: http://www.refworld.org/docid/50645e9d2.html Accessed: (18 June 2016)

"Speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;-whereas this cannot be so

consistent state practice and *opinio juris* (general recognition as a rule of law).[61] UNHCR supports the assertion that the principle of *non-refoulement* meets these requirements to be a rule of CIL.[62]

Eventually, the principle of *non-refoulement* is of vital importance in International Refugee Law. Prohibition of refoulement forbids all states in which refugees seek asylum from expelling or returning them to any country where they are likely to be exposed to persecution. The principle of *non-refoulement* applies throughout a state's territory and it also protects persons from refusal at its borders, since its purpose is to guarantee that refugees are protected

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in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded."

[61] See also: *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America);* Merits, ICJ, 27 June 1986, para. 186.

Available at: http://www.refworld.org/docid/4023a44d2.html (Accessed: 18 June 2016)

"In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

[62] 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,* 31 January 1994. Available at: http://www.refworld.org/docid/437b6db64.html (Accessed: 17 June 2016); UNHCR, *Note on the Principle of Non-Refoulement,* November 1997. Available at: http://www.refworld.org/docid/438c6d972.html (Accessed: 17 June 2016). *Zaoui v. Attorney-General and Ors,* CA166/04, New Zealand: Court of Appeal, 17 September 2004, para.34 states that *"The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation."* Also para.136 states that *"The Refugee Convention is designed to protect refugees from persecution and the non-refoulement obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at para (34) has become part of customary international law."*

Available at: http://www.refworld.org/docid/48abd5560.html (Accessed: 17 June 2016)

Goodwin-Gill G S, (1996), pp. 167–171.

from such forcible removal and, as will be explained in the next chapter, rejection at the border. To conclude, notwithstanding the fact that there are some opposing assertions, it is accepted that the principle of *non-refoulement* exists as a rule of CIL, a viewpoint that is supported by both the UNHCR[63] and greater part of legal scholars[64]. It therefore binds all states, regardless of being a Contracting State of 1951 Refugee Convention and/or its 1967 Protocol, or otherwise.

5. Concluding Remarks

According to the principle of *non-refoulement*, refugees cannot be forced to go back to a country where he/she will be in danger of persecution. This principle applies even where the state has not determined the refugee status of an individual or where it rejects an asylum seeker. By virtue of the fact that the principle of *non-refoulement* enjoys the status of a rule of CIL, all host states are bound this principle, regardless of being Contracting States or otherwise.

Without any doubt, in Refugee Law the most important tool for states to protect refugee rights is the principle of *non-refoulement*, which is the core right in International Refugee Law and enshrined by both refugee law and human rights instruments at international and regional levels. Use of these treaties in a complementary manner brings absolute benefits related to the 1951 Refugee Convention concerning its essence and also the supervision procedure, is an excellent right for asylum seekers in the face of steadily emerging inhibitive rules and the implications of practices of host countries.

[63] *Ibid*, UNHCR, 1994.

[64] Goodwin-Gill G S, (1996), pp:134-137; Lauterpacht E, Bethlehem D, (2003), pp:140-149; Turk V, *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Nicholson F, Twomey P (ed), Cambridge University Press, Cambridge, (1999), p. 172; Nowak M, *UN Covenant on Civil and Political Rights. CCPR Commentary*, (2nd rev.ed), USA, Arlington, N. P. Engel Publishers, (2005), p. 185.

THE PRACTICE OF BORDER CLOSURE AND COMPATIBILITY WITH THE PRINCIPLE OF NON-REFOULEMENT

1. General Overview

Closing borders is one of the most controversial aspects of Refugee Law, whether or not the principle of *non-refoulement* enforces an obligation on host States not to prevent, *in any manner,* asylum seekers from coming into the country.

States have preferred to close their borders to refugee influxes to reduce the pressure on their national interests and to provide security for citizens. For this reason, the practice of border closure has become a contemporary phenomenon, particularly within the last decades, which is relatively convenient to undermine the key provision of the 1951 Refugee Convention and other international instruments that offer protection to refugees and prohibit *refoulement*. Because of this relationship between the principle of *non-refoulement* and the practice of border closure, legal scholars intend to address the border closure issue as a form of the principle of *non-refoulement,* in particular by discussing if *non-refoulement* can be applicable at the frontier or in the face of mass influx[65].

Border control, which is a political decision of states, has been declared as an essential characteristic of state sovereignty;[66] states tend to interpret the international refugee provisions in a fairly restrictive manner, which ultimately diminishes their purpose and meaning. Additionally, this practice results in an associated decline in quality of asylum because refugees, who are not allowed entry into a safe country, have to settle in a neighbouring country where there might be insecurity and/or violence.

Border crossing is the pivotal phase in the notion of an international refugee regime. If refugees are able to cross international borders, they can achieve international refugee protection. Refugees are under the protection of the obligation not to *refoule,* however, as well as this, the 1948 UDHR guarantees both the right to leave one's country and the right to seek asylum. According to Article 13(2) of the UDHR "*Everyone has the right to leave any*

[65] For instance, Goodwin-Gill G S, McAdam J, (2007), p. 207; UNHCR, 1994.

[66] The application of border control was emphasised both the adoption of 1951 Refugee Convention and in the drafting process of 1948 UDHR. See Vedsted-Hansen J, *Non-admission Policies and the Right to Protection: Refugees' Choice Versus States' Exclusion?* in Nicholson F, Twomey P (eds), *Refugee Rights and Realities,* Cambridge, Cambridge University Press, (1999), p. 273.

country, including his own, and to return to his country" whilst Article 14(1) states that "*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*" Moreover, the right to leave one's country is enshrined in Article 12(2) of the ICCPR, which states "*Everyone shall be free to leave any country, including his own.*" Considering these provisions, the practice of border closure is against refugees' ability to exercise their right to leave their country and to seek and enjoy asylum.

As stated in Article 33 of the 1951 Refugee Convention, it is prohibited for any states to return refugees to any country "*in any manner whatsoever*." In this case, the principle of *non-refoulement* has a wider concept than is actually thought. This is one of the provisitions in the Convention against which none of the Contracting States are allowed to make reservation. It places emphasis on the extent to which this principle is considered to be a fundamental component of the international refugee law system. It clearly declares that states cannot expel any refugee from their territories or return them to any other country in which their life or liberty would be at stake.

As explained above, UNHCR has accepted the principle of *non-refoulement* as a normative character, as well as a rule of CIL.[67] This principle is protected by several international and regional legal instruments and, owing to its importance, the principle of *non-refoulement* has become a milestone of international refugee law. However, to understand its actual scope, it should be examined as to whether or not this principle prohibits the practice of border closure, towards which two particular issues must be investigated. One of these is whether the principle of *non-refoulement* prohibits rejection of asylum seekers at the border of country, and the second is whether this principle allows states to avoid their obligations by closing borders in instances of mass influx. Therefore, this chapter is allocated to find out the answers of these questions along with the analysis of security reason for closing borders and some state practices.

[67] UNHCR, 1994.

2. The Relationship Between Border Closure and the Extraterritorial Scope of Non-Refoulement

One of the most controversial aspects of the principle of *non-refoulement* has been rejection at the border. According to Goodwin Gill and McAdam, the principle of *non-refoulement* has a significant controversial aspect in terms of the applicability to the non-admission at the frontier.[68] Interpretation of the principle of *non-refoulement* indicates that this norm forces states to let persons come into their territories; however, states applications indicate that they want to keep their sovereignty by controlling entrance through borders, they, therefore, accept that the principle of *non-refoulement* has an extraordinary restriction on state sovereignty. For this reason, states were reluctant, during the negotiation of the 1951 Refugee Convention, to recognise the principle of *non-refoulement* as a mechanism that compels states to admit persons present at the borders.

