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Democratisation

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The Extra-Territorial Applicability of the Principle of Non-Refoulement and Its Interception with Human Rights Law

Shishir Lamichhane*

Abstract

The varying nature in treatment of refugees before and after the cold war is quite observable from the perspective of the ideological differences. The interest of asylum seekers was hardly promoted and protected in the absence of uniform state practices. It was further more affected because of non-reconciliation of the principle of non-refoulement and right of individuals to seek asylum. The paper talks about the challenges of the European Countries in framing policies and mechanisms to address the dysfunctionality of the refugee system. The paper further discusses the significance of international instruments and the extraterritorial application of those instruments along with mechanisms to address the problem of the refugees. The paper emphasizes on the duty of the states to take steps to ensure that the refugees must have 'protection somewhere' adhering to the principle of sharing burden/responsibility and to have a greater solidarity among the states.

Introduction

Until before the end of the Cold War, the refugee regime fairly served the interest of the European states, giving an international imprimatur to the sheltering of the enemies of those states' ideological adversaries¹. Marked by its end, as the asylum seekers lost their 'ideological values'², B.S. Chimni points out that the humanitarianism developed as an ideology in the global North in order to serve

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¹ See generally James C. Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950', vol. 33, no. 2, *Int'l & Comparative L. Quarterly*, 1984, p. 348; See AtleGrahlmadsen, 'The European Tradition of Asylum and the Development of Refugee Law', vol. 3, no. 3, *J. Peace Research*, 1966, p. 278; B. S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', vol. 11, no. 4, *Journal Refugee Studies*, 1998, p. 350; Matthew J. Gibney & Randall Hansen, 'Asylum Policy in the West: Past Trends, Future Possibilities', U.N. University Discussion Paper No. 2003/68, 2003.

² Chimni (n 1), p. 351 ("...once the Cold War ended, the need to maintain the stability of the international refugee law regime was not a priority with States which had won it. Indeed, its dismantling assumed relative urgency since the refugee no longer possessed ideological or geopolitical value").

the interests of the hegemonic states³. Now, these interest serving strategies include stricter border controls, dense visa requirements with arm-length interception and interdiction of asylum seekers⁴. Though theoretically it seems very simple to solve the growth in divergent state practices, such actions have led the viability of universal refugee protection systems to suffer severely.

Furthermore, in the absence of an immediate co-relation between the principle of *non-refoulement*, which is considered to be the cornerstone of international refugee protection regime,⁵ and the right of every individual to seek asylum,⁶ the resulting divide has placed. However, to some extent, it limits on what states can lawfully do,⁷ but it also has- to a larger extent- given a way for states to adopt severe measures of immigration control, often beyond the scope of checks for possible violations of the principle of *non-refoulement*.⁸ As a result, only seldom are the refugees able to present themselves to the authorities of the asylum state. In fact, a substantial number of asylum seekers make their claims after actually entering the territory of the asylum state.⁹

These measures of immigration controls have increasingly sought externalisation and containment in empty spaces of the global south¹⁰. Interestingly, newer models of refugee protection emerged to further their agendas of externalisation of the refugee protection system. More particularly, the notions of safe country¹¹

³ B. S. Chimni, 'Globalisation, Humanitarianism and the Erosion of Refugee Protection', RSC Working Paper No. 3, Refugee Studies Centre, 2000.

⁴ See generally James C. Hathaway & Thomas Gammeltoft-Hansen, 'Non-refoulement in a World of Cooperative Deterrence', vol. 53, *Columbia J. of Transnational L.*, p. 237, 2015, pp. 237-284.

⁵ See Guy S. Goodwin-Gill, *The Refugees in International Law*, Oxford University Press, 1996, p. 118.

⁶ Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-refoulement', vol. 23, no. 3, *Int'l J. of Refugee L.*, 2011, p. 144.

⁷ Ibid.

⁸ In the present day crisis, states have been engaged in intercepting refugees or repatriating them from well beyond their territories. This has created more challenges for independent investigation agencies to investigate into the reality of the incident. One good example of such an event is that of the possible violations of the rights of the asylum seekers and refugees in the off shore processing camps set out by Australia, where Australia itself carried out the investigation process, which was not considered to be reliable by many agencies.

⁹ Thomas Gammeltoft-Hansen, 'The Extra-Territorialization of Asylum and the Advent of "Protection Lite"', DIIS Working Paper Series Paper No. 2007/2, Danish Institute for International Studies, 2001, p. 1.

¹⁰ Chimni (n 3), p. 10.

¹¹ Safe Country is a notion that primarily developed in the European Union and forms a vital part of its asylum system. In practice, the safe country notion has been operating in two ways: Safe Third Country and the First Country of Asylum. Within the framework of the EU Laws, safe third country means the safe third country is the concept that Member States may send applicants to third countries with which the applicant has a connection, such that it would be reasonable for him/her to go there, and in which the possibility exists to request refugee status and if s/he is found to be a refugee, it must be possible for him/her to receive protection in accordance with the 1951 Convention. In that third country, the applicant must not be at risk of persecution, *refoulement* or treatment in violation of Article 3 of ECHR. While the first country of asylum concept denotes the country where the asylum seeker first stayed for a period of time (specified by the statute) and where the asylum seeker could have applied for protection. However, in practice, with regard to the 'first country of asylum' concept, the cases audited showed that the designation of a country as a safe country of asylum is made on an

and Internal Flight Alternative (“IFA”),¹² that sought the “protection elsewhere”¹³ for the refugees, as James Hathaway and Michelle Foster write, played a major role in justifying the negative assessment of refugee status.¹⁴

These policies are characteristics of what Hathaway calls *Non-Entrée* policies that refer to the array of policies adopted by states to stymie access by refugees to their territories.¹⁵ Moreover, these mechanisms have been proved highly effective with the developed world today by protecting less than 20% of the world’s refugee population¹⁶ but having no binding duty in place to share the costs of refugee protection in the less developed world and more or less to resettle them in their own countries.

