

THE INTERNATIONAL LEGAL FRAMEWORK OF REFUGEE PROTECTION

Moussaoud Constalain Chrisna¹

¹(PhD Candidate, Xiamen University, China and Affiliate to the Refugee law initiative, University of London)

Abstract: *The more there are conflicts, the more they generate a large number of refugees, the more a large number of refugees is spread out around the world, the more it becomes a global issue involving the entire international community. Nowadays, the protection of refugees has become a major problem states, international organizations and other refugees' agencies have been facing, so it can be seen as a continuous feature of international life in the present century. The aim of this article is to show the place of the protection of refugees in the international legal framework, which is International refugee law, governing refugee protection as a branch of international law, originating from the revolution in Russia and the collapse of the Ottoman Empire after the First World War in Europe, causing mass movement of people. International law is not itself a solution to the problem of refugees and the challenges produced by migratory flow, but it can be a facilitator and a guide to the principled effectiveness of measures which states may take. The significance of this topic is perceived from the fact it remains a current one and a global issue involving all the states signing the 1951 Geneva Convention on the status of the refugees.*

Keywords: Refugees, Protection, Legal Framework, International Law, States

Research Area: Refugee law

Paper Type: Research Paper

1. INTRODUCTION

The world today is full of conflicts generating a very large number of refugees and displaced persons, becoming a global issue involving different actors of the international community bringing up solutions to tackle this international refugee issue. Till now the international legal instruments regulating the status of the refugees are the 1951 Geneva Convention on the status of the refugees and its updating 1967 two protocols, including the status of the united nation-high commissioner for the refugees, complemented now by regional refugee's legal instruments in Africa, Central America, and Europe. These legal instruments provide a range number of provisions highlighting the protection of refugees, prohibiting the return of those refugees to the dangerous place prompted their flight. It implies the responsibility of States to assure the protection of the asylum seekers in their territory in collaboration with other international organizations and non-governmental organizations involved in humanitarian assistance and development aid. International refugee law regime operates to guarantee the protection of refugees and displaced persons, making the topic of the protection of refugees more relevant and global, that is why there had been organized on the date of 10th December 2018 an important conference gathering a huge number of states, governments representatives in Marrakesh in Morocco for the Global

compact on immigration and refugees, this clearly explains the crucial place the topic of the protection of refugees in the twenty-first century possesses and how this can impact the framework of the refugee law regime. The central point of this Chapter is to reveal the place of the general protection of the refugees within the framework of international law and understand who really entails benefiting the legal protection provided in the international instruments of the refugee's status. It is necessary to keep in mind that when states gathered under the new united nations, refugees were considered on the agenda. The General assembly in its first London session in February 1946 identified three principles which were already present in the league of Nations, but now acquired new salience: that as said earlier the refugee issue was international in character, the refugee should not be forced to return to the dangerous place, especially those having valid objections to going back to their habitual residence, and finally repatriation should be promoted on a voluntary basis. While the UN necessarily built on what had gone before, there was one major significance. With the adoption of the Universal Declaration of human rights in 1948, the individual now was clearly on the frame, the movement of refugees between states and the entitlement of refugee protection was clearly a matter of international law.

In order to get the clue of this Chapter different points will be discussed the first one is to understand the protection of the refugees in international law(I) the second one is the brief understanding of temporary protection (II) and the third point is the Justification of the Principle of refugee protection (III).

2. PROTECTIONS OF REFUGEES IN INTERNATIONAL LAW

The Lack or denial of protection is a principal feature of refugee character, and it is for international law, in turn, to substitute its own protection for that which the country of origin cannot or will not provide. Before we go deep to understand the protection of refugees, let's first get the clue of what are the term refugee and its description.

The most important instrument dealing with refugees is the United Nations convention relating to the Status of refugees and exiles signed in Geneva on 28 July 1951, further referred to as the 1951 Convention. For the first time a general definition of the term refugee is adopted at an international level, Article 1A (2) of the 1951 Convention, as completed by the 1967 Protocol, provides that a refugee is

“Any person who owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable, or owing to such fear, is unwilling to return to it.”

This definition depends entirely on whether the asylum seeker is successful or not in showing individual persecution on specific grounds, the emphasis being on political persecution. The main idea of the 1951 Convention is that every person is entitled to freedom from persecution and that he or she will receive recognition and assistance from the

international community in order to affect that freedom.¹The word refugee is used as a term of art, that is, a term having a content variable according to principles of general international law. In ordinary usage, it may enjoy a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found intolerable.

In treaties and arrangements concluded under the auspices of the League of Nations, a group or category approach to the definition of refugees was adopted, that someone was (a) outside their country of origin and (b) without the protection of the government of that state, were sufficient and necessary conditions. A Russian refugee for example in 1926 was defined as any persons of Russian origin who do not enjoy or who no longer enjoys the protection of the government of the Union of Socialist Soviet Republics and who has not acquired another nationality. In this instance, presence outside the country of origin was not explicitly required but was implicit in the objectives of the arrangements, namely, the issue of identity certificates for the purpose of travel and resettlement.² A similar approach was adopted in 1936 arrangements in respect of those fleeing Germany, which was later developed by article 1 of the 1938 convention, to cover:

- (a) Persons possessing or having possessed German nationality and not possessing any other nationality that is proved not to enjoy, in law or fact, the protection of the German government.
- (b) Stateless persons not covered by previous conventions or arrangements who have left German territory after being established therein and who are proved to enjoy, in law or in fact, the protection of the German government.³

Article 1(2) excluded from the definition persons who left Germany for reasons of purely personal convenience.

At the meeting in Evian in the same year, participating states resolved to establish an inter-governmental committee with, as its primary purpose, 'facilitating involuntary emigration from Germany including Austria. Included within the scope of the committee's activities were those who had yet to emigrate on account of their political opinions, religious belief, or racial origin, as well as those reasons and had not established themselves elsewhere.'⁴

Commenting on definitions, Simpson observed in 1938 that all had certain inherent deficiencies. He stressed the importance of keeping in view the 'essential quality' on the refugee as one 'who has sought refuge in a territory other than in which he was formerly resident as a result of political events which rendered his continued residence in his former territory impossible or intolerable'.⁵This description is in turn, something of abstraction from what was known then about the 'political events' producing refugees. While the notion of the impossibility or intolerability of continued residence illustrates the problem of the refugee in broad strokes after the second world war stress was laid on precise criteria. This is evident first in the constitution of the international refugee organization (IRO) than in the statute of the office of the United Nations high commissioner for Refugees (UNHCR) and finally in the provisions of the 1951 Convention relating to the status of refugees.

The Constitution of the IRO described different kinds to be assisted. 'Refugees' included victims of the Nazi, Fascist, or Quisling regimes which had opposed the United Nations, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of Nazi persecution, as well as persons considered as refugees before the outbreak of the second world war for reasons of race, religion, nationality, or political opinion. The IRO was also competent to assist displaced persons, including those deported or expelled from their own countries, some of whom had been sent to undertake forced labour. In addition, the term IRO constitution included as refugees those unable or unwilling to avail themselves of the protection of the government of their country of nationality or former residence. It was expressly recognized that individuals might have 'valid objections' returning to their country of origin, including persecution or fear based on reasonable grounds of persecution because of race, religion, nationality or political opinions, and objections of a political nature judged by the IRO to be valid.

The office of the United Nations high commissioner for refugees is the principal UN agency concerned with refugees, established by the general assembly to provide the necessary legal protection for refugees, and to seek permanent solutions for the problem of refugees. According to its statute, the work of the Office shall be an entirely non-political character –it is to be humanitarian and social and to relate, as a rule, to groups and categories of refugees.

The statute first brings within UNHCR's competence refugees covered by various earlier treaties and arrangements. It next includes refugees resulting from events occurring before 1 January 1951, who are outside their country of origin, and unable or unwilling to avail themselves of its protection 'owing to a well-founded fear of being persecuted' or for reasons other than personal convenience'. Finally, the statute extends to:

Any other who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinions or because of such fear, is unwilling to avail himself of the protection of the country of nationality, or if he has no nationality, to return to the country of his former habitual residence.

This description is of universal application, containing neither temporal nor geographical limitations. The definition is of critical importance in determining who is entitled to the protection and assistance of the United Nations, for it is the lack of protection by their own government which distinguished refugees from ordinary aliens.

