

**PROTECTING ASYLUM-SEEKERS PRIOR TO  
DETERMINATION OF REFUGEE STATUS:  
REINTERPRETING THE REFUGEE CONVENTION AND  
ASSESSING CONTEMPORARY STATE PRACTICE ON NON-  
REFOULEMENT**

**Abdul Ghafur Hamid\***  
**Shaban Abdul Majeed Phiri\*\***

**ABSTRACT**

The present decade is confronted with unprecedented refugee crises, dwarfing all similar refugee crises ever witnessed by mankind before. The plight of asylum-seekers, particularly prior to the determination of their refugee status by the host country, is of great concern to the UNHCR and the international community, as this is the time when they are most vulnerable. The sad situation of these asylum-seekers, their sufferings on small boats being packed like sardines on angry seas, and their pain in the hands of cruel human traffickers, beg the crucial question of whether they are protected in any way by international refugee law or left unprotected. With a view to answering this question, the present study applies the legal doctrinal method and attempts a holistic interpretation of articles 1A(2), 31(1) and 33 of the 1951 Refugee Convention. The study finds that the term 'refugee' in these articles is in effect referring to 'asylum-seekers' who fulfil the constituent elements of a refugee under the Convention and that these asylum-seekers cum refugees are protected by the Convention even before the regularisation of their refugee status. The key protection stems from the principle of non-*refoulement*. State practice nevertheless is not encouraging and potential States of refuge are very weak in honouring this principle, which is a corner stone of international refugee law. The study concludes with suggestions for resolving this core issue.

**Key words:** asylum-seekers, Refugee Convention, refugee status determination, non-*refoulement*

---

\* Professor of Law, Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia.

\*\* Ph.D Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia

**PERLINDUNGAN PENCARI SUAKA SEBELUM  
PENENTUAN STATUS PELARIAN: MENTAKRIF SEMULA  
KONVENSYEN PELARIAN DAN MENILAI AMALAN  
KONTEMPORARI NEGARA TENTANG ‘NON-  
REFOULEMENT’**

**ABSTRAK**

Krisis pelarian yang melanda dekad ini belum pernah terjadi sebelumnya dan mengkerdikan krisis-krisis pelarian yang pernah disaksikan sebelum ini. Nasib pencari suaka, terutamanya sebelum status mereka sebagai pelarian ditentukan oleh negara tuan rumah, membimbangkan UNHCR dan masyarakat antarabangsa kerana sewaktu inilah mereka paling terdedah. Keadaan sedih pencari suaka, penderitaan mereka apabila menaiki bot-bot kecil yang dimuat bagaikan sardin atas laut yang bergelora, dan kesakitan mereka ditangan pengedar manusia yang kejam, menimbulkan persoalan samada mereka dilindungi dengan apa cara sekalipun di bawah undang-undang antarabangsa mengenai pelarian atau mereka terus ditinggal tanpa perlindungan. Dengan niat menjawab persoalan ini, kajian ini mengaplikasi metod kajian perundangan doktrinal dan melawat semula takrifan holistik bagi artikel-artikel 1A(2), 31(1) dan 33 Konvensyen Pelarian 1951. Kajian ini mendapati bahawa istilah ‘pelarian’ dalam artikel-artikel ini dalam kesannya merujuk kepada ‘pencari suaka’ yang memenuhi unsur-unsur konstituen seorang pelarian di bawah Konvensyen walaupun sebelum pengaturcaraan status pelarian mereka. Perlindungan utama bermula daripada prinsip ‘non-*refoulement*’. Walau bagaimanapun, amalan negara-negara tidak begitu menggalakkan dan negara-negara yang berpotensi untuk para pelarian terlalu lemah dalam menghormati prinsip ini yang merupakan batu asas undang-undang antarabangsa mengenai pelarian. Kajian ini diakhiri dengan cadangan-cadangan bagi menyelesaikan permasalahan teras ini.

**Kata kunci:** pencari suaka, Konvensyen Pelarian, penentuan status pelarian, non-*refoulement*

## INTRODUCTION

Due to conflict and persecution, global forced displacement escalated sharply in the end of 2015, reflecting immense human suffering. According to the United Nations High Commissioner for Refugees (UNHCR), there was a “total of 65.3 million worldwide displacement, comprising 3.2 million asylum-seekers waiting for decision on asylum and 21.3 million refugees worldwide.”<sup>1</sup> What makes the matter worse is political overtones and the erroneous belief that asylum-seekers are not Convention refugees<sup>2</sup> and are therefore, not protected under international refugee law.

Asylum-seekers who flee from persecution and gross human rights violations usually find it extremely difficult to get a country of asylum. Their plight, pain and suffering in this regard cannot be overemphasised. The primary objective of this study, therefore, is to determine how to protect asylum-seekers who satisfy the elements of refugee under international refugee law and have left their own country on account of well-founded fear of persecution. During the period beginning from when they leave their country of origin until the time their refugee status has been officially recognised by any potential state of refuge, they are in a highly vulnerable situation.

The term ‘asylum-seeker’ is a non-legal term. There may be various types of asylum-seekers, namely, persons fleeing their own country for fear of persecution, persons fleeing violent armed conflicts but not subject to discrimination amounting to persecution, economic migrants, and victims of natural disasters. Not all these asylum-seekers can be regarded as ‘refugees’ within the meaning of article 1A(2) of the 1951 Convention relating to the Status of Refugees<sup>3</sup> and the 1967 Protocol relating to the Status of Refugees.<sup>4</sup> The present article advocates only for those asylum-seekers, who are qualified to be refugees under the Convention but whose status has not yet been formally recognised, deserving protection under

---

<sup>1</sup> *Global Trends - Forced Displacement in 2015* (UNHCR 20 June 2016) 2-3, accessed December 6, 2016, <http://www.unhcr.org/statistics>.

<sup>2</sup> Helene Lambert, *Seeking Asylum: Comparative Law and Practice in Selected European Countries* (The Hague: Martinus Nijhoff Publishers, 1995), 5.

<sup>3</sup> Convention relating to the Status of Refugees (adopted 28 Jul 1951, entered into force 22 Apr 1954) 189 UNTS 137; hereinafter referred to as ‘Refugee Convention.’

<sup>4</sup> Protocol relating to the Status of Refugees (adopted 31 Jan 1967, entered into force 4 Oct 1967) 606 UNTS 267.

international refugee law even prior to the determination of their refugee status.

To achieve this objective, the article defines ‘asylum-seeker’ for the purposes of the present study and then proceeds to make a holistic interpretation of articles 1A(2), 31, and 33 of the Refugee Convention, in order to justify the applicability of international refugee law to asylum-seekers who flee their own country for fear of persecution before they are formally recognised as refugees. It then discusses the protection of these asylum-seekers under international refugee law, particularly focusing on the principle of *non-refoulement*. It then proceeds to evaluate the contemporary practice of States in their application of the principle of *non-refoulement*, while concluding with suggestions and recommendations.

## DEFINING ‘ASYLUM-SEEKER’

The word ‘asylum’ is a derivative of the Greek word ‘asylon,’ which means freedom from seizure.”<sup>5</sup> Notwithstanding the fact that ‘the practice of asylum is as old as humanity itself,’<sup>6</sup> it has no clear and settled meaning.<sup>7</sup> It is, however, well established that the right of asylum comprises certain manifestations of State conduct, namely: “to admit a person to its territory, to allow the person to sojourn there, to refrain from expelling the person, to refrain from extraditing the person, and to refrain from prosecuting, punishing or otherwise restricting the person’s liberty.”<sup>8</sup>

While ‘refugee’ is a legal term officially defined in the Refugee Convention, the term ‘asylum-seeker’ is not defined or even mentioned in the convention. It appears that it has been used all this while as a non-legal term for convenience sake. Nonetheless, the term

---

<sup>5</sup> Atle Grahl-Madsen, *The Status of Refugees in International Law*, (Leiden: Sijthoff, 1972), 3.

<sup>6</sup> S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), 5.

<sup>7</sup> Atle Grahl-Madsen, *Territorial Asylum* (Stockholm: Almqvist & Wiksell International, 1980), 50.