The current surge in migration to the European Union (“EU”) has largely demonstrated the dysfunctionality of the refugee system. This surge, as many opine, should be the most challenging and complex issue that the Europe is facing after the Second World War.¹⁷ However, the issue or its causes are not unique, but the situation created by a mass influx in the EU borders has left the EU countries with challenges regarding framing a proper policy and formulating proper response mechanism. Unfortunately, the developed states failed in several instances to come to a ground of solidarity to resolve the crisis.¹⁸

individual basis taking into account the particular applicant. See UN High Commissioner for Refugees (UNHCR), ‘Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations’, 2010, p. 60.

¹² See generally James C. Hathaway & Michelle Foster, ‘Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination’ in E. Feller (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection*, UNHCR, 2003, pp. 357-417.

¹³ See generally Savitri Taylor, ‘Protection Elsewhere/Nowhere’, vol. 18, no. 2, *Int’l J. of Refugee L.* p. 283, 2006, pp. 283-312.

¹⁴ Hathaway & Foster (n 12), p. 360.

¹⁵ See generally James C. Hathaway, ‘The Emerging Policies of Non-Entrée’, vol. 91, *Refugees*, 1992, pp. 41-42.

¹⁶ Volker Türk, the Director of International Protection (UNHCR), in the 60th Meeting of the Standing Committee Agenda item 2: International Protection (1 July 2014) stated that the developing countries were hosting 86% of the world’s refugees at the end of 2013.

¹⁷ Victoria Metcalfe-Hough, ‘The Migration Crisis? Facts, Challenges and Possible Solutions’, 2015, p. 2, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/...files/9913.pdf>; European Commission, ‘ECHO Factsheet: Syrian Refugees’, May, 2016, p. 1; OECD, ‘Is this Humanitarian Migration Crisis Different?’, no. 7, *Migration Policy Debates*, 2015, p. 1; Charlotte Alfred, ‘What History Can Teach Us About the Worst Refugee Crisis Since World War II’, *The Huffington Post* (September 15, 2015), available at http://www.huffingtonpost.com/entry/alexander-betts-refugees-wwii_us_55f30f7ce4b077ca094edaec, accessed on 21 September 2017.

¹⁸ States like Greece and Italy at the frontline of refugee arrivals and some of the destination countries at far north like Germany are at dismay with the lack of solidarity in the EU about sharing the responsibility towards refugees. Following this, there had been, however, a response from Germany to no longer apply the Dublin Regulations. See European Union: Council of the European Union, Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June

Furthermore, the European states have engaged in an act of tightening their borders, creating a difficult situation for asylum seekers to access their territories. These restrictive policies have also been observed to the extent of high seas and in the sovereign areas of third countries where operations have been carried out to keep the migrants from coming to their territories and even off from their borders.¹⁹ This was more vividly observed in the deployment of North Atlantic Treaty Organization's ("NATO") forces alongside EU's border management agency Frontex to deal with the refugee crisis in a way to tackle the so-called human smuggling²⁰ and trafficking trade, which received wide criticisms from rights activists.²¹

More disappointingly, the more resourceful states, who agreed at the first place to be obliged by the principles enshrined in the 1951 Convention relating to the Status of Refugees ("Refugee Convention"), are now searching for opportunities to reinforce their border controls even in the wake of the refugee crisis. Having said that, interestingly, states have never denied to their obligations under the Refugee Convention but have argued on its limitations or either invoked the Exception Clause or Jurisdictional Clause, particularly in the case of the application of the principle of *non-refoulement*, the cornerstone principle of refugee

2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013; Mathew Holehouse, 'Germany Drops EU Rules to Allow in Syrian Refugees', *The Telegraph* (August 24, 2015), available at <http://www.telegraph.co.uk/news/worldnews/europe/germany/11821822/Germany-drops-EU-rules-to-allow-in-Syrian-refugees.html>;

A. Rangarajan, 'Different Refugees, Different Responses', *The Hindu* (September 3, 2016), available at

<http://www.thehindu.com/features/magazine/a-rangarajan-looks-back-at-a-time-when-european-refugees-sought-refuge-in-west-asia/article9069730.ece>

(The Slovakian government has even made a manifestly macabre announcement that it will only take in Christian refugees, and that only in very small numbers. Poland's right-wing government too has been unwelcoming); Charlotte England, 'EUNations must not refuse Muslim Refugees, Angela Merkel Says', *The Independent*, August 29, 2016, available at <http://www.independent.co.uk/news/world/europe/refugee-crisis-eu-europe-angela-merkel-muslim-refugees-migrants-asylum-seekers-a7214791.html>, accessed on 21 September 2017.

¹⁹ North Atlantic Treaty Organization (NATO), 'NATO Summit Guide, Warsaw, 8-9 July, 2016', 2016, p. 4 (Under Co-operation with the EU Section, NATO presents its intention to work together with the EU in dealing with the refugee crisis in line with its security challenges to the EU); S. Schmidt & Sewell Chan, 'NATO Will Send Ships to Aegean Sea to Deter Human Trafficking', *NY Times*, February 11, 2016, available at <http://www.nytimes.com/2016/02/12/world/europe/nato-aegean-migrant-crisis.html>; Rajeev Syal & Helena Smith, 'Migrant Crisis: UK to Join NATO Refugee Patrols in Aegean', *The Guardian*, March 7, 2016, available at <https://www.theguardian.com/world/2016/mar/07/uk-military-to-join-nato-refugee-patrols-in-aegean>, accessed on 21 September 2017.