In attempting to make good this deficiency, the appropriate international bodies will aim generally to protect the refugees' basic human rights, including the right to life, liberty, and security of the person. The UNHCR, however, contains an apparent contradiction. On the one hand, it affirms that the work of the Office shall relate, as a rule to groups and categories of refugees. On the other hand, it proposes a definition of the refugee which is essentially individualistic, requiring a case by case examination of the subjective and objective elements. The escalating in refugee crises over the last 30 years has made it necessary to be flexible in the administration of UNHCR's mandate. However, it follows from the UHCR statute that

there two kinds of refugees. First, the statute recognizes refugees who are part of a mass movement provoked by invasion, oppression or war, that was has been said earlier. In this case, groups are usually recognized as refugees according to the Statute of the UNHCR and programmes are set in place in the country of refuge, governments, to accept a quota of refugees.⁶ Second, the Statute sees refugees as individuals who claim to have escaped persecution in their own country. Unlike quota ‘refugees’ who are recognized refugees, individuals are also covered by article 1A (2) of the 1951 convention. Thus they only are recognized as refugees if they are successful at showing a well-founded fear of persecution on political grounds. We are not going to be deep and large on the definition of the refugee, rather be on the international protection of the refugee at the international level.

At its session, the General Assembly formally adopted the statute of UNHCR as an annexed to Resolution 428(V), in which it also called upon governments to co-operate with the Office. The functions of UNHCR encompass ‘providing international protection ‘and seeking permanent solutions’ to the problems of refugees by way of voluntary repatriation or assimilation in new national communities. The provision of international protection is of primary importance, for without protection, such as intervention by the office to secure the admission of refugees; there can be no possibility of finding lasting solutions. Besides defining refugees the UNHCR Statute prescribes the relationship of the high commissioner with the General Assembly and the Economic and Social Council (ECOSOC), makes provision for organization and finance, and identifies ways in which the high commissioner is to provide protection.⁷ These develop the functions engaged in by predecessor organizations and include: (i) Promoting the conclusion of international conventions for the protection of refugees, supervising their application and proposing amendments thereto,(ii) promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection, and (iii) promoting the admission of refugees.⁸ Notwithstanding the statutory injunction and categories that the work of the Office relate, as a rule, to groups and categories of refugees as mentioned above, a major part of the of UNHCR ‘s protection work is concerned with the individual cases, as was what of its predecessor organizations. No states have objected to UNHCR taking up individual cases as such⁹, although states may, and do; question whether an individual is indeed a refugee. Nevertheless, the individual dimension to the protection function is a natural corollary to the declared task of supervising the application of the international convention.

An international organization such as UNHCR is not only a forum in which the views of states may be represented, it is also, as a subject of international law, an actor in the relevant field whose actions count in the process of law formation. Specific authority to involve itself in the protection of refugees has been accorded to the office by states parties to the 1951 convention and /or the 1967 protocol relating to the status of refugees. The 1969 OAU Convention requires member states to cooperate similarly while declaring itself to be an effective regional complement in Africa of the 1951 Convention. UNHCR does enjoy an international personality. As a subsidiary organ of the General Assembly, its personality (its capacity to possess international rights and duties) can be traced to the United Nations at

large.¹⁰ Moreover, its statute shows that the Office was intended by the General assembly to act on the international plane. Its standing in regard to protection has been further reinforced by successive General Assembly resolutions urging all states to support the High Commissioner's activities for instance, by granting asylum, observing the principle of non-refoulement and acceding to the relevant international treaties.

Day to day protection activities are necessarily dictated by the needs of refugees, but a summary reading of both the statute of the Office and the 1951 Convention gives a general picture. There are, first, both direct and indirect aspects to the protection function with the later comprising the promotion activities of the Office already mentioned. Direct protection activities, including intervention on behalf of individuals or groups, involve protection of the refugee's basic human rights, for example, non-discrimination, liberty, and security of the person. The protection of refugees may also be promoted directly and indirectly, by the regional and non-governmental organizations including, for example, the organization of African unity, the organization of American states, and the Council of Europe. These have generated ,among others ,instruments such as the 1969 OAU Convention on te specific Aspects of refugee problems in Africa, the American convention n human rights, the European convention on human rights ,the European Agreement on the abolition of Visas for refugees, the Europeans agreement on Social Security and its supplementary Agreements ,the European Agreement on consular functions ,together with the protocol concerning the protection of the refugees ,and the European Agreement on transfer of responsibility for refugees.

The UNHCR is also concerned with the following (1) the prevention of the return of the refugees to a country in which their life or liberty may be endangered (2) the determination of refugee status,(3) the grant of asylum ,(4) the prevention of expulsion (5) the issue of identity and travel documents ,(6)the facilitation f voluntary repatriation,(7)the facilitation of family reunion,(8) the assurance of access to educational institutions(9) the assurance of the right to work and the benefit of other economic and social rights,(10) the facilitation of naturalization. Of these, the first four, together with the general function, are clearly of prime importance, with the principle of non-refoulement standing as the sine qua non of the search for permanent solutions.

3. PROTECTION IN THE HOSTILE TIME

The recent standoff on the waters of the Mediterranean between Italy, Malta and the rest of the EU are disheartening, but not unexpected given the trajectory of Europe's response to people seeking protection on its shores. The EU has taken an increasingly restrictive stance particularly at a time when more people need protection, with the ongoing displacement crises in Syria and elsewhere ,and the proliferation of causes of displacement and by no means in this trend of hostility confined to the EU, with similar policies and sentiments echoed across the wealthy world, particularly in Australia and America. The policies of such countries not only affect those seeking protection in their regions but impact refugee's protection throughout the world.

The field of refugee protection, underwritten by refugee law and developed policies and practices on the ground in countries around the world, is complex and multi-faceted and at its core, represents an international effort to ensure, that displaced persons are not left without a country to turn to in times of needs. However, recent trends have meant that frequently the following displacement, asylum seekers and refugees face further ordeals of confinement in camps, or detentions centres, perilous journey to safer countries, hostile reception conditions and reduced rights and circumstances for many years afterwards. Such conditions were not the intended outcome of the refugee convention and speak to the politics of fear and hostility that have since influenced the way in which protection is granted around the world.¹¹

Many have recognized the significance and ongoing Trend of this degradation of the refugee protection, and the need for change is reflected in the commissioning of the ongoing intergovernmental process. The global compacts on refugees and Migration, however, the ability of these compacts to significantly improve refugee protection is arguably slim. And they seem to offer only a small step forward in what is a difficult environment.

The limits of refugee protection stem from the nature of the treaty machinery for the implementation of protection norms. The relevant features of the treaty machinery are the absence of substantive guidance on a determination procedure in the convention, the vagueness of the definition of a Convention refugee or a person who is entitled to international protection under the Convention, and under the limited rights for refugees in the Convention, this had already been explained by different authors some years ago, these gaps to some extent can also have an impact on the current degradation of refugees protection.

Since the end of the Cold war, the crisis in the refugee protection system has intensified. One conventional explanation for the crisis is based on the change in the international political system. Under the political structure of the cold war era, the international refugee regime was regarded by the communist bloc as a symbolic instrument used to justify western ideology. Another explanation of the refugee protection is associated with the re-conceptualisation of ‘security’ by the international community. The community has gradually come to recognize that the phenomenon of forced migration is closely related to national and international security concerns. This recognition was propelled by a new perception of ‘security’ in the wake of the collapse of the cold war system. A number of international politics scholars argue that the new concept of security is extensive, and includes not only traditional military confrontations between states but also crises such as ethnic and religious conflict, environmental disaster and poverty.¹²

The protection of refugees at the international level is a very crucial issue between and among the states; it engages not only states but also international organizations, nongovernmental organizations in the process of the protection of those refugees. It’s important to keep n mind that this protection is given on the foundation of a certain number of requirements or criteria. But these conditions required the recognition of the refugee status in order to benefit the protection from the state are not uniform. There is a lack of uniformity in the international refugee law system. Each state at the international plan determines the

conditions to the recognition of the refugee status, and most of the states refer much more to their immigration law to ensure that the asylum seeker has fulfilled the requirements. So the protection of the refugee is followed by the recognition of the refugee status through the fulfilment of the requirements enacted in the immigration law or in the 1951 Geneva Convention and the two protocols. Some asylum seekers can be refused the refugee status and subjected to deportation to the port of embarkation which is usually the country of origin. But there exists a procedure of appeal against the decision of refusal of refugee status; the asylum seeker can follow the so-called procedure according to the rules provided by the legal instrument in force dealing with such kind of issues. Some countries do not recognize a right of appeal to a refugee or an asylum seeker who fails to meet the requirement of recognition of the refugee status. This failure may lead to a lack of protection e can observe some examples, for the case of Benin, The legal bases for the determination of refugee status are Decree no.75-153 of 16 July 1975, concerning the National refugee commission. Decisions on refugee status are taken by the national refugee commission. The UNHCR representative may be invited to attend the meetings of the national refugee commission as an observer, and the refugee identity cards are issued to those who are recognized. Those recognized refugees will benefit the protection of the Republic of Benin through the refugee identity cards. Let's take the case of Austria, the legal bases for the determination of refugee status are the federal law of 7 March 1968 concerning the right of Residence of refugees according to the 1951 convention, as amended by the federal law of 27 November 1974. The competent authority is the head of the Government of the Land (Lande-shauptmann) in which the application of refugees is made. For the case of Austria appeals against the negative decisions can be made in the first instance to the ministry of the interior and thereafter in certain cases to the Administration court. The UNHCR representative in Austria is informed of all applications for refugee status and may give opinions before a decision is taken, either at first instance or on appeal to the federal Ministry of the interior. The representative of the UNHCR can also contact the refugee during the procedure. For the case of the United Nations, there is the enactment of the 1980 refugee act which governs the admission of the refugees and the processing of asylum seeker. The definition of the refugee according to the convention and protocol is incorporated in the United Nations legislation; it makes provision for annual intakes of a refugee from among groups of specific humanitarian interest to the United States.¹³ for the case of the United States, we should bear in mind that no provision is made for the involvement of UNHCR in the Asylum process, although this has been requested with the support of numbers of concerned organizations and individuals. Some countries have incorporated the 1951 conventions and the two protocols within their domestic law, others have not expressly incorporated. The perception of protection is not perceived in the same way in different countries the same with the procedure of appeals against the negative decisions taken the competent authority for the non-recognition of refugee status. There are a lot of cases of countries referring to their own legal instruments in the first place coping with the issue of recognition of refugee status in order to guarantee protection.

4. THE BURDEN SHARING IN THE INTERNATIONAL PROTECTION OF REFUGEES

The crisis in Syria which has generated a very large number of refugees in many decades has once again thrown into relief a recruiting tension in the global regime. On the hand, the regime is premised on the understanding that individual host states will provide protection to refugees on behalf of the international community. On the other, State contributions as host countries are necessarily unequal, even arbitrary, with states in the global south hosting 86 percent of the world's refugees as at the end of 2015.¹⁴ Just as said at the end of 2015, primary by virtue of geographic proximity to refugee origin countries, States in the global south hosted 86 percent of the world's refugees¹⁵. This is just a north-south issue, however, within the European Union, there has been serious concern about the uneven distribution of state of responsibilities for refugees-a concern that significantly magnified with the large increase in arrivals in 2015 and 2016.¹⁶

At the heart of these tensions is a key set of principles: international cooperation, solidarity, burden sharing and responsibility sharing between states in the refugee regime. Recital 4 of the preamble of the 1951 convention relating to the status of refugees expresses as follow:

Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot, therefore, be achieved without international cooperation¹⁷.

A Burden sharing being so important in the international protection of refugees should be observed with very close attention in respect of its nature, and legal aspect, so simply saying it appears to represent a call for collective action to resolve refugee challenges. In the literature on international relations, the concept of burden sharing may be located within three broad institutional frameworks. For the sake of convenience, these may be termed as the multilateral, the alliance, and the distributive-developmental frameworks.¹⁸ The dictionary meaning of multilateralism is cooperation involving two or more actors. Unlike an alliance relationship which provides an exclusionary and discriminatory form of collaboration against outside actors, a multilateral relationship involves a more "inclusive" and equitable setting for international cooperation. The end of the cold war facilitated the settlement of many protracted regional conflicts; it also raised hopes a revived commitment to multilateralism in international affairs. George Bush 's concept of the new world order envisaged a return to multilateralism with the strengthening of the UN system as a core element. The UN's collective role was revived and tested during the Gulf war. However, greater multilateralism and burden sharing in refugee problems have proven to be particularly elusive. Instead, the end of the cold war has imposed severe constraints on multilateral approaches as to burden sharing. From the alliance perspective as James Hathaway could clearly say, the refugee problem constitutes a threat to the host countries. Refugees challenge the purpose of borders, the authority of government to control entry and the sovereignty and integrity of the country. They (refugees) threaten government and social burdens on the

receiving nations because of their impact in creating serious financial burdens on host countries. That is why to some extent the concept of burden-sharing must be taken seriously into account to relieve the host states. The crisis in Syria and particularly its impact in Europe have once again heightened policy and academic interest in burden sharing including within the United Nations, with the issue being discussed at a series of meetings in 2016 culminating in the adoption of the New York declaration for refugees and Migrants by the UN General assembly¹⁹. The assumption that burden sharing, while a desirable part of the international refugee regime, is a vague principle in terms of its scope, and normative content and is more relevant politically than legally, also the assumption that states are failing to sufficiently share burdens in practice –as evidenced by the inequitable distribution of refugee-hosting responsibilities between countries. And back to the past the convention was seen at the time of its adoption as imposing significant obligations on host states /countries of the first asylum –both because of the generalized refugee definition and the presumption that host states would provide permanent asylum to refugees who found themselves on their territory, to add more the 1951 convention does not address the question of host states as to how they would treat refugees, the 1951 convention notably does not address the question of admission to any country or establish the right to seek asylum, it does not even apportion responsibility between states, for example by prescribing which state should deal with a claim to refugee status or establishing quotas for admission²⁰ the idea of including the concept of burden sharing in the operative part of the 1951 convention was not well accepted by some countries, because the idea did not lay down any binding legal obligations. Venezuela, for example, observed that it was generally accepted in international law that only those provisions which imposed obligations on the signatories were included in the articles of international instruments, clauses containing statements of principles, hopes, wishes, etc. were generally inserted in the preamble and not in the operative part²¹. France was the primary proponent of retaining chapter II in the text of the 1951 convention, for reasons explored further in part III. France stressed that a wish expressed in the preamble of the convention or in a separate text would certainly not have the same force as a moral obligation set forth in the body of the convention. The united nations were in no way seeking to avoid the obligation of international solidarity, rather the question was whether the obligation to relieve the burden of the initial reception countries should appear in the operative part of the convention. Many states advocated for the burden sharing provision to be included either in the preamble or in a General Assembly resolution. Brazil suggested that a General Assembly resolution could stipulate the method by which that principle of international solidarity could be put into practice, for the United States in the interest of receiving states It would be better for the problem to be raised in the united nations rather than within the framework of the convention. After early attempts to include burden sharing in the operative part of the 1951 convention failed, the focus was then turned to the preamble²². The text of what became recital 4 was initially proposed by France as follows:

But considering that the exercise of the right of asylum places an undue burden on certain countries because of their geographical situation and that a satisfactory solution of a problem of which the United Nations have recognized the international scope and nature

*cannot be achieved without international cooperation to help to distribute refugees throughout the world.*²³

The French delegate justified the insertion of the proposed clause by noting that the grim reality which the Ad hoc committee (on statelessness and Related Matters) would have to take into account was that a number of countries were overburdened with refugees and threatened with continuous new intakes.²⁴ The French delegates clarified that this included Austria, which hosted 450,000 in a total population of 7 million inhabitants, as well as France itself which had recorded a monthly flow of 4,500 refugees fleeing the Franco dictatorship in Spain at the time the 1951 convention was drafted and had hosted up to 500,000 refugees by this point. The French delegates stated that if that situation were not to take into account, the instrument created might prove incapable of serving its purpose. In other words, if the burdens experienced by such states were not accounted for, the 1951 convention may be unable to be meaningfully applied in practice. Nonetheless, the discussion among the drafters of the 1951 convention reveals certain ambivalence about the burden sharing provision, both in terms of form and substance. At the first issue, there were significant discussions among delegations about the appropriateness of including the burden sharing provision in the preamble. This because the provision arguably went beyond the scope of 1951 which, as outlined above, was essentially between states as to the standards of treatment to be applied to refugees found on their territory. For example, Belgium was not opposed to the ideas expressed in the amendment but considered that they had no place in the convention. The United Nations stated several times that the substance of the text might be incorporated in a General assembly resolution, where it would be more proper and effective. India was opposed to inserting something in the preamble which went beyond the scope of the definition or something which was not normally consider proper in such a preamble²⁵. France was over the course of the negotiations insistent on the inclusion of the burden sharing clause in the preamble and despite the concerns expressed by several delegations, it was France's argumentation that ultimately prevailed. He was dismissive of including the burden sharing provision in a general assembly resolution, noting:

*Since a preamble formed an integral part of a convention, it carried greater weight than a General Assembly resolution. Although he did not wish to cast doubts on the value of resolutions adopted by the general assembly he ventured to suggest that in practice some of the had very little positive effect. On the other hand, the preamble being bound up with the convention would have the same authority as the convention itself. It was for that reason that the French delegation was pressing for the inclusion in the preamble of the ideas it had put forward, especially as the convention itself would entail considerable obligations of the contracting parties.*²⁶