<sup>8</sup> Roman Boed, “The State of the Right of Asylum in International Law,” *Duke Journal of Comparative & International Law* 5(1) (1994): 1, 2; See also Tom Clark, “Human Rights and Expulsion: Giving Contents to the Concept of Asylum” *International Journal of Refugee Law* 4 (1992): 189, 190; and Atle Grahl-Madsen, *Territorial Asylum*, 12.

has become so popular that it is increasingly used together with the term 'refugee' and sometimes it is used even to the extent that the two terms are interchangeable. In any case, it would be fair to assume that there is no clear-cut and established meaning of asylum-seeker. In its wider sense it may refer to various types of persons seeking asylum, encompassing those who seek asylum on convention grounds, economic migrants, and also those who flee armed conflict situations. In its narrower sense it may simply refer to refugees who seek asylum on convention grounds.

The following define asylum-seekers in the wider sense. According to Cambridge Advanced Learner's Dictionary, asylum-seekers are 'those who leave their country for their safety, often for political reasons or because of war, and who travel to another country hoping that the government will protect them and allow them to live there.'<sup>9</sup> International Organisation for Migration (IOM) defines asylum-seeker as 'a person who is seeking protection from a foreign country and is waiting to have his/her claim assessed.'<sup>10</sup> The European Union (EU) defines asylum-seeker as "a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken."<sup>11</sup>

The following define asylum-seekers in the narrower sense. According to Sarah Motha, "asylum-seeker is a person who is in another country applying for asylum ... if application is approved they gain refugee status."<sup>12</sup> Breen posits that "asylum-seekers are individuals awaiting determination of the application for refugee status."<sup>13</sup> Human Rights Education Associates (HREA) view an asylum-seeker as 'someone who has fled from her or his country and is seeking refugee status in another country.'<sup>14</sup>

---

<sup>9</sup> *Cambridge Advanced Learner's Dictionary*, (Cambridge: Cambridge University Press, 3<sup>rd</sup> Edition 2008) 80.

<sup>10</sup> Guidelines: *Protection Assistance for Vulnerable Migrants in Zambia*, (IOM Zambia, 2014) 7.

<sup>11</sup> European Union Council Directive (2003/9/EC of 27 Jan 2003) Article 2 (C).

<sup>12</sup> Sarah Motha, *The Education Rights of Refugees, Asylum Seekers And Migrants in South Africa*, Education Rights for Learners, Parents and Educators, Book 3 (nd), accessed August 22, 2016, <http://www.erp.org.za>.

<sup>13</sup> Clair Breen, 'The Policy of Direct Provision in Ireland: A Violation of Asylum Seeker's Right to Adequate Housing,' *International Journal of Refugee Law* 20(4) (2008): 611-636, 612.

<sup>14</sup> University of Minnesota, Human Rights Library, *Study Guide: Rights of Refugees*, (HREA, 2003), accessed August 18, 2016 <http://www.hrea.org/>.

The narrow definition seems to be supported by national legislation. South Africa, for example, has a comprehensive and well-advanced refugee statute. According to section 1 of South Africa's Refugees Act 1998, "asylum means refugee status recognized in terms of this Act"<sup>15</sup> and "asylum-seeker means a person who is seeking recognition as a refugee in the Republic."<sup>16</sup> In addition to a definition of 'refugee' taking directly from the Refugee Convention's definition,<sup>17</sup> the South African law also has a widened definition of refugee by adding persons who flee their country of origin owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order.<sup>18</sup> Zambia's Refugee (Control) Act 1970 defines refugees as "persons who are, or prior to their entry into Zambia were, ordinarily resident outside Zambia and who have sought asylum in Zambia owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and are declared to be refugees for the purpose of the Act."<sup>19</sup> It appears that the Zambia's law implicitly recognizes asylum-seekers who fulfil the requirements of a refugee under the convention.

Lambert argues that the Scandinavian States define asylum-seekers as *de facto* refugees.<sup>20</sup> Lambert further postulates that:

There are two kinds of refugees according to the UNHCR Statute, the first being those refugees generally referred to as "asylum seekers" prior to regularisation of their refugee status. While the second kind of refugees occurs after the refugee status of asylum seekers has been finally regularised. This is a metamorphosis or transformation process with which asylum seekers acquire a formal recognition of their refugee status in foreign States. It is at this stage that the tag "asylum seekers" is removed and replaced with that of a "refugee" and at which

---

<sup>15</sup> The Refugees Act 130 of 1998, Laws of the Republic of South Africa, section 1 (iv).

<sup>16</sup> *Ibid*, section 1(v).

<sup>17</sup> *Ibid*, section 3 (a).

<sup>18</sup> *Ibid*, section 3(b).

<sup>19</sup> Order 2, Refugees Control (Declaration of Refugees) Order, Statutory Instrument No. 240 of 1971, made under section 3 of Refugees (Control) Act, Chapter 120 of the Laws of the Republic of Zambia (adopted 4 Sep 1970).

<sup>20</sup> Lambert, *Seeking Asylum*, 5.

stage they become entitled to full enjoyment of Convention rights.<sup>21</sup>

The present study agrees with Lambert with regard to the distinction of the two kinds of refugees, namely: (i) those asylum-seekers cum refugees who flee their country of origin on account of well-founded fear of persecution on convention grounds and whose refugee status has not yet been formally recognised; and (ii) those refugees whose refugee status has been formally recognised.

## THE HOLISTIC INTERPRETATION OF THE REFUGEE CONVENTION

### The Need for a Holistic Approach

The general rule of interpretation is enshrined in article 31 of the Vienna Convention on the Law of Treaties: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>22</sup> Article 31 forms an integrated whole, containing a few elements. First, the interpretation must be in good faith as it is part of the performance of the treaty. Secondly, the terms of a treaty are to be given their ‘ordinary meaning’ as it can be assumed that the ordinary meaning will most probably reflect the parties’ intention.<sup>23</sup> Thirdly, the ordinary meaning cannot be taken in isolation but to be interpreted in the context of the treaty and in the light of its object and purpose.<sup>24</sup> In short, the general rule of interpretation of treaties according to the Vienna Convention is a holistic approach: looking at the natural and ordinary meaning of the terms of the treaty in their context, supported by its object and purpose.

---

<sup>21</sup> Ibid, 4.

<sup>22</sup> The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 *UNTS* 331, art 31(1).

<sup>23</sup> As McNair puts it, the task of interpretation is “the duty of giving effect to the expressed intention of the parties that is their intention as *expressed in the words used by them.*” McNair, *Law of Treaties* (Oxford: Oxford University Press, 1961), 365.

<sup>24</sup> Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University press, 2<sup>nd</sup> edition, 2007), 235.

The leading view with regard to interpretation of the provisions of the Refugee Convention supports a holistic approach which takes into account the object and purpose as well as the entire corpus of human rights law as an inextricable branch of international refugee law.<sup>25</sup> Then what is the object and purpose of the Refugee Convention? Taking from the Preamble to the Refugee Convention, the primary object of the convention is founded on the assurance of the widest possible enjoyment by refugees of fundamental human rights and freedoms.<sup>26</sup> This view opposes restrictive interpretation as it defeats the purpose and object for which it was adopted. As Franco correctly stated, ‘the restrictive interpretation of the 1951 Refugee Convention is purposefully adopted to exclude many asylum-seekers who are entitled to international protection under the Convention.’<sup>27</sup> This is because excluding asylum-seekers from the scope of the Convention would also imply excluding refugees whose protection it guarantees.

### **The Interpretation of Article 1A(2): The Term ‘Refugee’ Encompasses ‘Asylum-seeker’**

Article 1A(2) of the Refugee Convention, as amended by the 1967 Protocol, defines a refugee as:

[A] person owing to well-founded fear of being persecuted for reason 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.<sup>28</sup>

---

<sup>25</sup> Michelle Foster, *International Refugee Law and Socio-Economic Rights, Refugees from Deprivation* (Cambridge:Cambridge University Press, 2007), 40 -51.

<sup>26</sup> See *Preamble*, the Refugee Convention.

<sup>27</sup> Leonard Franco, “Legal Issues Arising from Recent UNHCR Operations: Introduction,” in *The Problem of Refugees in the Light of Contemporary International Law Issues*, ed. Vera Gowlland-Debbas (The Hague: Martinus Nijhoff Publishers 1996), 5.

<sup>28</sup> Refugee Convention art 1A(2), as amended by the 1967 Protocol.