²⁰ See Alexander Betts, 'Forget the 'War on Smuggling' We Need to be Helping Refugees in Need', *The Telegraph*, 25 April, 2015, available at <https://www.theguardian.com/commentisfree/2015/apr/25/war-on-trafficking-wrong-way-to-tackle-crisis-of-migrant-deaths> (...smuggling does not cause migration; it responds to an underlying demand. Criminalising the smugglers serves as a convenient scapegoat, but it cannot solve the problem. Rather like a "war on drugs", it will simply displace the problem, increase prices, introduce ever less scrupulous market entrants and make the journey more perilous), accessed on 21 September 2017.

²¹ Nicolas De Torrenté, 'Humanitarian NGOs Must not Ally with Military', *MSF*, May 1, 2016, available at <http://www.doctorswithoutborders.org/news-stories/op-ed/humanitarian-ngos-must-not-ally-military>, 21 September 2017.

protection. The paper therefore, in the first section, explores the extra-territorial applicability of the principle of *non-refoulement* (the aspect which many states deny or either defend their actions against). The interception of international human rights laws and international refugee law are discussed in the third section as the principle has found its source and jurisprudential development in wider sense through the international human rights regime in the recent times.

I. Human Rights Origin of the Principle of Non-Refoulement

A. Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

At the universal level, the development of the international protection of human rights later broadened the scope of the application of *non-refoulement*, whereby the principle grew beyond the narrow framework of international refugee law. An explicit *non-refoulement* provision is provided under the United Nation's Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment ("CAT"), in a general human rights context.²² Article 3 of the Convention provides that:

No State shall expel, return 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. 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 violation of human rights.

The Committee against Torture, enabled to examine individual's claims, extended its protection to prohibit the expulsion of a person to any state from which he or she may subsequently be expelled to a third state where he or she may face torture.²³ The prohibition of torture, moreover, is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*.²⁴ It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture, which is binding on all States, including those which have not become party to the relevant instruments.²⁵

B. International Covenant on Civil and Political Rights

²² *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984, art. 3.

²³ Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law', vol. 20, no. 3, *Int'l J. of Refugee L.*, 2008, p. 378.

²⁴ See generally Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law', vol. 15, *European J. of Int'l L.*, p. 97, 2004.

²⁵ UN High Commissioner for Refugees (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, para 21.

Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) reads:

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.

In an interpretation of the Article by the Human Rights Committee, entitled with monitoring the implementation of the Convention and to include *non-refoulement* component, the Committee stated in its General Comment No. 20 (1992), as follows:²⁶

States parties must not expose individuals to the danger of torture or cruel, inhumane or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.

The scope of Article 7 is wider than that of Article 3 of CAT, as Article 7 especially incorporates cruel, inhuman and degrading treatments into its non-derogable provisions,²⁷ while CAT is sometimes criticised for failing to do so.²⁸

Widening the convention’s prohibition on *refoulement*, in the case of *Kindler v. Canada*, the Human Rights Committee suggested that if a State party extradites a person within its jurisdiction in circumstances, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction. The State party itself may be in violation of the Covenant.²⁹ This move by the Committee was in reference to the Second Optional Protocol of the ICCPR, which explicitly outlaws the death penalty.³⁰

C. European Convention for the Protection of Human Rights and Fundamental Freedom

At a regional level, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) states that:

‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

In 1965, the Parliamentary Assembly of the Council of Europe affirmed that Article 3, by prohibiting inhuman treatment, binds contracting parties not to return refugees to a country where their lives or freedom would be threatened.³¹

²⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 9.

²⁷ Duffy (n 23), p. 381.

²⁸ Ibid, p. 380.

²⁹ *Kindler v. Canada* (1993), CCPR/C/48/D/470/1991, UN Commission on Human Rights, para 13.

³⁰ Duffy (n 23), p. 82; See also *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, A/RES/44/128, adopted on 15 December 1989, art. 1(1) (Providing that, “[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed.”).

³¹ Duffy (n 23), p. 378.

But, unlike the non-*refoulement* protection of Article 33 of the Refugee Convention, Article 3 of ECHR and earlier discussed Article 3 of CAT and Article 7 of ICCPR are not subject to exception.³²

There is growing consensus in the area of human rights that Article 3 of ECHR offers individuals more protection from *refoulement* than Article 33 of the Refugee Convention.³³ In the 1996 *Chahal* judgment, the European Court of Human Rights- (“European Court”) while upholding the absolute and non-derogable nature of Article 3,³⁴- also concluded that Article 3 of the Convention has a wider scope than Article 33 of the Refugee Convention.³⁵ The court also upheld the non-derogable nature of Article 3 in the case of *Ireland v. the United Kingdom* by emphasising such nature even in the wake of public emergency threatening the life of the nation.³⁶

In determining a wider obligation against *refoulement*, it has to be considered that the Committee against Torture and the Human Rights Committee does not possess the legal authority to enforce their views thus they only have moral force upon the State Parties thereto, whilst judgments of the European Court have legally binding effect.

II. Extra-Territorial Applicability of the Principle of *Non-Refoulement*

The concept of ‘jurisdiction’ in international law is concerned with rules prescribing the particular circumstances, through which a state is legally permitted to exercise its legal authority.³⁷ Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations.³⁸ However, in an extra-territorial

³² Ibid, p. 376.

