PERSECUTION TO INVOKE NON-REFOULEMENT PRINCIPLE IN REFUGEE PROTECTION: A REFLECTION ON THE REFUGEE CRISIS IN THE MIDDLE EAST AND EUROPE

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ABSTRACT

It is widely accepted that the principle of non-refoulement is the fundamental principle deep rooted in the conventional international practice for the protection of refugees. The influx of refugees can not be managed even by strict observance of the non-refoulement principle if the influx gets so gigantic form that it becomes a trans-boundary crisis of the world. Recent refugee crisis in Middle East and Europe caused by war in Syria and Iraq shows blatantly the limitation of the current laws and mechanisms to protect refugees. Over the centuries, societies have been welcoming the victims of persecution frightened and weary strangers. The protection of persecuted people has been of paramount concern to the world community since the establishment of the United Nations. The legal basis of international protection may be either the conventional international law or customary international law. This research, however, intends to explore the deeper meaning of persecution to get a better understanding of the refugee protection under the non-refoulement principle. It further seeks to scrutinize the formation of the principle of non-refoulement, find out the universal meaning of the prohibition of refoulement, to identify, analyze and compare in a systematic way the common features contained in the prohibitions of refoulement, to assess the human rights implication of this principle and to search the reformulation of the definition of non-refoulement principle in finding out the keys to the solution of big refugee crises.

Key words: Persecution, fear of death, right to return to homeland, non-refoulement, protection, refugee crisis

1. INTRODUCTION

People in every corner of the world have been forced to flee the countries of their birth in search of safety from persecution, political violence and armed conflict. From the time immemorial people have moved from their country of origin to another country for variety of forced or voluntary reasons. For the causes of persecution, civil war and economic despair, millions of people escape from their homes and go to live in other countries where they can alleviate their lives and find a safe place for themselves and their families (Weissbrodt and Hortreiter, 1999). The

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Office of the United Nations High Commissioner for Refugees (UNHCR) estimates 85 million people as refugees today in the world. This number is five million more than the last year and has marked 2016 as the deadliest year to date for refugees who have ventured perilous North Africa–Italy route to reach Europe. UNHCR spokesperson William Spindler in a statement during a press briefing at Palais Des Nations in Geneva, Switzerland on September 2, 2016, said that so far this year one person had died for every 42 crossings from North Africa to Italy, compared to one in every 52 in 2015.¹

The number of persecuted people in different countries is rising significantly due to gross violation of human rights through various kinds of persecutions, international and non-international armed conflicts, civil war, environmental degradation and persecution in various parts of the world. Refugees are not always protected and treated humanely in the states where they take shelter. Protection and promotion of human rights and fundamental freedoms for all as the leit-motif² of human development is globally recognized in the world. The international law of refugees was originated and developed to protect and promote the human being in specific circumstances and the refugee crisis was attributed as having global width and requiring global assistance in the repercussion of the World War I. The modern perception of refugee protection has been developed in the wake of World War II, which created massive number of refugees fleeing persecution of the war. The actual movement to protect the rights of refugees commenced with the adoption of the Universal Declaration of Human Rights (UDHR),³ 1948, which recognized the universal, inherent and inalienable rights for all human beings without any discrimination as to their race, sex, caste, religion, nationality or place of birth (Haider, 2002: 1). State practices in accepting and protecting the victims of persecution and not returning them to a territory where their life and freedom can be in danger is believed to have become a customary law. Though the right to asylum is not easily received by the states, many of them admit the obligation not to return a forced migrant under the principle of non-refoulement (Chimni, 2000).

Each sovereign and independent state exercises its territorial jurisdiction regarding refugee law and gives rise to challenges in the application of the principle of non-refoulement and protection of refugees. However, refugees may be a boon for a society because many world famous persons were refugees. UNHCR disclosed in its website some renowned names of refugee like Einstein, Anita Donaldson and Marlene Dietrich.⁴ States are obliged to permit the victims of persecution to remain in their territories and are prohibited from rejecting, returning or removing them from their jurisdiction so long as this would expose them to a threat of persecution or a real risk of torture, cruel, inhuman or degrading treatment and punishment.

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The existing legal mechanism is unable to tackle such gigantic mass influx situation. Under this circumstances in view, what can be the appropriate solution to the problem is the question.

2. REFUGEE AS DISTINGUISHED FROM ASYLEE, MIGRANT AND IDP

The terms refugee and asylum seeker (asylee) are sometimes used interchangeably whereas refugee status could be differentiated from asylum as asylum constitutes the institution for protection and the refugee status refers to one of the categories of individuals who benefit from such protection. Refugee and asylee both are subject to persecution because of their race, religion, nationality, political opinion, or membership in a particular social group.

Asylum in the general term relates to giving shelter to those who seek it. Asylee means a person who has applied for asylum under the Refugee Convention on the Status of Refugees, 1951 on the ground that if he is returned to his country of origin he may fall in persecution. He remains as an asylum for so long as his application or an appeal against refusal of his application for asylum is under process.

Refugee in this context means an asylee whose application is successful. In its broader context, it implies a person fleeing owing to civil war or natural disaster but not necessarily fearing persecution as defined by the 1951 Refugee Convention, 1951.

However, such type of demarcation may not be found in many cases. Under The United States of America (USA) immigration law and practice, a person is regarded as asylee while reaching within the US territory or any port of entry; he applies for asylum, and if a person not reaching US territory or port of entry, applies for shelter is regarded as refugee. As the terms of refugee and asylee are still used in the world confusingly in different places, even sometimes interchangeably, both need to be clearly determined by an international convention to evade confusion and controversy.

‘Economic migrant’ means a person who has left his own country and seeks by lawful or unlawful means to find employment in another country. Many asylum seekers are economic migrants who hope to secure entry into any country by claiming asylum.

3. PERSECUTION: MEANING AND DEFINITION

The codified definition of ‘persecution’ has nowhere been found and this was
perhaps premeditated. It seems as if the drafters have wanted to initiate a stretchy idea which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men (Maiani, 2015). Experts tried to make the scope of the term persecution. Persecution is most acceptably defined as the sustained or systemic failure of state protection with regard to one of the basic entitlements recognized by the world community (Hathaway, 1991: 104). In order to understand the harm to which a refugee may not be subjected in accordance with the prohibition on refoulement contained in Article 33(1) of the 1951 UN Convention Relating to the Status of Refugees, one has to look more closely at the term ‘persecution’ (Wouters, 2009). The term ‘persecution’ is primarily found in the definition of ‘refugee’ provided by Article 1A (2) of the 1951 Convention. Persecution as a crime against humanity was first codified in international criminal law in the Charter of the International Military Tribunal, 1945 which limited the crime to political, racial, or religious grounds (Oosterveld, 2006).