## The Essential Elements of a Convention Refugee

This definition makes it very clear that to be Convention refugees, the following four elements need to be satisfied:

- (i) Must be outside the country of origin;
- (ii) Must be unable or unwilling to seek the protection of that country, or to return there;
- (iii) Such inability or unwillingness is on account of a well-founded fear of persecution; and
- (iv) Fear of prosecution is based on any of the five grounds: race, religion, nationality, membership of a particular social group, or political opinion.<sup>29</sup>

## REFUGEE STATUS DETERMINATION DOES NOT CREATE REFUGEES

What is the natural and ordinary meaning of ‘refugee’ under the Refugee Convention? A refugee is none other than an asylum-seeker who satisfies the essential elements as laid down in article 1A(2). The UNHCR Handbook identifies ‘*well-founded fear of being persecuted*’ as the key phrase of the definition.<sup>30</sup> This well-founded fear of persecution ought to exist in the applicant’s frame of mind right from his or her country of origin prior to his entry or presence in the country of asylum. An asylum-seeker must enter the foreign country with a ‘well-founded fear of persecution’ as the only one motive with which refugee status is granted.<sup>31</sup>

There is no provision at all in the Refugee Convention to the effect that without or before the refugee status determination (RSD) of the State of refuge a person cannot be a refugee. The article merely says that ‘a person is a refugee’ on condition that the essential elements are satisfied. The refugee status determination would only be a formal process meant to assess, ascertain and confirm the refugee

---

<sup>29</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University press, 3rd edition, 2007), 37.

<sup>30</sup> UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, (Geneva: UNHCR, 1979, re-edited 1992) (hereafter *UNHCR Handbook*) para 37.

<sup>31</sup> *Ibid*, paras 37-50.

status of an asylum-seeker, who actually is already a refugee if the elements in the convention are satisfied.

Leading commentators such as Goodwin-Gill and McAdam support the above interpretation in these words: “a person becomes a refugee at the moment when he or she satisfies the definition, so that determination of status is declaratory, rather than constitutive.”<sup>32</sup> The declaratory nature of refugee status determination process is also clearly reflected in the following statement of Hathaway:

The acquisition of refugee rights under international law is not based on formal status recognition by a state or agency, but rather follows simply and automatically from the fact of substantive satisfaction of the refugee definition.<sup>33</sup>

Furthermore, UNHCR firmly upholds this view in its Handbook:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>34</sup>

Hence, the legal position that is clearly established is that asylum-seekers who fulfil the Convention requirements are Convention refugees and according to Hathaway, “in fact they are rights holders under international law, but are precluded from exercising their legal rights during the often protracted domestic processes by which their entitlement to protection is verified by officials.”<sup>35</sup> In the absence of the immediate assessment of status, the prospective State of refuge would be unable to implement its basic obligations under the Refugee

<sup>32</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 50.

<sup>33</sup> James C Hathaway, *The Rights of Refugees under International Law* (Cambridge: Cambridge University Press, 2005) 11.

<sup>34</sup> UNHCR *Handbook*, para 28; see Rhona K.M. Smith, *Texts and Materials on International Human Rights* (New York: Routledge, 2<sup>nd</sup> edition 2010), 610, acknowledging the high persuasive authority of the UNHCR Handbook; see also *INS v Cardoza Fonseca* 480 U.S. 421 (1987) at 439, as quoted in Joan Fitzpatrick, “The International Dimension of US Refugee Law,” *Berkeley Journal of International Law*, 15(1) (1997):1-26, at 13.

<sup>35</sup> Hathaway, *The Rights of Refugees*, 158.

Convention in good faith.<sup>36</sup> The following is the opinion of UNHCR in this respect:

Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-*refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.<sup>37</sup>

According to the UNHCR Executive Committee Conclusion No 22, ‘in the case of large-scale influx of asylum-seekers due to a generally recognized and clear-cut situation of persecution by the original State, there is no doubt that they are to be treated as refugees once they left their country of origin, the fundamental principle of non-*refoulement* – including non-rejection at the frontier – must be scrupulously observed.’<sup>38</sup>

The Conference of the Plenipotentiaries that adopted the Refugee Convention expressed the following hope:

The Convention will have value as an example exceeding its contractual scope wherein all nations will be guided by it in granting so far as possible to persons within their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.<sup>39</sup>

---

<sup>36</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2<sup>nd</sup> edition 1984), 119-120, stating that “to observe treaties in good faith or *pacta sunt servanda* is the most fundamental norm of treaty law.”

<sup>37</sup> UNHCR, “Note on International Protection,” UN Doc A/AC 96/815 (193), at para 11.

<sup>38</sup> UNHCR Executive Committee Conclusion No. 22 (1981). The consensus reached by the Committee in the course of its discussions is expressed in the form of Conclusions. Although not formally binding, they are relevant to the interpretation of the international protection regime. ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. See also Goodwin-Gill and McAdam, *Refugee in International Law*, 216.

<sup>39</sup> UNHCR *Handbook*, para 38.

## **THE INTERPRETATION OF ARTICLE 31: THE BENEFICIARIES ARE THOSE ASYLUM-SEEKERS WHO ILLEGALLY ENTERED**

The 1951 Refugee Convention is indeed underpinned by three fundamental principles, namely: non-discrimination, non-penalisation, and non-*refoulement*.<sup>40</sup> The second fundamental principle of non-penalisation can be found in article 31, which deals with ‘refugees unlawfully in the country of refuge’ and its first paragraph reads:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>41</sup>

It can be cogently argued that a reasonable construction of article 31(1) demonstrates clearly that “asylum seekers, who are coming directly from a territory where their life or freedom was threatened in the sense of article 1,” are addressed as refugees even though they entered the country of refuge illegally and due to illegal entry, their refugee status may not have been formally recognised by that State. It follows therefore, that this article cannot correctly be interpreted to have referred to refugees whose refugee status has already been regularised, but rather to asylum-seekers whose refugee status has not yet been formally determined. No doubt, this Article 31(1) depicts the true situation or circumstance in which asylum-seekers find themselves in foreign countries prior to determination of their refugee status and yet they are clearly referred to in the article as ‘refugees.’ Therefore, to exclude asylum-seekers from the ambit of these Articles will mean distorting the object and purpose of these articles unfairly and without any proper legal justification.

---

<sup>40</sup> *Introductory Note by the Office of the United Nations High Commissioner for Refugees to the Convention and Protocol relating to the Status of Refugees* (Geneva: UNHCR, Dec 2010) 3.

<sup>41</sup> 1951 Refugee Convention, art 31 (1).

Again, a critical appraisal of Article 31(1) demonstrates the following. Firstly, it is quite plausible that only asylum-seekers who, either before submitting their asylum applications or while waiting for the outcome of their refugee status determination (RSD), can be subjected to some restrictions or penalties as envisaged in subsection (2) of the said article and prohibited by subsection (1) of the same article. Secondly, it is also quite implausible that such prohibited measures or penalties could have been intended by the drafters to be imposed on refugees retrospectively after their refugee status was formally determined upon their illegal entry or presence in the territory of the State of asylum. Thirdly, it would certainly have been irrational on the part of the drafters of this Article 31 (1) to have referred to asylum-seekers as “refugees” if, in the first place, they did not intend to consider them to be refugees within the scope of the Refugee Convention before their refugee status was recognised. Fourthly and finally, it would be incompatible with the object and purpose of the Refugee Convention, if the very Refugee Convention and its Protocol could not impose obligations on State Parties to protect asylum-seekers before determination of their refugee status, knowing very well that there would be no refugees without asylum-seekers.

The English Court of Appeal reaffirmed this in the *Khaboka* case, holding that “a refugee is a refugee both before and after his claim for asylum as such may have been considered and accepted... It is a common sense and natural reading of article 31(1).”<sup>42</sup>

From the preceding analysis, it can be judiciously concluded that Article 31 was intended to protect asylum-seekers who, by nature of their situation and condition, usually enter foreign countries illegally for the sole purpose of seeking international protection therein. Hence the Refugee Convention could not be devoid of obligation being imposed on State Parties to respect the rights of asylum-seekers and to restrain from imposing penalties on them for their illegal entry or presence in the countries of refuge.<sup>43</sup> In other words, by analysing the

---

<sup>42</sup> *Khaboka v Secretary of State for the Home Department*, (1993] Imm AR 484 (Eng CA 25 Mar 1993).