³³ Ibid, p. 378.

³⁴ *Chahal v. The United Kingdom* (1996), 70/1995/576/662, ECHR, para 80 (The Court while mentioning *Viharajah and others case*, stated that, “[t]he prohibition provided by Article 3 (art. 3) against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 (art. 3) if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion”).

³⁵ Ibid. (The court highlighted that, in circumstances when the individual has a real risk of being subjected to a treatment contrary to Article 3, the activities of the individual, however, undesirable or dangerous cannot be a material consideration. The protection provided by Article 3 is thus, much wider than that of provided by Article 33 of the Refugee Convention); See also Duffy (n 23), p. 379.

³⁶ *Ireland v. The United Kingdom* (1977), 5310/71, ECHR, para 163 (The Court held that, “[t]he Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and, under Article 15 para. 2 (art. 15-2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.”).

³⁷ Ralph Wilde, ‘The Extra-Territorial Application of International Human Rights Law on Civil and Political Rights’, in Scott Sheeran (eds), *Routledge Handbook of International Human Rights Law*, 2013, p. 640.

³⁸ Malcolm N. Shaw, *International Law*, Cambridge University Press, 2003, p. 579.

setting, the sovereignty element is considered to be absent as extra-territorial obviously indicates something beyond territorial limits.³⁹

The function and notion of the concept of jurisdiction in human rights law differs from the concept of jurisdiction in international law. The function of the concept of jurisdiction in human rights context does not serve to determine the legality of the exercise of State power but rather, to determine whether, in a certain situation, a particular State is bound to respect its human rights obligations.⁴⁰ As will be discussed later, to trigger the extra-territorial jurisdiction of a state, ample references have been made to the “effective control” element.

A. Extra-Territorial Application of Article 33 of the Refugee Convention

The 1951 Refugee Convention still remains the key legal basis for the protection of refugees. One of the most essential functions of the Convention, besides defining the term ‘refugee’ and stipulating rights and duties of refugees, is the recognition of the principle of *non-refoulement* as an integral obligation of the states in the course of refugee protection. In this regard, Article 33(1) of the Convention provides that:⁴¹

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.

As mentioned in the provision itself, the principle of *non-refoulement* provides for its application only to refugees; anyone who meets the inclusion criteria contained in Article 1A (2)⁴² of the 1951 Refugee Convention and does not come within the scope of one of its exclusion provisions under Article 1F.⁴³ But given the

³⁹ *Black’s Law Dictionary*, online edition, 2009.

⁴⁰ Michal Gondek, *The Reach of Human Rights in a Globalizing World: Extraterritorial Application of Human Rights Treaties*, The School of Human Rights Research Series, vol. 32, 2009, p. 5.

⁴¹ See *Convention relating to the Status of Refugees*, 189 United Nations Treaty Series 137, 28 July 1951, art. 33(1).

⁴² Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term “refugee” shall apply to any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it.

⁴³ Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because:

- they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because
- they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because

declaratory nature of the refugee status, and that under the Refugee Convention, a person is a refugee as soon as he or she fulfils the criteria under the Convention.⁴⁴ The principle of *non-refoulement* applies to not only recognised refugees but also equally to the asylum seekers.⁴⁵

Furthermore, Lauterpacht and Bethlehem note that there is no binding duty under international law obliging states to grant asylum,⁴⁶ as such definitely a gap exists between the right to seek asylum⁴⁷ and the respective duty to grant asylum. Addressing this gap, Lauterpacht and Bethlehem emphasise that:⁴⁸

“This does not mean, however, that States are free to reject at the frontier, without constraint, those who have a well-founded fear of persecution. What it does mean is that, where States are not prepared to grant asylum, who have a well-founded fear of persecution, they must adopt a course that may not amount to *refoulement*. This may involve removal to a safe third country or some other solution such as temporary protection or refuge.”

Moreover, the Full Federal Court of Australia in a case before it⁴⁹ insisted that, in circumstances any state is to deny entry to refugees then the destination country must be one in which the applicant will not face a real chance of persecution for a Convention reason, and that there is not a real chance that the person might be *refouled*, from the state of immediate destination to a country where there will be a real risk of persecution.⁵⁰ This is to say that there is no obligation on states to fundamentally constrain their sovereign rights to regulate the entry of individuals into their country, but that denial by the exercise of sovereign power should not result in the individual being exposed to the risk of persecution.

In 1993, the Supreme Court of USA, however, determined in the *Sale v. Haitians Centre Council Case*,⁵¹ that USA was under no obligation for its acts of intercepting

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- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

⁴⁴ *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*, HCR/1P/4/ENG/REV., 3 December 2011, para 28.

⁴⁵ UNCHR, Executive Committee, Conclusion No. 6 on *Non-refoulement* states in paragraph c: Reaffirms 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 persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.

⁴⁶ Sir Elihu Lauterpacht & Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement: Opinion’, in E. Feller (eds), *Refugee Protection in International Law*, UNHCR, *Global Consultations on International Protection*, 2003, p. 76.

⁴⁷ See Universal Declaration of Human Rights, art. 14.

⁴⁸ Lauterpacht & Bethlehem (n 46), para. 76.

⁴⁹ *V872/00A v. Minister for Immigration and Multicultural Affairs* (2002), FCAFC 185.

⁵⁰ James C. Hathaway, *Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 301.

⁵¹ *The Haitian Centre for Human Rights et al. v. United States* (1997), Case 10.675, IACHR.

and repatriating (on the sea) of boats carrying Haitians fleeing persecution in Haiti.⁵² The Supreme Court indeed determined that:⁵³

Although not dispositive, the Convention's negotiating history—which indicates, *inter alia*, that the right of *non-refoulement* applies only to aliens physically present in the host country, that the term "*refouler*" was included in Article 33 to avoid concern about an inappropriately broad reading of the word "return," and that the Convention's limited reach resulted from a hard-fought bargain—solidly supports the foregoing conclusion.

In his dissenting opinion to the majority's decision, Blackmun emphasised that the command under the Article 33(1) was clear and unambiguous and in need of no further inquiry.⁵⁴ Adding to an inquiry made into the *travaux préparatoires*, Hathaway asserted that the drafter's assumption of *refoulement* to occur from only within the state's territory reflects, moreover, the context during the drafting, when states did not actually engage in *refoulement* extra-territorially.⁵⁵

It is also to be considered that the Vienna Convention on the Law of Treaties 1969 ("VCLT"), under Article 31,⁵⁶ considered to be declaratory of customary international law,⁵⁷ provides that a treaty is to be interpreted in good faith with ordinary meaning given to the its terms, in the light of its object and purpose. While the preparatory works and the circumstances of the treaty's conclusion are also provided as complementary means of interpretation under VCLT,⁵⁸ however, the decision of the Supreme Court in the *Sale* case of opting to relying on the preparatory works by not considering the object and purpose of the Refugee Convention seems problematic and invited criticism from a wide range of scholars.

Lauterpacht and Bethlehem further add that the use of the phrase "in any manner whatsoever" in the Article 33(1) leaves no room for doubt that the concept of *refoulement* must be construed expansively and without limitations."⁵⁹

Similarly, adding to the interpretation of the Refugee Convention, United Nation's High Commissioner for Refugees ("UNHCR") in its Advisory Opinion on the Extra-Territorial applicability of the Principle of *non-refoulement* stated that:⁶⁰

Any interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a

⁵² Ibid.

⁵³ Ibid, paras 28-31.

⁵⁴ Ibid, Dissenting Opinion.

⁵⁵ Hathaway (n 50), p. 337.

⁵⁶ *Vienna Convention on the Law of Treaties*, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

⁵⁷ Lauterpacht & Bethlehem (n 46), para 40; See also Shaw (n 38), p. 839.

⁵⁸ See VCLT, art. 22.

⁵⁹ Lauterpacht & Bethlehem (n 46), para 71.

⁶⁰ UN High Commissioner for Refugees (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, para 29.

country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol.

Given the practice of States to intercept persons at a great distance from their own territory, the objective and purpose of the international refugee protection regime would be rendered ineffective if the states are allowed to act divergently with their obligations under international refugee law and human rights law.

B. Extra-Territorial Prohibition on Refoulement derived from Human Rights Treaties

As explained in the previous section, the human rights origin of the principle of *non-refoulement* or non-return is well-accepted. Scholars have also agreed that the application of the *non-refoulement* principle arising out of the human rights regime is wider in nature than the one enshrined under the Refugee Convention.⁶¹ Having said that, to elaborate on the extra-territorial applicability of the principle of *non-refoulement* arising out of the human rights regime, the extra-territorial application of the human rights regime and their interception with the refugee regime shall suffice the purpose.

i. ICCPR's Prohibition on Extra-territorial Refoulement

Article 2(1) provides for the overall obligations of the states under ICCPR.⁶² It states:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.”

Article 2 mentions “territory and jurisdiction”, implying that the two concepts are alternative descriptions of the ICCPR's reach. This very idea was elaborated in the original Human Rights Committee Case in which this doctrine was first pronounced. In the case, the victim was kidnapped, abused, and secreted out of the country by Uruguayan security agents operating in Argentina.⁶³ The Human Rights Committee considered that the victim was nevertheless within the jurisdiction of Uruguay,⁶⁴ stressing on the relationship between the state and the individual rather than on the territory where the violation of the rights took place.

⁶¹ See David Cantor, ‘Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in light of Recent Human Rights Treaty Body Jurisprudence’, vol.34, no. 1, *Refugee Survey Quarterly*, 2014.

⁶² *International Covenant on Civil and Political Rights*, 999 United Nations Treaty Series 171, 16 December 1966.

⁶³ *Delia Saldías de López v. Uruguay* (1981) CCPR/C/13/D/52/1979, UN Human Rights Committee (HRC), para 12.3 (The Committee held that, “Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction”, but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”).

⁶⁴ *Ibid*, para 12.2.

In General Comment No. 31 of the Human Rights Committee and the Advisory Opinion of the International Court of Justice (“ICJ”) and in the *Legal Consequences of the Construction of Wall in Occupied Palestinian Territories*,⁶⁵ both the authorities concluded that a person may be within the state’s jurisdiction when that person is within the power or “effective control” of the state, even if not on the state’s territory.⁶⁶

Furthermore, the Human Rights Committee in the Comment No. 31 also emphasized that the principle of making available the enjoyment of Covenant rights to all individuals regardless of nationality, applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.⁶⁷ Thus, in the view of the Committee, the phrase ‘within its territory and subject to its jurisdiction’ refers not to the place where the violation occurred, but to the relationship between the individual and the State concerned.

In an interpretation of Article 7 of ICCPR by the Human Rights Committee, the Committee stated in its General Comment No. 20 (1992) to include *non-refoulement* component.⁶⁸ More importantly, the ICCPR provisions prohibiting the use of torture, cruel, inhumane and degrading treatment as Article 7 has been interpreted as having “extra-territorial application”⁶⁹ by giving rise to an obligation to the contracting state to refrain from conducting any extra-territorial *refoulement* acts.

⁶⁵ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras 109, 111 (“The court observed that while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions. And thus, the Court considered that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”).

⁶⁶ UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 10 (“States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”).

⁶⁷ *Ibid.*

⁶⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or 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*.”).

⁶⁹ The term “extra-territorial application” should be understood as in the sense when a state when it ratifies certain international treaties or its own domestic laws are generally applicable within its own territory. For example, a person in the custody of USA Army outside of USA, even though not in the territory of USA is still under the effective jurisdiction of USA and thus any such laws ratified by USA that provides for the protection of the person under custody, should therefore be respected by USA authorities.

The Human Rights Committee has extended the jurisprudence even further, holding in 2009⁷⁰ that a state may be liable for a human rights violation that occurs even outside of its area of control, as long as that state's activity was "a link in the causal chain" bringing about the human rights violation.⁷¹ These decisions of the far-reaching assertion of the extra-territorial obligation of states, in the context of extra-territorial *refoulement*, would generate obligation of state(s) playing any part in *refouling* over the asylum seekers or refugees.

In *Munaf v. Romania*, the Human Rights Committee affirmed the causal link doctrine. The Committee then refined its pre-existing doctrine stating that the risk of a violation outside a country's territory "must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time".⁷² In this way, the causal link doctrine was limited so as not to be applicable in all cases of risks faced by individuals in another territory, but only those that were foreseeable at the time of returning or refouling.

ii. CAT's Prohibition on Extra-Territorial Refoulement

CAT under Article 2(1) also provides similar state obligation as provided by ICCPR.⁷³ Article 2(1) of CAT states:

"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

The Committee against Torture addressed the issue of extra-territorial non-refoulement specifically in the interdiction context, in *J.H.A. v. Spain*, finding Spain's responsibility engaged with regard to *non-refoulement* where it interdicted sea migrants and conducted extraterritorial refugee status determinations.⁷⁴ Adding more to its importance, the Committee rejected efforts to justify torture on national security grounds, such as counter-terrorism even.⁷⁵

Furthermore, in Consideration of Reports Submitted by State Parties to the Convention, the Committee against Torture remarked on the second report submitted by the USA, wherein the Committee stated:⁷⁶

⁷⁰ *Mohammad Munaf v. Romania* (2009), CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), para 14.2.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See Convention Against Torture.

⁷⁴ *J.H.A. v. Spain* (2008), CAT/C/41/D/323/2007, UN Committee against Torture (CAT).

⁷⁵ See, e.g., UN Committee Against Torture, *Conclusions and recommendations of the Committee against Torture : Egypt*, CAT/C/CR/29/4, 23 December 2002, para 4 ("The Committee is aware of the difficulties that the State party faces in its prolonged fight against terrorism, but recalls that no exceptional circumstances whatsoever can be invoked as a justification for torture, and expresses concern at the possible restrictions of human rights which may result from measures taken for that purpose."); See also Craig Forcece, 'Spies without Borders, International Law and Intelligence Collection', vol. 5, *J. of National Security L. & Policy*, 2011, p. 179.

⁷⁶ *Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America*, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006, para 15; See also Duffy (n 23), p. 378.

“The State party should recognise and ensure that the provisions of the Convention expressed as applicable to “territory under the State party’s jurisdiction” apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.”

Furthermore, in the same Conclusion and Recommendation Report, the Committee expressed its concern that the USA did not consider that its *non-refoulement* obligation under Article 3 of the Convention against Torture extends to a person detained outside its territory. Having said this, the Committee stated:⁷⁷

The State party should apply the *non-refoulement* guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations.

Very explicitly expressed in the above recommendation is the phrase “in its custody,” that not only tends to address the states’ practice of engaging in such acts but also clearly provides that extra-territorial *refoulement* is clearly prohibited under the Convention against Torture.

iii. ECHR’s Prohibition on Extra-Territorial Refoulement

At a regional level, Article 1 of the ECHR⁷⁸ provides the overall obligation of the contracting states. It states:

“High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

The European Court, the permanent court under the ECHR,⁷⁹ has produced the most case law on the extra-territorial application, both in quantity and in variety.⁸⁰ Most notably, the Court’s extra-territorial decision to date was delivered in *Soering Case*, where it held that the United Kingdom (“UK”) would be in violation of Article 3⁸¹ if it were to extradite a criminal defendant to the United States, where there were substantial grounds for believing this person would face treatment that it described as the “death row phenomenon.”⁸²

The relation of Article 3 in extra-territorial context prohibiting *refoulement* of individuals at risk of persecution was also held in *Al-Saadoon and Mufdhi v. the United Kingdom*⁸³, where the court held that the UK was responsible for breach of

⁷⁷ Duffy (n 23).

⁷⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950.

⁷⁹ *Ibid*, art. 19.

⁸⁰ Marco Milanovic, ‘Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age’, vol. 56, *Harvard Int’l L. J.* 1, 2015.

⁸¹ See European Convention on Human Rights, art. 3.

⁸² *Soering v. The United Kingdom* (1989), 1/1989/161/217, ECHR; See also ErilRoxstorm et al., ‘The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and the Limits of Human Rights Protection’, vol. 23, no. 55, *Boston Uni. Int’l L. J.*, 2005, p. 100.

⁸³ *Al-Saadoon and Mufdhi v. United Kingdom*, 2010, Application no. 61498/08, ECHR.