There is no generally accepted definition of the term ‘persecution’ since the drafters of the Convention intentionally left the meaning undefined (Hathaway, 1993: 668) as they realized the impossibility of enumerating in advance all of the forms of maltreatment which might legitimately entitle persons to benefit from the protection of a foreign state (Forg, 1981: 92). Persecution is defined in the Rome Statute as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” According to this definition, persecution is the most significant ground of becoming the refugee by a person which rightly observes that a person is a refugee who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country.

Not every violation of a refugee claimant’s human rights forms persecution; rather it is only in certain situations that discrimination will create persecution (Haider, 2004: 89). It would be so if measures of discrimination lead to consequences of a considerably detrimental nature for the person concerned (UNHCR, 1992: 54). From Article 1A (2) of the 1951 Convention, it is inferred that a threat to life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion is always persecution. Other serious violation of human rights—for the same reasons—would also constitute persecution (Malik, 1998: 80). Moreover, the deprivation of certain of the socio-economic rights, such as the ability to earn a living or the entitlement to food, shelter, or health care will, at a certain level, be tantamount to the deprivation of life or cruel, inhuman or degrading treat
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ment, and will unquestionably constitute persecution (Hathaway, 1991: 111). Persecution is not restricted solely to physical abuse or incarceration (Fragomen, 1970: 54).

Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the State’s ability and willingness to respond effectively to that risk (Haines, 2003). Persecution is the construct of two separate but essential elements, namely risk of serious harm and failure of protection by state and it can be expressed in the formula: (persecution = serious harm + failure of State protection) (RWLG, 1998: 1.17). Again, whether the anticipated harm rises to the level of persecution depends not on a rigid or mechanical application of the categories of rights, but on an assessment of a complex set of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened. Other measures in disregard of human dignity might also constitute persecution (Weis, 1960: 970).

From the definition of refugee under the 1951 Convention it is clear that, mere persecution per se is not enough to constitute the claim to be a refugee or to seek the refugee status. Rather a well-founded fear or apprehension of persecution or infliction of harm is indispensible in order to get the refugee protection. It implies that there must be sufficient facts on the ground to justify the concept of fear and the fear must be reasonable, exact and imminent, which might produce from a variety of circumstances. The term ‘persecution’ used in the definition of refugee is very significant as it is intended to ensure that persons who merely have a general dislike of the political or any other conditions in the country of origin or former habitual residence and do not wish to return there due to personal inconvenience should not be in a position to claim the status of refugee (Ahmed, 2014: 32).

There is no universally accepted definition of persecution and various attempts to formulate such a definition have met with a little success. However, from a general point of view, persecution indicates such a repulsive behavioral attitude towards a person that undermines his or her physical or psychological quietude and even may sometimes cause to death of that person. In the case of Horvath vs. Secretary of State for the Home Department, it was observed that as the primary duty to protect the nationals of a states lies with the home state, the protection mechanism is to be established and accommodated in the home country itself to save its own people from the persecution operated by some perpetrators.

It was held in another case that persecution might be committed by bodies other than the state where state may either tolerate or fails to protect people from
persecution. In the case of Minister for Immigration and Multicultural Affairs vs. Khawar it was argued that where persecution consists of two elements, the criminal conduct of private citizens, and the toleration of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

Persecution also refers to a regular and continuous ill-treatment to the mind or body of an individual or group of individuals by another individual or group. In the refugee law context and from the view point of Article 33 of the 1951 Convention, persecution refers to infliction or threat to infliction of mental or physical harm or harassment, fear or pain, isolation or imprisonment by which the fundamental human rights of a person is severely infringed to subjugate or eliminate him or her for reasons of race, cast, religion, nationality and political opinion, place of birth or membership of a particular social group. Though there are naturally some overlaps among them, the instances of most common forms of persecution are political, religious and ethnic persecution. Even it is pertinent to mention here that all threat or infliction of suffering will not necessarily constitute persecution.

4. THE DIFFERENT GROUNDS OF PERSECUTION

There are many grounds of persecution and that can be divided into two broad aspects, e.g., human created persecution and natural imbalance or disastrous attack on earth species. Membership of any particular social group or political party inter alia may sometimes be a valid ground for seeking the refugee protection as has been mentioned in the definition of refugee under the 1951 Refugee Convention. In the case Matter of Acosta, 1985 the US Board of Immigration Appeals held that, persecution on account of ‘membership in a particular social group’ refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic, i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.

The 1951 Convention inter alia specifies mainly five grounds of persecution that are placed in the following figure:
In the case Canada (Attorney General) vs. Ward it was argued that, in distilling the contents of the head of ‘particular social group’, account should be taken of the general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative. A good working rule for the meaning of ‘particular social group’ provides that this basis of persecution consists of three categories: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

In another case Islam vs. Secretary of State for the Home Department; (R vs. Immigration Appeal Tribunal and Another, ex parte Shah), it was decided that, the term ‘particular social group’ did not mean an additional element of cohesiveness, co-operation or interdependence. The fact that members of a group may or may not have some form of organization or interdependence was irrelevant to the question of whether it would be contrary to principles of human rights to discriminate against its members. The concept of a social group was a general one and its meaning could not be confined to those social groups which the framers of the Convention might have had in mind. In choosing to use the general term ‘particular social group’ rather than an enumeration of specific social groups, the framers of the Convention were intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention. So, the term ‘particular social group’ must be interpreted liberally because its stingy interpretation may encourage persecution which may destroy the very objective of the Convention.

The Convention would give no specific protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps reasonable or otherwise to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a
‘particular social group’ if it was a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to the people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality.”

In the case of David Hellman vs. Immigration Review Tribunal17 Mr. David Hellman was a 17-year old US citizen whose parents were divorced and father migrated to Australia and became an Australian citizen while his mother remained in the USA. David came to Australia because he wanted to escape from his mother who was described as an enthusiastic follower of orthodox Jewish sect. He sought refugee status on the basis that he feared assaults and abuse, being forced to become a priest and being taken to a foster home. He also alleged that he might be harmed because of his knowledge of criminal conducts by members of his mother’s religious community. His application for refugee status was rejected by the Immigration Department. He filed an appeal to the Immigration Review Tribunal. The Tribunal found that David Hellman had a well-founded fear of persecution but not that was because of his membership of a particular social group. Persecution on account of a particular social group would have satisfied one of the criteria of the 1951 Refugee Convention. Therefore, his appeal was dismissed.