Even though it is not explicitly stated in Article 33 of the 1951 Refugee Convention that the principle of *non-refoulement* would embrace the obligation of non-rejection at the borders, it also does not restrict the scope for application to persons already present to seek asylum at the border of a state. A broad interpretation of Article 33(1) of the 1951 Refugee Convention is possible owing to the expression "*in any manner whatsoever*;" however to give a simple answer to the question concerned is not as easy as it seems. In other words, despite the fact that it is obvious that the principle of *non-refoulement* encompasses those who are legally or illegally present within a state's territory, it is less certain whether or not it applies (extraterritorially) to those who are present at the border.[69] This concept needs to be emphasised and clarified more than ever inasmuch as states have steadily intensified their alleged non-entree applications by such mechanisms as border closure and visa requirements, and even non-admittance at the borders or interception on the high seas.[70]

The interpretation of the *non-refoulement* is important that any different meaning or reading of article 33 of the 1951 Refugee Convention lets States abdicate from their obligations when the intervention occurred outside the borders by accepting so States both prevent refugees

[68] Goodwin Gill G S, McAdam J, (2007), p. 207.

[69] See Hailbronner K, *"Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?"* Virginia Journal of International Law, Vol. 4, No. 26, (1986), p. 857.

[70] Hans A & Suhrke A, *Responsibility Sharing,* in Hathaway J (eds) *Reconceiving International Refugee Law,* The Hague, Nijhoff Publishers, (1997), p. XX.

from reaching their territory and do not violate any obligations unless the interdiction happens within the territory. This situation encounters a legal gap which is not desired and acceptable. Nehemiah Robinson says in his work that *"if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is hard luck."*[71]

According to Grahl-Madsen's suggestion, states can protect their right not to accept those persons, who are not their citizens, present at the borders by rejecting them, since those who have not been in the territory are not covered by the principle of *non-refoulement*.[72] This conclusion comes from the statements made by a group of representatives of states while the 1951 Refugee Convention was being drafted, yet this idea was not reflected in any way in the Convention. In fact, this conclusion has an arguable concept.

First of all, the statements in question were related to non-admittance in circumstances of mass influx and, therefore, clearly did not include rejection at the border. Additionally, the statements, on which Grahl-Madsen based his conclusion, were only made by the Swiss and Dutch representatives; other statements show that not all representatives shared their positions. As a point of fact, the statement made by the US representative, Louis Henkin, represented a totally distinct perspective from those whose statements were argued by Grahl-Madsen. As per the US delegate's statement "*Whether it was a question of closing the frontier to a refugee who asked admittance or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom would be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the state concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an internment camp.*"[73]

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[71] Robinson N, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation; a Commentary*, Institute of Jewish Affairs, World Jewish Congress, (1953), p. 138.

[72] Grahl-Madsen A, *supra* note 8.

[73] UN Ad-Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York,* on Wednesday, 10 February 1950, E/AC.32/SR.20.
Available at: http://wwwrefworld.org/docid/3ae68c1c0.html (Accessed: 26 June 2016)

Secondly, when the International Refugee Organisation (IRO) prepared the first draft of the Convention, it obviously mentioned that admission obligation at the border would be comprised by the principle of *non-refoulement.*[74] However, due to the fact that this reference was criticised by French representative Mr Ordonneau, the new draft did not include this clear expression. It seems that the representatives of states wanted to adopt an ambiguous formula without including the prohibition of rejection at the frontier. According to Goodwin-Gill, this circumstance should have been seen as an indication that the drafters were conscious of omitting this point from the new draft of the 1951 Refugee Convention, since a clear statement regarding the admission obligations would be close to the right to be granted asylum.[75]

When the principle of *non-refoulement* is accepted as a generic rule of the 1951 Refugee Convention, it should include both the previous stage, which is the drafting phase, and the subsequent stages, which are the practices of states, regarding this principle to interpret its intent in the correct way. Generic terms are interpreted by the judicial authorities as well. Therefore, as a generic term, *non-refoulement* can be interpreted by the judicial authorities; for instance, in the *Aegean Sea Continental Shelf Judgement*[76] the ICJ had interpreted another generic term "*territorial status*". Thus, the principle of *non-refoulement* can also be interpreted, and it makes possible to support the evolution of law and to shed light on the ensuing state exercises.

Even though there have been otherwise applications, considering the fact that there have been a set of legal instruments which explicitly forbid rejection at the border, it can be said that states' intent is to accept that the principle of *non-refoulement* comprises non-rejection at the

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[74] UN Ad-Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems,Status of Refugees and Stateless Persons – Memorandum by the Secretary General*, 3 January 1950, E/AC.32/2, Chapter XI, Article 24.

"Each of the High Contracting Parties undertakes not to remove or keep from its territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement) refugees (and stateless persons) who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order."

[75] Goodwin-Gill G S, (1996), p. 122.

[76] *Aegean Sea Continental Shelf Case,* (Greece v. Turkey), ICJ Reports 1978, International Court of Justice Judgement, 19 December 1978.

Available at: http://www.icj-cij.org/docket/index.php?sum=327&p1=3&p2=3&case=62&p3=5

(Accessed: 26 June 2016)

frontier. Such as Article II(3) of the OAU Convention, Article III(1) of the Bangkok Principles on the Status and Treatment of Refugees[77] and Article 3(1) of the Declaration on Territorial Asylum adopted this approach on legal grounds. Furthermore, the suggested scope of the principle of *non-refoulement* is promoted by Article III(5) of the Cartagena Declaration. In this way, this approach has been developed as the scope of *non-refoulement.*

Indeed, in the judgement process of the *Regina v. Immigration Officer at Prague and Another, Ex parte European Roma Rights Centre and Others*[78] case, in which UNHCR was an intervener, the consultant report stated that[79] over the last couple of decades, the interpretation regarding the relationship between non-rejection at a border and the principle of *non-refoulement* has found its ground by the practices of states. These practices, for instance, in South East Asia, Africa and Europe have allowed wide range of persons both to pass their borders and to remain within their territories until appropriate solutions have been found.

Currently, scholars are prone to accept that the scope of the *non-refoulement* embraces non-rejection at the frontier.[80] Since, it can be applicable so long as leaving the country is possible. However, such measures including border closure is an obstacle in front of the leaving one's country and also remaining outside of that country. The UNHCR is of the same opinion which clarifies that such measures restrain the aplicability of the principle of *non-refoulement* by not allowing persons leaving where they are at risk of persecution.[81] Additionally, member States

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[77] Asian-African Legal Consultative Organisation (AALCO), Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966. (Hereafter Bangkok Principles).

Article III (1) states that *"No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion."*

[78] *Regina v. Immigration Officer at Prague and Another, Ex parte European Roma Rights Centre and Others,* [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004.

Available at: http://www.refworld.org/docid/41c17ebf4.html (Accessed: 26 June 2016)

[79] Noll G, *"Seeking Asylum at Embassies: A Right to Entry under International Law?",* International Journal of Refugee Law, Vol. 17, No. 3, (2005), pp: 542-573.

[80] Noll G, (2005), pp: 543; Lauterpacht E, Bethlehem D, (2003), p. 113; Goodwin Gill G S, McAdam J, (2007), p. 207; Hathaway J, (2005), pp: 315-317.

[81] UNHCR, *Note on the International Protection,* 13 September 2001, A/AC.96/951, para. 16, (The Obligation of Non-Refoulement); UNHCR, *Interception of Asylum Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach,* 9 June 2000, EC/50/SC/CRP.17, para. 18.

of the Committee of Ministers have been advised that any person should be subjected to such measures, including non-admission at the border, which may result in forcing them neither return to nor stay in a country where there is a jeopardy of persecution. This approach has also been repeated in its Resolution.[82]

Moreover, this scope of the principle of *non-refoulement* has found a place amongst the ExCom Conclusions. The substantial compliance with the principle of *non-refoulement*, not only within the states' territories but also at their frontiers, has been highlighted by ExCom Conclusion No 6;[83] this scope has also been emphasised in more recent and developed Conclusions by ExCom.[84] In this manner, the fundamental significance of the principle of *non-refoulement* has been highlighted by the UNHCR on a number of occasions that emphasised that rejection at a border must be rigorously avoided.