Article 3 under the ECHR for having transferred the applicants who were in the custody of UK troops in Iraq to Iraqi authorities for trial⁸⁴. In this case, the wider protection under the ECHR (Article 3) prohibiting *refoulement* was made more vivid,⁸⁵ as Article 1 of the Refugee Convention requires an individual to be outside country of origin to be eligible for entitlement to the protection under Article 33, but such a limitation under Article 3 of ECHR was not required.

More recently, in *HirsiJamaa and Others v. Italy*,⁸⁶ whereby a group of about two hundred individuals, who had left Libya on three vessels with an aim to reach the coasts of Italy⁸⁷ were intercepted by Italian authorities in the Maltese Search and Rescue Region.⁸⁸ The court unanimously held that the applicants were under the control of the Italian authorities for the purpose of Article 1 of ECHR.⁸⁹ The court thus held Italy in breach of Article 3 of ECHR on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya and rejected the Government's preliminary objection concerning the applicants' lack of victim status.⁹⁰

iv. American Convention on Human Rights' ("ACHR") Prohibition on Extra-Territorial Refoulement

Another regional human rights body that could be important for discussion here is the ACHR, a treaty modelled after the ECHR⁹¹, which sets forth its jurisdictional scope under the "General Obligations" inherent in the treaty, in Article 1(1) as:

"The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

In the Inter-American Commission on Human Rights' ("The Commission"), the understanding of the term "jurisdiction" is very much similar to that of the European Court's. This was well understood in the *Haitian Centre for Human Rights*

⁸⁴ Ibid, para 171.

⁸⁵ Ibid, para 122 ("Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. It makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of any offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.")

⁸⁶ *HirsiJamaa and Others v. Italy* (2012), Application no. 27765/09, ECHR.

⁸⁷ Ibid, para 9.

⁸⁸ Ibid, para 10.

⁸⁹ Ibid, para 3.

⁹⁰ Ibid, para 5.

⁹¹ See Christina M. Cerna, 'Extra-Territorial Scope of the Human Rights Treaties: The American Convention on Human Rights', in Fons Coomans & Menno Kamminga (eds), *Extra-Territorial Application of Human Rights Treaties*, 2004, pp. 141-74.

et al v. the United States. In this case, the petitioners filed a complaint with the Commission against the USA's action of interdiction and repatriation of boats, at sea, carrying Haitians fleeing persecution in Haiti.⁹² This case, moreover, brought the dubious policies of USA on granting asylum into the light, with the USA making differences on granting asylum depending on the nationality of the asylum seekers⁹³. Disagreeing with the finding of the US Supreme Court in the *Sale Case*, where the Supreme Court held that the principle of *non-refoulement* under Article 33 of the Refugee Convention did not apply to the Haitians interdicted at sea⁹⁴, the Commission stated:⁹⁵

“The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its *amicus curiae* brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.”

The Commission accepted the reasoning made by the European Court in the *Soering Case* and further emphasised that:⁹⁶

“...if a State party extradites a person within its jurisdiction in circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.”

This line of argument, by the Commission, of making states liable for the human rights violations in a third state (even outside their control), owing to the *refouling* state's “link in the causal chain”⁹⁷ is a jurisprudence that has been accepted and reiterated by other international courts as well.⁹⁸

IV. UNHCR's Position

In an *amicus curiae* submission made by UNHCR to the High Court of Australia in the case of *CPCF v Minister for Immigration and Border Protection*,⁹⁹ UNCHR stated that:

“The obligations in Article 33(1) of the Refugee Convention apply to a State party wherever it exercises jurisdiction in relation to a refugee or asylum seeker, including where the State acts outside of its territory: (a) on board a vessel flying the flag of the State; or (b) in

⁹² See *The Haitian Centre Case* (n 51).

⁹³ See for e.g., *ibid*, para 88 (In the reply submitted by the plaintiff in response to the reply submitted by the US government to the petition, the plaintiff maintained that: Customary international law in this case has been violated because there has been extensive and virtually uniform adoption of the policy of *non-refoulement* throughout the world. The policy of interdicting Haitians based on their national origin (while, coincidentally, liberally admitting others, such as Cuban nationals), and forcibly returning them to Haiti without asylum interviews of any sort, clearly violated the principle of *non-refoulement*).

⁹⁴ *Ibid*, para 156.

⁹⁵ *Ibid*, para 157.

⁹⁶ *Ibid*, para 167; See also *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.* (1993), 509 U.S. 155.

⁹⁷ *Mohammad Munaf Case* (n 70).

⁹⁸ *Ibid*.

⁹⁹ *CPCF v Minister for Immigration and Border Protection*, (2015), HCA 1.

circumstances where the State exercises effective control over the refugee or asylum seeker.¹⁰⁰

Key principles put forward by UNHCR included that the *non-refoulement* obligation in Article 33(1) of the 1951 Refugee Convention applies to officials of a Contracting State wherever they exercise jurisdiction; that Australia as a party to the Refugee Convention is obliged to fulfill its obligations in good faith; and that Australian laws, while binding on Australian officials and courts, do not change Australia's international obligations.¹⁰¹

In another written submission made by UNCHR to the House of Lords in *European Roma Rights Case*, UNHCR submitted that the principle of *non-refoulement*/non-rejection at the frontier is part of the customary international law, and thus very well a part of English law.¹⁰² While emphasising the Court of Appeal's failure to recognise and give weight to the principle of good faith, by failing to acknowledge the international obligation of UK, UNHCR stated that:¹⁰³

...the Court of Appeal erroneously characterised the case as solely one of admission to the United Kingdom, whereas it is properly to be seen as involving the lawfulness of extra-territorial measures of control, irrespective of admission.

UNCHR very rightly highlighted that compliance with international obligations does not actually require a state to admit the asylum seekers, but it rather means (in line with the *non-refoulement* principle), that act lawfully in what they do, even if that is to obstruct the flow of refugees.¹⁰⁴

In its twenty-eighth session, the Executive Committee requested UNHCR to prepare, after due consideration of the opinions of States parties to the 1951 Convention and the 1967 Protocol, a detailed study on the question of the extra-territorial effect of determination of refugee status. Following this in January 2007, the UNHCR published the *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the Convention*.¹⁰⁵ The Advisory Opinion restated the arguments that supported UNHCR's view that Article 33(1) has extra-territorial

¹⁰⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Submissions in the High Court of Australia in the case of CPCF v Minister for Immigration and Border Protection and the Commonwealth of Australia*, NO S169 OF 2014.

¹⁰¹ See also UNCHR, 'UNHCR Legal Position: Despite Court Ruling on Sri Lankans Detained at Sea, Australia Bound by International Obligations', UNHCR, February 4, 2015, <http://www.unhcr.org/news/press/2015/2/54d1e4ac9/unhcr-legal-position-despite-court-ruling-sri-lankans-detained-sea-australia.html>, accessed on 21 September 2017.

¹⁰² UN High Commissioner for Refugees (UNHCR), *UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v. Immigration Officer at Prague Airport, Secretary of State for the Home Department*, 28 September 2004, para 6.3.

¹⁰³ *Ibid*, para 6.1.

¹⁰⁴ *Ibid*, para 14.

¹⁰⁵ UNCHR, *Advisory Opinion on Extra-Territorial Nature of Non-refoulement* (n 25).

effect,¹⁰⁶ and refuted and rejected the arguments relied upon by national courts in several of the cases that came before it.¹⁰⁷

In its Note on International Protection of 13 September 2001, UNHCR indicated that the principle of *non-refoulement* laid down in Article 33:¹⁰⁸

...encompasses any measure attributable to a State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx.

As Justice Anthony emphasised, the judgment of the final appellate courts in the US, the UK and Australia, spanning over eleven years was a considerable barrier to the acceptance of the views of the expert scholars and UNHCR.¹⁰⁹ Sadly, authorities in many jurisdictions, including ones that Justice Anthony mentioned, have adopted divergent state practices, many times seemingly in a manner to avoid the international obligations. However, it is also equally true that on paper, at least at a global level, there appears a similar voice regarding the need to protect the refugees.

Conclusion

There is no doubt that the 1951 Refugee Convention still retains the prominent role in the refugee protection regime. The global practice clearly reflects a wider recognition of the principles of the Refugee Convention, however, the functional aspect of the Refugee Convention that rests with the states to frame has suffered a serious backlash. Therefore, the dense interrelation between the international refugee law and international human rights law are of great relevance.

Moreover, as argued by several scholars, although it may be called “complementary protection”, the protection provided by human rights law has been of wider nature than that of the principal refugee law instruments. Vincent Chetail further emphasises that the interrelation has been pivotal in counterbalancing the restrictive interpretations of the Refugee Convention by individual states with the contextual interpretation of the human rights treaties by the respective Treaty Bodies.¹¹⁰ The Human Rights instruments have in fact reinforced and revitalised the principles established by the refugee law instruments. It is, therefore, as both the branches of law are the part of a same

¹⁰⁶ Ibid.

¹⁰⁷ For e.g., see *ibid*, p. 12 (UNCHR rejects the idea put forward by the Supreme Court of USA in the *Sale case*, where the court attached geographical limitation to the principle of *non-refoulement*.)

¹⁰⁸ *Note on International Protection*, A/AC.96/951, 13 September 2001.

¹⁰⁹ Justice A. M. North, ‘Extra-Territorial Effect of Non-refoulement’, *Federal Judicial Scholarship*, 9 September, 2001, available at <http://www.austlii.edu.au/au/journals/FedJSchol/2011/19.html>, accessed on 21 September 2017.

¹¹⁰ Vincent Chetail, ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’, in Ruth Rubio-Martin (ed), *Human Rights and Immigration*, 2014, p. 69.

normative continuum, important to emphasise on the cumulative application of the both branches of law.

The particular instance of non-refoulement, which appears as a primary principle in the Refugee Convention, however, has a wider interpretation in the Human Rights treaties, enshrined as a general provision for the protection of human rights. More significantly, when the Refugee Convention applies only to refugees and asylum seekers, the human rights treaties have endorsed even the principle of non-refoulement for aliens of non-refugee nature.

The above reiterations of the distinctive features of protection guarantee of the two branches of law, therefore, highlight the risks of a dissociated implementation of refugee law, more so in terms of the probabilities of subjecting a genuine asylum seeker or a refugee to the risk of persecution. This risk has been obviously reduced to a greater extent by the transformation brought about in refugee law by the advent of similar provisions in human rights treaties and their subsequent wider interpretations.

The Refugee Convention, however, is largely silent on whether the principle of non-refoulement applies when a state acts beyond its territory. This was clearly reflected in the *Salé case*, where the US Supreme Court's sole reliance on the Refugee Convention resulted in a majority vote in favour of non-applicability of obligations under Refugee Convention in extra-territorial context. In contrast, the Treaty Bodies and the European Court to the largest extent have engaged in recognising the treaty obligations to apply wherever a state exercises its effective control, regardless of the territory or even the legality of its action.