In another reputed case Chan vs. the Minister of Immigration, 1989,18 Mr. Chan Yee Kin was a citizen of China and was a member of a faction of Red Guards which lost the struggle for control of that organization in his local area, who was questioned by police and was detained for two weeks in 1968. He tried to escape but was caught and received increasing period of detention. In 1974 he escaped to Macau and stowed away on a ship to Australia which he entered illegally in 1980. He applied for refugee status on 29th November 1982. He was refused the status of a refugee within the meaning of the 1951 Convention. He challenged the decision to the single judge of the Federal Court. The Court set aside the decision of the Immigration Department and referred to the Minister for consideration. The Minister appealed to the Full Federal Court against the decision. The Full Federal Court upheld the appeal. Mr. Chan went to the High Court against the decision of the Full Federal Court. The Court held that the definition of a refugee involved a mixed subjective and objective test. The Court inter alia held that the phrase ‘well-founded fear’ of being persecuted had occasioned some difference of opinion in the interpretation of the definition of a refugee. There must be a state of fear of being persecuted and a basis ‘well-founded’ for that fear.

In the case of Turkish National vs. Minister of Interior of Austria, 1980,19 a Turkish national applied for asylum in Austria under its Asylum Act on the ground
that he belonged to the Christian minority and he and his family were being persecuted by the Muslims in his country of origin. The application was refused. He made an appeal to the interior ministry which turned his appeal down. The ministry states that criminal activities against the applicant are not persecution and the applicant could have found safety from such criminal activities in other parts of Turkey. He lodged an appeal to the Higher Administrative Court against the decision. The Court dismissed the appeal holding that the applicant did not have well-founded fear of persecution within the meaning of 1951 Convention. The Court held that the well-founded fear of persecution existed only when on an objective basis it would become clear that the conditions concerning the grounds of persecution mentioned in the convention are such that a further stay of the claimant in the country of origin had been unbearable.

Again, in the case Somali National vs. the Secretary of State, 1991, a Somali national belonging to Issaq clan enlisted in the army in 1981 in his country, deserted, and then fled to Libya through Djibouti. He remained at his father's home in Libya and his passport was renewed both in Djibouti and in Libya. He fled to the Netherlands and requested refugee status in 1987 on the ground that he faced persecution in Somalia after 1988 because he belonged to Issaq clan. His request was rejected by the Secretary of State. He lodged an appeal to the Council of State. The Council upheld the decision of the Secretary of State on the ground that the applicant was not a political activist and it was unlikely that the Govt. of Somalia considered him a political opponent simply because he deserted from the army. His passport was renewed without any incident by his government and his family suffered no persecution. It is another example where the authority avoided its responsibility to accept a person as refugee not on an apparent ground but indirectly, emphasizing upon not on the persecution but on making exception of the membership of a political party.

From the above cases, it is found that the application of refugees have been rejected in most of the cases not for persecution but for non-fulfillment of the grounds of persecution. The terms and definition is interpreted in the immigration courts very strictly, not liberally. In the above cases, only the case Islam vs. Secretary of State for the Home Department emphasized on the liberal interpretation of the definition. All the other cases interpreted the terms constrictively. Such type of interpretation may nullify the objective of the Convention in the long run. The court should emphasize on the persecution; not on the types of the grounds for which he has the fear of persecution. The very nature of the persecution, whether it is for being a member of social group or race or for political opinion, is the pain for which it becomes impossible for the person to stay in its country of origin. So, the objective of the definition of refugee and the principle of non-refoulement is to free people
from persecution; but if such objective is made trampled down alternatively interpreting the definition in such a manner that the persecuted persons are excepted from the definition by any of the grounds not fitting within the ambit of the definition, the interpretation must be avoided.

5. PRINCIPLE OF NON-REFOULEMENT: EXPLANATION

5.1 Evolution of the Principle

In the arena of international law, there is a principle of paramount importance—i.e., the principle of non-refoulement (non expulsion). The principle of non-refoulement is seen by most in the international law, whether governments, NGOs or commentators, as basic to refugee law. Since its expression in the Refugee Convention in 1951, it has been playing a key role in how states deal with the asylum seekers and refugees (Rodger, 2001). This principle is applicable to any refugee, asylum-seeker or alien who needs some form of shelter from the state whose control s/he is under. It also applies when a person seeking asylum, i.e., prior to recognition of refugee status or until it is established that the applicant does not fulfill the refugee definition.

The significance of this is that even countries that are not party to the convention must respect this principle. Prior to the 1930s the principle of non-refoulement did not exist in international law (Robert, 1993). It was first expressed at international law in the 1933 Refugee Convention Relating to the Status of Refugees (Goodwin-Gill, 1996: 118). The mass refugee influx by the destruction of World War II provided a momentum for careful assessment of the rules regarding refugees. Before this time states had been very conscious of the area to which consent to international rules with regard to refugees, would impact on their sovereign right to determine who was allowed to inhabit within their frontiers (Robert, 1993).

Although many appeared to have accepted that there was an ethical obligation to admit refugees and not return them, this was done principally on an impromptu basis. In the first few years of its creation, the UN showed its concern with the refugee issue and consequently in 1946 the UNGA passed a resolution stating that refugees should not be expelled when they had ‘valid objections’ (Goodwin-Gill, 1996: 119). This encouraged largely by the huge number of refugees in Europe following the war, ultimately led to the drafting of the 1951 Refugee Convention (Robert, 1993). The non-refoulement principle means that states cannot return aliens to territories where they might be subjected to torture, inhumane or degrading treatment, or where their lives and freedoms might be at risk (Stoyanova, 2008: 1). A binding principle in international customary law, the principle of non-refoulement applies to all asylum seekers, refugees and stateless persons.
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Various prohibitions on refoulement exist in international law but there is no common definition of it. The term ‘non-refoulement’ originates from the French word ‘refouler’, meaning literally to drive back or to repel in the context of immigration control summary re-conduction to the frontier of those found to have entered illegally and summary refusal of admission of those without valid papers (Goodwin-Gill, 1998: 17). Helene Lambert (1999: 519) opines that, refoulement includes and refers to expulsion, deportation, removal, extradition, sending back, return or rejection of a person from a country to the frontiers of a territory where there exists a danger of ill-treatment, i.e., persecution, torture or inhumane treatment (Islam, 2004: 215-238). It is worth mentioning here that the principle of non-refoulement does not only forbid the expulsion of refugees to their country of origin but to any country in which they might be subject to persecution. Though the principle of non-refoulement is universally accepted, problems with refoulement frequently arise through the fact that its application requires a recognized refugee status.