Considering the fact that this attitude is widely supported amongst scholars and commentators,[85] and regional and international legal instruments signed by the majority of

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[82] Committee of Ministers, Resolution (67) 14: Asylum to Persons in Danger of Persecution, 29 June 1967.

[83] UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees,* December 2009, 1975-2009 (Conclusion No 1-109), No 6 (XXVIII)(Non-Refoulement 1977).

[84] UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees,* December 2009, 1975-2009 (Conclusion No 1-109), No 85(XLIX), (Conclusion on International Protection 1998), (q) *"Strongly deplores the continuing incidence and often tragic humanitarian consequences of refoulement in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs"*; Conclusion No 99(LV), (General 2004), (l) *"Expresses concern at the persecution, generalized violence and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and calls on States to address these challenges while ensuring full respect for the fundamental principle of non-refoulement, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs".* Interestingly, in the latter conclusion, ExCom mentions the responsibility which is beyond the national frontiers.; Conclusion No 22(XXXII), (Protection of Asylum-Seekers in Situations of Large-Scale Influx 1981), (II-B-2)(g) *" the location of asylum seekers should be determined by their safety and wellbeing as well as by the security needs of the receiving State. Asylum seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State;"*

[85] For instance, Goodwin-Gill G S, (1996), p.124; Vedsted-Hansen J, (1999), p.273; Lauterpacht E, Bethlehem D, (2003), p.113-115; Coleman N, *"Non-Refoulement Revised Renewed Review of the Status of the Principle of*

states and states' practices, it can be said that it is widely accepted that the principle of *non-refoulement* embraces non-rejection at the border as a component. A question that needs to be asked here is what the particular geographical extent of the principle of *non-refoulement* actually is. In accordance with Goodwin-Gill and McAdam, states' practices and recorded opinions show that they have accepted that it is applied not only to those who are present within the state territory but also to those who are present to seek asylum at the frontier of the state.[86] Therefore, the principle of *non-refoulement* applies outside the State's territory including frontier check-points.

Notwithstanding the fact that there have been some instances in which states have claimed to exclude ports[87] or airports[88] from their jurisdiction not to undertake responsibility of non-admittance, such attempts have not found support or endorsement at the international level. On the other hand, in the post-Cold War period, most developed countries claimed that the principle of *non-refoulement* will not be applied unless persons who seek asylum are present within the territories of states. Furthermore, this claim was ratified as a legal application by the US Supreme Court in the case of *Sale v. Haitian Councils Centre*,[89] in which the USA had

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Non-Refoulement as Customary International Law" European Journal of Migration and Law, Vol. 5, No. 1 (2003), pP. 40-41; Hathaway J, (2005), p. 7; Eggli A V, *Mass Refugee Influx and the Limits of Public International Law*, The Hague, Martinus Nijhoff Publishers, (2002), p. 156.

[86] Goodwin-Gill G S, McAdam J, (2007), p. 246.

[87] In September 20011 Australian Federal Government passed the Migration Amendment Act in which a group of external territories, Ashmore Island, Cartier Islands, Christmas Island, and Cocos Island have been removed from Australian migration zone. As per this amendment, the Australian government announced that aliens cannot enter the territory of Australia by being present on these territories. However, both a range of human rights NGOs, including Amnesty International (by report on Australia, 2001), and the UNHCR criticised this application. On 18th April 2008, in Geneva, Jennifer Pagonis, UNHCR spokesperson, stressed that *"If this were to happen it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the State."*

[88] *Amuur v. France, 17/1995/523/609*, Council of Europe: European Court of Human Rights, 25 June 1996. Available at: http://www.refworld.org/docid/3ae6b76710.html (Accessed: 26 June 2016)
The ECtHR decided that there was a violation of ECHR by the French government. Since the government wanted to curb of its obligations by a rule-free international zone in its airport.

[89] *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al. ,* 509 US 155; 113 S Ct. 2549;125. L.Ed. 2d 128; 61 USLW. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, US Supreme Court, 21 June 1993. Available at:

intercepted and forcibly returned persons. Happily, the UK House of Lords (Judicial Committee) has stressed and ignored this judgement by stating it was "*wrongly decided*."[90] Moreover, the ECtHR held a contrasting position to the US Supreme Court in the case of *Hirsi Jama et al v. Italy*.[91] Even though Pallis argues that the prohibition of *refoulement* can only apply in territorial waters[92] as well as the territories of states, it is widely accepted by scholars and UNHCR that the concept of the prohibition of *refoulement* includes inside and outside of territory.[93] It is more reasonable to recognise that the prohibition of *refoulement* includes the high seas as well as territorial waters, or states might be prone to attempts at intercepting refugees on the high seas to prevent them from entering their countries and thus avoid taking responsibility and this scope lets us accept that if the principle of *non-refoulement* applies on the high seas it applies at the borders. Namely, persons are present at the border are under the responsibility of the potential recipient State.

Lauterpacht and Bethlehem placed particular emphasis on the point that if states try to disclaim their obligations arise from the 1951 Refugee Convention by claiming the interdiction occurred outside their territory, this disclaimer cannot protect them from taking appropriate responsibility. This is pointed out in the statement: "*The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.*"[94]

Consequently, if persons are present at a border, port or airport, or even on the high seas, it would be accepted that they were within the state's territory and that he or she can benefit

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http://www.refworld.org/docid/3ae6b7178.html (Accessed: 27 June 2016). See also Pizor A G, *"Sale v Haitian Centers Council: The Return of Haitian Refugees"*, Fordham International Law Journal, Vol. 17, No. 4, (1993), pp: 1062-1114.

[90] Hathaway J C, Gammeltoft-Hansen T, *"Non-Refoulement in a World of Deterrence",* Law&Economics Working Papers, Paper 106, (2014), p.16.

[91] *Supra* note 58.

[92] See Pallis M, *"Obligations of States Towards Asylum Seekers at Sea Interactions and Conflict Between Legal Regimes"*, International Journal of Refugee Law, Vol. 14, No. 2&3, (2002), pp: 329-364.

[93] See Gammeltoft-Hansen T, *"The Refugee, The Sovereign and the Sea: EU Interdiction Policies in the Mediterranean"* Danish Institute for International Studies Working Paper, 2008/6, pp: 4-31; UNHCR, 2007. Available at: http://www.unhcr.org/4d9486929.pdf (Accessed: 26 June 2016)

[94] Lauterpacht E, Bethlehem D, (2003), p. 110.

from the prohibition on *refoulement.* In the current circumstances, *non-refoulement* has been expanded in scope and includes non-rejection at the border of any potential host state. This means that the practice of border closure, which aims to preclude the entry of refugee flows, violates the obligations of states stemming from the spirit of the principle of *non-refoulement.*

3. Reasons for the Practice of Border Closure

a) Contemporary Security Challenge

The principle of *non-refoulement* has met a particular challenge in front of security concerns that might result in border closure to prevent refugees from coming into the country. Since the early 1980s, states have individually and collectively introduced various measures against the arrival of anybody who wishes to lay claim to refugee status in their territories.[95] This is due, perhaps, to the recent increase in migratory movement and, in particular, economic crises that have confronted the majority of European countries in the 21st century. Coupled with domestic pressures, states, and in particular the Western countries, enacted various immigration policies, such as border closure and visa requirement, extraterritorial border check points, safe areas and the like, to discourage asylum seekers.[96]

The contemporary world has witnessed large movements of refugees for a number of reasons, including war and internal conflict, which have caused many to flee their countries of origin and seek asylum in a peaceful environment. However, states are reluctant in this regard, and are increasingly closing their borders to persons for whom they have special responsibility to protect.[97] In his Geneva 2012 ExCom opening speech, the High Commissioner for Refugees, Antonio Guterres, confirmed the high influx of refugees as a major challenge of this decade. He said that "*already in 2011, as crisis after crisis unfolded more than 800,000 people crossed the border in search of refuge, an average of more than 2000 refugee every day and this was higher than in the last decade*."[98] He called on all states to open their borders and help refugees. The Cold War and its aftermath, including globalisation and the war on terror,

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[95] UNHCR, *"State of the World's Refugees: A Humanitarian Agenda"*, 1 January 1997.
Available at: http://www.unhcr.org/3eb7ba414.html (Accessed: 20 August 2016)

[96] *Ibid.*

[97] Long K, *"In Search of Sanctuary: Border Closure, 'Safe' Zone and Refugee Protection"*, Journal of Refugee Studies, Vol. 26, No. 3, (2012), p. 464.