<sup>43</sup> Guy Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention, and Protection,” in *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection*, ed. Erika Feller, Volker Turk and Frances Nicholson (Cambridge: Cambridge University Press, 2003), 188-193.

provisions of the Convention contextually and structurally, asylum-seekers automatically appear vividly in the text of the Convention as refugees while pending formal regularisation of their refugee status.<sup>44</sup> This can, indubitably, prove the notion wrong that asylum-seekers are not Convention refugees. It also tends to provide a good platform for rebutting the claim that international protection depends on the refugee status determination (RSD) at the discretion of the States of refuge.<sup>45</sup>

### **RIGHTS OF ASYLUM-SEEKERS WHO SATISFY THE REQUIREMENTS OF CONVENTION REFUGEES**

Hathaway appears to be strongly in support of the view that asylum-seekers who satisfy the requirements of Convention refugees are in fact ‘refugees.’ That is why the learned author refers to them with full confidence as ‘refugees’ and not as asylum-seekers.<sup>46</sup>

The Refugee Convention is structured in such a way that certain basic rights under the Convention are meant for those refugees who are physically present while a few more rights are added to those who are lawfully present, and more extensive rights are given to those who are lawfully staying, in the territory of the State of refuge.<sup>47</sup>

Once asylum-seekers cum refugees are at the border post, in the territorial waters, or anywhere within the jurisdiction and control of the potential State of refuge, they are *physically present*.<sup>48</sup> A refugee is *lawfully present* in the territory of the State of refuge, when his admission is authorized or his refugee status is being verified.<sup>49</sup> These two are the stages where asylum-seekers cum refugees have not yet

<sup>44</sup> Andreas Schloenhardt, “To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia,” *International Journal of Refugee Law* 14(2-3) (2002): 302.

<sup>45</sup> Mohammad Naqib Ishan Jan, “The Status of Refugees under International Law and *Shari’ah*: Parallels and Distinctive Features,” *Shari’ah Law Reports Articles* 2(2007): lviii.

<sup>46</sup> Hathaway, *The Rights of Refugees*, 278.

<sup>47</sup> Rights of refugees who are staying lawfully in the territory of the State of refuge are, for example, employment rights (arts 17 & 18); housing (art 21); labour law rights and social security (art 24); freedom of movement (art 26); travel documents (art 28); and freedom from expulsion (art 32).

<sup>48</sup> Hathaway, *The Rights of Refugees*, Chap 4 Rights of Refugees Physically Present, 278-656.

<sup>49</sup> *Ibid*, Chap 5 Rights of Refugees Lawfully Present, 657-729.

been formally recognised as refugees. A refugee is *lawfully staying* in the territory of the State of refuge when his presence in that state is on-going in practical terms, for example, he has been granted asylum as a consequence of formal recognition of refugee status.<sup>50</sup>

Those asylum-seekers cum refugees who are physically present are entitled to the following basic refugee rights:

- (i) Prohibition of return (*refoulement*);<sup>51</sup>
- (ii) No penalties for illegal entry and presence;<sup>52</sup>
- (iii) Freedom of religion;<sup>53</sup>
- (iv) Property rights;<sup>54</sup>
- (v) Access to courts;<sup>55</sup>
- (vi) Right to education.<sup>56</sup>

These rights of asylum-seekers cum refugees are to be respected by State parties to the Convention unless and until the determination of the refugee's claim to protection is unsuccessful. Of all these rights, the present study will focus only on 'prohibition of return (*refoulement*),' which is of crucial importance as far as asylum-seekers are concerned.

## ASYLUM-SEEKERS AND NON-REFOULEMENT

There is no doubt that asylum-seekers are entitled to basic human rights which are available to all human beings, such as the right to life and freedom from torture.<sup>57</sup> It is also evident from the above discussion that asylum-seekers whose refugee status has not yet been confirmed are also protected by the Refugee Convention in the sense that although they may not enjoy all the rights of refugees under the convention, they are in the minimum entitled to the protection of the principle of non-*refoulement*.

---

<sup>50</sup> Ibid, Chap 6 Rights of Refugees Lawfully Staying, 730-912.

<sup>51</sup> 1951 Refugee Convention, art 33.

<sup>52</sup> Ibid, art 31.

<sup>53</sup> Ibid, art 4.

<sup>54</sup> Ibid, art 13.

<sup>55</sup> Ibid, art 14.

<sup>56</sup> Ibid, art 22.

<sup>57</sup> Santhosh Persaud, "Protecting Refugees and Asylum Seekers under the ICCPR," *New Issues in Refugee Research*, Research Paper No 132, (Geneva: UNHCR, Nov 2006) 5, stating that international human rights law complement international refugee law.

The term *refoulement* is a derivative of the French *refouler*, which means ‘to drive back or to repel.’<sup>58</sup> The following is the prohibition of *refoulement* in Article 33 (1) of the Refugee Convention:

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.<sup>59</sup>

### **Who Are Entitled To Non-Refoulement?**

The principle of non-*refoulement* is applicable to both recognised refugees and refugees who have not had their refugee status formally recognised. This position has been approved by the Executive Committee of the UNHCR<sup>60</sup> and also by the UN General Assembly.<sup>61</sup> The latter category, that is refugees whose refugee status has not yet been formally recognised, primarily refers to asylum-seekers who fulfil the elements of refugee under the convention.

The principle of non-*refoulement*, therefore, is of particular relevance to asylum-seekers. As asylum-seekers who satisfy the requirements of a refugee can be regarded as refugees, they are protected by international refugee law and thus they should not be returned or expelled before determination of their status. The way the asylum-seeker comes within the territory or jurisdiction of the State is

---

<sup>58</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 201.

<sup>59</sup> 1951 Refugee Convention, art 31(1). Non-*refoulement* obligations can also be found in international human rights law. For example, article 3 of the Convention against Torture provides: “No State Party shall expel, return (‘*refouler*’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture;” the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec 1984, entered into force 26 Jun 1987, 1465 UNTS 85.

<sup>60</sup> See UNHCR Executive Committee Conclusion No. 6 (XXVIII) ‘Non-*refoulement*’ (1977), para (c), reaffirming “the fundamental importance of the principle of non-*refoulement* ... of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.” See also Conclusion No 79 (1996), No 81 (1997) and No 82 (1997).

<sup>61</sup> UN General Assembly Res 52/103 (12 December 1997) para 5.

not important. What is important is how the State of refuge responds once the asylum-seeker is within their jurisdiction. “If the asylum-seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution, then that is *refoulement* contrary to international law.”<sup>62</sup>

It is clear from the phrase ‘*in any manner whatsoever*,’ that the prohibition is applicable to any form of forcible removal, including non-admission at the border.<sup>63</sup> It also applies not only in respect of return to the country of origin but also to any other place where a person has any risk to his life or freedom on the basis of any of the grounds stated in the 1951 Convention.<sup>64</sup>

The principle does not guarantee an asylum-seeker to be granted asylum in a particular State.<sup>65</sup> What it does mean is that if the State of refuge does not want to grant asylum to asylum-seekers, that State needs to adopt a policy that will not return these asylum-seekers, directly or indirectly, to a territory where their lives or freedom would be in danger.<sup>66</sup> The essence of the principle, therefore, is that States are required to grant asylum-seekers at least access to the territory and to fair and efficient refugee status determination procedures.<sup>67</sup>

---

<sup>62</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 233.

<sup>63</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Geneva: UNHCR, 26 Jan 2007) para 7, accessed January 12, 2017 <http://www.unhcr.org/4d9486929.pdf>.

<sup>64</sup> See UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para 4. See also P Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (Cambridge: Cambridge University Press, 1995), 341.

<sup>65</sup> See Weis, *The Refugee Convention*, 342.

<sup>66</sup> See E Lauterpacht and D Bethlehem, “The Scope and Content of the Principle of Non-Refoulement: Opinion,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, ed. E. Feller, V. Türk and F. Nicholson, (Cambridge: Cambridge University Press, 2003), para 76.

<sup>67</sup> The 1951 Convention and the 1967 Protocol do not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element in the full and inclusive application of the 1951 Convention outside the context of mass influx situations. See UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5.

## Temporal and Territorial Scope of Non-*Refoulement*

The non-*refoulement* obligation arises once the asylum-seekers satisfy the criteria for refugee status provided for in the convention (in particular, when they are outside the country of origin on convention grounds) and find themselves within the territory or jurisdiction of another State, although their refugee status has not been formally recognized.<sup>68</sup>

The territorial jurisdiction of a State extends to its land territory (including internal waters), maritime territory (mainly the territorial sea) and territorial air space.<sup>69</sup> The prohibition of *refoulement* therefore, is unquestionably applicable to all asylum-seekers who are in its land territory (at the border check point, airport, or port) or with boats or in a ship in the territorial sea of a State. An interesting question is whether a failure to consider a request of protection of an asylum-seeker made in an international zone, say for example an international or transit area of an airport, would amount to rejection at the frontier. The answer appears to be in the affirmative as it was decided by the European Court of Human Rights in *Amuur v France*<sup>70</sup> that ‘despite its name, the international zone does not have extraterritorial status.’

## Extraterritorial Application of the Principle

State responsibility may arise from the acts or omissions of State organs (government officials) and its scope is not necessarily limited to the territorial limits of a State.<sup>71</sup> The rule that a state’s responsibility under international law extends beyond its physical territory is well established in international human rights law. According to article 2 of the International Covenant on Civil and Political Rights (ICCPR), for example, “each State Party to the present Covenant undertakes to respect and to ensure to all

---

<sup>68</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 244; UNHCR *Handbook*, para 28.

<sup>69</sup> Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law*, vol 1, Peace (Oxford: Oxford University Press, 9<sup>th</sup> ed, 1996), 572-74.

<sup>70</sup> *Amuur v France* (1996) 22 EHRR 533. In this case the ECHR decided that “France violated art 5 of the European Convention on Human Rights 1950 by detaining asylum seekers in the transit area of Paris-Orly Airport.”

<sup>71</sup> Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford: Oxford University Press, 1983), 150-51, 159-66.

individuals *within its territory* and *subject to its jurisdiction* the rights recognized in the present Covenant.” This is interpreted by the Human Rights Committee to mean that “the Covenant rights are applicable to ‘*anyone within the power or effective control*’ of that State Party, even if not situated within the territory of the State Party.... the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.”<sup>72</sup> The Committee is of the view that it is unreasonable to interpret article 2 as territorially constrained.<sup>73</sup>

Similarly, it was decided by the European Court of Human Rights (ECHR) that “the concept of jurisdiction in article 1 of the European Convention on Human Rights 1950 extends beyond Member States’ national territorial limits when acts of their authorities, whether performed within or outside national boundaries... produce ...effects outside their territory.”<sup>74</sup>

A careful perusal of the Refugee Convention demonstrates the fact that in most of its provisions rights of refugees are subject to their presence and lawful residence in the territory of the State of refuge. Article 33(1) nevertheless contains no such limitation. The principle of *non-refoulement*, therefore, is applicable even if the rejection or return occurs outside the national territory of a particular State.<sup>75</sup>

It can fairly be concluded that the principle of *non-refoulement* has extraterritorial effect and its application goes beyond the territory of a State and extends to the places where the State concerned can exercise jurisdiction and effective control. It would therefore be a violation of *non-refoulement* prohibition if a State returns or pushes away the asylum-seekers cum refugees who are in boats within the 12 nautical miles territorial sea or even if it conducts interdictions on the high seas (which amount to exercising *de facto* jurisdiction).

In stark contrast to the above interpretation of the human rights and refugee conventions, the United States Supreme Court in *Sale v*

---

<sup>72</sup> Human Rights Committee (HRC), General Comment No 31, adopted on 29 march 2004, para 10, CCPR/C/21/Rev.1/Add. 1326 May 2004.

<sup>73</sup> See *Lopez Burgos v Uruguay*, Comm No R 12/52, UN Doc A/36/40 (1981) para 12.3.

<sup>74</sup> *Loizidou v Turkey* (1995) 20 EHRR 90, para 62.

<sup>75</sup> E Lauterpacht and D Bethlehem, “Principle of Non-Refoulement,” para 67.

*Haitian Centers Council* decided that ‘Article 33(1) of the 1951 Convention was applicable only to persons who were within the territory of the United States, supporting the American Government policy of interdicting Haitians who were seeking protection on the high seas and returning them to Haiti.’<sup>76</sup> It was in fact against the strong position taken by UNHCR, acting as *amicus curiae* in that case, which held that “the judgment of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention” and that:

[T]he obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.<sup>77</sup>

The Inter-American Commission of Human Rights was fiercely critical of the above decision of the US Supreme Court and found that the United States was in breach of article 33(1).<sup>78</sup> The English Court of Appeal is also of the same view and concluded that ‘it is impermissible to return refugees from the high seas to their country of origin.’<sup>79</sup>

---

<sup>76</sup> *Sale, Acting Commissioner, Immigration and Naturalization Service, et al, Petitioners v. Haitian Centers Council, Inc, et al*, 509 US 155 (1993).

<sup>77</sup> *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations* (UNHCR), para 24.

<sup>78</sup> *Haitian Centre for Human Rights v United States*, Case 10.675, Report No 51/96, Int Am CHR Doc OEA/Ser L/V/II.95 Doc 7 rev (13 Mar 1997) para 156-8; see also Human Rights Committee, ‘Concluding Observations of the Human Rights Committee: United States of America, UN doc CCPR/C/79/Add 50 (6 Apr 1995) para 284.

<sup>79</sup> *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport*, [2003] EWCA Civ 666 (Eng CA, 29 May 2003) paras 34-35; cf Lord Hope’s opinion in the House of Lords: *R v Immigration Officer at Prague Airport et al, ex parte European Roma Rights Centre et al* [2004] UKHL 55 (UKHL 9 Dec 2004) para 68.

### **The Meaning of ‘Expel Or Return (*Refouler*)... In Any Manner Whatsoever’**

Article 33(1) commences with this: ‘no contracting State shall expel or return (*refouler*)...in any manner whatsoever.’ The term ‘expel’ may describe any measure, judicial, administration, or police, which secure the departure of an alien and by virtue of article 32 (the provision on expulsion of a refugee lawfully in the territory), it implies that expulsion is meant for refugees who lawfully enter and are resident of the State of refuge.<sup>80</sup> It appears that the drafters in fact intended the use of ‘return’ as an English equivalent to the original French term ‘*refouler*,’ which means drive back or repel. In that sense, it possibly refers to asylum-seekers, who are seeking entry or just entered the territory of the host State and whose refugee status has not yet been formalized.<sup>81</sup>

### **Does ‘Non-*Refoulement*’ Encompass Non-Rejection at the Frontier?**

What is meant by non-*refoulement*? Does it include the right to admission and non-rejection at the frontier? The views of commentators on the scope of non-*refoulement* under article 33 are divided. According to some commentators, article 33 is limited only to those asylum-seekers cum refugees who gained entry into or are present, legally or illegally, in the territory of the State in question and their presence in that country is *sine qua non* of the protection.<sup>82</sup> On the other hand, the other commentators are of the view that the principle of non-*refoulement* encompasses non-refusal of admission to a refugee at the border and further that the State concerned shall

---

<sup>80</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 206.

<sup>81</sup> See Fatima Khan ‘The Principle of Non-*Refoulement*,’ in *Refugee Law in South Africa*, ed. Fatima Khan and Tal Schreier (Cape Town: Juta & Co, 2014), 4-5.

<sup>82</sup> See, for example, Atle Grahl-Madsen, *Territorial Asylum*, 40; see also Nehemiah Robinson, *Convention Relating to the Status of Refugee, Its History, Contents, and Interpretation; A Commentary* (New York: Institute of Jewish Affairs, 1953) 163. Naqib is of the view that “This narrow interpretation attributed to Robinson, has been refuted by many writers later; see Mohammad Naqib Ishan Jan, “Asylum and Non-*Refoulement* in International Law: An Analysis,” *IJUM Law Journal*, 9(2) (2001): 117-142, at 132.

grant him at least temporary asylum,<sup>83</sup> or removal to a safe third country or some other solution such as temporary protection or refuge.

It may be that at the time when the Refugee Convention was adopted, the principle of *non-refoulement* was to be applied solely on the basis of treaty law and it did not encompass non-rejection at the frontier. Nevertheless, the contemporary status of the principle will depend on subsequent practice of States and international organizations since that time. It appears that over the years, the broader interpretation of *non-refoulement* has become established and that it applies to the moment at which asylum-seekers present themselves for entry, either within a State or at its border,<sup>84</sup> and thus it can fairly be concluded that the principle of *non-refoulement* now encompasses non-rejection at the frontier.<sup>85</sup>

### **Indirect or Constructive *Refoulement***

The effect of the phrase ‘in any manner whatsoever’ is that it prohibits direct as well as indirect expulsion or return of an asylum-seeker cum refugee to a persecuting State.<sup>86</sup> Indirect *refoulement* means returning by a State of a refugee to another State which subsequently returns him to a third State where the refugee has a well-founded fear of persecution on convention grounds.<sup>87</sup> The following is the decision of the House of Lords in this respect:

[F]or a country to return a refugee to a state from which he will then be returned by the government of that state to a territory where his life or freedom will be threatened will be as

---

<sup>83</sup> See P Weis, “Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees,” *British Yearbook of International Law* 30 (1953): 478, at 482-3; E Lauterpacht and D Bethlehem, “Principle of Non-Refoulement,” para 76; Mohammad Naqib Ishan Jan, “Asylum and Non-Refoulement,” 133.

<sup>84</sup> *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport (UNHCR Intervening)* [2005] UKHL 55, para 26 (Lord Bingham).

<sup>85</sup> Goodwin-Gill and McAdam, *Refugee in International Law*, 208.

<sup>86</sup> Alberto Achermann and Mario Gattiker, “Safe Third Countries: European Developments,” *International Journal of Refugee Law* 7 (1995): 19, at 26.

<sup>87</sup> Andrea Hadaway, “Safe Third Countries in Australian Refugee Law: *NAGV v Minister for Immigration & Multicultural Affairs*,” *Sydney Law Review* 27 (2005): 727, 732.

much a breach of Article 33 as if the first country had itself returned him there direct. This is the effect of Article 33.<sup>88</sup>

## THE PLIGHT OF ASYLUM-SEEKERS AND CONTEMPORARY STATE PRACTICE

The principle of non-*refoulement* has been incorporated in the Refugee Convention and its Protocol, the OAU Convention, and the American Convention on Human Rights. Its acceptance by the international community is so widespread and there is no doubt that it 'has acquired a normative character and constitutes a rule of customary international law,' binding also on non-party States.<sup>89</sup> No State questions the prohibition of *refoulement* under international law, but instead will go to great lengths to justify specific incidents of return as the application of normal immigration policies or that the persons involved are not genuine refugees.<sup>90</sup> Although the principle is well-established and accepted as a corner-stone of the international refugee law, compliance is not much encouraging. There have been frequent violations of the principle.<sup>91</sup> Hathaway has illustrated numerous instances of returns, push-backs, turn-back policies by the complete closure of borders, summary ejections at the borders, interdictions in international waters, and non-entry policies.<sup>92</sup> The present study will add to these with contemporary practices emphasising the non-compliance of States with non-*refoulement* obligation.

---

<sup>88</sup> *R (ex parte Adan) v Secretary of State for the Home Department* [2001] 2 WLR 143 (Lord Hobhouse).

<sup>89</sup> *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*, (Refworld: UNHCR, 31 Jan. 1994), accessed March 12, 2017 <http://www.refworld.org/docid/437b6db64.html>. See also Mohammad Naqib Ishan Jan, "Asylum and Non-Refoulement," 117-118; Robert C. Sexton, "Political Refugees, Non-Refoulement and State Practice: A Comparative Study" *Vand. J. Transnational L.* 18 (1985): 731, 733.

<sup>90</sup> See Goodwin-Gill and McAdam, *Refugee in International Law*, 228.

<sup>91</sup> *Ibid.*, 229.

<sup>92</sup> Hathaway, *The Rights of Refugees*, 279-300.

## The American Practice

The United States, the sole super power of the world, joined the international refugee regime by ratifying the 1967 Protocol in 1968 and passed the Refugee Act of 1980<sup>93</sup> for the purpose of implementing the Protocol. Since there is close resemblance between statutory language and that of the Protocol, naturally the expectations were high for the United States of America's compliance with international refugee law.<sup>94</sup>

Despite these promising signs, US domestic refugee law in many respects is not in line with the international regime, resulting in a serious denial of justice to many asylum-seekers.<sup>95</sup> Both the executive and the judiciary are not willing to give full legal effect to the Refugee Protocol. In *Stevic*,<sup>96</sup> for example, the Supreme Court decided to give preference to the test of 'clear probability' as established in the previous domestic law over 'well-founded fear of persecution,' as laid down in Refugee Protocol. Again, as stated earlier, in *Sale*<sup>97</sup> the US Supreme Court failed to honour the UNHCR's suggestion against following an erroneous narrow interpretation of the Protocol, which might create a bad example for other state parties.<sup>98</sup>

Furthermore, several attempts have been made in the United States to pass a law aimed at preventing asylum and resettlement of refugees in the United States particularly against asylum-seekers fleeing persecution from Syria and Iraq.<sup>99</sup> Although subsequent reports have shown that such attempts had failed in the past,<sup>100</sup> the efforts to thwart asylum-seekers' entry into the United States have continued. Another similar Bill has been introduced recently that if

---

<sup>93</sup> Refugee Act, Pub L No 96-212, 94 Stat 102.

<sup>94</sup> Fitzpatrick, "The International Dimension," 2.

<sup>95</sup> *Ibid*, 3.

<sup>96</sup> *INS v. Stevic*, 467 U.S. 407 (1984).

<sup>97</sup> *Sale v Haitian Centers Council* 509 U.S. 155 (1993).

<sup>98</sup> Fitzpatrick, "The International Dimension," 25. See also Kevin R Johnson, "Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum-Seekers," *Georgetown Immigration Law Journal* 7 (1993): 1.

<sup>99</sup> Brenda Bower Soder, *Human Rights First, Washington Week on Human Rights*: 23 Nov 2015 (the House of Representatives passing the American Safe Act), accessed February 22, 2017 <http://www.humanrightsfirst.org/blog/washington-week-human-rights-november-23-2015>.

<sup>100</sup> *Washington Week on Human Rights*: 1 Feb 2016.

enacted into law, will prevent the United States from granting asylum to many asylum-seekers fleeing persecution and even unfairly alter the refugee definition.<sup>101</sup>

Donald Trump, whose avowed aim is to crack down on asylum-seekers, issued an ‘Executive Order’ soon after his swearing in as the new American President, suspending the entry of more than 50,000 refugees in the year 2017, indefinitely stopping citizens of Syria, Libya, Iraq, Iran, Somalia, Yemen and Sudan from entering the U.S.<sup>102</sup> The extremely harsh Executive Order was challenged in courts and the implementation of it was halted by multiple federal courts decisions, prompting Trump to issue a new Executive Order that significantly softened the original one around the edges to avoid legal challenges.<sup>103</sup> Nonetheless, it is obvious that asylum-seekers would find unprecedented hardship in entry into the United States under the Trump regime.

### **The Australian Position on Asylum-seekers**

One of the most criticised countries around the world in terms of its refugee policies is Australia. This began with the Tampa incident in August 2001, when a sinking vessel gave a distress signal in the South Pacific. The M/V Tampa, a Norwegian vessel, came to its assistance, rescued more than 430 refugees, and set out to the Christmas Island, an Australian territory. The Tampa was not permitted by the Australian Government to enter Australian territory and the pleas of asylum-seekers for relief were also rejected by the Australian Government.<sup>104</sup>

After the Tampa Affair, the Australian government began a controversial policy commonly known as the ‘Pacific Solution.’

---

<sup>101</sup> Ibid, Mar 21, 2016.

<sup>102</sup> Donald Trump, “Executive Order, Protecting the Nation from Foreign Terrorist Entry into the United States,” The White House, January 27, 2017, accessed May 4, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>103</sup> Helen Klein Murillo, “Trump’s New Executive Order on Refugees and Immigrants: A Summary,” *Law Fare*, March 6, 2017, accessed May 4, 2017, <https://www.lawfareblog.com/trumps-new-executive-order-refugees-and-immigrants-summary>.

<sup>104</sup> See Janet Phillips and Harriet Spinks, “Boat Arrivals in Australia Since 1976,” Research Paper, Social Policy Section, Department of Parliamentary Services, Parliament of Australia (23 Jul 2013), 1.