5.2 Overview on the practice of the Principle of Non-Refoulement

The principle of non-refoulement invoking the denial of excluding, expelling, returning, sending or otherwise shifting (refoulement) a refugee to “territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group” is recognized in Article 33(1) of the 1951 Refugee Convention, its 1967 Protocol Relating to the Status of Refugees and in numerous treaty texts. The keystone of refugee protection is the principle of non-refoulement, which provides that no refugee should be returned to any country where s/he is likely to face persecution on the grounds of race, religion, nationality, political opinion, or membership of a particular social group (Goodwin-Gill, 1996: 167-170). The first paragraph of Article 33(1) of the 1951 Convention states:

“No contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

The principle of Non-refoulement is recognized as a non-derogable principle applicable in all circumstances, regardless of the nature of the activities the person concerned may have been engaged in, and relates not only to the country
to which the person faces instant return but extends to “any other country where he runs a risk of being returned.” Through the work of UNHCR and general state practice, it has been accepted that Article 33 applies to all refugees, whether or not they fit the prescribed definition (Howland, 1998).

The UNHCR and states throughout the world endure to protest and object to any violation of the non-refoulement principle or any conduct that amount to non-refoulement (Coleman, 2003: 23-68). The State parties to the 1951 Convention formally accepted non-refoulement as a principle “whose applicability is embedded in the customary international law” and its large acceptance as a norm of fundamentally norm-creating character, has led many scholars and UNHCR to conclude that it forms part of customary international law today (Goodwin-Gill, 2007). But this view has not been universally accepted, e.g., prominent jurist Hathaway is very dubious about the customary international law status of non-refoulement and interprets that customary international law does not come into force by simple declaration but needs to be supported by wide and constant state practice.

This principle is expressed in different manners and originated from various provisions; Lauterpacht and Bethlehem extort the prime spirit of the rule to draw the core substance of the protection under customary international law. This principle is also considered to apply in a human rights context to forbid the forcible sending, or returning or in any other way transferring a person to a country where s/he may face persecution (Lauterpacht and Bethlehem, 2001). There is no doubt that non-refoulement is a legal notion, and “not simply a means by which states can devise political solutions in the refugee field” (Marx, 1995). Allain (2001: 533-558) states that it is a debatable issue whether non-refoulement is a jus cogens of international law, that forbids the expulsion of a person into an area, usually his or her home-country, where that person might be again subjected to persecution (Kalin, 2011: 1345).

5.3 Principle of Non-refoulement under Different Instruments

The prohibition on refoulement has been developed in various international legal instruments, on both global and regional levels. Thus an overwhelming majority of States is party to at least one treaty binding it to the principle of non-refoulement. The principle of non-refoulement as included in Article 33 of the 1951 Refugee Convention is one of the codified provisions and considered as the best form of expression apart from provisions of other human rights instruments with equal effect. The principle of non-refoulement has been incorporated in international treaties adopted at the regional and universal levels to which a large number of states have now been parties. At the universal level the most important provision
in this respect is Article 33(1) of the 1951 Convention that constitutes one of the basic Articles of the 1951 Convention to which no reservation are permitted. Apart from this, also at the universal level, the UN Declaration on Territorial Asylum, 1967\textsuperscript{35} states:

“No person referred to in Article 1, Para 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.”\textsuperscript{36}

Again, the Declaration on Territorial Asylum of 1967 declares:

“No asylum seeker shall be subjected to measures such as rejection at the frontier or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.”\textsuperscript{37}

At the regional level, the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969\textsuperscript{38} provides expression in non-binding form to a number of important principles relating to asylum, including the principle of non-refoulement, “No person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened.”\textsuperscript{39} The OAU Convention recognizes that particular countries will have to call for help when they are overburdened with refugees and it imposes a duty on the other states to assist (Kuruk, 1999: 313-332).

The American Convention on Human Rights, 1969 provides that, ‘In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.’\textsuperscript{40} International human rights law provides in the 1984 UN Convention against Torture additional forms of protection in this area that stipulates that, “No state party 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.”\textsuperscript{41} Likewise the ICCPR, 1966 has been interpreted as prohibiting the return of persons to places where torture or persecution is feared.\textsuperscript{42}

6. HUMAN RIGHTS IMPLICATION AND APPLICATION OF THE PRINCIPLE AT COURTS WORLDWIDE

Practicing of the principle of non-refoulement by the states is a humanitarian act and if a state unduly infringes this principle, it may amount to an infringement of human rights (Khan, 2014). From the early 1960s, the European Commis
sion of Human Rights, established under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR) to monitor compliance by states parties with the ECHR, found that despite its silence on asylum and non-refoulement matters, the Convention could be applicable to instances of forced removal. The Commission developed a method which made it clear that matters involving the forced removal to a risk of prohibited treatment against Article 3 ECHR could generate states parties’ responsibility under this instrument (Gil-Bazo, 2015: 6).

The well established jurisprudence of the European Commission of Human Rights was confirmed in 1989 by the European Court of Human Rights in the case Soering vs. the UK, a case involving extradition (Gil-Bazo, 2015: 6). The Court confirmed that “in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee”. In the Soering case, the European Court of Human Rights enlarges the application of Article 3 ECHR to extradition cases (Bacaian, 2011). This case established the principle that a state would be in violation if its obligations under ECHR if it extradites an individual to a state, in this case the USA, where that individual was likely to face inhuman or degrading treatment or torture contrary to Article 3 ECHR.