[98] UNHCR, *"UNHCR Executive Committee Meeting"*, Geneva, 2012.

have shaped world politics and the way and manner in which states and policy makers respond to refugees.[99] States now see refugees as a threat to their national security, especially since refugees have been identified among the perpetrators of the 9/11 terrorist attacks and other major bombings, including the London bombing. It was reported that several convicted bombers in the failed London bomb attempts in July 2005 had come to Britain as child refugees.[100] Therefore, the asylum process and screening have become quite tight. The international regime that protects refugees has its own method of determining and screening asylum seekers for the security of host nations.[101]

Article 1(F) of the 1951 Refugee Convention prohibits applications to the Convention by individuals for whom there are serious reasons for considering whether he or she was the perpetrator of any serious criminal activity before arrival at the frontier of a refuge state. In addition, Article 32(2) of the 1951 Refugee Convention permits the forceful expulsion of a refugee to his/her country of origin when such a refugee is perceived as a present or future threat to the national security of the state.[102] Considering these provisions, claims of refuge should be evaluated individually, if there is a suspicious situation related to criminal events, host States would have a right to deny the claim of asylum. However, before assessing this situation closing borders to all asylum seekers should not have an acceptable legal ground. In other words, closing borders due to alleged security reason always negatively affect and restrict the movement of asylum seekers and it is a violation of the principle of *non-refoulement.*

[99] Loescher G, *"A Universal Mandate to Protect: The Challenges of Refugee Protection"*, Harvard International Review, Vol. 31, No. 3, (2009), pp: 44-48.

[100] This is not to say that terrorist have penetrated countries through laying claim to refugee status, but some refugees have been found guilty for taking part in terrorist acts after they became citizen of their host country. Hence, states are reluctant to give permanent resident permit to refugees. For more analysis, see Rotella S, *"Boston Bombing Suspects Echo Home-Grown Terrorists in Madrid, London Attacks"*, ProPublica, 19/04/2013. Available at: https://www.propublica.org/article/boston-bombing-suspects-echo-home-grown-terrorists-in-madrid-london-att (Accessed: 20 August 2016)

[101] Kelley N, *"International Refugee Protection Challenges and Opportunities"*, International Journal of Refugee Law, Vol. 19, No. 3, (2007), p. 418.

[102] *Ibid.*

b) Can Mass Influx Be a Reason to Close Borders?

Mass influx is another contentious area regarding the principle of *non-refoulement.* The question here is whether the principle of *non-refoulement* applies when borders are closed in the face of a mass influx of refugees. The 1951 Refugee Convention does not include any explicit provision for derogation of states' responsibilities from *non-refoulement* under pressure of mass influx. The 1951 Refugee Convention has a definitional shortcoming regarding the term "*mass influx*" of refugees. Despite this deficiency, mass influx embraces cases of large scaled migration from countries in conflict to countries which are incapable of providing effective protection.[103]

Mass influx's characteristics have been determined by ExCom Conclusion No 100, when there is, *inter alia*, one of the following features, mass influx situation can be considered; "*(i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.*"[104]

The definition of refugee in the 1951 Refugee Convention requires individual assessment for every asylum seeker. Goodwin-Gill supports this view and says that the definition of refugee in the 1951 Refugee Convention necessitates that subjective and objective components should be evaluated as occasion requires.[105] However, considering those aspects of mass influx, it could be said that when a mass influx occurs, it is almost impossible, or is certainly impractical, to process asylum claims individually. Taking into account this conclusion, a group of legal scholars are of the view that the 1951 Refugee Convention has not been drafted to tackle mass influx.[106]

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[103] Nessel L A, *"Externalized Borders and the Invisible Refugee"* , Colombia Human Rights Law Review, Vol. 40, No. 625, (2009), pp: 625-699.

[104] UNHCR, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1975-2009, (Conclusion 1-109), No 100(LV), (Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations-2004), para. (a).
Available at: http://www.refworld.org/pdfid/4b28bf1f2.pdf (Accessed: 28 June 2016)

[105] Goodwin-Gill G S, (1996), p. 8.

[106] Fatemi, S M G S, *"Who is a Refugee? Comparison of a Misconstrued Concept in International Human Rights, Shi'i Fiqh and the Iranian Legal System",* The International Journal of Human Rights, Vol.9, No.2, (2005), pp:183-223.

Particularly, whilst the 1951 Refugee Convention was being drafted, the representative of the Netherlands expressed his interpretation that mass influx would not be covered by the principle of *non-refoulement.*[107] In fact, this idea was similar to the view of the Swiss representative, who stated that states cannot be forced to let mass groups of refugees cross their borders to claim asylum.[108] The view of the Swiss government found supporters such as Germany, Italy, France and Belgium. However, this opinion is invalid in any official interpretation of Article 33 in the face of mass influx; therefore the principle of *non-refoulement* necessitates allowing large scale crossing of borders.

From the states' reluctance to offer a protection for refugees due to the excessive burden of mass influx, it can be observed that mass influx may sometimes result in derogation of states' obligations under the principle of *non-refoulement.*[109] States, therefore, exercise certain measures, including border closure, to evade their responsibilities. Therefore, a strong perspective has been given by Article 3(2) of the Declaration on Territorial Asylum, if national security would be threatened by mass influx it is an exception to the principle of *non-refoulement*.

Subsequently, on the topic of mass influx the Report of the United Nations Conference on Territorial Asylum has mentioned the exception by recognition of the claim of Turkey. The position of this article is that there is an exception to the principle of *non-refoulement* when mass influx threatens national security.[110]

1999 witnessed the practice of border closure, where around 130,000 Kosovan Albanian refugees claimed refuge from the Former Yugoslav Republic of Macedonia because of the Kosovo War. However, the Macedonian Government was concerned the high numbers of Albenian refugees would lead to a destabilising effect. Considering this situation in conjunction with the already suffering Macedonian economy, national concerns cannot be solved via a simple burden-sharing mechanism; this condition encouraged the Macedonian

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[107] Harijer den M, *"Extraterritorial Immigration Control: Legal Challenges"*, Ryan B, Mitsilegas V (eds), Martinus Nijhoff Publishers, Leiden-Boston, (2010), p. 186.

[108] *Ibid.*

[109] The United States Supreme Court, for instance, argued this issue in the case of *Sale v Haitain Centers Council*, *supra* note 89.

[110] Report of the United Nations Conference on Territorial Asylum: UN doc. A/CONF.78/12 (21 April 1977) Available at: global.oup.com/booksites/content/9780199207633/resources/annexe5 (Accessed: 29 June 2016)

Government to close its borders. Due to such reasons, states find the practice of border closure most appealing, which leads to the plight of millions of refugees. In terms of more recent events, in 2016 Europe was exposed to a massive refugee flow because of the conflict in Syria. Thus, European countries have applied firm border restrictions, including border closure, on the tens of thousands of refugees who have made dangerous crossings by rubber dinghy to seek asylum in Europe. More specific experience occurred in Austria in January 2016, when the government imposed strict measures on refugees, virtually all of whom have been rejected by closing borders. Subsequently, Germany extended its border controls for an undetermined period of time, and refused entry to refugees at its border with Austria.[111]

In spite of the declarations of states' representatives during the drafting process and the claims of scholars such as Hathaway, who have pointed out that the prohibition of *refoulement* should not be applied to mass influx situations[112], it is difficult to claim that the 1951 Refugee Convention's draft allows for any exception in the face of mass influx,[113] therefore mass influx is not a legal exception to the principle of *non-refoulement*, and further it is not open to any interpretation;[114] indeed, Article 33(2) reflects on exceptions as *numerus clausus.*

Despite the legal conditions of asylum in cases of mass influx, states' practices of border closing is obviously against international refugee law and, particularly, the 1951 Refugee Convention. The question that may be asked here is why those States quite blatantly infringe their obligations. The nature of mass influx may be an answer to this question. As indicated in ExCom Conclusion No 100, insufficient capacity in the host state[115] is a feature of mass influx that can be envisioned as requiring the practice of border closure to be a *state of necessity* for Contracting States. Since *state of necessity* provides a valid reason for violation,

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[111] Global Research Centre for Research on Globalization, *"Austria Closes its Borders to Refugees".*
Available at: http://www.globalresearch.ca/autria-closes-its-borders-to-refugees/5503754
(Accessed: 30 June 2016)

[112] Hathaway J, (2005), p. 367. (*"There is a legal basis for restricting non-refoulement if a States's basic national survival is threatened by a mass influx."*)

[113] Duieux J F, McAdam J, *"Non-Refoulement Through Time: The Case for a Derogation Clause the the Refugee Convention in Mass Influx Emergencies",* International Journal of Refugee Law, Vol. 16, No. 1, (2004), pp: 4-24.

[114] Coleman N, (2003), pp: 44-46.

[115] MI Guidelines Work Guide, *The Michigan Guidelines on the Right to Work*, Michigan Journal of International Law, Vol. 31, No. 293, (2010), pp: 293-306.

it never allows for disavowing responsibilities, yet ensures a justification for a state evading its responsibility.[116] Macedonian Government's practice relied upon this conclusion; in fact, it was eager to allow persons to cross borders, but had assessed that admitting a massive volume of asylum seekers would threaten public order and, as a result, decided to close borders.

"*State of necessity*" is presented as a rule of the CIL under the title of *"Necessity"* by article 25 of the International Law Commission[117] Draft Articles on Responsibility of States for Internationally Wrongful Acts[118]. As per the article "*Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril.*" Taking into account the wording of the article, a situation can be called a "*state of necessity*" as long as it threatens the state's "*essential interest*."

Boed analysed the article in question in terms of whether or not "*state of necessity*" applies to the principle of *non-refoulement* when mass influx occurs. In respect to Boed "*essential interest*" is not related to the subsistence of states, and the ILC's Draft Article's clearly refers to this point.[119] In the case of Macedonia, for instance, "*essential interest*" was related to internal stability, which may in turn be coupled with economic maintenance or environmental protection.[120]

According to Article 25 of the ILC's Draft Articles, "*grave and imminent peril*" is another instance of "*state of necessity*" which can be resorted to by states. Boed indicates that the

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[116] Boed R, *"State of Necessity as a Justification for Internationally Wrongful Conduct",* Yale Human Rights and Development Law Journal, Vol. 3, No. 1, (2000), pp: 1-40.

[117] The International Law Commission was founded by the UNGA to assume the mandate of the General Assembly in 1947. (Hereafter ILC)

[118] International Law Commission, *"Draft Articles on Responsibility of States for Internationally Wrongful Acts"*, November 2001, Suplement No 10(A/56/10), chp.IV.E.1.(Hereafter ILC's Draft Articles).
Available at: http://www.refworld.org/docid/3ddb8f804.html (Accessed: 30 June 2016)

[119] Boed R, *supra* note 116.

[120] In the present case, Boed mentions the ICJ case of Gabcikovo-Nagymaros Project(Hungary/Slovakia) which had been decided that environment protection even in a specific region is an essential interest in accordance with the ILC Draft Articles, therefore, the protection in question does not need to be regarding whole territory.

article refers to the vague term of "*imminent peril*."[121] In this respect, every condition related to this term must be assessed individually.

In brief, "*state of necessity*" should only be resorted to if there is no other way to protect the state's interests. In other words, when mass influx occurred and states believed that the admission of a large number of persons would be a threat to their economic stabilities but would not, however, receive economic assistance from international organisations or other states in shouldering the financial burden mass influx poses, non-admission of a great number of refugees resulting in *refoulement* will not be justified through a "*state of necessity.*"

Indeed, Article 26 of the ILC's Draft Articles considers the possibility of resorting to a "*state of necessity*" when mass influx occurs. In respect to the article "*Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.*"

The "*peremptory norm of international law,*" is defined by Article 53 of the Vienna Convention on the Law of Treaties[122]. As per the definition, a norm can be a peremptory norm if it cannot be derogated and it can be amended by the following norm of international law. The observation on the principle of *non-refoulement* made by ExCom also supports this article. ExCom Conclusion No 25 indicates that the principle of *non-refoulement* has the nature of a peremptory rule of international law.[123] In these circumstances, the principle of *non-refoulement* has both a non-derogable nature and the rule of CIL status; therefore, violation of this principle on the grounds of a "*state of necessity*" would be an infringement of the obligations that arise from *jus cogens* of international law.[124]

To conclude, "*state of necessity*" can be a justification for border closure only when mass influx is coupled with persecution. In addition to this, an international "*burden-sharing*" mechanism can reconcile the principle of *non-refoulement*. Therefore states should benefit

[121] Boed R, *supra* note 116.

[122] Vienna Convention on the Law of Treaties, 22 May 1969, entered into force 27 January 1980.

[123] UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees,* December 2009, 1975-2009 (Conclusion No 1-109), No. 25(XXXIII), (General-1982). Available at: http://www.refworld.org/docid/4b28bf1f2.html (Accessed: 30 June 2016)

[124] Farmer A, *"Non-Refoulement And Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection"*, Georgetown Immigration Law Journal, Vol. 23, No. 1, (2008), pp: 1-38.

from international mechanisms when mass influx occurred rather than apply the practice of border closure.

4. States Practices of Border Closure

As mentioned above, the practice of border closure has a political nature and by implementing this practice, the principle of *non-refoulement* is affected as regards its non-derogable nature. For this reason, in particular, the UNHCR is concerned with how to persuade states and policy makers to fulfil their obligations under the principle of *non-refoulement* and to provide protection for refugees by admitting them into their territory.[125] The security challenge is one reason that forced many states to close their borders against refugees during mass influx of refugees.[126] The restrictive method of border closure that has often been witnessed in recent times is not a novel development. In 1938, at the small town of Evian in France, six European countries (Hungary, Yugoslavia, Italy, Belgium, Holland, and Switzerland) agreed to close their borders against the influx of Jewish refugees fleeing Nazi Germany.[127]

Border closure reflects the refusal of states to accept their obligations towards protection of refugees under the 1951 Refugee Convention.[128] Politically, security issues have become a serious concern to policy makers. Governments continue to view the influx of refugees into their territories as a threat to the security of their citizens and thus close their borders to them.[129]

Border closure is mostly practised by those states that are the largest recipients of refugees. For example, in 2000, Pakistan and Iran, which have been the major recipients of Afghan refugees (together playing host to over 3.5 million Afghan refugees before the US war on the Taliban in Afghanistan), decided to temporarily close their borders. Even when Afghan refugees, fleeing Afghanistan during the US war on terror exercises in Afghanistan, were at

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[125] Loescher G, *"A Universal Mandate to Protect: The Challenges of Refugee Protection"*, Harvard International Review, Vol. 31, No. 3, (2009), pp: 44-48.

[126] Kelley N, (2007), p. 404.

[127] See, Glyn I, *"Asylum-Seeking in Europe in the 1930s and 2010s Compared"*, Migration Citizenship Education, 2009. Available at:
http://migrationeducation.de/33.2.html?&rid=219&cHash=a21915e38b6857b98d81aedf584fb3f2
(Accessed: 20 August 2016)

[128] Kelley N, (2007), p. 406.

[129] *Ibid.*

their borders, both countries continued to deny entrance into their territories.[130] In Africa, where refugees were generally welcomed with open arms, border closure has also become an increasing practice. Tanzania, which has a good record of hospitality in hosting one of the largest numbers of refugees in Africa at around 600,000, has recently resorted to closing its borders and enacting forceful repatriation of refugees.[131] This act was unthinkable in Tanzania only several years ago. In 1995, the Tanzanian government, which had played host to Burundian refugees, suddenly decided to close its border to Burundians fleeing persecution from the war that erupted in their country. The Tanzanian Minister of Foreign Affairs would later explain "*We are saying enough is enough. Let refugees go home and no more should come*."[132] Responding to this action, the UNHCR appealed to the Tanzanian government to ensure the continued protection of the millions of refugees already inside Tanzanian borders.[133]

Tanzania is not the only country in Africa that has closed its border to refugees. In January 2007, the Kenyan government, by claiming security concerns, closed its borders to over 4,000 Somalian refugees at Dholbley town (which borders Somalia) and forcefully sent back around 360 Somalian refugees waiting for UNHCR's transfer to Dadaab camp from Liboi camp.[134]

The incidents of border closure and repatriation of refugees by host states are not peculiar to Asian and African countries, as this also happens on a daily basis in other parts of the world. In South America, Panama deported a large number of Colombian refugees who had escaped a decade of violence that had spread across the country back to Colombia. The swift response of the UNHCR and other 61 international condemnations of the Panamanian authorities

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[130] *Ibid.*

[131] Rutinwa B, *"The Tanzania Government's Response to the Rwandan Emergency"*, Journal of Refugee Studies, Vol. 9, No. 3, (1996), pp: 295-296.

[132] *Ibid.*

[133] Long K, *"No entry! A review of UNHCR's response to border closures in situations of mass refugee influx"*, UNHCR's Policy Development and Evaluation Service, PDES, 2010.

[134] Kenya played host to over 200,000 Somalian refugees since the war broke out in that country. Between 1999 and 2007, the Kenyan government closed its border with Somalia not less than three times. Its action was understandable because Somalia at that time had become a pariah state without a central government and was controlled by the Alshabaab rebel group who launched a deadly attack on Kenya for interfering in the Somalia crisis. Closing its border with Somalia perhaps might be the last solution to securing its own citizens. For an in-depth analysis on this and the international response to it, see Long K, (2010), pp: 51-55.

curbed further deportation of Colombians in Panama.[135] As mentioned above, in Eastern Europe, Macedonia has been consistently subjecting Kosovan refugees to *refoulement.* Hence, in all ways, Macedonia has failed as to its obligations under international refugee law.[136] For example, in 1999, Amnesty International[137] reported that the Macedonian authorities closed all borders to approximately one thousand Kosovan refugees, forcing them back to the dangerous frontiers of Yugoslavia. Though the Macedonian government would later give assurances to the UNHCR that the border would remain open, it insisted that countries wishing to share the burden should do so directly from the border.[138]

Concerning state practices of border closure, it can be seen that no matter what the reason is these practices explicitly infringe the principle of *non-refoulement.* Although states have the right to control their borders to protect the welfare of their citizens, yet, such practices should be compatible with, and not supersede, international refugee laws.

5. Concluding Remarks

Border closure practice is a political decision on the part of states that want to protect their control on the decision as to who can be allowed to come into their territories and when. The primary responsibility of host states is to protect and give assistance to refugees. However, states' interests depend upon limiting the numbers of asylum seekers and therefore opt not to accept refugees in the face of, *inter alia*, mass influx in particular.

Rejection of refugees at the border by closing borders is concluded by infringement of the principle of *non-refoulement* and this negates the granting of refugee status. Even though there is no explicit expression in Article 33(1) of the 1951 Refugee Convention, it is suitable to accept that not returning refugees from frontiers by closing borders is compatible with the spirit of this principle, since the expression "*in any manner whatsoever*" allows a broader interpretation than its explicit expression. In addition to this, even ignoring its CIL status, this principle is a rule of *jus cogens.* As a result of this status, the principle of *non-refoulement* cannot be derogated or infringed in any way. The principle of *non-refoulement* aims to protect

[135] Kelley N, (2007), p. 407.

[136] Amnesty International, *"The protection of Kosovo Albanian refugees"*, EUR 65/03/99, 19/05/1999. Available at: http://www.refworld.org/docid/3ae6a9c914.html (Accessed: 20 August 2016)

[137] Amnesty International was established in 1961 in London which is a non-governmental organization focused on human rights issues. (Hereafter AI).

[138] *Supra* note 136.

a group of rights that have a remarkable value, therefore states should be willing to protect these rights, rather than allow them to be breached. Instead of preventing refugees coming into their territory, states should accept asylum seekers to evaluate their claim; only in these circumstances can states meet their obligations, including the principle of *non-refoulement*, arising from the 1951 Refugee Convention.

Border closure is suitable to stop refugees from claiming asylum, would violate the principle of *non-refoulement*, no matter what the reason to close borders is. Its application extends to outside the territory and even the high seas. In the 21st century the refugee problem is becoming a major issue worldwide. The practice of border closure exacerbates this problem. States should respect and obey their international obligations and find other ways to cope with alleged security risks or any other problem, which they might anticipate being caused by mass refugee influxes, instead of breaching refugee rights by closing their borders.

LEGALITY ASSESSING ORGANISATIONS OF THE BORDER CLOSURE PRACTICE

1. General Overview

The practice of border closure and the principle of *non-refoulement* are linked, and prohibition of *refoulement* has taken place in several treaties analysed in previous chapters. Even though a group of treaties explicitly prohibit rejection at the border, not all of them mention this situation. Providing the same application depends on the same understanding of the principle of *non-refoulement*, which needs a clear interpretation in certain circumstances. The practice of border closure infringes a range of refugee rights, but the first at stake is the principle of *non-refoulement*. Therefore, there should be international bodies to assess the legality of this practice. This chapter will analyse the international organisations relevant to the implementation, enforcement and/or interpretation of international refugee law and consequently the principle of *non-refoulement* and the practice of border closure.

2. Non-Binding Responses of the UNHCR

The UNHCR was established to protect refugee rights; in fact, the 1951 Refugee Convention does not have any formal observation body. The 1951 Refugee Convention includes a number of measures to protect the rights of refugees. In 1950, the UNGA decided to establish the UNHCR, which was considered as a supplementary body that would be responsible for ensuring international protection for refugees, and would assume a vague supervisory responsibility. At the international level, amongst international lawyers, it is accepted that the UNHCR's role is not legally binding.[139] Although states occasionally ask the UNHCR's opinion, regional courts interpret none of these opinions to be binding.[140]

The core duty of the UNHCR is to supply protection to refugees and pursue lasting solutions for associated problems.[141] According to the UNHCR Statute,[142] the UNHCR is entitled to

[139] Goodwin-Gill G S, *"The Dynamic of International Refugee Law",* International Journal of Refugee Law, Vol. 25, No. 4, (2013), pp:651-666.

[140] *Ibid.*

[141] UNHCR, *"Solutions for Refugee Problems in Todays's World"* – Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, at the Commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees, Mexico City, 15 November 2004.

monitor all conventions that are related to the protection of refugees. In line with Paragraph 8 of the Statute, all international refugee treaties are included in the UNHCR's supervisory role, including the application of the 1951 Refugee Convention, and the norms of CIL relating to the protection of refugees. This mandate is also reiterated with the article 35 of the 1951 Refugee Convention and article II of the 1967 Protocol.[143] Generally, the principle of *non-refoulement* is under the supervisory responsibility of the UNHCR, both as a provision of the 1951 Refugee Convention and as a rule of CIL.

States' practices of border closure show that there is an increasing reluctance to accept refugees which creates challenges at the international level. The UNHCR usually responds[144] to such acts when they occur and calls for opening of borders.[145] However, these are not related to the assessment of the legality of this practice, and the UNHCR does not have any formal duty to assess the legality of the practice of border closure that infringes *non-refoulement* which is the core principle in Refugee Law[146]. However, it is important to shed light on a situation when there is a dispute regarding the application or interpretation of the 1951 Refugee Convention.

A more harmonised application and interpretation are important to provide an equal protection for refugees. Concerning the lack of an exclusive legally binding body to provide a unity of application of the 1951 Refugee Convention, UNHCR's documents become important. It has interpreted the scope of the *non-refoulement* by several conclusions

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Available at: http://www.unhcr.org/uk/admin/hcspeeches/42c930ac2/solutions-refugee-problems-todays-world-statement-mr-ruud-lubbers-united.html (Accessed: 30 June 2016); Goodwin-Gill G S, (1996), p. 7.

[142] UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V). (Hereafter Statute). Available at: http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ae69ee64&query=UNHCR%20Statute (Accessed: 30 June 2016)

[143] Huber S, *"Refugees in the US: Protected from Persecution, or Vulnerable to Unjust Removal?",* Journal of Civil Rights and Economic Development, Vol. 20, No. 1, (2005), pp: 199-243.

[144] See UNHCR Voluntary Return Repatriation and Border Monitoring Monthly Update, April 2015. Available at: https://www.humanitarianresponse.info/en/operations/afghanistan/document/unhcr-voluntary-return-repatriation-and-border-monitoring-monthly-25 (Accessed: 22 August 2016)

[145] See Dobbs L, *"UNHCR Calls for open borders for possible South Sudan refugee outflows"* 12 July 2016. Available at: http://www.unhcr.org/uk/news/briefing/2016/7/5784b1ef4/unhcr-calls-open-borders-possible-south-sudan-refugee-outflows.html (Accessed: 22 August 2016)

[146] Gammeltoft-Hansen T, (2008), p. 11.

regarding non-admission at the border, as mentioned above, and has also responded to some border closure practices.

3. Legally Binding Organisations

a) International Court of Justice

Whilst the 1951 Refugee Convention was being drafted, the need to have a specific court or a legally binding body to oversee the applications of the Contracting States was not anticipated. In fact, the UNHCR has been seen as being sufficient to monitor the application of the 1951 Refugee Convention. Regarding the solutions to disputes between Contracting States, there is only a reference to the ICJ. Article 38 of the 1951 Refugee Convention and Article IV of the 1967 Protocol state that if there is any disagreement related to the application or interpretation of the Convention, guidance may be requested from the ICJ. However, with the exception of the ICJ, there is no any reference to a legally binding international organisation to interpret the 1951 Refugee Convention or related applications.

In respect to Hathaway, the 1951 Refugee Convention should be interpreted as guaranteeing a common understanding and application by its Contracting States; he adds that Contracting States have, in fact, a legal responsibility to do so.[147] Additionally, he emphasises the significance of the interpretation of the 1951 Refugee Convention by quoting the *Regina v. Immigration Officer at Prague Airport*;[148] "*As in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning ... without taking colour from distinctive features of the legal system of any individual Contracting State. In principle therefore there can only be one true interpretation of a treaty. In practice it is left to national courts, faced, with the material disagreement on an issue of interpretation, to resolve it. But in doing so, [they] must search, untrammelled by notions of [their] national legal culture, for the true autonomous and international meaning of the treaty.*"
Even though there is an explicit reference as such, to date, any request has not been made. Furthermore, this mechanism does not allow individual complaints.

[147] Hathaway J, (2005), p. 2.

[148] *Supra* note 78.

b) European Court of Human Rights

According to Article 19 of the ECHR, the ECtHR was established to monitor the applications of the provisions of the ECHR by the Contracting States, which has the status of being a permanent judicial organisation. Its judicial power arises from Article 32 of the ECHR, which includes the decision on all issues related to interpretation and/or application of the ECHR. The Court is both independent and impartial. Cases can be referred by both states and individuals, and the Committee of Ministers may also demand to be given an advisory opinion by the ECtHR.

As per Article 46(1) of the ECHR, its judgements are legally binding, as per the statement: "*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*" Even though its judgements must be obeyed, the state that is the part of the case, in fact the final judgement is vitally important for other Contracting States in avoiding repetition of similar incidents. This point was highlighted by the ECtHR in the case of *Ireland v. United Kingdom*.[149]

The ECtHR has not dealt with any issue regarding the practice of border closure. However, it can be analysed in the context of a leading case such as *Xhavara and et al v. Italy and Albania*[150]. This case was related to the interception at sea of an Albanian boat that was going to Italy; it was intercepted by an Italian warship in Italian territorial waters. A large number of persons on board drowned as a result of this action. The ECtHR decided that the claim was non-admissible due to non-exhaustion of national law. However, it mentioned that regardless of where the event occurred, Italy, as a Contracting State, would have been considered responsible for this incident no matter whether the event had occurred inside or outside its territory. If the action of a state prevents refugees from reaching its territory, this event causes the state to incur any legal responsibility towards them. This scenario can be adapted to border closure. Therefore, this perspective can apply when refugees cannot reach the territory

[149] The ECtHR pointed out in the case that, *"The Court's judgements in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties..."*. Ireland v. United Kingdom, *supra* note 35.

[150] *Xhavara and et al v. Italy and Albania,* Application no: 39473/98, CE: European Court of Human Rights, 11 January 2001.

of a state due to the practice of border closure. In this manner, persons are put at risk by any state that has an effective role in preventing individuals from reaching a given territory.

The ECtHR is capable of judging violations of human rights, *inter alia*, the principle of *non-refoulement* and, according to the ECHR, these violations do not have to be within the territory of a Contracting State. The ECHR's formula,[151] and also the jurisprudence of the ECtHR, accepts that states are accountable for the effects of any act carried out within their jurisdiction, even if such effects take place outside their territory.[152] In the reality of border closure, the effects of the application violate refugees' fundamental rights, such as protection from *refoulement.* By virtue of the border closure practice violating the principle of *non-refoulement*, the ECtHR can assess the legality of this application.

c) Court of Justice of the European Union

Protection of refugee rights by judicial bodies is important. For this reason, secondary legislation in the EU and applications of states are assessed by supranational courts. The CJEU assesses whether or not state practices are in conformity with the 1951 Refugee Convention and rules on complaints related to the violation of human rights, which of course includes refugee rights. The legality of the practice of border closure is under the judicial power of courts.

Regarding the refugee law applications across the European Union (EU), the CJEU is of particular importance. The CJEU has the judiciary role in the EU of a supranational court. It has a role in interpreting the treaties, including the 1951 Refugee Convention. By this, it became the first supranational judicial organisation that can interpret the 1951 Refugee Convention.[153]

[151] The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the ECHR.(Article 1- Obligation to respect human rights).

[152] See, ECtHR 12 March 2003, n. 462211/99 (Ocalan v. Turkey), applying to Turkish activities in Kenya, and ECtHR 16 November 2004, n. 31821/96 (Issa v. Turkey) applying to Turkish activities in Iraq.