The last decade has witnessed a meteoric rise in the number of refugees and displaced persons worldwide, reaching more than 65 million by the end of 2015. Over two-thirds of refugees never leave their region of origin, leading to a severe overburdening of countries of first asylum. The main tool to correct such imbalance—resettlement—is currently incapable of fulfilling its burden-sharing role. The United Nations high commissioner for refugees estimates that 1.19 million refugees will be in need of resettlement in 2017, yet only 107,100

persons are resettled in 2015. The September 2016 New York Declaration for refugees and Migrants called for the expansion of the opportunities for refugees to legally relocate to other countries through, for example labor mobility or education schemes.²⁷ UN Members were called upon to put forward proposals to expand the number of legal pathways to enhance refugee mobility. These proposals will be included in global compacts on refugees and migrants to be adopted in 2018. We can observe from that point of view how the whole international community is really concerned with the challenge of refugee burden –sharing, and different mechanisms that should be taken in order to make it more efficient in practice. The first World humanitarian Summit held in Istanbul in May 2016 and the September 2016 New York declaration are indicative that new contexts and displacement dynamics require new solutions and appropriate policies. There is a very practical Canadian example of private refugee sponsorship programme in opening new channels for refugee's mobility we have the example of more than 275,000 refugees have been resettled through this Canadian model in the last 25 years. Some countries have shown interest to also apply the model such as Australia, Spain, Japan, and Britain. George Soros' Open society Foundation pledged half a billion US dollars to the project organizing a Private sector forum on Migration and Refugees in Ottawa in December 2016. Britain has already adopted the private sponsorship scheme, It has already been implemented in Germany, New Zealand, Argentina, Brazil Italy and Ireland often in conjunction with humanitarian visa programmes aiming at relocating the most vulnerable refugees. Even the EU commission in April 2016 recognized the need to enhance legal and safe pathways to Europe by improving the use and implementation of existing legal migration instruments and the use of private sponsorship²⁸.

5. TEMPORARY PROTECTION AND COMPLEMENTARY PROTECTION

5.1 Understanding the legal concept of temporary protection

Discussions of temporary protection frequently proceed from a false assumption. In asking whether there is a good reason to consider the adoption of temporary protection as either a complementary remedy to or replacement for traditional modes of protection, commentators assume permanent integration of refugees to be the status quo position.²⁹ According to James C. H. International instruments do not establish a right of refugees to permanent admission to an asylum state. Whereas humanitarian or human rights concerns would arguably dictate the grant to refugees of some form of durable protection where safe repatriation is impossible, international refugee law presently the state of reception only to avoid the return of a refugee to a country where she or he may face persecution. This idea is found in the Article 33(1) of the convention relating to the status of refugees 1951.

Temporary protection mechanisms emerged in Europe in the 1990s in response to mass influxes of asylum seekers. The influxes of asylum seekers from the former Yugoslavia, fleeing conflicts and violence resulting from the break-up of that country, have been closely associated with its emergence. In the 1990s there were new asylum pressures as large numbers of people coming from the eastern European nations arrived in the European Union states, with the collapse of the soviet block and European communism. The single largest group of asylum seekers was comprised of persons fleeing conflict after the breakup of

Yugoslavia. Refuge under various national arrangements of temporary protection was given to those who reached the EU from Yugoslavia. Agreement for a common pan-EU temporary protection instrument was slow coming primarily due to a lack of consensus between states on an acceptable basis for sharing the burden of a mass influx, which was considered as a central part of an effective EU wide arrangement. Following Change brought by the Treaty of Amsterdam in 1999, which required the EU to have a temporary protection instrument in 2004, The temporary protection Directive 2001/55/EC (TPD or the directive) was agreed in 2001.³⁰ The directive provides the EU with a mechanism to activate an EU-wide temporary protection arrangement in a situation of a mass influx or imminent mass influx of displaced persons in third countries.³¹ Under the TPD displaced persons include persons who have fled areas of armed conflict or endemic violence³² The Directive provides temporary protection for one year initially, with the possibility of extension for a further two years.³³ It has been claimed that the TPD establishes ‘the binding legal obligation of temporary protection ‘providing more legal security³⁴ and that TPD sets out a model temporary protection system which the EU can ‘take off the shelf’ and use in the event of a crisis.³⁵

The current international legal regime for refugees is a relatively, recent one, Establishing under the framework of the 1951 Geneva Convention relating to the status of refugees³⁶ with the entry in force of the refugee convention and the establishment of the UNHCR, the international legal norm affecting bilateral and multilateral arrangements concerning refugees shifted in a manner of significant ways. Although the refugee convention was drafted to address the mass displacement caused by the world war II in Europe and has provisions for group or category determination, it has been viewed by states primarily assessment is considered inappropriate for the mass influx, some states view refugees convention as inapplicable to situations of mass refugee flow. So New instruments and policies have been devised to bridge the gap between states-Obligations of non-refoulement and the need for durable solution in situation where individualized asylum claims overwhelm the capacity of systems or where the cause of flight is for non-convention reasons, it is in this context that temporary protection has emerged as a regularized status in recent years.

It is import to keep in mind that the idea of temporary protection is also linked to the principle of non-refoulement. The principle of non-refoulement states broadly that no refugee should be returned to any country where he or she likely has to face persecution or danger to life or freedom. The idea that states ought not to return persons to other states in other circumstances is of comparatively recent origin. Common in the past were formal agreements between sovereign states for the reciprocal surrender of subversives, dissidents, and traitors. We have for instance agreement regarding refugees from Germany in 1936 and 1938 also contained some limitation on expulsion or return.³⁷ It will be important to remind that the idea of temporary protection was existent back before the Yugoslavia conflict which in 1990 generated a large number of refugees in refugee as we said earlier and we will get back to it very soon to understand the temporary protection directive in Europe.

Fourteen years after the enactment of TDP, the EU experienced what has been acknowledged as the largest and humanitarian crisis in Europe for decades, with close to 1.3

million recorded asylum claims in 2015.³⁸ 363,000 asylum applications were submitted by Syrians, representing 29 per cent of all claims in 2015³⁹ EU data shows that since 2014 Syrians have had an average EU-wide asylum recognition rate equal to or higher than 75 per cent.⁴⁰ So due to that critical situation, there have been calls to activate TDP to help address the crisis in the EU, and some calls to activate it to facilitate the evacuation of Syrians to the EU.

According to John Koo, three general observations can be made about the character of European and international politics in the 1990s which are integral to an understanding of the emergence of temporary protection and the subsequent concerns about its putative benefits and purpose.

The first was the rising migration numbers, and from the perspective of EU states, this was dominated by an increasing asylum problem. The numbers of refugees from the 1970s to the beginning of the 1980s crossing Western Europe were not that much compared to the numbers of these refugees from the mid-1980s the numbers began to cause serious concerns, by 1985, the number had risen to 157,000. By 1990, asylum seekers were arriving from Afghanistan, Angola, Ghana, Iran Iraq, Nigeria Pakistan, Somalia, Sri Lanka, Vietnam and Zaire.⁴¹ The 1990s became a decade of new record numbers of asylum claims as new groups of asylum seekers arrived from Eastern Europe. In 1992 the EU received a high of 674,000 asylum claims.

The second context was the collapse of the Soviet Union at the beginning of the decade and the decline of its influence⁴². The impact of this was both a period of political uncertainty in the international arena, and as noted above, an increasing number of asylum applications in the EU states from East Europeans.

The third observation is how international affairs were increasingly viewed and legitimized from a humanitarian perspective. The increasingly influential role of the media facilitated this.

The breakup of the Socialist Federal Republic of Yugoslavia into separate independent states was a complex series of bloody conflicts representing the first war in Europe since the end of the world war two. Between 1991 and 1992, Croatia, Bosnia-Herzegovina, Macedonia, and Slovenia declared themselves separate states, leaving Serbia (with its two provinces, Vojvodina and Kosovo), and Montenegro, as the remainder of what was to be renamed the federal republic of Yugoslavia⁴³. Slovenia seceded first. The first major Yugoslavian conflict was the Croatian civil war between 1991 and 1995.

The second and bloodiest conflict was the Bosnian civil war, 1992-5, with both Croatia and Serbia seeking to make gains from the Bosnian territory at the expense of the majority Bosnian Muslims. These wars resulted in what were the largest refugee movements in Europe since the World war two. It has been recorded that the total number of displaced Bosnians was over three million⁴⁴. The EU States implemented temporary protection arrangements for these refugees.

During the 1990s the EU started developing its common European asylum system: a system of harmonized law applicable across all EU states. A common approach to the problem was also to protect the EU's internal market, designed to enable free movement for EU citizens. There was a risk to the functioning of the internal market of multiple asylum claims by the same person: an asylum claim denied in one state could be made in another state if nothing was done to deny this possibility and to reduce secondary movements between states. It made sense then to develop a common EU wide set of asylum rules to manage, reduce and eliminate multiple claims. Due to this circumstance within the EU, a key innovation was then set, called Dublin transfer rules. The principle was and remains that an asylum seeker can make one claim only for asylum within the EU⁴⁵. The rules are to discourage and prevent multiple applications which as noted were recognized as contributing to increasing numbers of Asylum claims. The Dublin rules determine which one state is responsible for the claim.

In 1997, EU states agreed the Treaty of Amsterdam which was intended to provide a firm and coherent legal base to build the common asylum system⁴⁶. Amsterdam incorporated formally into the EU law the Dublin transfer rules and the Schengen rules abolishing border controls. In addition, Amsterdam committed EU institutions to develop a pan-EU temporary protection mechanism. The first post Treaty of Amsterdam was TDP. It is important to remind that the emergence of temporary protection was not separated from the politics about how to address and resist increasing migration into the EU particularly from asylum seekers. Temporary protection emerged because not all refugees could be kept out: a response to spontaneous arrivals. It was not an admission of defeat⁴⁷. Temporary protection was a part of the control policies vis a vis the influxes. The emergence of temporary protection was controversial. On the one hand, it had the support of UNHCR as an innovative response to the Yugoslavian refugee crises. On the positive side, by applying temporary protection EU states accepted a humanitarian Obligation to protect those fleeing war and conflict. On the other hand, there were concerns: UNHCR support for temporary protection did not insist that displaced people be treated as regular Convention refugees. There was no common set of EU obligations on the form and extent of protection-each state implemented its own arrangements. There were concerns that some states used temporary protection to avoid or water down obligations under the 1951 convention⁴⁸.

Despite different and varied approaches, it became accepted the wisdom that temporary protection could be an appropriate response to mass influxes and so states moved towards converging on the key elements.

International discussions on temporary protection have revolved around what such a regime, if it were to be regulated at the level of international law, should ideally entail who should it apply to, what situations would it cover, what would be the minimum content of rights envisaged and when would status end?⁴⁹ Most recently in July 2012, the United Nations High commissioner for refugees organized a roundtable on temporary protection, with the stated purpose to discuss the scope and meaning of temporary protection, and to examine what it is or should be, what it does guarantee, and in what situations it could apply.⁵⁰ While each of these consultations and meetings raised the question of the

relationship between temporary protection and the 1951 refugee convention and accepted the need for an adequate legal basis for temporary protection under international law, no consensus view was forthcoming. It is important to remind that temporary protection has an unclear relationship with the 1951 refugee convention, yet beneficiaries of temporary protection have in fact included both persons who clearly qualify as refugees under the convention and others who might not. Moreover, the global consultation confirmed the need for greater clarity concerning the international protection in mass influx situations.⁵¹

Temporary protection has no accepted meaning under international law. In fact, it has acquired multiple and varied meanings depending on the context and the country. It is a concept commonly used to describe a short term emergency response to a mass influx of asylum seekers.⁵² Temporary protection has also been applied in situations where it is difficult to distinguish between asylum seekers and others moving in a mixed flow.⁵³ As well to broader categories of persons who fall outside the 1951 refugee convention definition of a refugee.⁵⁴ For the purpose of the thesis, temporary protection is therefore understood to refer to protection of limited duration composed of admission to safety, protection against refoulement, respect for basic human rights and safe return when conditions permit to the country of origin⁵⁵. Temporary protection is thus associated not only with a stay of limited duration but also with a reduced or variable set of rights from those normally applicable under the 1951 refugee convention.

5.2 Mass influxes:

Temporary protection as said earlier is perceived as a response to mass influx situations involving Convention refugees, while ‘‘ mass influx’’ is not a term of art, it is generally understood to entail

*Considerable numbers of persons arriving over an international border, a rapid rate of arrival, inadequate absorption or response capacity in host states particularly during the emergency phase, and individual asylum procedures, where they exist, are unable to deal with the assessment of such large numbers.*⁵⁶

There is neither a minimum number nor speed of arrival, for a mass influx. In fact while mass influx has been the most common reason given by states for resorting to temporary protection, the size and scale of movement of refugees is not the decisive criterion as to whether a state is empowered to delay or suspend the application of the 1951 convention’s provisions. The decisive criterion is rather whether the mass influx presents a threat to national security within this specific context of war or other grave and exceptional circumstances, it is thus enough for a state to declare a particular refugee movement as a mass influx to a circumvent Convention.

The UNHCR has clarified that a special response is not required in every mass influx, especially if the state can continue to process asylum seekers in the normal way including through group (prima facie) determination.⁵⁷

In other words, there are other techniques available to cope with such events instead of temporary protection and the correlative suspension of convention rights. Temporary

protection under national laws can be a legal category or discretionary exercise of executive power, which have typically been used to extend protection to broader categories of persons in need of some form of international protection other than convention refugees.

Recent large –scale population movements have been the source of many of the most intractable problems affecting refugees. In some case, ethnic similarities encouraged reception and hospitality, but where the flow was cross-cultural, serious political problems arose, in addition to the usual logistical and economic ones.⁵⁸ The 1951 Convention was drawn up very much with the individual asylum-seeker in mind, and yet it contains no provision on admission. The thousands who fled Hungary in 1956, for example, were granted what turned out to be relatively temporary ‘asylum in Austria and Yugoslavia, prior to onward movement, some 170,000 being resettled within eighteen months. It was evident that generous admission policies were dependent on, if not conditioned by, generous resettlement policies maintained by other countries.

The idea of Temporary admission pending movement of another country has also figured in a number of international instruments, as an alternative to *refoulement*⁵⁹. The concept of temporary refuge as the practical consequence of non-*refoulement* though time provides, first, the necessary theoretical nexus between the admission of refugees and the attainment of a lasting solution. It establishes, a priori, no hierarchy in the field of solutions, but allows a pragmatic yet principled approach to the idiosyncrasies of each situation. So for example, it does not rule out the eventual local integration of all or a proportion of a mass influx in the state of the first refuge, acting in concert with others and pursuant to principles of international solidarity and equitable burden- sharing. Secondly, the Concept provides a platform upon which to build principles of protection for refugees pending a durable solution whereby minimum rights and standards of treatment may be secured.⁶⁰

<<In its first 100 days, the Trump administration has enacted dramatic political theatre and rhetoric as well as new as harsh new policies targeting refugees and migrants in the United States. Immigration restrictions was a –if not the central plank of Trump's campaign. Within a week of his inauguration, Trump promulgated three Executive Orders aimed at preventing the entry of asylum seekers from the Central America and refugees from Syria. The popular growth of anti-refugee sentiment in the United States began with the surge of Central American women and children seeking protection at the southwest border in 2014. Migrants flows from El Salvador, Honduras and Guatemala sought protection from increasingly unsustainable levels of gang violence in the countries. In 2014 Obama administration began to engage in a harsh policy of deterrence, including detention of mothers and children fleeing gang violence. Secretary of Homeland Security Jeh Johnson Bluntly stated, ‘our message is clear to those who try to illegally cross our borders: you will be sent back home.’ Though the numbers of Central Americans at the southwest border increased relative to earlier years, the absolute numbers-fewer than 150,000 family units and unaccompanied children –represented approximately 0.04% of the US population. In other words, the perceptions of masses of migrants and at the southwest border loomed larger in the public imagination than in reality.

Under the Trump Administration, the response was even more draconian, taking the form of two executive orders promulgated on January 25. The first, on the “border security” seeks among other horrors, to build a wall at the southwest border to increase detention of asylum seekers, to return them to Mexico for processing, and to expand the geographic and temporal scope of expedited processing of undocumented migrants, including asylum seekers. The second, on “interior public safety” authorizes increased prosecution of undocumented entrants, including asylum seekers.

The other mass influx that prompted irrational and disproportional at legal and policy responses did not even manifest at the U.S border, but rather at the border of Europe. In particular, the November 2015 terrorist attacking Paris, inaccurately attributed to Syrian refugees, prompted then candidate Trump’s proposal for a ban on Muslims entering the United States. Mike Pence, who was then governor of Indiana, led a charge that eventually included thirty-one governors of U.S states aiming to prevent Syrian refugees from being resettled in their states. Legal battles ensued, at these were the first steps towards the infamous “Muslim ban”: The January 27 and March 26 executive orders (challenge to which continue to work their way through the courts) This chain of events demonstrate the nearly unstoppable force of the imaginary of mass influx: a group of migrants seeking protection at the borders of European countries, thousands of miles away, and wrongly blamed for a terrorist attack, became fodder to justify an effort to shut down the US refugee resettlement process.>>⁶¹

Based on this idea, the concept of mass influx can have an influence on the interior public security policy of a country; this has been seen in the US, in European countries.

6. TEMPORARY PROTECTION OF THE REFUGEE AND THE 1951 REFUGEE CONVENTION

There is no Obligation in the 1951 refugee convention or under international law more generally, to grant asylum on a permanent basis⁶² in the sense of granting permanent residency. The 1951 Refugee Convention is thus fundamentally a protection instrument, rather than an instrument of permanent migration⁶³. In terms of any rights to nationality, article 34 of the convention provides only a discretionary encouragement for states to “facilitate the assimilation and naturalization of the refugees⁶⁴. Article 3(3) of the 1967 declaration on Territorial Asylum, for example, asks states to consider granting admission on a temporary basis, while pending an opportunity of going to another state.⁶⁵ Today the modern right to asylum is perhaps, therefore, best defined as the granting of protection against return to threats to life or freedom for as long as those threats exist. Coupled with the right and duties stipulated in relevant instruments. At the regional level, the OAU Refugee convention is structured similarly to the 1951 Refugee convention. While it could be seen as solutions-oriented in so far as it calls on states to “use their best endeavours... to secure the settlement of refugees (although it does not define settlement),⁶⁶ it also recognizes that states are only required to provide temporary residence pending these other arrangements. Article II(5):

Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph. This paragraph is regularly referred to as support for the view of ‘temporary protection regime operating in Africa’⁶⁷. In addition to the OAU Refugee Convention, the principles concerning the treatment of refugees, adopted by the Asian-African Legal Consultative committee in 1966, restated by its successor, the Asian-African Legal Consultative organization in 2001, provide that before taking measures contrary to the principle of non-refoulement, the state in question should enable the person concerned to seek asylum in another country.⁶⁸ Some national temporary protection schemes should not be confused with ‘temporary protection’ as this term is used in the context of mass influx of refugees as a mean to suspend Convention obligations, Temporary protection under national laws can be a legal category and /or a discretionary exercise of executive power, which have been typically been used to extend protection to broader categories of persons in need of some form of international protection other than convention refugees⁶⁹

7. COMPLEMENTARY PROTECTION:

There should be a difference reminded between complementary protection and temporary protection, they both have the same legal basis rooted in human rights obligations of the principle of not returning the refugee to the unsafe place prompted his flight. Complementary forms of protection are applied on an individual case basis, rather than to mass movements of persons⁷⁰. Jane McAdam indicates that the word ‘complementary’ in its broadest application ‘signifies protection that falls outside the dominant international refugee instrument. Complementary protection implies that the person is already in the territory of the asylum state and thus does not give rise to questions of admission, Accepted grounds for complementary protection forms of protection have so far involved prohibitions or return to the risk of torture or cruel, inhuman or degrading treatment or punishment, unfair trial or arbitrary deprivation of life⁷¹. Temporary protection may also be distinguished from the granting of refugee status on a prima facie basis, on the basis of apparent objective circumstances in the country of origin giving rise to the exodus.⁷² Prima facie recognition does not denote a subsidiary category of refugee but is rather an evidentiary shortcut to recognition as a refugee⁷³

8. HOW CAN WE JUSTIFY THE PROTECTION OF THE REFUGEES?

As said earlier refugee has an international character that is to say the whole international community is concerned with that serious issue of asylum seekers around the world. All the refugees falling in the Geneva Convention are entitled to protection and legal assistance, due to the urgent character of the flight, the so-called urgent character is an important aspect justifying the protection of the refugees. These refugees have no other places to go, they can’t either return to the place of persecution where their lives are highly in danger; their only hope is to settle down in the host country and enjoy the safety and respect of their rights. UNHCR has a principal mission to protect those refugees in collaboration with the host state using its discretionary power to guarantee the safety and protection of the

recognized refugees in its territory. The urgent character of the refugee protection in need of humanitarian assistance should be at the heart of states concern, the refugee has a right to life, to liberty, to freedom, to employment..., these are elements of the protection, and a protection without the respect of these rights does not support the term protection. Another Justification of the protection of refugees is the respect of the 1951 Geneva Convention related to the status of the refugees and it's updating 1967 two protocols, complemented by the regional arrangements in Africa, Central America and Europe. The protection of refugees has itself evolved and been strengthened by developments in the general field of human rights, while the principle of non-refoulement is manifestly one of customary international law. Another element to add in order to justify the protection of the refugees is the identity element. The cornerstone of refugee identity has been established in the legal and normative framework of protection enshrined in the 1951 convention⁷⁴ Refugees are the product of complex social and economic conditions which precipitate conflict and violence and which may cause people to flee. From the start, refugee identity has been largely ascribed, grounded in law and, as such, it is inevitably partial. The 1951 convention relating to the status of Refugees proposed a designation constructed around the core and intertwined principles of (a) a well-founded fear of persecution, (b) outside the country of origin and thus (c) in need of a defining attribute –international protection. A legal definition of a refugee established on these explicit and unique criteria was a construct of its time which, as long has argued , separated the distinct category of ‘refugee’ from migrant by reifying protection over other claims and needs.⁷⁵ Refugees and asylum seekers are such a group whose identity is materialized or constructed around the concept of protection and how that is enacted through states policies and practices. The international convention has produced a constructed identity which largely serves the need of states, refugees, has been highly instrumental in shaping and constraining that identity and the experiences of those so categorized⁷⁶. The protection has a close link or connection with the identity, in other words, the identity implies the protection, and the protection is backed up by the features of the defining elements of the article 1 of the 1951 Geneva convention.

9. CONCLUSION

The refugee Convention meaning should be ascertained having regard to its object, bearing in mind that the convention is one of several important international treaties designed to redress ‘violations of basic human rights, demonstrative of a failure of state protection’...Is the recognition of the failure of state protection, so often repeated in the history of the past hundred years, that led to the exceptional involvement of international law in matters concerning individual human rights⁷⁷. The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a convention reason in his own country to turn for protection to the international community⁷⁸ Protection of the refugees is the whole international community concerns, making the subject more relevant in international law and international human right law.

End Notes:

¹ Helene Lambert *Seeking Asylum Comparative law and practice in selected European countries*, International studies in human rights, Martinus Nijhoff publishers

² It was also provided that certificates should cease to be valid if the bearers returned to their country of origin, see form and wording of the certificate attached to the arrangement of 5 July 1922:13 LNTS no. 3555, Res.9 of the arrangement of 30 June 1928: Refugee coming from Germany of 10 February 1938:192 LNTS no.4461.

³ 1938 Convention concerning the status of refugees coming from Germany: 191 LTNS no. 4461. The definition was subsequently extended to cover persons coming from Austria, following the Anschluss, see the additional protocol, 14 sept 1939 :198 LNTS no. 4634.

⁴ Para.8, Resolution adopted by the Intergovernmental meeting at Evian, 14 July 1938: LN OJ, 19th year, nos.8-9: aug,-sept.1938, 676-.see also agreement relating to the issue of travel documents to refugees who are the concern of the intergovernmental committee on refugees, 15 Oct.1946:11 UNTS 73

⁵ Simpson, *Refugees –A preliminary Report of a survey* (1938), 1.

⁶ The term quota 'refers to the number of places which a country makes available to the UNHCR as a planning figure for selection from different camps. The country in question fixes the number of places and selects the individual persons for transfer. For example, 21,300 south-Asians refugees were accepted for resettlement in Britain between 1979 and 1989 (D.O' Keeffe and R.W piotrwicz, *National report: Asylum law in the United kingdom*'' , Paper presented at Trier , March 1992 ,p.4) As another example, Sweden receives refugees for resettlement under annual quota of 2,000. During 1991 ,1,222 refugees from Vietnam ,Iran, El Salvador and Iraq were accepted (Swedish Ministry of cultural affairs ,*Immigrant and refugee policy,1992,p.25*) However Sweden has recently decided to refuse convention status to quota refugees in UNHCR camps, they will be given a lower status instead (MNS, March 1994,p.8)

⁷ Statute ,Para .8

⁸ In addition to the declared functions, UNHCR's indirect or promotional activities encompass the enforcement of national laws and regulations benefitting refugees, the development and adoption of appropriate national laws, regulations, and procedures, promotion of accession to international instruments, and the development of new legal instruments. Latterly, the executive committee has also included with approval the dissemination of refugee law in the list of activities, see for example ,UN doc .A/AC.96/588, para.48(1)(k)(report of the 31st Session of the executive committee,1980)

⁹ Sadruddin Aga Khan, 'Legal problems relating to refugees and displaced persons' Hague recueil (1976-I) 331-2, Schnyder, *Les aspects juridiques actuels du problem des refugies*' Hague recueil (1965-I) 319,416, Weis,30 BYIL, at 214

¹⁰ See generally ,*Reparations cases*, ICJ Rep.1949,174 at 178-9

¹¹ Susan Reardon-Smith: *Refugee protection in a hostile world?* working paper presented at the third Annual conference of the Refugee law initiative ,University of London,18-19 July 2018.

¹² Osamu Arakaki : *Refugee law and practice in Japan*, law and migration, Ashgate publishing limited

¹³ Refugee Act 1980 ,s.201(a)and(b), amending and adding to Immigration and nationality Act(INA),s.101(a).The law distinguishes between refugees, who are screened overseas and accepted for resettlement ,and those granted asylum after making application when physically present in the US at a border or port of entry.

¹⁴ Clair Inder *The origins of 'burden sharing ' in the contemporary refugee protection regime ''* A special edition of papers arising from the refugee law initiative ,Inaugural Annual Conference ,The future of refugee law ,29 june-1 July 2016,Senate house, London.

¹⁵ UNHCR, *Global trends: Forced displacements in 2015*, 20 June 2016, <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-0614-global-trends-2015.pdf>.p.2.

¹⁶ For latest data on arrivals across the Mediterranean see UNHCR, *Refugees/migrants Emergency Response-Mediterranean*, updated regularly, <http://data.unhcr.org/Mediterranean/regional.php>.

¹⁷ 1951 Convention Relating to the status of refugee, United Nations Treaty Series, vol.189, p.137.1967 protocol relating to the status of refugees, United Nations Treaty series, vol.606, p27.

¹⁸James C Hathaway (Editor) *Reconceiving International Refugee law*, Martinus Nijhoff publishers, The Hague/Boston/London. P 124.

¹⁹The New York declaration contains language acknowledging a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive compassionate and people and people – centered manner (para 11), as well the ‘centrality of international cooperation to the refugee protection regime (para.68.).States ‘commit to a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and differing capacities and resources among states (para 68): United Nations General Assembly, New York Declaration for refugees and Migrants, A/RES/71/1,19 September 2016,www.unhcr.org/events/conferences/57e39d987/new-york-declaration-refugees-migrants.html. See also Executive committee conclusion No.112 (LXVII)(2016) on international cooperation from a protection and solutions perspective, ‘www.refworld.org/type,EXCONC,UNHCR,57fb574,0.html.

²⁰Guy Goodwin –Gill ,’convention Relating to the status of refugees, protocol Relating to the status of refugees’ United Nations Audiovisual Library of international law(2008),<http://legal.un.org/avl/ha/prsr/prsr.html>

²¹Ad hoc committee on statelessness and related problems, First session, summary Record of the seventh Meeting, Para 8.

²²The preamble was discussed by the ad Hoc committee on statelessness and related problems(16 January-16 February 1950)and the social committee of the Economic and social council (meeting in July and August 1950).The draft refugee definition and the preamble as amended were adopted by the economic and social council on 11 August 1950.See further ,Guy S Goodwin-Gill, convention relating to the status of refugees ,protocol relating to the status of refugees, UN audiovisual library of international law(2008) <http://legal.un.org/avl/ha/prsr/prsr.html>.

²³France :amendment to the draft convention relating to the status of refugees, UN Doc .E/L.81(29 July 1950)

²⁴Economic and social council ,United Nations Economic and social council official Records ,Eleventh ,406th meeting ,E SR.406ENG(11 August 1959),p.275

²⁵Economic and Social council ,United Nations Economic and social council official records ,Eleventh Session,406th meeting ,E SR.406 NG(11 August 1950) para 101

²⁶Social committee ,summary Record of the Hundred and sixty seventh Meeting, Economic and social Council, E/AC.7/SR.167(22 August 1950)pp.6-7

²⁷Dr Ingrid Boccardi ‘ ‘ *Meeting the challenge of refugee Burden-sharing; Enhancing Refugee Mobility through Legal Migration Schemes*’ Panel session(day3)-stream 1 second annual conference Refugee law initiative5-7 June 2017,Senate house London

²⁸EU Commission Communication: towards a Reform of the common European Asylum system and enhancing Legal Avenues to Europe ,COM,(2016)197 FIN).

²⁹V30 James C.Hathaway (Editor) *Reconceiving International refugee law* Page 1section I :Temporary protection ,Martinus Nijhoff Publishers 1997

³⁰Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member states in receiving such persons and bearing the consequences thereof (2001) OJL212/12.(TPD)

³¹Ibd.article 1.

³²Ibd .article2 (c).

³³Ibd.article4.

³⁴Nuria Arena, *The concept of max influx of displaced persons in the European Directive establishing the temporary protections system* European Journal of migration and Law,7 (2006),PP.435,437

³⁵Steve Peers, EU Justice and home affairs law(3rd edn,Oxford :Oxford University press,2011),p 300

³⁶Convention relating to the status of refugee adopted in July 28,1951(entered in force Apr22,1954)its companion 1967 protocol (refugee protocol) protocol relating to the status of refugee adopted in January31,1967(entered in force in October 4,1967)

³⁷ Art 4, provisional arrangement concerning the status of refugees coming from Germany,1936:171LNTS no.3952,official text in English and French. The arrangement was definitively signed by seven states, the United Kingdom excluded refugees subject to extradition proceedings from the ambit of art. 4 , and likewise , for most purposes ,refugees admitted for a temporary visit or purpose.Art.5,Convention concerning the status of refugees coming from Germany ,1938:92LNTS no.446,official texts in English and French .The convention was ratified by only three states ,the United Kingdom repeated its 1936reservations.

³⁸ European Commission(asylum statistics in 2016),http://ec.europa.eu/eurostat/statistics-explained/inde.php/asylum_statistics(accede 20 December 2016)

³⁹European commission(Asylum statistics 2016)

⁴⁰ European commission press Release(22 September 2015),http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm(accessed 14 September 2016)

⁴¹UNHCR ,the State of the world's refugees 2000:fifty years of humanitarian Action (Oxford :Oxford University press,2000),p 156 available at www.unhcr.org (accessed 9 January 2017)

⁴²J.M Robert *The New penguin History of the world* (4th edition,harmondsworth:penguin,2002),p1141

⁴³ UN international criminal Tribunal for the former Yugoslavia (ICTY)website at www.icty.org/en/about/what-former-yugoslavia(accessed 15november 2016)

⁴⁴Kirsten Young , ‘UNHCR and ICRC in the former Yugoslavia :Bosnia-Herzegovina’, International review of the red cross ,83(2001),pp.782-3

⁴⁵The current transfer rules are in a 2013 EU regulation ,604/2013:European parliament and council Regulation 604/2013 of 29 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(2013) OJL180/1

⁴⁶ Karoline Kerber , ‘*Temporary protection in the European Union: A Chronology*’, Georgetown Immigration law journal,14(1999),pp.35,44,49

⁴⁷James C.hathaway(ed) *Reconceiving International refugee law* (Kluwer law international,1997),p 32

⁴⁸Fitzpatrick ‘*Temporary protection of refugees*’,pp.279,280

⁴⁹Primary, these discussions examined two different applications of a possible temporary protection regime: the first ,in large refugee influxes or other comparable situations and how it ought to be regulated ,the second ,to groups of persons who are not covered by the 1951 refugee convention because they would fail outside the definition of a refugee. The international law association (ILA), for example, studied all these aspects of temporary protection from 1996 until 2002 and sought to elaborate a draft declaration on temporary protection. In May 2002 the ILA adopted its guidelines: international law Association, Resolution 5/2002 on refugee procedures (guidelines on temporary protection, 6 April 2002) (ILA Guidelines).

⁵⁰United nations high commissioner for refugees , ‘summary Conclusions on temporary protection(summary conclusions ,19-20 July 2012) which proposes to include a number of savings clauses in any temporary protection arrangement in order to ensure existing international obligations are not determined.

⁵¹Global consultations, UN Doc EC/GC/01/4, (1)

⁵²Existing doctrine on temporary protection accepts it as an emergency response to a mass movement of asylum seekers; United Nations high commissioner for refugees, Summary conclusions on Temporary protection (19-20 July 2012). Ruma Mandal , ‘Protection mechanisms outside of the 1951 Convention (Complementary protection) Legal and protection policy Research series paper No PPLA/2005/02,United Nations high commissioner for refugees,2 June 2005)

⁵³See,eg, United Nations high commissioner for refugees ,Protection considerations with regard to people fleeing from Libya –UNHCR Recommendations (25 February 2011),UNHCR ,Protection considerations with regard to people fleeing from Libya-UNHCR’S recommendation update No1 (29march 2011)

⁵⁴See the United Nations high commissioner for refugees, Guidelines relating to the eligibility of Iraqi Asylum seekers (3 October 2005)

⁵⁵The best elaboration of the rights that should apply in mass influx of asylum seekers are contained in executive committee of the high commissioner's programme, protection of asylum seekers in situations of large-scale influx: No 22(XXXII),32nd sess (21-24 April 1981)..

⁵⁶Executive committee of the high commissioner 's programme ,Conclusion on international Cooperation and burden and responsibility sharing in mass influx situations :No 100(LV), 55th sess (2004)(a)..see also Protection and cooperation in Mass influx situations ,UN Doc EC/54/sc/crp.11,(3)

⁵⁷Global Consultation, UN Doc, EC/GC/01/4,(18)

⁵⁸Guy.S GOODWIN-GILL *The Refugee in international law*, CLAREDON PRESS 1986, P 114

⁵⁹Cf. the various formulations in art .III(4),principles concerning treatment of refugees, adopted by the asian-african legal Consultative committee ,8th session,Bangkok,1966, and in 1967 art.3(3) of the Declaration on territorial Asylum,art.11(5),1969 OAU convention,para.3,Council of Europe Res.14(1967) on asylum to persons in danger of persecution,art.3(3),adopted by the committee of the whole of the 1977 United Nations Conference on Territorial Asylum.

⁶⁰Guy.S.GOODWIN-GILL *The refugee in international law* ,CLAREDON PRESS 1986,p120

⁶¹Blog post written by Professor Jaya Ramji-Nogales (Temple University) who presented on the mass Migrants flows, international obligation and internal resistance: Trump's executive orders in Critical Perspective panel at the Second Refugee Law initiative Conference 2017

⁶²See Manuel Angel Castillo and James C Hathaway, 'Temporary protection' in James Hathaway (ed) ,Reconceiving International refugee law (Martinus Nijhoff,1997)1.2

⁶³Matte J Gibney , ' Between Control and Humanitarianism: *Temporary protection in Contemporary Europe*' (2000) 14 Georgetown Immigration law journal 689,692.

⁶⁴1951 Refugee Convention art 34.

⁶⁵Declaration on Territorial Asylum, GA Res 2312(XXII),UN GAOR,22nd sess,1631st plen mtg ,Agenda Item 89,Supp No 16,UN Doc A/RES/2312(XXII)(14 December 1967) art 3(3) provides: Should a state decides in any case that exception to the principal stated in paragraph 1 of this article would be justified ,it shall consider the possibility of granting to the person concerned ,under such conditions as it may deem appropriate ,an opportunity ,whether by way of provisional asylum or otherwise ,of going to another state.

⁶⁶OAU Refugee convention art II (I) Provides: Member states of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well –founded reasons, are unable or unwilling to return to their country of origin or nationality.

⁶⁷Rutinwa, quoting Refugee Research Unit, Centre for refugee studies, York University, 'The Temporary protection of refugees: A solution –oriented and Rights Regarding Approach '(Discussion paper, 17 July 1996) 22: The debate about temporary versus permanent refugee protection has no real currency in the south, where protection has almost always been assumed to be temporary, even if it lasted for a long time ..Protection has usually been provided by neighboring countries with the clear understanding that the refugees would eventually return home. In fact in Africa temporary protection is not only common practice ,it is given prominence in the organization of African unity's 1969 Convention Governing the specific aspects of refugee problems in Africa, Article II(5)

⁶⁸Asian-African Legal Consultative committee ,Bangkok Principles on the status and treatment of refugee (31 December 1966) arts II(4),III(2) ,Asian-African Legal consultative organization,1966 Bangkok principles on status and treatment of refugees(Declaration adopted by the Asian-African Legal consultative organization,40th sess , New delhi,24 June 2001)arts II(4) ,III(2)

⁶⁹A distinction needs to be made between temporary protection regimes for non-Convention protection categories on the one hand and, the other hand, practices of granting temporary visas to recognized refugees. In the early 2000s, the Australian Government, for example introduced Temporary protection visa (TPVs) for recognized refugees under the 1951 Geneva Convention who had been processed through an individual procedure. The TPVs were not created to apply to 'mass influx situation'. They were widely criticized for carrying substantial levels of treatment including the denial of some basic rights, such as family unity ordinarily applicable to 1951 refugee convention: see eg ,Alice Edwards, 'Tempering with refugee protection: The case of

Australia⁷⁰(2003)15 International journal of refugee law 192. The TPVs were abolished in 2008 and replaced by permanent visas.

⁷⁰ Jane McAdam, *Complementary protection in international refugee law*, (2007) Oxford University press, 2

⁷¹ See C W Wouters, *International legal Standards for the protection from Refoulement* (2009) Intersentia

⁷² Bonaventure Rutinwa 'Prima facie status and refugee protection' (Working paper N 69, United Nations High commissioner for refugees, October 2002) 1.

⁷³ Jean -Francois Durieux, 'The Many faces of prima facie' Group -based Evidence in refugee status Determination' (2008) 25(2) refugee 151, 15-5

⁷⁴ Convention relating to the status of Refugees, Geneva, 28 July, 1951, UNTS 137, supplemented by the protocols relating to the status of refugees, 31 January 1967, 19 UST 6223, 6257 ('1951 refugee convention')

⁷⁵ Katy Long 'When refugees stopped Being migrants: Movement, labor and humanitarian protection' (2013) 1 migration studies. 4

⁷⁶ Roger Zetter 'Creating identities, diminishing protection and the securitization of asylum in Europe' In Refugee protection and the rule of law: Conflicting identities. Edited by Susan Kneebone, Dallal Stevens and Loretta Baldassar, Routledge research in Asylum, migration and refugee law, (2014)

⁷⁷ Minister for immigration and Multicultural affairs v. Khawar, (2002) HCA 14 (AUS.HC, Apr. 11, 2002) per Kirby J. see also Applicant 'A' and Anor v. Minister for migration and Multicultural Affairs, (1997) 190 CLR 225 (Aus, Feb. 24, 1997), per Kirby J. at 296-297, holding that the term 'refugee' is to be understood as written against the background of international human right law, including as reflected or expressed in the Universal Declaration of Human rights (esp. Arts. 3, 5, and 16) and the international Covenant on civil and political rights (esp. Arts. 7, 23)

⁷⁸ Horvath, v. Secretary of state for the home department, (2000) 3 ALL ER 577 (UK HL, July 6, 2000) per Lord Hope of Craighead.

REFERENCES

- Susan. R (2018) Refugee protection in a hostile world? working paper, Refugee law initiative University of London
- Clair.I (2016) the origins of burden sharing in the contemporary refugee protection regime, Refugee law initiative, University of London.
- Guy.G (2008) Convention relating to the status of refugees, protocol relating to the status of refugees, United Nations, audio visual library of international law.
- James.H (1997) “ Reconceiving International refugee law”, Martinus Nijhoff publishers
- J.M.Robert (2000) ‘the new Penguin History of the world’ Harmondsworth
- Karoline.K (1999) Temporary protection in the European Union, A chronology, Georgetown immigration law journal.
- Wouter.C(2009) ‘International legal standard for the protection from refoulement’. Intersentia.
- Jean.F (2008) the many forces prima facie group based evidence in refugee status determination.
- Katy Long (2013) when refugees stopped being migrants: movement, labor and humanitarian protection. Migration studies.
- Lorett. B (2014) Migration and refugee law, Routledge research in asylum
- Horvath, v. (2000)Secretary of state for the home department , 3 ALL ER 577(UK HL,July6,2000)per Lord hope of Craighead .
- Guy.S(1986) *The refugee in international law*, CLAREDON PRESS ,p120
- Jane McAdam, (2007) *Complementary protection in international refugee law*, Oxford University press,2
- Matte .J Gibney ,(2000) ‘ Between Control and Humanitarianism: *Temporary protection in Contemporary Europe*’ 14 Georgetown Immigration law journal 689,692.
- Matte .J Gibney ,(2000) ‘ Between Control and Humanitarianism: *Temporary protection in Contemporary Europe*’ 14 Georgetown Immigration law journal 689,692.
- Convention relating to the status of Refugees ,Geneva ,28 july,1989,UNTS 137,supplemented by the protocols relating to the status of refugees ,31 January 1967, 19 UST 6223,6257(‘1951 refugee convention’)
- Kirsten Young , ‘UNHCR and ICRC in the former Yugoslavia :Bosnia-Herzegovina’, International review of the red cross ,83(2001),pp.782-3