The most significant authority confirming the Soering Case principle to extradition case is Chahal vs. United Kingdom. In this case, the applicant an Indian national belonging to Sikh population, was suspected of having terrorist acts. He had asked for asylum in the UK. Though the British authority considered a balancing act between the national security of UK and the protection needs of Chahal to be necessary, the European Court ruled that the absolute character of Article 3 does not permit deportation to India if there is a real risk of being subjected to torture or inhuman or degrading treatment or punishment, irrespective of the conduct of the applicant or a possible danger to the national security of the UK. The Court concluded that ‘if returned to India, Chahal would run a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

Therefore, the deportation would lead to a violation of Article 3 ECHR. The Court concluded that Article 3 ECHR does not allow any balancing act between the security interests of State parties and the protection needs of individuals. In this case, the ECHR stated that Article 3 of ECHR provides a wider protection to asylum seekers than Article 32 and 33 of the 1951 Refugee Convention (Bacaian, 2011). In the landmark Chahal case before the European Court of Human Rights, the Court recognized that the principle of non-refoulement to torture or cruel, inhuman or
degrading treatment or punishment was absolute and allowed for no balancing with competing State concerns, even when these related to national security (REDRESS and ILPA, 2006).

In the case Bundesrepublik Deutschland vs. B and D, the ECJ stated that the mere fact of being a member of an organization which committed terrorist acts did not constitute a serious non-political crime for excluding a person from refugee status (Bacaian, 2011). In the case Suresh vs. Canada, the Supreme Court of Canada considered whether the Canadian law precluded deportation to a country where Suresh ran a risk of being tortured. Related questions were concerned with when there is a danger to the national security of Canada and whether mere membership of an alleged terrorist organization sufficed. The main legal issue indicated a balancing act between the protection needs of Suresh and the security interests of Canada. According to the Canadian Supreme Court, a balancing act is permitted but need to be in accordance with the principles of fundamental justice. These principles are defined by Canadian municipal law and applicable international law (Khan, 2014).

The principle of non-refoulement protects refugees from being returned to places where their lives or freedoms could be endangered (Rodger, 2001). This principle as articulated in Article 33 is broad in scope, offering expansive protection to refugees (Weissbrodt and Hortreiter, 1999). The protection against refoulement under Article 33(1) applies to persons who are the refugees under the terms of the 1951 Convention, i.e., people who meet the requirements of the refugee definition contained in Article 1A (2) of the 1951 Convention (the “inclusion” clause) and do not come within the scope of one of its exclusion provisions. It applies not only with respect to return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.

The protection of non-refoulement is not only contained in the 1951 Refugee Convention (Clayton, 2008), but also the prohibition has been expressed throughout international and regional refugee, human rights, humanitarian and extradition treaties, and has been continuously embraced by a range of international forums. In another words, it can also be described as principal of customary international law (Kunmo, 2015). This means that it is considered to be combined at all stages irrespective of assent (Goodman, 2008). However, the recent violations of the right of non-refoulement, though troubling, should not distract attention from the extraordinary continuing burden on key receiving States and the challenges this poses authorities at all levels in delivering assistance and protection to the displaced (Sanderson, 2013).
7. PERSECUTION TO INVOKE NON-REFOULEMENT PRINCIPLE IN REFUGEE PROTECTION

It is declared in the Article 14(1) of UDHR, 1948 that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” Apparently this provision of law entails that every person or who has the fear of persecution has the right to seek the protection and shelter of another country. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the UDHR, 1948 this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person (UNHCR, 1997). To be recognized as a refugee an applicant must fear a form of harm which constitutes persecution within the meaning of the 1951 Convention.

Here, the fear must be rational, certain and imminent and mere excuse or guise of fear is not enough to claim the refugee protection. There should also be a mixture of objective and subjective factors amounting to fear and the element of fear must look to the future and not to the past. The essential test is, whether there is adequate fact to draw a conclusion to the person’s fear of persecution. The phrase “well-founded fear of being persecuted” as mentioned in the refugee definition under 1951 Convention is a key phrase of the definition that reflects the views of its authors as to the main elements of refugee character (Ahmed, 2014: 35).

In order to constitute a persecution or well-founded fear of persecution, the suffering or pain inflicted or experienced by the victim must be sufficiently severe in nature and must cause a significant harm to his body, mind, reputation or property (Ahmed, 2014). It was argued in a case that, the test as to whether a state is unable to protect a national is bipartite: (1) The claimant must subjectively fear persecution; and (2) This fear must be well-founded in an objective sense. The precondition that the fear of being persecuted be well-founded requires an objective estimation of the risk of persecution faced by the applicant (UNHCR, 1992: 38). This precondition can present significant difficulty where little is known of the true conditions in the country of origin (Haines, 2003: 338).

In the case, Immigration and Naturalization Service vs. Cardoza-Fonseca, it was argued that, to show a “well-founded fear of persecution”, an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country. In another famous case it was opined that, the requirement that an applicant for refugee status had to have a “well-founded” fear of persecution if he was returned to his own country meant that there had to be demonstrated a reason
able degree of likelihood that he would be so persecuted, and in deciding whether the applicant had made out his claim that his fear of persecution was well-founded the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant’s fear was objectively justified. In the case of Danian vs. Secretary of State for the Home Department it was observed that, an applicant who could establish that he had a well-founded fear of persecution on the Convention (Refugee Convention, 1951) grounds should fall under the scope of the inclusion clauses, irrespective of whether the actions giving rise to such a fear had been carried out in good or bad faith.

From the above discussion and case study it may rightly be observed that in order to seek the asylum or refugee status or to be granted as a refugee through invoking the non-refoulement principle, the claimant must have a well-founded fear or apprehension of persecution. If this definitional condition of seeking refugee status is not fulfilled by the applicant there is a probability of rejection of the application by the refuge state. Proof of sufficient fear is a must for granting an application by the host state.

8. INELIGIBILITY OF PROTECTION IN NON-REFOULEMENT PRINCIPLE

“International law of refugees imposes a clear obligation on State: under the principle of non-refoulement no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the regime of international protection of refugees” (Marx, 1995). Whereas non-refoulement has gained broad acceptance as a fundamental norm of refugee law, the exceptions to non-refoulement have not garnered similar status. The presence of exceptions to non-refoulement had long been subject to varied state practice prior to the norm’s codification (Farmer, 2009: 8). Exceptions to the principle of non-refoulement under the 1951 Refugee Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates:

“The benefit of Article 33(1) may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

Such exception based on factors with regard to the person concerned does not figure in the other instruments either regional or universal mentioned above. The application of this provision requires an individualized determination by the country in which the refugee is that s/he comes within one of the two categories.
provided for under Article 33(2) of the 1951 Convention.\textsuperscript{59} As codified in the 1951 Convention, Article 33(2) has two exceptions, i.e., for national security and for public order.\textsuperscript{60} This means in essence that refugees can exceptionally be returned on two grounds: (a) In case of threat to the national security of the host country; and (b) In case their proven criminal nature and record constitutes a danger to the community.