[153] Bank R, *"The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law",* International Journal of Refugee Law, Vol. 27, No. 2, (2015), pp: 213-244.

On asylum law in the EU, which was derived from the 1951 Refugee Convention, the CJEU has assumed binding judgement since 2005.[154] As a supranational court, it undertakes to provide a unique application among national courts in the EU. National courts apply EU law, but they can request guidance from the CJEU, if necessary, to interpret the treaties. Its decisions concerning the 1951 Refugee Convention are binding for all national courts of the Contracting States of the 1951 Refugee Convention.[155]

In the EU, the 1951 Refugee Convention is the major instrument used to protect the rights of refugees. Therefore, all national instruments regarding the asylum regime should be consistent with the 1951 Refugee Convention. The Court's judiciary decisions are all binding, and it can assess secondary legislation in the EU regarding the infringement of international refugee law, *inter alia,* border closure practices which breach states' obligations arising from the 1951 Refugee Convention.

Its power is related, as a whole, to the 1951 Refugee Convention and 1967 Protocol, rather than specific implementations or provisions. The CJEU referred to the obligation of the principle of *non-refoulement* in the case of *NS and ME*,[156] and more generally to the 1951 Refugee Convention and 1967 Protocol. The main concept of the interpretation of a provision is to deduce the aim of the provision, but above all the 1951 Refugee Convention as a milestone and whole asylum and refugee law.[157]

Closing borders, as a political decision of a state, is ultimately to undermine the principle of *non-refoulement* and other obligations, and the refugee protection regime related specifically to the 1951 Refugee Convention and, more generally, International Refugee Law. States must

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[154] Garlick M, *"International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR"* Refugee Survey Quarterly, Vol. 34, No. 1, (2015), pp: 107-130.

[155] Errera R, *"A New Supranational Court for Refugee and Asylum Law: The Court of Justice of the European Union a Commentary of Its Recent Case Law",* International Association of Refugee Law Judges – 9th World Conference, Bled, 7-9 September 2011 – Between Border Control, security concerns and international protection: A judicial Perspective, p. 5.

[156] *N.S. (c 411/10) v. Secretary of State for the Home Department and M.E. (C 493/10) and others v. Refugee Appications Commissioner, Minister for Justice, Equality and Law Reform,* C-411/10 and C-493/10, EU: CJEU, 21 December 2011.

[157] CJEU has adopted this is as a way for its applications. For instance, in the Case 26/62 *van Gend en Loos* [1963] ECR 1; *"..according to the spirit, the general scheme and the wording.."*

conduct the duties that arise from their international refugee obligations. Violations are under observation of the courts.

4. Concluding Remarks

The principle of *non-refoulement* is guaranteed by a set of instruments, including human right documents. This principle is currently subject to various violations; in particular, the practice of border closure has become a contemporary phenomenon to be applied. However, this practice must be assessed in terms of legality, and states found to be in breach should have sanctions imposed. The aim of this principle is to provide international protection for refugees. The international meaning of the principle of *non-refoulement* can be identified only when the states' understanding and applications are the same. Even though the 1951 Refugee Convention is the cornerstone of International Refugee Law, it does not have a judicial body. The unique reference is to the ICJ to solve disputes between Contracting States regarding the application or interpretation of the 1951 Refugee Convention. In this case, the UNHCR is of importance concerning the interpretation and application of the Convention. Though its findings are not legally binding, there are a set of conclusions and documents, mentioned in relevant sections, related to the illegality and incompatibility of the practice of border closure with the principle of *non-refoulement*.

The lack of an exclusive and competent judicial body of the 1951 Refugee Convention is filled by other courts. In particular, the ECtHR has more importance due to individual complaints. However, there are a handful cases regarding the principle of *non-refoulement*; none of these are related to the practice of border closure, even though the practice has seen an alarmingly increasing trend in the 21st century.

CONCLUSION

The fundamental duty of any state is to guarantee the basic rights and security of its citizenry. However, an outbreak of war, social unrest and agitation, and other forms of instability within a state may force persons to flee their country. In such circumstances, other states have a responsibility to such individuals, morally as well as legally, that arises from International Refugee Law.

Not until during and after WWII did refugee issues become a focal point of discussion at the international level. By the time the Cold War began, the issue of protecting refugees and stateless persons had taken on another dimension. The UNHCR, as the primary agency of the UN, was created in 1950 to find a permanent and durable solution to refugee problems. By 1951, the Convention relating to the Status of Refugees came into being as the legal framework guaranteeing refugee rights. Additionally, some regional and international human rights treaties followed the same issue to offer protection for refugees. In this case, the principle of *non-refoulement* is crucial to protect the rights of refugees, and is free of any territorial or other material limitations, but belongs to a "*category of entitlements broadly addressed to all refugees with the exception of the type of refugee laid out in Article 33(2).*"[158]

According to Article 33(1) of the 1951 Refugee Convention, states are obliged not to send a refugee to a country where he or she may be at risk of persecution. As discussed before, the meaning of this article is much broader than its actual words. The expression "*in any manner whatsoever*" provides the need for interpretation of this article. Taking into account the practice of border closure, it might be thought that any act that does not occur within a state's territory is not against the principle of *non-refoulement.* However, this principle is not subject to territorial restrictions, and applies whenever a state closes its borders to refugees to push them back, inasmuch as the applicability of the principle of *non-refoulement* holds beyond the territory of states, as indicated by the specific cases above, since in doing so the state rejects refugees at its frontiers. As stated by Lauterpacht and Bethlehem, the obligation of *non-refoulement* is a very essential principle of refugee protection, as it is the only guarantee that

[158] Moreno-Lax V, *"Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea"* International Journal of Refugee Law, Vol. 23, No. 2, (2011), pp: 174-220.

refugees are not exposed to the same persecution that forced them to leave their country of origin in the first place.[159]

The principle of *non-refoulement* has a non-derogable nature. This means that all Contracting States to the 1951 Refugee Convention have to behave in a manner consistent with the responsibilities given by the principle of *non-refoulement.* Additionally, considering this principle has the status of being a rule of CIL, all states are bound, regardless of them being a signatory state or otherwise.

Refugees can be seen as being the most vulnerable group in a society due to not only lack of political, civil, social, and economic rights to maintain their lives, but also due to their need for protection in order to avoid persecution. However, states prefer to close their borders to refugees, especially in the face of mass influx. Their defence is that of protecting the security of their own territories. However, this application violates the principle of *non-refoulement,* which is in the concept of judgements given by the courts. For this reason, in particular, some specific events that were decided on by regional courts should be considered as violations of the principle of *non-refoulement*. In fact, it must be considered that there is a complete lack of any exclusive judiciary organisation that can adjudicate violations of refugee rights stemming from the 1951 Refugee Convention. The principle of *non-refoulement* is a rule of CIL, and thus it is binding to non-Contracting States as well. Its violation by any state must be adjudicated. Even though the Courts mentioned have judicial powers, for instance, the ECHR is binding just for its own Contracting States, in this case the ECtHR cannot assess the legality of border closure practice when is applied by a non-Contracting State of the ECHR. This is the issue that must be solved in order to provide real and tangible international protection for refugees. Otherwise, refugee law consists of nothing more than words written in treaties.

The cases mentioned in the relevant sections above verify that the consideration of the principle of *non-refoulement* is fundamentally important, both inside and outside the territory of a state. This principle applies regardless of having the formal status of refugee, or otherwise. The main point is protection from persecution no matter where they are ultimately sent. Refugees should not be a "burden" but should be a "responsibility" to be shared equally by the international community. When there would be an infringement their rights arising

[159] Lauterpacht E, Bethlehem D, (2003), p. 87.

from International Refugee Law, legally binding organisations are competent to assess the legality of a practice, including border closure.

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