According to this scheme, asylum-seekers who arrive in Australian territory by boat would be detained by Australian authorities and transferred to an appropriate Pacific country for the purpose of processing and reviewing their refugee claims according to their laws. Human rights activists rejected this ‘offshore processing’ mechanism and criticised it as incompatible with Australia’s non-*refoulement* obligation under international law. The Australian Government selected Papua New Guinea and Nauru for the purpose of the Pacific Solution. Detention centres were subsequently built in these island nations.<sup>105</sup>

Another controversial policy of the Australian Government was the refugee ‘swap’ scheme with Malaysia, known as the Malaysian Solution, in 2011. According to this scheme, Australia would send to Malaysia 800 asylum-seekers in exchange for Australia’s resettling 4,000 persons who were already recognized as genuine refugees. A number of human rights and refugee advocates from around the world criticized this scheme and it also met with legal challenges locally.<sup>106</sup> In *Plaintiff M70*, the High Court of Australia ruled against the refugee swap scheme and held that it was contrary to both Australian and international law. The following is a quotation from the decision:

Malaysia is not a party to the [1951] Convention. It does not recognise, or provide for the recognition of, refugees in its domestic law. It therefore does not provide any procedures for the determination of claims to refugee status...Malaysia does not bind itself, in its immigration legislation, to *non-refoulement*.<sup>107</sup>

When the refugee swap scheme with Malaysia failed, the Australian government decided to revive the Pacific Solution by re-opening refugee processing centres in Nauru and Papua New Guinea.<sup>108</sup> These so-called refugee processing centres are in fact

---

<sup>105</sup> Jared L. Lacertosa, “Unfriendly Shores: An Examination of Australia’s ‘Pacific Solution’ under International Law,” *Brooklyn Journal of International Law* 40(1) (2014): 321-356, 331.

<sup>106</sup> Bonnie Malkin, “Australia’s ‘Malaysia Solution’ Blocked by High Court,” *Telegraph*, 31 Aug 2011.

<sup>107</sup> *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, para 249 (Australia).

<sup>108</sup> See Government of Australia, *Report of the Expert Panel on Asylum Seekers* (Aug 2012) 16, accessed February 23, 2017

detention centres, wherein “asylum-seekers are subject to horrid living conditions, high levels of violence, prolonged detention, and inability to access a legal system to challenge their detentions. The conditions in these detention centres are human rights catastrophes.”<sup>109</sup> In any case, if the Australian Government transfers asylum-seekers to a place where they could be persecuted or face violence, it would clearly violate the obligation of *non-refoulement*.<sup>110</sup>

## THE TRAGEDY OF THE ROHINGYA

In another part of the world, the plight of the Rohingya from Myanmar, regarded by many as the most persecuted people of the world,<sup>111</sup> is another unprecedented sorrow.<sup>112</sup> From January to March 2015 alone, around 25,000 Rohingya people have braved dangerous seas to reach Malaysia, Indonesia and Thailand through the Bay of Bengal and hundreds have lost their lives. The boats that these Rohingya asylum-seekers voyage on are barely stocked with clean water and food and many die of dehydration even before reaching the shores. The Rohingya people were packed in the boats like sardines, and any person seen to be weak and close to collapse is sometimes thrown off the boat to spare some room.

However, their journey does not end when they reach the shores. Malnourished women, children and men who have finally reached the shores of Indonesia, Malaysia, Thailand and other coastal ports are

---

[http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf).

<sup>109</sup> See, Amnesty International Australia, “This is breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea,” (11 Dec 2013) 36–45.

<sup>110</sup> Exposing a transferee to violence would violate the Convention. See generally, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations* (UNHCR), 2–6; see also Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (Oxford: Oxford University Press, 2011), 1111; Lacertosa, “Unfriendly Shores,” 345.

<sup>111</sup> Amie Hamling, “Rohingya People: the Most Persecuted Refugees in the World,” (Amnesty International Australia, 7 October 2015), accessed February 16, 2017, <http://www.amnesty.org.au/refugees/comments/35290/>.

<sup>112</sup> For a detailed analysis of the Rohingya issue, see Imtiaz Ahmed, “The Rohingyas: From Stateless to Refugee,” Accessed February 24, 2017, [http://www.mcrg.ac.in/WC\\_2015/Reading/D\\_stateless\\_Refugee.pdf](http://www.mcrg.ac.in/WC_2015/Reading/D_stateless_Refugee.pdf).

either denied entry, or are detained. In the worst case, they are sold to human traffickers to enter the sex trade. The asylum-seekers made their first stop in Thailand where traffickers held them until they could collect ‘ransom’ money from relatives. The asylum-seekers could continue onward, usually to Malaysia, only after the ‘ransom’ was paid. However, a heavy state crackdown on human traffickers has disrupted this profitable enterprise. This forces traffickers, who are afraid of being arrested by the authorities, to abandon boats filled with hundreds of Rohingya and Bangladeshi asylum-seekers offshore. Closed borders and a heavy state crackdown on human trafficking thus have left thousands of Rohingya in the open sea.<sup>113</sup>

In Myanmar, the new civilian government has been trying to resolve the Rohingya problem by setting up a ‘Commission on Rakhine State,’ chaired by Kofi Annan, the former Secretary General of the United Nations, with the objective of recommending ‘lasting solutions to complex and delicate issues’ between the two communities.<sup>114</sup> However, the Rohingya problem has gone from bad to worse recently due to the crackdown by the military in Northern Rakhine State after alleged attacks by armed militants on police stations in October 2016.<sup>115</sup> It is estimated that:

74,000 Rohingyas have crossed over the border into Bangladesh. Most of the new arrivals to Bangladesh are living in makeshift shelters outside two United Nations-administered refugee camps,

---

<sup>113</sup> Euan McKirdy and Saima Mohsin, “Lost at Sea, Unwanted: The Plight of Myanmar’s Rohingya ‘Boat People,’” *CNN News*, 20 May 2015, accessed February 24, 2017, <http://edition.cnn.com/2015/05/19/asia/rohingya-refugee-ships-explainer/>.

<sup>114</sup> “Forming Advisory Commission on Rakhine State to Solve Delicate Matters,” *The Mirror Daily*, 24 Aug 2016, 1; “Setting up Advisory Commission on Rakhine State Chaired by Kofi Annan Former UNSG and Noble Laureate,” *Myanma Alinn Daily*, 24 Aug 2016, 1; Esia Sarai, “Kofi Anna to Lead Commission on Myanmar’s Rakhine State,” *VOA*, 24- Aug 2016; “Kofi Annan to Chair Advisory Commission on Rakhine State” Kofi Annan Foundation, Geneva, 24 Aug 2016.

<sup>115</sup> See the Resolution of the UN Human Rights Council to dispatch urgently an independent International Fact-Finding Mission, to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State. *UN HRC Resolution A/HRC/RES/34/22*, 24 March 2017.

along with hundreds of thousands of other Rohingyas who were already there after fleeing previous spates of violence.<sup>116</sup>

Due to the recent large influx of new asylum-seekers from Myanmar, the Bangladeshi government has asked the Myanmar government to take them back and also has made plans to have them transferred to Thengar Char, an island in the Bay of Bengal that is lashed by high tides year-round and submerged during the monsoon season. The suggestion that they be moved to the largely uninhabitable marshland several hours by boat from the mainland drew criticism from around the world<sup>117</sup> and it is doubtful whether Bangladesh is complying with its non-*refoulement* obligation.

## THE ISSUE OF SYRIAN ASYLUM-SEEKERS

The pain and suffering of asylum-seekers is true and real.<sup>118</sup> If one looks at the Syrian Arab Republic alone, it is currently faced with the world's largest refugee crisis. Syrian refugees are in dire need of life-saving humanitarian assistance and international protection.<sup>119</sup> A half of the country's population has been forcefully uprooted from their homes. About 4.7 million Syrians are languishing in neighbouring countries (mainly Turkey, Lebanon, Jordan, and Iraq) where over a half of these are children.<sup>120</sup>

Over the past year, around 1 million people have crossed the narrow straits between Turkey and Greece to claim asylum in Europe. Hundreds of thousands of Syrian asylum-seekers attempted the dangerous trip across the Mediterranean Sea from Turkey to Greece,

---

<sup>116</sup> Rebecca Wright, "The 'Silence Crisis' of Rohingya Refugees in Bangladesh," *CNN News*, April 19, 2017.

<sup>117</sup> Maher Satter, "Rohingya Refugees in Bangladesh to Be Relocated to Remote Island," *The New York Times*, January 31, 2017, accessed May 3, 2017, <https://www.nytimes.com/2017/01/31/world/asia/rohingya-refugees-bangladesh.html>.

<sup>118</sup> *Global Trends – Forced Displacement in 2015*, 2.

<sup>119</sup> *3RP Regional Progress Report* (Jun 2015), 3 RP - Regional, Refugee & Resilience Plan (2015-2016): in Response to the Syria Crisis, 2-4. Accessed February 25, 2017, <http://www.3rpsyriacrisis.org/wp-content/uploads/2015/06/3RP-Progress-Report.pdf>. See also *Global Trends – Forced Displacement in 2015*, 8.

<sup>120</sup> "Quick Facts: What You Need to Know about the Syria Crisis," *Mercy Corps*, 16 Jun 2016.

hoping to find a better future in Europe. Not all of them made it across alive. Those who did make it to Greece still faced steep challenges - resources are strained by the influx, services are minimal and much of the route into Western Europe has been closed. These asylum-seekers are being detained in refugee detention centres in Greece pending their return to Turkey in accordance with a new controversial agreement signed between the European Union and Turkey in Brussels on 18 March 2016.<sup>121</sup> To do this, the EU has deemed Turkey a safe country for refugees, a decision strongly contested by rights groups as Turkey is not a full signatory to the Refugee Convention.<sup>122</sup>

The UNHCR, Medecins Sans Frontieres (MSF), International Rescue Committee and the Norwegian Refugee Council have strongly rejected this agreement and categorically refused to be involved in the mass expulsion of asylum-seekers in contravention of international law.<sup>123</sup> This agreement allows the European Member States to *refouler* (return) refugees to Turkey in violation of international refugee law which is predicated on the fundamental principle of *non-refoulement*, the principle which has become a rule of customary international law binding on all States.<sup>124</sup> These undeniable facts depict the general picture with regard to the vulnerability and languishment of asylum-seekers worldwide.

## RECOMMENDATIONS AND CONCLUSION

The time when asylum-seekers cum refugees suffer most is after fleeing their own country and before they are properly regularised as refugees by the country of refuge. This is the time when they are most helpless and exposed because of the mistaken argument by the would-be States of refuge that they are not yet convention refugees and are

---

<sup>121</sup> *Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey*, (UNHCR), Accessed April 26, 2017, <http://www.unhcr.org/56f3ec5a9.pdf>.

<sup>122</sup> "Refugee Crisis: Boats Arrive in Greece Despite EU-Deal," *Aljazeera*, 20 Mar 2016, accessed April 30, 2017, <http://www.aljazeera.com/news/2016/03/refugee-crisis-boats-arrive-greece-eu-turkey-deal-160320044556614.html>.

<sup>123</sup> Patrick Kingsley, "Refugee Crisis: Key Aid Agencies Refuse Any Role in Mass Expulsion," *The Guardian* (Wednesday 23 Mar 2016).

<sup>124</sup> *Hirsi Jamaa and Others v Italy* (ECtHR, Grand Chamber, Application No.27765/09) Judgment (23 Feb 2012) 7.

thus unprotected by international refugee law. The present study has argued that although they are called ‘asylum-seekers’ in layman terms, they are in fact refugees if they fulfil the constituent elements of a refugee as defined in article 1A(2) of the Refugee Convention. Once they flee their own country for fear of persecution, they are entitled to protection, most notably against *refoulement*, under international refugee law.

Although in principle there is no doubt that asylum-seekers who flee their own country for fear of persecution are in the minimum protected against *refoulement*, in practice many States are not complying with this. These asylum-seekers are refused entry at the border, their boats are driven away from the waters of the would-be State of refuge, exposing them to calamities of the seas, hunger and death, and they are forced to go to unsafe third countries. The present world is replete with tragic accounts of deaths and sufferings of thousands of asylum-seekers.

What can we do to resolve this humanitarian disaster? Is it because the law is inadequate or because there is a lack of effective implementation or enforcement? It is probably due to both. The Refugee Convention, which was drafted on the basis of the situation at the time of the Second World War, is simply outdated to apply to the complicated 21<sup>st</sup> century refugee situations. What makes the matter worse is that there is no explicit provision to protect asylum-seekers before their formal recognition as refugees. The preferred solution is to amend the Refugee Convention by including a specific obligation imposing on all parties to protect asylum-seekers prior to their refugee status recognition. To overhaul the entire convention at this moment would be unwise due to the fact that even the present convention was the result of hard negotiations taking into consideration the reluctance of States to surrender their sovereign right to grant asylum.<sup>125</sup> On the other hand, it is also recommended that UNHCR has to keep up with its good work of adopting a comprehensive Handbook and Executive Committee conclusions to fill in the gaps in the law in respect of the protection of yet to be

---

<sup>125</sup> Goldenziel has suggested to adopt a new convention on displaced persons, which would supplement, not supplant, the Refugee Convention. See Goldenziel, J. “Displaced: A Proposal for an International Agreement to Protect Refugees, Migrants and States” *Berkeley Journal of International Law*, 35 (1) (2017): 47-89, 47.

recognized asylum-seekers' rights. Nevertheless, States tend to disregard them.

Another flaw in the system is lack of law determination and law enforcement machinery. Here again it is understandable as refugee law is part of human rights law and the international community is not yet prepared to establish even an international human rights court. For the time being, instead of changing the law and developing an effective enforcement machinery at the international level, we can start small and do our best to adopt better refugee conventions and enforcement mechanisms at the regional level where reaching consensus is much easier.<sup>126</sup>

Asylum-seekers are human beings like all of us and there are suggestions that for the cause of humanity, States should be magnanimous, cooperate fully and share the burden. However, it is easier said than done. Why are States so reluctant to take responsibility for refugees who are begging for help at their door steps? 'Taking responsibility for refugees means additional economic as well as social load for a country, such as competition in employment, business and also cultural considerations.'<sup>127</sup> It is indeed a heavy responsibility in particular, for a small and poor country.

The best solution for the long term, therefore, would be to tackle the root causes of the refugee problem, namely: the underlying armed conflicts and protracted civil wars, totalitarian or dictatorial regimes, and racial and religious discrimination and intolerances.<sup>128</sup> In Myanmar, for example, the influx of asylum-seekers to neighbouring countries like Thailand and China is due to more than sixty years of protracted civil war (probably the longest ever in the world), and the same to Bangladesh and Malaysia is on account of racial and religious discrimination against the Rohingya and Muslim minorities. Without first tackling these underlying causes, the refugee problem can never

---

<sup>126</sup> See, for example, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 Sep 1969, entered into force 20 Jun 1974, enlarging the definition of refugee (art I.2) and adding 'rejecting at the frontier' as one of the prohibited things for would-be State of refuge. (art II.3).

<sup>127</sup> Ibid. Christina Boswell, *The Ethics of Refugee Policy* (Aldershot: Ashgate Publishing Ltd, 2005) 3.

<sup>128</sup> See, for example, Astri Suhrke, "Global Refugee Movements and Strategies of Response," in *U.S. Immigration and Refugee Policy: Global and Domestic Issues*, ed. Mary M. Kritz, (Mass: Lexington Books, 1983), 157-174.

be solved.<sup>129</sup> Since the underlying causes are too complicated, intertwined with sensitive racial and religious intolerance and hatred, it will need ample time and effective strategy to cure all these.

The Syrian refugee crisis is due to multi-faceted causes, including protracted civil war, the basis of which was politico-religious, involvement of various terrorist groups with conflicting ideologies and active intervention of foreign countries with vested interest. The Big Powers should refrain from playing power politics for their own national interests and should sincerely strive to stop the most devastating civil war of the present times. Several attempts had been made to broker ceasefires in Syria but to date all of them have collapsed.<sup>130</sup> The fourth and the most recent ceasefire attempt was made on 4 May 2017 on the basis of an agreement signed by Russia, Turkey and Iran in Astana, which came into effect on 6 May 2017.<sup>131</sup> The outcome of these efforts and how effective the ceasefire would be remain yet to be seen, given the fact that some rebel groups have rejected it.

---

<sup>129</sup> The new civilian government of Aung San Su Kyi is working hard to achieve peace agreement with the various ethnic armed rebels in the Union Peace Conference (21<sup>st</sup> Century Panglong), the 2<sup>nd</sup> Session of which was held recently on 24 to 29 of May 2017, to end the long protracted civil war. See “Union Peace Conference (21<sup>st</sup> Century Panglong) Successfully Held,” *The Mirror Daily*, 30 May 2017, 1.

<sup>130</sup> ‘Syria’s Civil war; US and Russia Clinch Ceasefire Deal,’ *Al Jazeera News*, 11 Sep 2016.

<sup>131</sup> Anne Barnard & Rick, “Russia Reaches Deal for Safe Zones But Some Rebels Scoff,” *The New York Times*, 4 May 2017.