In spite of the impending width of the language of Article 33(2), international law indicates that the exceptions should be interpreted restrictively.\textsuperscript{61} The little obstacle in Article 33(2) provides the bounty opportunity for states to paint exclusion regimes with broad brushstrokes, to the great detriment of the refugee law regime (Farmer, 2009: 11). In 1977 the European Court of Justice ruled that there must be genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of the society.\textsuperscript{62} It follows from the state practice that criminal offence without any specific national security implications are not to be deemed threats to national security, and that national security exceptions to non-refoulement are not appropriate in local or isolated threats to law and order. It is not very clear concerning what extent a person with a criminal record would form a danger to the community of a country where he seeks refuge. The law is unclear and is still developing by state practice (Ahmed, 2014). It is worth mentioning here that, Article 33 does not guarantee the total non-refoulement to refugees as envisaged in article 28 of the draft 1951 Convention. However, with its international customary status it has effectively provided protection to millions of refugees who have crossed borders in search for safety (Chambo, 2005). Article 28 of the draft document of the 1951 Convention provided:

“No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or political opinion.”

The 1951 Refugee Convention, in Sections (D), (E) and (F) of Article 1, further contains provisions whereby persons otherwise having the characteristics of refugees, as defined in Article 1(A), are excluded from seeking refugee protection or status. Such persons fall into three groups: The first group Article 1(D) consists of persons already receiving the protection of UN; the second group Article 1(E) deals with persons who are not considered to be in need of international protection; and the third group Article 1(F) enumerates the categories of persons who are not considered to be deserving of international protection (UNHCR, 1992). Article 1(F)
of the Convention also deals with persons considered not to be deserving of international protection and expressly states as follows:

“...The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) He has been guilty of acts contrary to the purposes and principles of the United Nations...”

The 1969 OAU Convention declares the principle of non-refoulement without exception. Again, Article 3 of the UN Declaration on Territorial Asylum, 1967 not only acknowledges the national security exception, but also appears to authorize further exceptions ‘in order to safeguard the population, as in the case of a mass influx of persons’ (Haider, 2002: 106).

9. RECENT REFUGEE CRISIS IN MIDDLE EAST, EUROPE AND SOME OTHER PLACES

After the World War I, when millions of people had become refugees, forced out of their homelands by enemy occupation or deportation, a global regime was developed to coordinate effective responses and ease the suffering of those who had been uprooted (Solana, 2015). During the liberation war of 1971, the persecuted people of Bangladesh have sought sanctuary and taken shelter in India as there was a well-founded fear of being persecuted by the military of Pakistan. Likewise, the Muslim minorities of Myanmar have also been persecuted in Myanmar for many years and finding no way they have taken the shelter in Bangladesh. Furthermore, in recent times the people from some African and Middle East states, Iraq, Syria and Afghanistan have also become the victim of persecution, left their country of origin and become the major part of refugees in the world.

Thus the intimidated people all over the world are moving from their home country and taking shelter of another country for the fear of persecution. The current refugee crisis in European region that resulted from the war of Syria, Iraq and Afghanistan has caused massive destruction and gross violation of human rights. Millions of people have been brutally killed, wounded and fled their home country and taken shelter of the European countries. Different monitoring groups and analysts observed that attacks by Syrian government forces are a primary cause...
of the refugee crisis (Naylor, 2015). The European refugee crisis arose through the rising number of refugees coming to the EU, across the Mediterranean Sea or Southeast Europe, and applying for asylum. They come mainly from Syria, Iraq, Yemen and other parts of Asia, e.g., Afghanistan, Pakistan, Bangladesh.

The number of people seeking refugee status has continued to climb in the first half of 2014, driven by the wars in Syria and Iraq, as well as conflict and instability in Afghanistan, Eritrea and elsewhere. Since 2013, the region has witnessed an increase in the numbers of refugees crossing the Mediterranean. A complicated mix of war, weather and logistical considerations lies behind the extraordinary influx of refugees into Europe (Sly, 2015). Thousands of asylum seekers have died trying to Europe from Africa, putting the refugee policies of EU under scrutiny (Iyengar, 2015). According to the UNHCR, as of early September 2015, 71% of the Mediterranean Sea arrivals are refugees coming from Syria, Afghanistan and Eritrea. Out of the 366,402 refugees who arrived through crossing the Mediterranean Sea in this year, 51% of them have been Syrian. This overflow of refugees into Europe is planned to put stress on the West and provide a cause for an attack of Syria, the removal of Syrian President and the installation of a Sunni government (Nimmo, 2015).

More than 4 million refugees have fled Syria since the war there began in 2011. According to the UNHCR, almost 1.8 million have gone to Turkey, more than 600,000 to Jordan and 1 million to Lebanon whose population is just 4 million (Harding, Oltermann and Watt, 2015). Germany, the main destination for many migrants, supports quotas, but some EU countries oppose a compulsory system (BBC Online, 2015). Angela Merkel, the German Chancellor observed that Germany expected to take at least 800,000 asylum seekers this year. Berlin has proposed a quota system, thousands of Germans have volunteered to help refugees, and press coverage has been more balanced though there have also been more violent incidents in Germany.

In 2014 the European nation that accepted the largest number of refugees in proportion to its population was Sweden. Hungary, Malta, Switzerland and 13 other countries accepted more asylum applications than the UK. Between June 2014 and June 2015, the UK took only 166 Syrian refugees. Egypt, Iraq, Jordan and Turkey have begun to actively limit the number of Syrians permitted to seek refuge on their territory by imposing quotas on those allowed to cross the border from Syria each day, refusing entry to particular classes as defined in relation to gender and/or age or by closing the border altogether. Those Syrians prevented from crossing are left exposed to the worst effects of the conflict and, in particular, the
depradations of the Syrian military, which now seems increasingly inclined to directly attack border areas (Sanderson, 2013).

There are two levels of this refugee crisis and why it has grown so dire in Europe: first one is the web of wars and crises occurred in various parts of the world that has forced millions of people from their homes in the Middle East, sub-Saharan Africa, and elsewhere and that has opened, ever so slightly, a previously closed route to Europe. The result is that when at a time thousands or millions of innocent refugee families need help, wealthy countries are more reluctant to help putting them in peril (Taub, 2015). The international law of refugee is binding upon all EU states, but the European regional instruments, relocation theories and practices may diverge from the 1951 Refugee Convention and its 1967 Protocol. This may lead to the violation of the jus cogens norm of the principle of non-refoulement. At the time of massive inflows of refugees from the Middle East, European hosting states are put under major pressure. Being signatories of the main refugee treaties, EU states should avoid the automatic repatriation of the refugees and asylum seekers (Balogh, 2015).

10. LOOPHOLES OF THE EXISTING LAWS

The draft document of the 1951 Refugee Convention provides that ‘no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories’. In this regard, the question comes, what would happen to the destiny of the doomed guys who are found in the high seas; not found in the area of any country? And what would happen to the refugees in the territory of any country which has no capacity to relocate so many numbers of the refugees?

In the current context of the refugee influx of Middle East, these questions are relevant and the answer of which is not found in the Article of the 1951 convention. A large numbers of refugees of Syria and Myanmar have set off their journey in the sea having led their lives in peril. They are drowning in the water in a countless number. One doomed baby Aylan whose dead body grounded on the sand of the sea shore has been marked as the symbol of such distressed refugees for whom no authority or law on the earth could be doing anything. If all the mechanisms and laws on the protection of refugees fail to save such lives, these laws would mean to deny the right to life of such people. So, laws on non refoulement should be reformed complying with the right to life of human being. Therefore, some changes are to be brought in Article 1 and 28 of the 1951 Refugee Convention.
11. MASS INFLUX SITUATIONS TREATED UNDER DIFFERENT RULES

It is found in state practices that situations of mass influx often create unique problems for states. It could therefore be hinted out that it is unreasonable to expect the same rules to apply when one refugee is arriving as when there are thousands of refugees. Though, in a practical stage at least, it is clear that such different circumstances require greatly different approaches, we would submit that the basic policy should remain the same. It has never been accepted that this non-refoulement rule ceases to apply in a situation of mass influx. However, the Executive Committee of the UNHCR has expressly stated that in such cases ‘the fundamental principle of non-refoulement…must be scrupulously observed’. Given that the 1951 Convention itself was made in reaction to a large refugee problem resulting from World War II, it seems weird to suddenly assume that these rules are no longer applicable in such situations. Nevertheless, it is also arguable that the reasons behind, and nature of, massive refugee flows, have changed considerably in the past fifty years and new convention should be drafted to reflect this kind of crises. The major instruments for solution in this regard may be adoption of some measures like temporary protection, extension of persecution grounds and burden sharing etc.

11.1 Temporary protection for refugees

Temporary protection implies to offer protection to the refugees temporarily by allowing them visa for a limited period of time. When everlasting visa is not possible to allow for refugees, a country may allow them to stay in that state for a short term. Many countries now choose temporary protection as an alternative to the establishment of Refugee Convention. Presently it seems to have gained the status of a customary norm. Like EU, the United States and Australia also prefer temporary permission to permanent residence. Temporary protection is having replacement for permanent residence, a measure suggested by Refugee Convention. Although, from a state perspective at least, temporary protection entails many benefits, it represents a threat to the 1951 refugee regime”.

Temporary protection has mainly developed to handle cases of mass influx. States often find themselves in a difficult situation when large numbers of people, often fleeing internal conflict, apply for refugee status. In addition to the basic fact that it is virtually next to impossible in such cases to individually screen each person, there is also the additional problem of the restrictive definition of refugee in the Refugee Convention. In the case of Rwanda, for example, some people would have had a valid argument that they fell within the definition. Rwandan Refugee Crisis of 1991 in its civil conflict is a glaring example of this kind. States usually
agree easily to accept the refugees when they know that they will be a burden on the state only for a certain period of time and therefore will cost them less. Temporary protection is the best alternative in this regard. Perhaps the major benefit, from a state angle, is that the concept of temporary protection is generally more simply accepted by the domestic inhabitants of a host state. However, even the UNHCR now recognize it as a legitimate solution in such circumstances. Many commentators have noted that harmonization of temporary protection systems with other rules of refugee protection would remove many of the current refugee problems.\(^7\)

11.2 Extension of causes for fleeing home country due to persecution

Currently, the 1951 Refugee Convention only protects the persons who fear persecution on the basis of their ‘race, religion, nationality, membership of a particular social group or political opinion’. The narrow scope of this definition has caused major inconveniences for states and refugee organizations as well, and is to some extent responsible for the progress of temporary protection system. The UNHCR and some regional organizations have admitted the fact that many of today’s refugees are really in grave danger, though not for the reasons specified in the Convention. It is also now accepted that the non-refoulement principle applies to all refugees, regardless of whether they fit the Convention definition or not. We would therefore suggest that the new provision should recognize this, and accommodate a broader range of reasons of flight. A probable model could be the OAU Convention which states; ‘the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.\(^7\) Therefore, it should be emphasized on the persecution itself, not causes why the person was persecuted and thereby, definition of refugee under the 1951 Refugee Convention is to be reformulated accordingly.

11.3 Addition of the phrase ‘wherever found’

The phrase ‘wherever found’ should also be added after the phrase ‘no contracting state shall expel or return a refugee’ because, a person may not be found in the territory of a state; he may be found in the high sea or any other place what is not its own territory. In such situation, doesn’t the given contracting state to the Convention have any liability to that particular person? Obviously it should have. So, if the term ‘wherever found’ will be included in the definition, sense of liability of individual state to protect the misfortunes will certainly rise amongst the states.
11.4 Burden sharing

In a situation of mass influx, placement of refugees in its territory may be too much difficult for a single state. It may be easier if any other state shares burden with that host state. So, there should be another burden sharing clause in addition to Article 28 so that the relocation of the refugees becomes smooth and effective. Recent EU-Turkey deal on the settlement of Syrian refugees is a good example of burden sharing.

11.5 EU-Turkey Pact on the settlement of irregular migrants

Turkey has become a great nation by offering humanitarian assistance to the endangered Syrian refugees. In addition, it has signed a Pact with European Union on 18 March, 2016 on irregular migrants approaching to Europe. At its core, the agreement aims to address the overwhelming flow of smuggled migrants and asylum seekers traveling across the Aegean from Turkey to the Greek Islands by allowing Greece to return to Turkey “all new irregular migrants” arriving after March 20. In exchange, EU Member States will increase resettlement of Syrian refugees residing in Turkey, accelerate visa liberalization for Turkish nationals, and boost existing financial support for Turkey’s refugee population. Though the Agreement has many contingencies to be implemented, such accord is an auspicious effort so far. More treaties of this kind for burden sharing are needed especially between and among East war protagonists like Saudi Arabia, USA and Russia to rescue the Middle East refugees who are in peril.

12. CONCLUSION

Not long ago it was difficult to define who is really a refugee. Now we can find formulated definition of refugees, who are obviously different from the migrants seeking better economic condition abroad. Internally displaced people ultimately lead to the rise of tide of refugees. After World War II European nations have quickly settled their territorial disputes over national boundaries. However English colonizers had created one of the most tragic refugee-migrants population in the Indian subcontinent leading to horrible killings of more than one million people. Since then, international communities have been taking various ways and means to address the refugee problems all over the world.

Last few decades the UN agencies have been failing to address refugee problems in the many regions of the world. UNHCR’s efforts have been proved inadequate to cater the basic needs of the refugees, not talking about the dare needs for food, medicine and shelter of millions of internally displaced people. Stronger,
wealthier and industrialized nations and their leaders are quite indifferent to the miseries of the millions of refugees, especially to the Muslim refugees. German Chancellor Angela Merkel, who is an exception, considers it a duty to help refugees coming to Europe. On September 19, 2016, the General Assembly, meaning all the states in the world, have issued a non-binding declaration known as the New York Declaration, committing themselves to protecting, assisting refugees. Though U.N. Secretary-General Ban Ki-moon himself is a refugee of the Korean War, failed to devise the New York Declaration on Migrants and Refugees as a binding instrument of concrete commitment.

Both the customary international law and international treaties reiterate the prohibition against refoulement of a refugee to circumstances imperiling life or liberty as one of the most basic principles of refugee protection. Though the idea of shielding people from being distant to a country where they run a threat of being subjected to human rights violations appears definitely accepted by the States in international law, the actual scope and content of such protection is remote from clarity. Throughout this study it has been strived to show that the principle of non-refoulement is intrinsically linked with a procedure aimed at identifying potential victims of persecution.

In short, the laws regarding the refugee protection may be so extended that it can effectively protect the small and large refugee influx and that the refugees can dispense after/while facing the restriction of the host states in the guise of interpretation as well. The right to life of a man, the basic human right, can’t be denied by making artificial boundaries and in addition enjoying uncontrollable right to expel a person from the border who may in turn be fallen in a persecution leading to death. Examples of Rohingyas in Myanmar and the Syrian refugees are glaring instances of this kind before our eyes in current times.

Endnotes:

2. It means Dominant recurring theme.
3. The Universal Declaration of Human Rights (UDHR) is a landmark document in the history of human rights, was adopted by the UNGA in Paris on 10th December, 1948 under the General Assembly Resolution 217A(III) as a common standard of achievements for all peoples and all nations.
4. See http://www.unhcr.org/pages/49c3646c74-page4.html , last accessed on 01.03.2016


8. There is no universally accepted definition of persecution but in general concept, persecution indicates such ugly behavioral attitudes which undermine someone’s physical or mental peace and even that may cause to death of persecuted person.

9. The Charter of the International Military Tribunal, 1945 was developed under the authority of the Moscow Declaration: Statement on Atrocities, which was agreed at the Moscow Conference (1943) and was issued on 8th August, 1945.


17. Hellman vs. MIMA (2000) 175 ALR, 149 at 16

18. Chan vs. MIEA (1989), 169, CLR, 225


20. Ibid, p. 131


22. Policy Paper: The Principle of Non-Refoulement of a person to a place in which he is expected to suffer danger to life, liberty, persecution or torture, June 2008, Refugees’ Rights Forum.


27. Article 22 (8), American Convention on Human Rights (general clause on non-refoulement), adopted on 22nd November, 1969.

28. UN Committee Against Torture, Case: Seid Mortesa Aemei vs. Switzerland, 29th
30. The International Institute of Humanitarian Law has also declared the customary status of the non-refoulement principle (IIHL, 2001).
32. Jus cogens, a peremptory norm is a basic principle of international law that is accepted by the world community of states as a norm from which no derogation is permitted.
34. The same rule of non-return is also provided under Article 3 of the 1967 Declaration on Territorial Asylum; Article II (3) of the OAU Refugee Convention; Article 22 (8) of the 1969 American Convention on Human Rights; Section III Paragraph 5 of the 1984 Cartagena Declaration; Article 3 of CAT; Article 7 of the ICCPR; and Article 3 of the 1950 European Convention on Human Rights.
35. The UN Declaration on Territorial Asylum was adopted at the 1631st plenary meeting, 14th December, 1967; In: Resolutions adopted by the UNGA during its 22nd Session, UNGA. Res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).
36. Article 3, UN Declaration on Territorial Asylum, 1967.
37. Article 2, UN Declaration on Territorial Asylum, 1967.
38. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 was entered into force on 20th June, 1974.
41. Article 3 (1), 1984 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
42. Article 7, International Covenant on Civil and Political Rights, 1966.
46. ECtHR, Soering vs. UK. 7th July 1989.
48. Suresh vs. Canada, (11th Jan, 2002), Supreme Court of Canada, 2002 SCC 1, File no. 27790.
50. Exclusion from international refugee protection means denial of refugee status to people who come within the scope of Article 1A(2) of the 1951 Convention.
51. UNHCR Note on Non-Refoulement (EC/SCP/2), 1977, Para. 4.
52. UNGA Res. 217A (III), 10th December, 1948, Article 14(1).
53. Immigration Appellate Authority, Asylum and Gender Guidelines, November 2000.
59. For detailed discussion of the criteria which must be met for Article 33(2) of the 1951 Convention to apply, see Lauterpacht, E. and Bethlehem, D (2001). The Scope and Content of the Principle of Non-Refoulement (Opinion), Para. 145-192.
60. Article 33 (2), the 1951 Refugee Convention Relating to the Status of Refugees.
62. See Reg vs. Bouchereau.
63. UNHCR viewpoint: ‘Refugee’ or ‘migrant’ - Which is right?’
64. The Civil war in Syria (2011-current).
70. Article 28, Draft document of the 1951 Convention.
72. OAU Convention governing the specific aspects of refugee problems in Africa (10th September 1969) 1001 UNTS 45.
73. The Daily Mail, 29 February, 2016.

References: