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LLM Thesis

Topic: Does the 1951 UN Convention Relating to the Status Of Refugees adequately protect refugees from refoulement?

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LLM degree in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.
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# Table of Contents

## Contents

Declaration ........................................................................................................................................... i

Acknowledgements .......................................................................................................................... ii

Table of Contents ............................................................................................................................ iii

List of Abbreviations ....................................................................................................................... v

PART A - INTRODUCTION AND LEGAL FRAMEWORK ............................................................. 1

(I) Introduction .................................................................................................................................. 1

(II) Legal Framework ....................................................................................................................... 6

(i) Under International Refugee Law ............................................................................................ 8

(ii) Regional refugee law arrangements ....................................................................................... 10

(iii) Under International and Regional Human Rights Law ....................................................... 13

PART B - RATIONE PERSONAE ................................................................................................. 17

(I) Protected persons ....................................................................................................................... 17

(ii) Stateless persons and persons with dual and multiple nationalities ..................................... 18

(iii) Recognised refugees, asylum-seekers and illegal entrants .................................................... 20

(iv) Groups in mass influx situations ............................................................................................ 22

(v) Stowaways and other maritime arrivals .................................................................................. 24

(vi) Combatants .......................................................................................................................... 26

(II) Qualitative Shortcomings ......................................................................................................... 28

PART C - RATIONE MATERIAE .................................................................................................... 31

(I) Prohibited Measures .................................................................................................................. 31

(ii) Rejection at the border ............................................................................................................ 31

(iii) Expulsion ................................................................................................................................. 32

(iv) Deportation ............................................................................................................................. 33

(v) Extradition ................................................................................................................................. 33

(vi) Conclusion ............................................................................................................................... 35

(II) Degree of persecution .............................................................................................................. 35

(III) Exceptions and Exclusions .................................................................................................... 40

PART D - RATIONE LOCI ............................................................................................................. 42
(I) Relevant provisions ........................................................................................................... 42
(II) The alienage requirement ................................................................................................ 43
(III) Territorial scope from States’ perspective .............................................................. 46
   (i) To which places are States prohibited from returning a refugee? ................... 46
   (ii) Prohibition of *refoulement* within a State’s territory ........................................ 49
       (a) Within a Federal State ................................................................................ 49
       (b) Within a Unitary State ............................................................................. 50
   (iii) Prohibition of *refoulement* outside a State’s territory .................................... 52

PART E- *RATIONE TEMPORIS* .................................................................................. 58
(I) Commencement ............................................................................................................. 58
(II) Continued Existence .................................................................................................. 59
(III) Termination .............................................................................................................. 61
   (i) Voluntary efforts .............................................................................................. 61
   (ii) Ceased circumstances .................................................................................... 62
   (iii) Compelling reasons exemption ..................................................................... 63

PART F – CONCLUSION ............................................................................................... 65
BIBLIOGRAPHY ........................................................................................................... 67
List of Abbreviations

CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
EC- European Council.
ECHR- European Court of Human Rights.
ECRE- European Council on Refugees and Exiles.
EU- European Union.
EXCOM- Executive Committee of the High Commissioner’s Programme.
ICCPR- International Covenant on Civil and Political Rights.
ICJ- International Court of Justice.
ICLQ- International and Comparative Law Quarterly.
ICTY- International Criminal Tribunal for the Former Yugoslavia.
INS- Immigration and Naturalization Service.
UDHR- Universal Declaration of Human Rights.
UNHCR- United Nations High Commissioner for Refugees.
PART A - INTRODUCTION AND LEGAL FRAMEWORK

(I) Introduction

The 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol\(^1\) provide for refugee protection from *refoulement* by prohibiting States from returning a refugee to a territory where her\(^2\) life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.\(^3\) The specific reference to a refugee in the prohibition of *refoulement* links the protection from *refoulement* to the definition of a refugee under the Refugee Convention.\(^4\) The Refugee Convention defines a refugee for the purposes of the whole Convention rather than a single provision or a certain category of provisions.\(^5\) Consequently, a person becomes entitled to protection from *refoulement* upon satisfying the criteria prescribed by the definition of a refugee under the Convention.\(^6\) Recognition of refugee status is therefore not a prerequisite for protection from *refoulement* since a person may satisfy the definitional criteria of a refugee before recognition as such.\(^7\) This is a practical protective feature of the Convention because a refugee becomes entitled to protection from *refoulement* even if a State avoids or delays a

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2 References to females include males except in specific references to authors and persons involved in case law.


5 Op cit note 1 Article1A.


7 Ibid.
refugee’s access to status determination procedures. However this feature is not directly attributable to the Refugee Convention since its text is silent on the declaratory nature of recognition. It is a direct innovation of the ‘soft law’ of the Office of the United Nations High Commissioner for Refugees.

No reservations can be made by States to either the provision against refoulement or the definition of a refugee under the Convention. This clearly shows the fundamental importance of the principle of non-refoulement in the protection scheme of the Refugee Convention. The Convention strives to establish a uniform protection regime among Member States. This is consistent with its status as a ‘universal’ refugee rights treaty and its object and purpose ‘…to assure refugees the widest possible exercise of … fundamental human rights…’. A universal refugee protection regime improves the quality of refugee protection from refoulement because uniform rules ensure certainty for both the beneficiaries and the benefactors of the protection. The consistent application of the principle of non-refoulement among States is an achievement since the protection from refoulement is offered by one State to nationals of other States.

The Convention merely lays a minimum standard of refugee rights. It does not impair access to additional rights by refugees. This facilitates

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9 Op cit note 6.
10 Article 42(1) of the Refugee Convention and Article VII (1) of the 1967 Protocol.
11 Op cit note 8 at 198-199. For that terminology but in the context of maritime interception and rescue. Also Executive Committee (EXCOM) Conclusions No- 17 (XXXI) 1980, para (b), No 65 (XLII) 1991 para (c) and No79 (XLVII) 1996 para (j) for the repeated affirmation of the principle of non-refoulement as the cornerstone of international refugee law.
14 Article 5 of the Refugee Convention provides that, ‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’.
refugee access to complementary protection\textsuperscript{15} under international human rights law. The recognition of complementary protection in the refugee protection regime can be seen as an admission of the fact that the Refugee Convention, by itself, cannot adequately protect refugees from \textit{refoulement}. Refugees who fail to satisfy the Convention criteria for \textit{non-refoulement} can resort to the protection from \textit{refoulement} offered by international human rights law\textsuperscript{16} because the Convention acknowledges that it does not exhaustively provide for refugee rights.\textsuperscript{17}

Refugee protection from \textit{refoulement} under the Convention derives inspiration from the Universal Declaration of Human Rights which provides for the right to seek and enjoy in other countries asylum from persecution.\textsuperscript{18} Unfortunately, this provision was not incorporated into the subsequent binding part of the International Bill of Rights,\textsuperscript{19} so it remains ’soft law’ and not legally binding.\textsuperscript{20} Concomitantly, the Convention provision for \textit{non-refoulement} is couched in negative terms as an obligation not to return an individual to territories of likely persecution rather than a duty to admit those fearing persecution. States therefore have no legally binding duty to facilitate

\begin{footnotesize}
\begin{enumerate}
\item Jennifer Moore ‘Humanitarian Law in Action Within Africa’ (2012), Oxford University Press, Oxford at 156 hopefully comments that ‘this right is still making the journey from soft to hard law’. Although most of the provisions of the UDHR have acquired the status of customary international law, there is no sufficient evidence of State practice with the requisite \textit{opinio juris} for the right to seek asylum. D Harris ‘Cases and Materials on International Law’ 6th ed (2004) Sweet and Maxwell, London at 62 defines ‘soft law’ as non-binding international rules which are not subject to the law of treaties.
\end{enumerate}
\end{footnotesize}
the arrival and subsequent recognition of refugees. The facilitation of arrival and the subsequent granting of status is therefore a matter within the exercise of State discretion.\textsuperscript{21} Nicholson and Twomey argue that the subjection of refugee protection to State discretion is `contrary to current trends in human rights protection.'\textsuperscript{22}

International refugee law is not only related to international human rights law but it also uses general principles of public international law especially in aspects of territory and jurisdiction which are relevant considerations in the prohibition of refoulement. It also interacts with international humanitarian law\textsuperscript{23} and international criminal law especially in the consideration of exceptions to non-refoulement on the basis of criminality during armed conflicts. These systems of law and the general contemporary situations and needs of refugees are useful yardsticks in assessing the adequacy of refugee protection from refoulement with international human rights standards enjoying primary importance.\textsuperscript{24}

The Convention was drafted during the rudimentary stages of the international human rights movement. Its provisions, including that for non-refoulement, are lagging behind the subsequent developments in the international human rights regime. It does not have an explicit provision against torture and this reduces the quality of the protection from refoulement it offers in view of the intrinsic relationship between the prohibition of torture and the principle of non-refoulement.\textsuperscript{25}

The Convention does not establish an international treaty body to enforce the rights it creates. This compromises the human rights dimension of the Convention and removes refugee protection from the general human

\begin{footnotesize}
\footnote{21}{James C Hathaway ‘The Rights of Refugees Under International Law’ (2005), Cambridge University Press, Cambridge Ch 4.1 at 301.}
\footnote{23}{Jane McAdam ‘Examining flight from generalized violence in situations of conflict’(2011) International Association of Refugee Law Judges (Third Report ) at 8 available at http://www.iarlj.org/general/images/stories/BLED_conference/papers/WP_1951_Conv_-_J_McAdam.pdf International humanitarian law (IHL) is the name given to the body of law which seeks to protect both combatants and non-combatants from collateral harm in the course of armed conflicts.}
\footnote{24}{Alice Edwards \textit{op cit} note 17 at 297-299.)}
\footnote{25}{Alice Edwards ‘The Optional Protocol to the Convention Against Torture and Detention of Refugees’ (2008) \textit{International Comparative Law Quarterly} 789 at 797.}
\end{footnotesize}
rights protection setting.\textsuperscript{26}

This paper assesses the adequacy of refugee protection from *refoulement* under the Convention. Despite the above noted general strengths and weaknesses of the Convention which are relevant to refugee protection from *refoulement*, the assessment of the adequacy of refugee protection from *refoulement* under the Convention in this paper is specifically restricted to the legal framework and scope of the principle of *non-refoulement* under the Convention for the sake of brevity. This paper is divided into six parts. Each part examines the protection offered to refugees by the Convention and the shortcomings of the protection.

Part A is this introduction which is supplemented by the legal framework for *non-refoulement*. The legal framework section outlines and assesses the contemporary provisions for *non-refoulement* under various global and regional treaties. It examines the principle of *non-refoulement* under the Convention in comparison with the principle of *non-refoulement* under regional and global refugee and human rights treaties to indicate the strengths and weaknesses of refugee protection from *refoulement* under the Convention.

Part B examines the personal scope of refugee protection from *refoulement* under the Convention. It highlights that the Convention protects all persons who satisfy the criteria prescribed by its definition of a refugee but there are protection gaps in situations not specifically provided for, with groups in mass influx situations and persons fleeing from war being the most controversial beneficiaries. Furthermore, there are qualitative shortcomings which arise from the interpretative dilemma surrounding the constituent concepts of the refugee definition.

Part C examines the substantive scope of *non-refoulement* under the Convention. It has three sections namely; the prohibited measures, the degree of persecution and exceptions and exclusions. The prohibited measures are linked to the territorial scope. It is not clear whether the Convention prohibits rejection at the border and extradition since they are not explicitly mentioned in Article 33 (1). The Convention’s silence on the relationship between

\textsuperscript{26} *Op cit* note 22.
‘threats to life or freedom’ and ‘well-founded fear of persecution’ has resulted in several divergent interpretations which create a protection gap between refugee status and the protection from *refoulement*. The exceptions and exclusions have a policy justification of avoiding the granting of safe haven to persons who do not deserve international protection but the failure of the Convention to define national security and public order improperly subjects refugee protection to State discretion.

Part D examines the territorial and extraterritorial scope of *non-refoulement*. It highlights the silence of Article 33 on its territorial scope and the role of principles of public international law in imputing territorial and extraterritorial responsibility on States. The territorial scope of *non-refoulement* is less controversial than its extraterritorial scope.

Part E examines the temporal scope of *non-refoulement*. It traces the obligation of *non-refoulement* from its commencement through its continued existence culminating in its termination. It notes the commencement of refugee protection from *refoulement* at the stage of a refugee’s first need of protection and the potential protection gaps during the continued existence and termination of refugee protection from *refoulement*.

Part F concludes by noting some of the strengths and weaknesses of refugee protection from *refoulement* under the Convention. It does not summarize all the issues examined in this paper for the sake of brevity. It asserts that the Convention remains an enduring source of refugee protection from *refoulement* despite its inadequacies.  

(II) **Legal Framework**

This section outlines the international legal provisions which recognize the principle of *non-refoulement*. It highlights the recognition of *non-refoulement* in previous refugee law arrangements and compares refugee protection from *refoulement* under the Refugee Convention with the

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protection from *refoulement* under other international treaties. This comparison reflects the strengths and weaknesses of refugee protection from *refoulement* under the Refugee Convention.

The principle of *non-refoulement* emanated from a series of intergovernmental arrangements which were made in 1922, 1924, 1926 and 1928. These arrangements were not formally binding legal instruments but they were later revised and extended in a formally binding Convention in 1933.

Article 3 of the 1933 Convention was the first treaty provision for *non-refoulement*. It prohibited States from removing authorized refugees through police measures such as expulsion and non-admittance at the frontier. The Refugee Convention is an improvement because it protects even unauthorized refugees from *refoulement* but it does not specifically prohibit rejection at the border. Article 3 of the 1933 Convention was subject to national security and public order exceptions like Article 33 of the 1951 Convention.

The 1933 Convention introduced the term ‘*refoulement*’ which derives from the French verb ‘*refouler*’ which means to drive back or repel. *Refoulement* implies summary refusal of entry or forced return of illegal immigrants in the refugee law context. The 1933 Convention immensely contributed to the current position of the principle of *non-refoulement* under...
the Refugee Convention.

The principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and has generally been accepted by States\textsuperscript{35} through legislative,\textsuperscript{36} judicial and even administrative measures. In addition to its recognition under the Refugee Convention, the principle is also recognised under international human rights law, international humanitarian law,\textsuperscript{37} regional refugee law and human rights arrangements and national legislation. ‘Soft law’ also elaborates on the prohibition of refoulement although it is not formally binding. For the sake of brevity, this section focuses on international and regional refugee law provisions in comparison with regional and international human rights provisions.

(i) Under International Refugee Law

The Refugee Convention is the primary source of international refugee law. Article 33 of the Refugee Convention provides that:

1. ‘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.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’\textsuperscript{38}

\textsuperscript{35} UNHCR EXCOM, ‘Non-refoulement’, Conclusion No. 6 (XXVIII), 1977. Para (a).

\textsuperscript{36} For instance The South African Refugees Act No 30 of 1998 s 2 and the Zimbabwean Refugees Act (Chapter 4: 03) of 1983 s 13 provide that ‘…no person shall be refused entry into Zimbabwe, expelled, extradited or returned from Zimbabwe to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—

\textsuperscript{(a)} he or she may be subjected to persecution on account of his race, religion, nationality, membership of a particular social group or political opinion; or

\textsuperscript{(b)} his or her life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or the whole of that country’.

\textsuperscript{37} Article 45 of the 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War provides, in part, that ‘In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

\textsuperscript{38} Op cit note 1.
The rationale behind this provision is that refugees should not be returned to their persecutors.\textsuperscript{39} It does not create a positive duty for States to facilitate the arrival and subsequent reception of refugees.\textsuperscript{40} Neither does it offer absolute protection as shown by the enumerated exceptions. This provision is intrinsically related to Article 1A (2) of the Refugee Convention which defines a refugee, thereby determining the personal scope of the protection from 	extit{refoulement}.\textsuperscript{41} Article 33 of the Convention is also related to Article 31 which prohibits the penalization of refugees who illegally enter into the host State if they come directly from territories of persecution, present themselves to the authorities of the host State without delay and show good cause for their illegal entry.\textsuperscript{42}

The express reference to expulsion in Article 33 of the Convention links it with Article 32 which restricts the power of States to expel refugees lawfully in their territory.\textsuperscript{43} However, there are some differences between these two provisions. Article 32 specifically protects refugees who are lawfully present\textsuperscript{44} while Article 33 generally applies to all refugees. Article 33 prohibits expulsion to territories where a refugee may be persecuted while Article 32 emphasizes on compliance with certain procedural safeguards without specific regard to the situation in the refugee’s destination country after the expulsion.\textsuperscript{45} Expulsion under Article 32 may constitute 	extit{refoulement}.
since it does not consider the situation in the territory where a refugee is expelled.\textsuperscript{46} This possible inconsistency between these two provisions compromises refugee protection from \textit{refoulement} under the Refugee Convention.\textsuperscript{47}

(ii) **Regional refugee law arrangements**

The OAU Refugee Convention,\textsuperscript{48} the Cartagena Declaration\textsuperscript{49} and the EU Directives\textsuperscript{50} are notable regional refugee protection efforts. The OAU Convention has received the most commentary among the aforementioned arrangements and it is hereby assessed in detail.

The OAU Convention proclaims itself as the effective regional complement of the 1951 Convention.\textsuperscript{51} It adopts and expands the 1951 Convention refugee definition by further defining a refugee as someone fleeing from external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or habitual residence.\textsuperscript{52}

Article 2 (3) of the OAU Convention has a broader list of prohibited measures than the Refugee Convention namely; rejection at the frontier, return or expulsion or measures which compel a person to return to or remain in a territory where his life, physical integrity or liberty would be threatened.

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\textsuperscript{46} Grahl-Madsen ‘Commentary on the refugee Convention 1951’ (1963, posthumous publication 1997) at para 2 of his comment on Article 33(1) calls expulsion the simple expedient of \textit{refoulement} in relation to refugees lawfully present.


\textsuperscript{49} Americas - Miscellaneous, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: [http://www.unhcr.org/refworld/docid/3ae6b36ec.html](http://www.unhcr.org/refworld/docid/3ae6b36ec.html) [accessed 29 November 2012].


\textsuperscript{51} OAU Convention Article 8 (2).

\textsuperscript{52} \textit{Ibid} Article 1(2).
for reasons set out in its refugee definition. The Refugee Convention’s failure to explicitly prohibit rejection at the border and measures which compel a refugee to remain in a territory of likely persecution renders its protection of refugees from refoulement inadequate as highlighted in Parts C and D of this paper, respectively.

The OAU Convention extends the personal scope of the protection from refoulement under the 1951 Convention by providing for additional grounds of flight.\(^53\) Consequently, persons fleeing from civil strife and even international armed conflicts can directly benefit from the protection of the OAU Convention even without fulfilling the conventional requirements of the 1951 Convention refugee definition. \(^54\) Under the 1951 Convention the protection of persons fleeing from civil or international war is a matter of innovative interpretation because there is no explicit provision for the circumstances which cause their flight. The OAU Convention therefore addresses the reality that refugee flight in Africa has been caused mostly by coups d’état, civil wars and political instability.\(^55\) The 1951 Convention protection from refoulement is therefore inadequate in view of the fact that civil unrest also produces refugees in countries outside the African continent.\(^56\)

The prohibition of measures which may compel a person to ‘… remain within a territory…’ of likely persecution under the OAU Convention also extends States’ obligations to protect persons against internal displacement.\(^57\) The restrictive policy of internal flight alternative is not applicable to a person who is recognized as a refugee under Article 1(2) of the OAU Convention because it protects persons in flight from events ‘… in either part or the whole…’ of the country of origin. The 1951 Convention has no similar protection against the invocation of an internal flight alternative.

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\(^{53}\) Kalin \textit{et al} note 4 at 1347 para 37.

\(^{54}\) Article 1 (2) of the OAU Convention is clearly a separate and independent limb of the refugee definition from Article 1 (1).

\(^{55}\) Kalin \textit{et al op cit} note 4 at 1347 para 37. Also Jacob Van Garderen \textit{et al} ‘Regional Developments: Africa’ in Zimmermann \textit{op cit} note 4 185 – 203 at 189 para 17.

\(^{56}\) For instance the civil unrest and ethnic cleansing in the Former Yugoslavia and the currently continuing Arab Spring which struck North Africa and the Middle East with a wave of upheavals. The current civil war in Syria is part of the ongoing tide of the Arab Spring and it is producing refugees.

\(^{57}\) Van Garderen \textit{et al op cit} note 55 at 192 para 31.
Article 5 of the OAU Convention creates an elaborate legal framework for repatriation based on voluntariness.58 The 1951 Convention does not specifically establish such a framework. It emphasizes on voluntary re-establishment or re-acquisition of nationality. It has a ceased circumstances cessation clause whose invocation may lead to involuntary and premature repatriation.

The OAU Convention, unlike the 1951 Convention, effectively prohibits all *refoulement* even in cases where the national security of a host State is at stake.59 It prohibits *refoulement* without exceptions.

The Cartagena Declaration, though not a legally binding instrument, has done much standard setting for refugee protection from *refoulement* in Latin America. It derives inspiration from the OAU Convention.60 It adopts its extensive definition of a refugee and further proclaims the *jus cogens* status of *non-refoulement*.61 This elevates refugee protection from *refoulement* under the Cartagena Declaration to the higher status of a peremptory non-derogable norm.62 The 1951 Convention protection from *refoulement* is subject to exceptions which may not be justified if the prohibition of *refoulement* is elevated to a *jus cogens* norm which is peremptory and non-derogable.

The EU Directives arose from the EU Council’s efforts to harmonize the European asylum system. The 2004 Qualification Directive63 created a system of subsidiary protection for persons who do not qualify to be refugees but have reasonable grounds to fear persecution if returned to their countries of origin or habitual residence.64 This is a better fall-back provision than Article 33 (1) of the Refugee Convention which does not provide for the fate of persons who cannot be returned and or be accepted into the territory of the

58 *Ibid* at 194 para 44.
60 Flavia Piovesan *et al* *‘Regional Developments: Americas’* in Zimmermann *op cit* note 4 205-224 at 217-219.
61 Cartagena Declaration Section III para 5. Lauterpacht and Bethlehem para 5.
62 As implicit from Article 53 and 64 of the Vienna Convention on the Law of Treaties which defines *jus cogens* norms.
64 *Ibid* Article 2(e).
prospective host State. This creates a protection gap and the possibility of protracted presence at the border. Hathaway and Dent suggest that such non-removable persons must be allowed to stay `somewhere’ in view of this uncertainty.\(^{65}\)

The 2004 Directive also defined serious harm to include the death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.\(^{66}\) This is a clearer indication of the harm from which the prospective beneficiaries are protected as compared to the Refugee Convention which does not define persecution. The Directive enjoins Member States to recognise the principle of non-refoulement in accordance with their international obligations thereby combining the refugee-specific protection offered by the Convention with general international human rights protection.\(^{67}\)

(iii) **Under International and Regional Human Rights Law**

The protection from refoulement under international human rights law has a wider personal scope and it is not subject to exceptions.\(^{68}\) Both the CAT and ICCPR protect all individuals not specifically refugees only and are not subject to national security and public order exceptions.\(^{69}\) Persons who fail to meet the Convention requirements for protection can resort to the provisions for non-refoulement under international human rights law.\(^{70}\) This has rendered the continued validity of refugee-specific protection from refoulement questionable since it is perceived to be inferior to general human

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\(^{65}\) Hathaway and Dent *op cit* note 47.

\(^{66}\) Article 15.

\(^{67}\) EC Directive Article 21 (1).

\(^{68}\) Kalin *et al* note 4 at 1352 para 56.

\(^{69}\) Refugee Convention note 1 and CAT and ICCPR note 16.

\(^{70}\) *Chahal v United Kingdom*, (1996) 23 EHRR 413 (ECtHR, 15 November 1996) at 414

Although the court was interpreting the European Convention prohibition of torture the same reasoning is applicable to international human rights instruments. Also *Suresh v Canada*, [2002] 1 SCR 3 (Canada, Supreme Court, 11 January 2002) at para72 where the Court Held that Article 33 of the Refugee Convention protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture.
However this criticism does not render refugee-specific protection redundant because it has its own merits, like special affirmative measures of non-penalisation for illegal entry, which are not available under international human rights law.  

Article 3 of the Convention against Torture (CAT) explicitly provides for non-refoulement. It provides that,

1. ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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

The CAT only protects individuals from being returned to violations of human rights which satisfy its definition of torture. The definition of torture imposes a wide variety of conditions, among others gravity or severity of the act, State complicity or acquiescence and intentional violation of rights for specific purposes. The Refugee Convention imposes a lower threshold of severity for acts to rise to the level of persecution. It does not strictly require that the agent of persecution should act in an official capacity. Thus the Refugee Convention protects refugees from a broader range of harm than the CAT although it requires that the harm should be linked to certain

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71 Hathaway and Dent note 47 at 3.
73 Op cit note 16.
74 Article 1 of the CAT defines torture as ‘… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.
75 Ibid
76 UNHCR Handbook op cit note 6 paras 53 and 55. For the possibility of persecution arising from cumulative acts which may not constitute persecution if considered separately.
enumerated grounds.\textsuperscript{77}

Articles 6 and 7 of the ICCPR\textsuperscript{78} have been held to be implicit provisions for \textit{non-refoulement}.\textsuperscript{79} The principle of \textit{non-refoulement} has also been recognised under several regional human rights arrangements.

Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has been construed as a prohibition of \textit{refoulement} by the European Court of Human Rights.\textsuperscript{80}

Other regional provisions are Article 12(3) of the African Charter on Human and People’s Rights which confers the right to seek and obtain asylum in reminiscent terms to Article 14 of the UDHR and Article 22(8) of the American Convention on Human Rights\textsuperscript{81} which prohibits the deportation or return of aliens to countries of likely persecution.

There is no international consensus on the current international legal status of \textit{non-refoulement} as either \textit{jus cogens} or customary international law. One school of thought adopts the position that the international legal status of \textit{non-refoulement} depends on the status of the right being protected. When it protects non-derogable rights like the freedom from torture it creates an absolute obligation.\textsuperscript{82} Another school proclaims that it has attained \textit{jus cogens} status\textsuperscript{83} while the other school asserts that it is neither \textit{jus cogens} nor customary law.\textsuperscript{84} If the first two schools of thought are accurate the

\textsuperscript{77} Barbara Milner \textit{op cit} note 8 at 204.
\textsuperscript{78} Article 6 of the ICCPR provides for the right to life while Article 7 prohibits the subjection of persons to torture or cruel, inhuman or degrading treatment or punishment.
\textsuperscript{80} \textit{The Chahal Family v UK} ECHR (22414/93), 27 June 1995 at para 103-104 where the Court confirmed the absolute nature of Article 3of the ECHR as permitting no exceptions and offering wider protection than Articles 32 and 33 of the 1951 Refugee Convention.
\textsuperscript{81} American Convention on Human Rights “Pact of San José, Costa Rica”, 1969, 9 ILM 673.
exceptions from the principle of non-refoulement under the Refugee Convention render refugee protection from refoulement inadequate.\textsuperscript{85}

It can therefore be said that none of the legal provisions for non-refoulement examined in this section adequately protects its beneficiaries from refoulement by itself.

\footnote{\textit{Op cit} note 83. Also Article 64 of the Vienna Convention provides that `If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'}
PART B- RATIONE PERSONAE

This part identifies the beneficiaries of the protection from *refoulement* under the Refugee Convention. Article 33(1) of the Refugee Convention clearly provides that a person should be ‘a refugee’ in order to benefit from the Convention protection from *refoulement*.\(^{86}\) However, in situations not expressly provided for by the Convention, a potential beneficiary may be deprived of the protection from *refoulement* on technical interpretive grounds. The inconsistent interpretation and application of Convention provisions, including the refugee definition and non-*refoulement* provisions, among, and sometimes within Member States, unduly curtails the personal scope of the principle of non-*refoulement*.\(^{87}\) The European Council on Refugees and Exiles (ECRE) aptly described seeking asylum as a ‘dangerous lottery’ in view of the divergent interpretation of the Refugee Convention among EU Member States.\(^{88}\)

(I) Protected persons

There is unanimous consensus among academics that the term ‘refugee’ in Article 33 of the Convention retains its meaning in Article 1 A (2) as amended by Article I(2) of the 1967 Protocol.\(^{89}\) Although the definition of a refugee under the Convention does not include an express and exhaustive list of persons who qualify to be refugees in all situations, it is now generally agreed that it includes persons who satisfy the criteria it prescribes in a considerably wide variety of situations.

Article 1 A (2) of the Convention does not include formal recognition of status among the criteria for designation as a refugee under the Convention. Article 33 (1) of the Convention does not require any threshold of attachment with the putative asylum State as a condition for protection.

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\(^{86}\) Lauterpacht and Bethlehem *op cit* note 3 para 88. Also Wouters *op cit* note 82 at 46.


\(^{89}\) Lauterpacht and Bethlehem *op cit* note 86, Wouters *op cit* note 86. Hathaway (2005) *op cit* note 21 Ch 4.1.1 at 304-305.
from *refoulement*.\textsuperscript{90} It simply refers to ‘a refugee’ without the conditions of regularisation of status, lawful presence or residence.\textsuperscript{91} This unqualified reference to ‘a refugee’ gives the protection from *refoulement* under the Convention a wider personal scope than other Convention rights which prescribe certain levels of attachment with the asylum State for refugee protection.\textsuperscript{92}

The beneficiaries of the protection from *refoulement* under the Convention therefore include beneficiaries under previous refugee law arrangements,\textsuperscript{93} although their inclusion has lost current relevance because of lapse of time, recognised refugees, asylum-seekers\textsuperscript{94} or *prima facie* refugees, illegal entrants, stateless persons, persons with dual or multiple nationalities and even certain groups of persons in situations of mass influx, stowaways,\textsuperscript{95} the shipwrecked at sea and lawful combatants fleeing from war zones and other persons in various situations who satisfy the Convention refugee definition criteria and are not subject to exclusion clauses.

(i) **Stateless persons and persons with dual and multiple nationalities**

The Refugee Convention expressly includes both stateless persons and persons with multiple or dual nationalities among persons who may be refugees and, concomitantly, beneficiaries of the protection from

\textsuperscript{90} Hathaway *ibid*.

\textsuperscript{91} These are the common thresholds of attachment required under some provisions of the Convention. For instance Articles 15, 17-19, 21,23 and 24 require the threshold of ‘lawful residence’ while Articles 26 and 32 require mere ‘lawful presence’. Article 31(2) refers to regularisation of status. Gill (1996) *op cit* note 44. Also Hathaway (2005) *op cit* note 21 at 156-157.


\textsuperscript{93} Refugee Convention Article 1 A (1).

\textsuperscript{94} Asylum-seekers are refugees who are not yet recognised but are seeking or formally applying for refugee status. See EXCOM Conclusion No 81(XLVII), 1997 para (h) and (i) also Hathaway (2005) *op cit* note 21 at 303. Wouters *op cit* note 82 at 47. For their protection from *refoulement* the EXCOM reaffirmed “the fundamental importance of the principle of *non-refoulement*... irrespective of whether or not individuals have been formally recognized as refugees” in Conclusion No. 6 (XXVIII), 1977. Para (c).

\textsuperscript{95} Convention on the Facilitation of International Maritime Traffic 1965 Article 1 A (1) defines a stowaway as ‘A person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities. Definition also available at [http://www.itfseafarers.org/TTI-stowaways.cfm](http://www.itfseafarers.org/TTI-stowaways.cfm)
refoulement.96

A stateless person is a person who is not considered as a national by any State under the operation of its law.97 The specific inclusion of stateless persons in the Refugee Convention is a protective feature because some States could have argued that stateless persons are not entitled to refugee status and the consequent protection from refoulement since they have their own Conventions.98 This argument can also be buttressed by the international law position that nationality is not merely factual but it is a legal bond based on genuine factual attachment to a State.99 Stateless persons can only satisfy the factual limb of nationality based on habitual residence without any legal bond. The Refugee Convention therefore successfully avoided the removal of Stateless persons from its protection.

The Convention protects persons with dual or multiple nationalities from refoulement only if they exhaust the opportunities for protection in all their countries of nationality100 in addition to satisfying the other definitive criteria prescribed by the Convention. This requirement is based on the surrogate nature of international refugee protection and the presumption of a State`s capacity to protect its citizens unless the contrary is proved through a request for protection which elicits an inadequate or no response at all.101 Therefore, the requirement to exhaust the available opportunities of

96 Op cit note 1 Article 1 A (2).
100 Paragraph 2 of Article 1 A (2) of the Refugee Convention provides that `In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.' Also UNHCR Handbook op cit note 6 para 106 – 107. Wouters op cit note 82 at 48 and Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, at 95 -102 available at: http://www.canlii.org/en/ca/scc/doc/1993/1993canlii105/1993canlii105.pdf [accessed 30 November 2012].
101 Ward case ibid.
protection in all States of nationality should not be viewed as a compromise on the protection from refoulement offered by the Convention.

(ii) Recognised refugees, asylum-seekers and illegal entrants

The Convention definition of a refugee is silent about recognition of status. Neither does it exclude those not recognised as refugees from its protection. Article 33 is also silent about any threshold of attachment to the putative asylum State. The overall protection scheme of the Convention and the fact that the acquisition of refugee status is a process which emanates from asylum-seeking had been used to infer that refugees and asylum-seekers are beneficiaries of the protection from refoulement.

The protection of recognised refugees from refoulement logically follows from the proposition that refugee rights under the Convention are ordinarily contingent upon the attainment of status. A person becomes entitled to the full array of the rights in the Convention, including protection from refoulement upon recognition of refugee status. Therefore the protection of recognised refugees from refoulement is within the ordinary scheme of protection under the Convention.

The protection of asylum-seekers or prima facie refugees from refoulement is based on the previously mentioned declaratory nature of

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102 The scheme is that once an individual attains refugee status she is entitled to all the rights to protection offered by the Convention including non-refoulement. See Secretary of State for the Home Department (SSHD) v AH (Sudan) [2007] UKHL49 (14 November 2007) at para 32. Also AJ (China) [2012] New Zealand Immigration and Protection Tribunal (NZIPT) 800122 (26 January 2012) paras 68 and 70 `… because the appellant has been recognised as a refugee he is entitled to protection against refoulement to China – see Article 33 of the Refugee Convention…'

103 UNHCR EXCOM, Note on International Protection, UN doc. A/AC.96/815, 31 August 1993, para. 11.


105 Op cit note 102. Also Jane McAdam *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection* in Jane McAdam (eds) *Forced Migration, Human Rights and Security, Studies In International Law 17* (Hart 2008) 262-283 at 267 `… a grant of Convention status entitles the recipient to the full gamut of Convention rights,…’. This ordinary protection scheme is contrary to the declaratory nature of recognition which is applicable to asylum-seekers.
recognition of refugee status.\textsuperscript{106} \textit{Prima facie} refugee status is not necessarily temporary and inferior to formally recognised refugee status. It may be final in the absence of refuting evidence.\textsuperscript{107}

The protection of asylum-seekers and illegal entrants is a realistic benefit derived from the flexibility of the Convention’s provisions against \textit{refoulement}. It is sensitive to the contemporary reality that asylum-seeking refugees usually depart from their countries of origin and subsequently enter into their putative host States without authorization and that the acquisition of refugee status is a process which emanates from asylum-seeking.\textsuperscript{108} The UNHCR EXCOM aptly captured this position when it commented that;

\begin{quote}
`Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established'.\textsuperscript{109}
\end{quote}

The inclusion of asylum-seekers and illegal entrants among the beneficiaries of Article 33 of the Convention promotes continuity of protection if read in conjunction with Article 31 which provides for non-penalization of refugees for illegal entry. James Hathaway categorically noted this protective achievement when he commented that;

\begin{quote}
`Th[e] decision to grant protection against \textit{refoulement} to all refugees, whether authorized or not, closed the most critical protection gap…Because even "irregular" refugees are now shielded from return… to a place in which they are at risk. Article 33 can be relied upon to counter penalties which raise this prospect.'\textsuperscript{110}
\end{quote}

Clark and Crepeau argue that the non-penalization of refugees for illegal entry in the Convention is a special affirmative measure which allows refugees to access protection in view of the protective link between Article

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\textsuperscript{106} \textit{Op cit} note 6.  \\
\textsuperscript{107} \textit{Op cit} note 103.  \\
\textsuperscript{108} Hathaway (2005) \textit{op cit} note 94.  \\
\textsuperscript{109} \textit{Op cit} note 103. Also Wouters \textit{op cit} note 94.  \\
\textsuperscript{110} Hathaway (2005) \textit{op cit} note 21 Ch 4.2 at 386.
\end{flushright}
31(1) and 33(1) of the Convention.\textsuperscript{111}

The personal scope of Article 31 is based on similar principles to the personal scope of Article 33.\textsuperscript{112} Article 31 offers initial temporary protection from penalties, which may include refoulement, pending regularization of status or admission into another safe country\textsuperscript{113} while Article 33 directly prohibits expulsion from the putative host State to territories of likely persecution. The Convention therefore creates a coherent scheme of refugee protection from refoulement in view of the relationship between Articles 31 and 33(1).

(iii) \textbf{Groups in mass influx situations}

The Convention neither specifically provides for nor defines a mass influx of refugees. The silence of the Convention on mass influx situations and the singular reference to ‘a refugee’ in both the refugee definition and the provision for non-refoulement has been used to argue that the Convention does not protect refugees in mass influx situations.\textsuperscript{114} Conversely, the humanitarian object and purpose of the Convention and the conspicuous absence of mass influx situations among the exceptions to refugee protection under the Convention are supportive indicators of the extension of non-refoulement to mass influx situations.\textsuperscript{115}

The UNHCR EXCOM noted the absence of a definition of mass influx. It did not define mass influx but it identified some of its indicative features namely; a considerable number of sudden arrivals at an international border, inadequate capacity of the host State to respond to the arrivals and the inability of status determination procedures, where available, to assess the

\begin{itemize}
\item \textsuperscript{111} Clark and Crepeau \textit{op cit} note 72.
\item \textsuperscript{112} Gregor Noll ‘Article 31: Refugees Unlawfully in the Country of Refuge’ in Zimmerman (ed) (2011) \textit{op cit} note 4 1243 – 1276 at 1253 para 35 -38, Lauterpacht and Bethlehem \textit{op cit} note 3 at para 92-93. Also \textit{Ex p Adimi supra} note 40 para 16 Simon Brown LJ.
\item \textsuperscript{113} \textit{Op cit} note 1 article 31(2).Also Hathaway (2005) Ch 4.2.1 at 389 and Ch 4.2.4 at 414.
\item \textsuperscript{114} Lauterpacht and Bethlehem \textit{op cit} note 3 at para 103 cite some comments in the \textit{travaux preparatoires} against the prohibition of refoulement in mass influx situations although they are categorically against such limitation of the protection from refoulement.
\item \textsuperscript{115} Lauterpacht and Bethlehem \textit{ibid} at para104.
\end{itemize}
status of the mass arrivals.\textsuperscript{116} States have perceived mass influx as a disaster in view of its negative impacts on their administrative machinery. There has been much asylum fatigue in receiving States which led to the adoption of restrictive policies and group cessation especially in the light of recurrent civil strife.\textsuperscript{117} The exceptions of national security and public order can be employed to evade international refugee protection obligations by returning groups of asylum-seekers to territories of persecution.\textsuperscript{118}

The silence of the Convention on mass influx situations has generated three schools of thought on refugee protection in mass influx situations. The first school, based on the passing comments in the \textit{travaux preparatoires} to the Convention, is against the extension of \textit{non-refoulement} in mass influx situations.\textsuperscript{119} The second school is the UNHCR EXCOM recommendation for ‘at least temporary protection’ from \textit{refoulement} in all situations of mass influx with international assistance being given to the host State in case of its failure to handle the mass arrivals.\textsuperscript{120} This school is also partly supported by academic commentary.\textsuperscript{121} The third school of thought postulates a qualified duty of protection from \textit{refoulement} in mass influx situations which recognizes the national security exception in appropriate circumstances.\textsuperscript{122} Lauterpacht and Bethlehem are of the extreme view that the principle of \textit{non-refoulement} must apply unless expressly excluded and its application has been unambiguously affirmed by the EXCOM.\textsuperscript{123}

All the above positions on refugee protection from \textit{refoulement} in mass influx situations are unfortunately not legally binding prescriptions of

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\textsuperscript{117} Nicholson and Twomey \textit{op cit} note 22.

\textsuperscript{118} Hathaway (2005) \textit{op cit} note 21 at 360 and 362 calls this an implied exception since mass influx is not expressly provided for as an exception to refugee protection under the Convention.

\textsuperscript{119} Lauterpacht and Bethlehem \textit{op cit} note 114.

\textsuperscript{120} EXCOM Conclusions No. No. 6 (XXVIII) (1977) , No. 15 (XXX) (1979) para(f) No. 22 (XXXII) (1981) paras II A 1 and 2. Also No. 100 \textit{op cit} note 116 Preamble.

\textsuperscript{121} Lauterpacht and Bethlehem \textit{op cit} note 3 para 103-105 support the UNHCR EXCOM school of thought.


\textsuperscript{123} Lauterpacht and Bethlehem \textit{op cit} note 121. Hathaway (2005) \textit{op cit} note 21 at 358 for the extremity of Lauterpacht’s view.
\end{flushright}
international refugee law. Refugee protection from *refoulement* in mass influx situations is therefore currently, not effectively regulated by the Convention in view of its open-ended provisions. States therefore enjoy a wide margin of appreciation in labeling mass influx situations as either genuine plights for protection or threats to public order and security depending on political expediency.\(^\text{124}\)

(iv) **Stowaways and other maritime arrivals**

The Refugee Convention has no specific provision for refugee protection from *refoulement* in the maritime context. The protection of stowaways, persons seeking landing in distress and normal arrivals by boat in coastal States\(^\text{126}\) is regulated by the prohibition of *refoulement* but it is also regulated by the Law of the Sea\(^\text{126}\) and this creates confusion on the applicable principles of jurisdiction.\(^\text{127}\) The failure of the 1957 International Convention Relating to Stowaways to muster the requisite ratifications to enter into force fostered the present confusion surrounding the identity of the State responsible for stowaways.\(^\text{128}\)

The UNHCR EXCOM recommended that stowaway asylum-seekers should be given equal protection from *refoulement* with other asylum-seekers and they should be allowed to disembark at the first Coastal State to have an opportunity for status determination.\(^\text{129}\) Goodwin Gill repeatedly\(^\text{130}\) argued

125 Michael White’ *M.V. Tampa and Christmas Island Incident, August 2001’ at 5 available at [http://www ila.org.au/pdfs/ex_The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20%28Updated%29.PDF](http://www ila.org.au/pdfs/ex_The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20%28Updated%29.PDF) A ‘coastal State’ is the State whose shores are adjacent to the seas in question.
127 Excom Conclusion No. 53 (XXXIX) ‘Stowaway asylum-seekers’ (39th Session ,1988) 4th preambular paragraph where the EXCOM noted that there are no general and internationally recognized rules dealing specifically with stowaway asylum-seekers.
129 ExCom Conclusion 53 *op cit* note 127 3rd preambular paragraph and paras 1 and 2.
that the status or personal circumstances of a stowaway asylum-seeker determine the courses of action available to a receiving Coastal State. He suggested three options which may be open to a receiving Coastal State in the case of a stowaway asylum seeker. The Coastal State may request the shipmaster to retain custody of the stowaway on board the ship and proceeding with her to the next Coastal State where such an option does not amount to *refoulement*.131 Where proceeding to the next State will constitute *refoulement*, the Coastal State may request the flag State to exercise jurisdiction over the stowaway in accordance with the principle of exclusive jurisdiction of a State over a ship flying its flag. The Coastal State may also allow the stowaway temporary disembarkation pending resettlement in another State if the flag State refuses to assume responsibility over the stowaway.132

The UNHCR EXCOM recommendation for protection of stowaways is 'soft law'. It does not impose binding legal obligations.133 The discretionary options suggested by Gill are not precise enough to resolve the confusion surrounding refugee protection from *refoulement* in the maritime context. Asylum-seekers at the sea may be left in a legally uncertain situation if both the flag State and the Coastal State do not assume responsibility over them.134

State responsibility for *refoulement* in the maritime context is not yet effectively and precisely regulated by the Convention as shown by incidents at the sea like the US Haitian interdiction policy,135 the MV Tampa incident136 and the recent *Hirsi* case.137 Asylum-seekers who seek entry through sea ports are therefore not adequately protected from *refoulement*.

131 Ibid.
132 Ibid.
134 Gill 1996 *op cit* note 4 at 155 and Bank *op cit* note 128.
136 It involved a Norwegian vessel which rescued some Indonesians in distress at sea at the request of the Australian Canberra Rescue and Coordination Centre in August 2001. The Australian government shockingly refused to give effective assistance to the rescued sailors when they were brought at the Christmas Island. It only later ferried them to Nauru for status determination. This was a clear case of evasion of the obligation of non-*refoulement*.
137 *Hirsi* case *op cit* note 82.
under the Refugee Convention and there is possible jurisdictional confusion between the putative host Coastal State and the flag State because of the concurrent jurisdiction of States involved in stowaway cases. Currently each case is dealt with on its own merits since there is no specific regulation of arrivals by sea under the Refugee Convention.138

(v) Combatants

The Convention does not explicitly provide for the protection of combatants from refoulement. Neither does it define the term ‘combatant’. Unlike the 1969 OAU Convention, the Refugee Convention does not explicitly provide for external aggression, occupation, foreign domination or events seriously disturbing public order139 in the country of origin, nationality or habitual residence among the reasons for flight to seek refugee protection. This subjects persons fleeing from war zones to the stringent reasons for persecution prescribed by the Refugee Convention.

The UNHCR EXCOM cited the humanitarian and civilian character of asylum to argue for the exclusion of combatants from refugee protection until the authorities have established within a reasonable timeframe that they have genuinely and permanently renounced military activities….140 This prima facie exclusion of combatants from refugee protection has been correctly criticized as inconsistent with the Refugee Convention.141

International humanitarian law (IHL) defines a lawful combatant as a person who takes part in hostilities in accordance with the laws and customs of war prescribed by IHL, as opposed to a civilian who does not take part in hostilities or an unlawful combatant who engages in combat contrary to the rules of IHL. This is implicit from the terminology of Article 3(1) Common to the Geneva Conventions of 1949 which refers to ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds,
detention, or any other cause… in identifying protected persons during internal armed conflicts.

It is therefore clear from that definition that engagement in combat is not *prima facie* criminal and combatants should not be excluded from refugee status determination procedures without a hearing although the Convention has no express provision to that effect. There is considerable State practice for the consideration of ex-combatants for refugee protection before exclusion from refugee status under the Convention.\(^{143}\)

Despite the arguments in favour of the *non-refoulement* of combatants and the case law considering people involved in the service of repressive regimes for refugee protection, the EXCOM recommendation for *prima facie* exclusion of combatants from protection and the absence of military conflicts among the Convention reasons for refugee flight compromise the protection of combatants from *refoulement* under the Convention.

Therefore the Convention does not adequately protect persons fleeing from war from *refoulement* because it does not expressly include armed conflicts among the reasons for flight to alleviate their burden of proof in claims for refugee protection. The incorporation of Article 15(c) of the European Union Qualification Directive in Article 1 A (2) of the Convention with some minor changes to include combatants will improve the protection of persons fleeing from war zones from *refoulement*.\(^{144}\)

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\(^{143}\) See for instance *QD AND AH (Iraq) v SSHD* [2009] EWCA Civ 620 QD (UK) A member of the Ba`ath party under the Saddam Hussein regime was considered for refugee status. The UNHCR in stark contrast with its EXCOM argued for the protection of former combatants from return to places where they would be at risk of harm caused by breaches of international humanitarian law. Para 37 of the main case and para 19 of the annexed UNHCR submissions. *Attorney General v. Tamil X* [2010] NZSC 107. The New Zealand Supreme Court overruled the Refugee Authority decision to exclude a Sri Lankan Tamil ex-combatant from refugee protection under Article 1 F of the Convention. *AB v Refugee Appeals Tribunal et al* [2011] (IEHC) 198 (High Court of Ireland, 5 May 2011) The applicant did not forfeit his right to seek refugee protection by virtue of his post as regional commander of Taliban forces in Afghanistan.

\(^{144}\) Article 15 (c) of the EU Qualification Directive (Council Directive 2004/83/EC) provides for ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. If this provision is manipulated to include combatants this will improve the protection of combatant asylum-seekers.
(II) Qualitative Shortcomings

Although the Convention protects all persons who satisfy the refugee definition in various circumstances from *refoulement*, its protection has been qualitatively compromised by the uncertainty surrounding the interpretation of the constituent elements of the refugee definition. Daniel J Steinbock noted that ‘… virtually every word of the core phrase of the refugee definition has been subject to interpretive dispute.’ Steinbock further argues that the concept of persecution is the most contentious element of both the refugee definition and the principle of *non-refoulement*. The concepts of protection and persecution are inherently related. The Refugee Convention does not define both persecution and protection. It requires a refugee to have well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. These reasons reflect the qualities of persons who are entitled to refugee protection but they are not easily ascertainable.

The Convention does not explain the extent of the risk of persecution implicit in the phrase ‘well-founded fear’. Its drafting history has no clear guidance on this aspect. The UNHCR interpreted ‘well-founded fear’ to imply a ‘reasonable degree of likelihood’ of persecution. Municipal courts divergently interpreted the concept of well-founded fear. In the case of *INS v Stevic* the US Supreme Court construed ‘well-founded fear’ to imply that an applicant for withholding of deportation was supposed to establish a ‘clear probability’ of persecution to avoid deportation. In the case of *INS v Cardoza Fonseca* the US Supreme Court held a ‘less than 50 per cent chance’ of persecution to be sufficient to satisfy the well-founded fear standard and in *Montecino v INS* it reduced the standard to a ten per cent

145 Durieux and McAdam *op cit* note 122 at 8. Tampering with the refugee definition … shifts the problem from the quantitative level (large numbers) to the qualitative (refugee identity and protection).
146 *Op cit* note 87.
147 Ibid.
150 UNHCR Handbook para 42.
chance. Australian and New Zealand case law requires a ‘real chance’ of persecution to satisfy the well-founded fear standard. These divergent interpretations show that a refugee in one State may not be a refugee in another State.

The drafters of the Convention did not define persecution because of the unpredictability of human cruelty. Types of harm which were not foreseen at the time of drafting the Convention can therefore currently satisfy the requirement of persecution.

Hathaway defines persecution as ‘the sustained or systemic violation of basic human rights demonstrative of a failure of State protection.’ This definition does not adequately resolve all the difficulties surrounding the concept of persecution. It does not explain the five enumerated grounds of persecution namely race, religion, nationality, membership of a particular social group or political opinion.

For example, ‘membership of a particular social group’ is the least clear ground of persecution. Three approaches to the meaning of ‘membership of a particular social group’ have emerged namely the ‘protected characteristics’ approach, ‘social perception’ and ‘combined’ approach. In the Matter of Acosta the US Board of Immigration Appeals (BIA) adopted the ‘protected characteristics’ approach and used the *ejusdem generis* rule to hold that the interpretation of ‘membership of a particular social group’ was determined by the characteristics of the four other enumerated grounds of persecution. The BIA held that the ground of ‘membership of a particular social group’ was meant to protect persons who share an innate and immutable characteristic which cannot be voluntarily changed such as gender or color. The *Acosta* decision was adopted in

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153 915F. 2d 518, (9th Circuit 1990) at 520.
154 V872/00A v Minister for Immigration and Multicultural Affairs [2002] FCCAF 185.
155 AC (Russia)[2012] New Zealand Immigration and Protection Tribunal (NZIFT),800151 (26 June 2012) para 41.
157 Ibid at 104-105.
158 Zimmermann and Mahler *op cit* note 149 at 390 para 395.
159 Ibid at 392-393 paras 399-404.
160 It literally means ‘of the same kind’. Under the rule general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.
161 Interim Decision 2986, (1 March 1985).
Canada\textsuperscript{162} and New Zealand.\textsuperscript{163}

Australia adopted the ‘social perception’ approach which requires that a group should have some special characteristics which sets it apart from other segments of society.\textsuperscript{164} This approach does not require immutability. It covers voluntary associations with special uniting characteristics.

The case law of the Ninth Circuit of the US Court of Appeals manifests the confusion surrounding the concept of ‘membership of a particular social group’. In \textit{Sanchez-Trujillo v. INS} the Court deviated from the \textit{Acosta} decision by requiring a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as members of that discrete group.\textsuperscript{165} In the case of \textit{Hernandez-Montiel v. INS} the Court adopted a combined approach by holding that;

\begin{quote}
‘… a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it’.\textsuperscript{166}
\end{quote}

The personal scope of \textit{non-refoulement} remains subject to State discretion in view of these divergent approaches to the concept of ‘membership of a particular social group’. US case law shows the possibility of internal contradictions in the interpretation of the Convention refugee definition within a single State.

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\textsuperscript{162} \textit{Ward} case at 74–79.
\textsuperscript{163} \textit{AC Russia} note 155 para 78–80 Where the court held that a Russian businessman was not a member of a particular social group although he had a well-founded fear of persecution.
\textsuperscript{164} \textit{Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another}, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331. at 241.
\textsuperscript{165} 801 F 2d 1571 (9th Circuit), 1986 at 1576.
\textsuperscript{166} 225 F 3d 1084 (9th Circuit), 2000 at 1093.
PART C- RATIONE MATERIAE

The *ratione materiae* or substantive scope of *non-refoulement* concerns the type of harm that attracts the obligation to protect. The exceptions from *non-refoulement* are also included under this head of scope but they will not be addressed in detail in this paper for the purposes of brevity. Gunnel Sternberg divides the substantive scope of *non-refoulement* into three categories namely; the prohibited measures, the degree of persecution and the exceptions. This part addresses these categories accordingly.

(I) **Prohibited Measures**

Article 33(1) of the Convention expressly prohibits the `… expulsion or return (`*refouler*’) of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened…’ The Convention is silent about the specific situations where refugees might be returned. It does not mention the places from where the refugees should not be returned or expelled. The place of rejection is relevant to determine whether rejection at the border, expulsion, extradition or deportation fall under the prohibition of *refoulement* under the Convention. The prohibited measures have partly been addressed under Part A (II) and this section amplifies Part A (II).

(i) **Rejection at the border**

The Convention does not expressly prohibit rejection at the border. Sternberg cites State practice for the prohibition of rejection at the border. There are interpretations which exclude rejection at the border from the prohibition of *refoulement* under the Convention.\(^{169}\)

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167 Barbara Miltner *op cit* note 8 at 202 – 203, Sternberg *op cit* note 59 at 286-287 and Kalin *et al op cit* note 4 at 1360 para 84-85.
168 Ibid.
170 Sternberg *op cit* note 59.
The French term `refouler' restricts the scope of the prohibition of return in Article 33 to those who have physically arrived in a State’s territory. It strengthens the logical assertion that a State cannot be prohibited from returning a refugee who has not yet arrived in its territory. Therefore, from a theoretical standpoint, it is not clear whether rejection at the border is covered by the prohibition of *refoulement* under the Refugee Convention despite the State practice to the contrary cited by Sternberg. The exclusion of rejection at the border is also consistent with the negative tenor of the principle of *non-refoulement*. It is simply a duty not to return but not necessarily to take positive action to accept refugees. Unfortunately, this understanding of *non-refoulement* permits *non-entrée* policies which indirectly constitute *refoulement*.

State practice and UNHCR EXCOM recommendations for the prohibition of *refoulement* at the border and a humanitarian interpretation of the Convention to prohibit rejection at the border are not adequate efforts to improve refugee protection from *refoulement* under the Convention. The best legal achievement is to convert those ‘soft law’ efforts into ‘hard law’ especially in view of the absence of international unanimity on the customary or *jus cogens* status of *non-refoulement*.

(ii) Expulsion

Article 33 (1) of the Convention expressly prohibits expulsion but it does not define it. Academic commentary defines expulsion as a formal measure whereby a lawfully resident refugee is requested to leave a State’s territory or forced to leave upon failure to comply with a request to do so.

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171 Gill *op cit* note 34 for its definition.
172 Grahl-Madsen *op cit* note 46 at para 3.
173 Grahl-Madsen *op cit* note 46. Gill (1996) *op cit* note 4 at 121-122 also cites comments of the Swiss and Dutch delegates at the Conference of Plenipotentiaries for this view.
174 Kalin *et al* *op cit* note 4 at 1367 para 106.
175 Hathaway (2005) *op cit* note 21 at 310 for the failure of Article 33 of the Refugee Convention to prohibit *non-entrée* policies which defeat refugee protection from *refoulement*.
178 Part A Section II (iii) above for the absence of consensus on the international legal status of *non-refoulement*.
179 Kalin *et al op cit* note 4 1363 para 93, Gill (1996) *op cit* note 4 at 117.
The Convention does not absolutely prohibit States from expelling refugees. Article 32 of the Convention allows States to expel lawfully present refugees from their territories pursuant to a decision in accordance with due process of law and with the rights to legal representation, to present favorable evidence and to appeal in the event of an adverse decision. This catalogue of both procedural and substantive guarantees is a commendable protective feature which is consistent with international human rights standards. However, this does not elevate refugee protection from *refoulement* under Article 32 of the Convention to the requisite level of adequacy because of the silence of Article 32 on the risk of persecution in the destination country after expulsion and the residual discretion bestowed upon States to apply unspecified measures on a refugee pending admission into another country. Expulsion under Article 32 may facilitate the circumvention of Article 33 (1) where there is a risk of persecution in the destination country after expulsion.

(iii) **Deportation**

Deportation is the execution of an expulsion order upon failure of willful compliance. It is simply a consequence of an expulsion order so it is not subject to different principles from those applicable to the prohibition of expulsion.

(iv) **Extradition**

The Convention neither defines extradition nor explicitly includes it among the constitutive acts of the prohibition of *refoulement*. Extradition has been defined as the surrender of an alleged offender and fugitive from justice, regardless of his or her consent, by the authorities of the State on whose territory he or she is found, to the authorities of another State for the purpose of criminal prosecution. There is no international consensus on the inclusion of extradition among the acts prohibited under the Refugee

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181 *Op cit* note 1 Article 32 (3).
182 Kalin *et al op cit* note 4 at 1363 para 93.
183 *Ibid* at 1364 para 97.
Convention prohibition of *refoulement*. There are both arguments for and against refugee protection from *refoulement* through extradition.

Grahl-Madsen opined that the drafters of the Convention did not intend to include extradition under the acts prohibited by Article 33 of the Convention. Goodwin Gill commented that the attitude of States in 1951 was that Article 33 of the Convention did not prejudice extradition. Furthermore, extradition is part of the war against impunity in international criminal law. There are treaties which impose *aut dedere aut prosequi* obligations on States. This may result in a conflict of treaty obligations for signatory States. However these obligations may be perceived as the right balance between the international struggle against impunity and the refugee plight for protection.

The phrase ‘...in any manner whatsoever...’ implies an extensive prohibition of all acts resulting in *refoulement* including extradition. This phrase elevates the principle of *non-refoulement* to a result-oriented prohibition of any act which results in return to a territory of likely persecution. The UNHCR EXCOM and academic commentators have used this phrase to argue for the prohibition of virtually all acts which can result in *refoulement*.

The Refugee Convention does not specifically provide for the circumstances in which refugee protection from *refoulement* enjoys precedence over extradition law. So far there are no settled principles on the circumstances in which refugee protection from *refoulement* enjoys precedence over extradition law. Gill suggests that any conflict of treaty obligations depends upon which obligation was contracted first while Kapferer opines that refugee and human rights law should enjoy precedence.

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184 Sternberg *op cit* note 59 at 287.
188 Ibid Gill at 149.
189 Conclusion 17 (1980), para (c) and (g).
over other agreements between States on the basis of Article 103 of the UN Charter. Zimmermann also argues for the precedence of the Refugee Convention as the *lex specialis* in refugee protection. He further argues that the principle of *non-refoulement* is not linked to the notion of surrogacy but it emanates from the need for individual protection. Wouters is of the view that there is no hierarchy of treaties in international law and human rights treaties should not enjoy precedence over other treaties except where they codify *jus cogens* norms. The Convention does not resolve this debate because it has no provision establishing preferential rules for the various systems of law relevant to extradition cases. The current position is not clear and this leaves refugee protection from improper extradition at the mercy of State discretion.

(v) **Conclusion**

It is difficult to determine whether acts not specifically prohibited by Article 33(1) of the Convention can be included under the prohibition of *refoulement* in view of the divergent views on the prohibited measures. Concomitantly, the protection of refugees from *refoulement* through acts not specifically prohibited by the Convention is discretionary.

(II) **Degree of persecution**

The Convention does not prescribe a clear threshold of persecution required to trigger refugee protection from *refoulement*. Article 33 (1) protects a refugee from being returned to ‘…territories where his life or freedom would be threatened…’. Article 1 A (2) which determines the personal scope of Article 33 (1) requires a ‘… well-founded fear of persecution…’ in the country of origin or former habitual residence among the definitive criteria of a refugee. The Convention does not explain its use of disparate terminology in these two inherently related provisions. Neither does

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191 Kapferer *op cit* note 187 at p.13 para 41 and p. 80 para 231. Article 103 of the UN Charter provides that, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.
its *travaux preparatoires* give an explicit clarification of this different wording.\(^{194}\) This has resulted in an interpretive dilemma with both liberal and restrictive results on refugee protection from *refoulement*.

Three categories of results emerged from various efforts to interpret these provisions namely that; the concept of threats to life or freedom is identical to, narrower than and broader than, the well-founded fear of persecution criterion prescribed by the Convention refugee definition.\(^{195}\)

Proponents of the first category use various interpretive indicia to argue for the identical meaning of threats to life and freedom with the concept of persecution. Paul Weis\(^{196}\) and Atle Grahl-Madsen\(^{197}\) refer to the interchangeable use of the terms `country of origin’, `territories where their life or freedom was threatened’ and ‘countries in which he is persecuted’ in the *travaux preparatoires* to the Convention to argue for the identical meaning of threats to life or freedom to persecution.\(^{198}\) The UNHCR\(^{199}\) and subsequent academic commentary also support this position.\(^{200}\) This interpretation ensures coherence between Articles 1 A (2), 31 (1) and 33(1).

Article 31(1) of the Convention also refers to threats to life or freedom.\(^{201}\) This position is the most consistent with the protection scheme of the Convention among the three interpretations.\(^{202}\) This position is also buttressed by case law from reputable jurisdictions in the world like the UK.\(^{203}\)

\(^{194}\) Gill *Comments on INS v Stevic* (1984) and *INS v Cardoza Fonseca*, *IJLR* 1990 461-467 at 466.

\(^{195}\) Barbara Miltner *op cit* note 8 at 204.

\(^{196}\) *The Refugee Convention, 1951: The travaux preparatoires Analyzed with a Commentary* (posthumous publication, 1995), at 303 and 341.

\(^{197}\) Grahl-Madsen *Commentary op cit* note 46 at para 4.

\(^{198}\) Kalin *et al op cit* note 4 at 1387 para156-157.

\(^{199}\) UNHCR Handbook *op cit* note 6 para 51.

\(^{200}\) Lauterpacht and Bethlehem *op cit* note 3 para 123 and 126, Wouters (2009) *op cit* note 82 at 58 ‘We may look at Article 1 in order to determine the scope of Articles 31 and 33,…’ Kalin *et al op cit* note 4 at 1389 para 162 adopt this view.

\(^{201}\) *Ibid* Lauterpacht and Bethlehem. Grahl-Madsen Commentary *op cit* note 46 at 175 note that the language of Articles 31 and 33 should not be used to restrict the meaning of persecution in Article 1.

\(^{202}\) Hathaway (2005) *op cit* note 21 at 307 This position is firmly rooted in the actual intentions of the drafters and it effectively meshes with the internal structure of the Convention.

\(^{203}\) *R v Secretary of State for the Home Department, ex parte Sivakumaran*, [1988] 1 All ER 193 (UK HL 16 December 1987) at 202-203 Lord Goff accepted the UNHCR’s submission which referred to the *travaux preparatoires* of the Convention for the view that Article 33 (1) was intended to apply to all persons determined to be refugees under Article 1 of the Convention.
Australia and New Zealand. Any approach which severs the protective link between refugee status and non-refoulement compromises the adequacy of refugee protection from refoulement. The Convention does not explicitly prohibit approaches which result in the severance of the protection continuum between refugee status and non-refoulement.

The failure of the Convention to tightly close any possible protection gaps between refugee status and the protection from refoulement is evident in the second category of results which construes the standard of ‘threats to life or freedom’ as narrower than the concept of persecution in the refugee definition. This approach was enunciated by the US Supreme Court in the case of Immigration and Naturalization Service v Cardoza Fonseca. The court interpreted sections 208 (a) and 243(h) of the US Immigration and Naturalization Act which domesticate the Convention refugee definition and Article 33(1), respectively. It held that:

‘… Article 33 (1) does not extend this right [non-refoulement] to everyone who meets the refugee definition. … [It] requires that an applicant satisfy two burdens: first, that he or she be a “refugee”, i.e, prove at least a “well-founded fear of persecution”; second, … that his or her life or freedom ‘would be threatened’ if deported.’

This interpretation of the Convention creates an additional burden of proof for refugees to be protected from refoulement. Although this decision has been criticized as an improper severance of refugee status from non-refoulement, it has some justification from a literal reading of the Convention and it shows that the current terminology of the Convention is susceptible to interpretive manipulation which can circumvent refugee protection from refoulement.

205 Attorney General v Zaoui Decision No CA 20/04 New Zealand Court of Appeal (30 September 2004) para 36.
206 Gill ‘Comments on Stevic’ op cit note 194 at 466-467 Non-refoulement is still the correlative to refugee status… any distinctions [between refugee status and non-refoulement] may defeat the object and purpose of protection.
207 supra note 152.
208 Ibid at 442.
209 Gill op cit note 194 at 461 The decision in Cardoza Fonseca opened a large theoretical gap between eligibility for refugee status and protection from refoulement through deportation. Also Hathaway (2005) op cit note 21 at 304, Kalin et al op cit note 4 at 1387-1388 para 158.
Both the UNHCR\textsuperscript{210} and Lauterpacht and Bethlehem\textsuperscript{211} also support the view that the concept of ‘threats to life or freedom’ is broader than the concept of persecution in addition to their view on the identical meaning of these two concepts. This possibility of several interpretations demonstrates that the Convention does not reliably protect refugees from \textit{refoulement} since its language is malleable and capable of interpretation which can produce different results depending on the interpreter’s reasoning.

Lauterpacht and Bethlehem propose several justifications for a broader interpretation of threats to life or freedom. They refer to the extension of the competence of the UNCHR by the United Nations General Assembly (UNGA) to cover those fleeing generalized violence, a literal reading of Article 33 of the Convention in the context of the humanitarian objective of the Convention, EXCOM Conclusions which refer to the physical safety of refugees and their protection from the danger of being tortured,\textsuperscript{212} and references to ‘a danger of violation of the right to life or personal freedom, ‘…circumstances threatening life, physical integrity or liberty’\textsuperscript{213} and ‘… risk that a person may be subjected to torture, cruel, inhuman or degrading treatment or punishment,\textsuperscript{214} in both regional refugee and international human rights instruments which offer broader protection, to argue for the broader meaning of ‘threats to life or freedom’.\textsuperscript{215}

Walter Kalin, Martina Caroni and Lukas Heim note that the UNHCR EXCOM has not adopted a definite position on the relationship between threats to life or freedom and persecution. They observe that some Conclusions use the terminology of Article 33\textsuperscript{216} but others merely refer to ‘persecution’\textsuperscript{217} without limiting it to the notion of threats to life or freedom.

\begin{footnotes}
\item[210] UNHCR Handbook \textit{op cit} note 6 para 51- 64 for a wide variety of other measures which can amount to persecution but which are not necessarily threats to life or freedom.
\item[211] Lauterpacht \textit{et al op cit} note 3 para 133.
\item[212] They refer to Conclusion No.29 (XXXIV) – 1983, at paragraph (b); and Conclusions No.79 (XLVII) – 1996 and No 81 (XLVIII) – 1997, at paragraphs (j) and (i) respectively as examples for their assertion.
\item[213] OAU Convention \textit{op cit} note 48 Article 2(3).
\item[214] Article 3(1) of the CAT.
\item[215] Lauterpacht and Bethlehem \textit{op cit} note 3 para 128 – 132.
\item[216] They cite Conclusions No.79 (XLVII) –(1996) para (j), No 81(1997) para (i) and No 82 (1997) paras (d) (i) for the simple reference to threats to life or freedom.
\item[217] Conclusions No 6 (1977) para (c), No 14 (1979) para (c) and No 15 (1979) para (b) simply refer to persecution without any restriction to threats to life or freedom.
\end{footnotes}
freedom.\footnote{218} Lauterpacht and Bethlehem’s examination of the EXCOM position was not complete as shown by the citation of more conclusions which reflect the divergent positions of the EXCOM by Kalin, Caroni and Heim.

Hathaway criticises the Lauterpacht justifications for a broader interpretation of threats to life or freedom. He argues that the extension of the UNHCR mandate and developments outside refugee law cannot be used to break the link between refugee status and protection from *refoulement* under the Convention.\footnote{219} He chooses the approach which construes threats to life or freedom to have an identical meaning to the concept of persecution in the refugee definition.\footnote{220} The identical meaning approach is the most consistent with the Convention protection scheme in view of the inherent relationship between refugee status and protection from *refoulement*.

The broader approach seems to offer refugees the best protection from *refoulement* since it triggers the duty of *non-refoulement* for the violation of virtually every right.\footnote{221} However, it can be argued that this approach offers excessive protection from *refoulement* because the principle of *non-refoulement* does not apply to the violation of every human right.\footnote{222} Hathaway confirms this argument by considering the identical meaning approach and *nothing more or less* to be sufficient for refugee protection from *refoulement*.\footnote{223}

In view of this muddled academic commentary and UNHCR positions on the relationship between the concepts of ‘threats to life or freedom’ and persecution, each case is treated on its own merits. This leads to *ad hoc* and unpredictable discretionary consideration of refugee claims for protection from *refoulement*. The Refugee Convention therefore does not adequately protect refugees from *refoulement* because it does not clarify the relationship

\footnote{218} Kalin *et al op cit* note 4 at 1388 para 159.  
\footnote{219} Hathaway (2005) *op cit* note 21 at 306.  
\footnote{220} *Ibid* at 307.  
\footnote{221} See for instance the suggestions for the protection of an extensive list of values by proponents of this view for instance the UNHCR in its Handbook at paragraphs 51 - 64 which includes cumulative discrimination and possibly prosecution and economic values and also Lauterpacht and Bethlehem *op cit* note 3 para 133 include a well-founded fear of being persecuted, a real risk of torture, cruel, inhuman or degrading treatment or punishment, and a catch-all phrase in the form of ‘*other threats to life, physical integrity or liberty*’.  
\footnote{222} Wouters (2009) *op cit* note 82 at 26.  
\footnote{223} Hathaway (2005) note 220.
between the apparently different thresholds of persecution in the refugee
definition and the provision for non-refoulement.

(III) Exceptions and Exclusions

Article 33 (2) of the Convention excludes refugees from protection
from refoulement on grounds of national security or if they are considered a
danger to the community of the host country because of their conviction of a
particularly serious crime. Article 1 F of the Convention excludes from
refugee status persons with respect to whom there are serious reasons for
considering that they have committed international crimes, serious non-
political crimes and acts contrary to the purposes and principles of the United
Nations. These exceptions are based on the policy consideration that refugee
protection should not be extended to persons who do not deserve
international protection. However, the fact that the Convention neither
defines national security nor provides a catalogue of ‘particularly serious’ and
‘serious non-political’ crimes gives States a wide discretion in the invocation
of the exceptions and exclusions. This exposes refugee protection from
refoulement to the whims of State discretion.

The standard of ‘serious reasons for considering that a person has
committed’ the crimes listed in Article 1F(a) and (b) is less exacting than
‘having been convicted’ by a final judgement of a particularly serious crime
in Article 33(2). Hathaway argues that Articles 33(2) and 1F (b) of the
Convention form a coherent and logical system which ensures the exclusion
of persons who have not expiated their serious criminal acts from refugee
protection. However, Wouters argues for an equally exacting standard in
Article 1 F to ensure that persons with genuine defences to criminal
allegations are not improperly excluded from refugee protection. Wouters’
view is more conducive to adequate refugee protection from refoulement
because refugees should not be excluded from protection on the mere

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224 Ibid at 344-345.
225 Sternberg op cit note 59 at 287.
226 Op cit note 224.
227 Wouters (2009) at 126-129 for the relationship between the thresholds of commission and conviction of a crime.
suspicion of criminality without a hearing.

Therefore Article 1 F of the Convention improperly restricts refugee access to protection from *refoulement* by prescribing a lower evidential threshold of ‘serious reasons for considering that a person has committed’ the enumerated crimes for exclusion from refugee status, than ‘reasonable grounds for considering that a person convicted by a final judgment of a particularly serious crime’ constitutes a danger to the community of the host State, required for exclusion from *non-refoulement*. 
PART D- **RATIONE LOCI**

This part examines the territorial scope of the prohibition of *refoulement* under the Convention. It identifies the relevant provisions of the Convention and thereafter assesses its territorial scope from the perspective of the beneficiaries and the perspective of States as bearers of the obligation of *non-refoulement*. The territorial scope of the principle of *non-refoulement* under the Convention is relevant in determining the adequacy of refugee protection from *refoulement* because State obligations at international law arise from a State’s effective control over a territory.

(I) **Relevant provisions**

The territorial scope of treaty obligations must be determined on a treaty-by-treaty basis in conformity with the rules of interpretation.\(^{228}\) The assessment of the territorial scope of *non-refoulement* under the Refugee Convention is therefore a treaty-specific exercise which uses the plain meaning of the relevant provisions as informed by the object, purpose and context of the Convention,\(^{229}\) on the presumption that the Convention is binding on the entire territory of each party unless the contrary is established.\(^{230}\)

Article 1 A (2), which includes the criterion of being ‘… outside the country of … nationality… or … former habitual residence …’ among the definitive criteria of a refugee is relevant in assessing the territorial scope of *non-refoulement* under the Convention from the perspective of the beneficiaries. Articles 33(1), 40, 41 and 44(3) are relevant to the territorial scope of *non-refoulement* under the Convention from the perspective of States parties.

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\(^{228}\) Barbara Milner *op cit* note 8 at 205.


\(^{230}\) *Ibid* Article 29. ‘Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory’.
(II) **The alienage requirement**

The beneficiaries of the protection from *refoulement* under the Convention are refugees. A person should have crossed an international border in order to satisfy the alienage requirement of the refugee definition.\(^{231}\) This requirement is not subject to any exception because refugee protection is surrogate international protection which becomes available only upon failure of national protection.\(^{232}\) The Convention therefore does not protect prospective refugees, who are still within the borders of their countries of origin or habitual residence, from *refoulement*.\(^{233}\)

The alienage requirement has several criticisms and justifications. It has been justified on reasons of the national sovereignty of the country of origin, limited resources and the need to alleviate the burden of the international community.\(^{234}\) These justifications consider the maintenance of harmonious international relations and equitable international burden-sharing without a primary focus on refugee protection. The major criticism of the alienage requirement is that it does not realistically respond to the vulnerability of prospective refugees who fail to leave their country of origin. This criticism equates the protection needs of those who satisfy the alienage requirement with the needs of those who fail to satisfy it.\(^{235}\) Although this criticism is realistic it is defeated by the surrogate nature of refugee protection. Thus internally displaced persons can only benefit through material humanitarian assistance not the recognition of refugee status. Therefore, the alienage requirement cannot, by itself, be considered to be an improper limitation of refugee protection from *refoulement* in view of the surrogate nature of international refugee protection.

The alienage requirement is not an impediment to *sur place*\(^{236}\) claims.

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\(^{232}\) UNHCR Handbook *op cit* note 6 para. 88.
\(^{234}\) Hathaway (1991) note 231 at 29- 33.
\(^{235}\) *Ibid*.
\(^{236}\) UNHCR Handbook *op cit* note 6 para 94-95 A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee “*sur place*”. A
Although the text of the Convention has no explicit provision for *sur place* claims, it does not make any distinction between persons who flee from an extant risk of actual or contemplated persecution and those who fear a risk of persecution which emerges after their departure from the country of origin or habitual residence for other reasons not the fear of persecution.\(^{237}\) Hathaway cites the statements of French and Israeli delegates at the Conference of Plenipotentiaries to show that *sur place* claims based on a significant change of circumstances in the country of origin were clearly envisaged by the drafters of the Convention.\(^{238}\) The equal protection of refugees *sur place* with refugees who flee from existing or imminently contemplated persecution indicates that the Convention refugee definition is premised on the notion that those in genuine need of international protection, including protection from *refoulement*, should not be deprived of such protection when they bring themselves within its reach.\(^{239}\)

*Sur place* claims which arise from the asylum-seeker’s activities while abroad are based on the need to protect the asylum-seeker’s freedom of expression and assembly through criticism of the government of the country of origin or former habitual residence.\(^{240}\) However, they are counterbalanced by the exclusion of bad faith claims. The rejection of bad faith claims is based on the notion that refugee protection should not be extended to those who engage in political activities while abroad in order to become refugees.\(^{241}\) This excludes manufactured claims for refugee protection by implying a requirement for good faith into the Refugee Convention.

Bad faith claims are not among the exclusion clauses of the Convention but they are a product of State practice pioneered by the New

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\(^{237}\) Hathaway (1991) *op cit* note 156 at 33-34. Zimmermann and Mahler *op cit* note 149 at 327 para 138. Also Chaudri v Canada (Min. of Employment & Immigration) 1986 69 N.R. 114 (Federal Court of Appeal, Canada, 5 June 1986) This case involved a Pakistani citizen who left Pakistan for Canada for study purposes only to discover a significant deterioration in the political situation at home and a pending warrant of arrest to appear before a court-martial for his political activities prior to departure. The Canadian Federal Court of Appeal correctly granted him *sur place* refugee status on the basis of these subsequent developments.\(^{238}\) Hathaway *ibid* at 33 footnote 25. Also Zimmerman and Mahler *ibid* at 324-327 para 125-139.

\(^{239}\) Hathaway *ibid*.

\(^{240}\) *Ibid* at 37.

\(^{241}\) *Ibid* at 38.
Zealand Refugee Status Appeals Authority (RSAA). 242 Some States 243 and the UNHCR 244 categorically reject the practice of bad faith claims since it is neither explicitly nor implicitly provided for in the Convention. 245 The recognition of bad faith claims is inherently related to the implicit recognition of sur place claims in the Convention. 246 The exclusion of refugees from protection from refoulement on the grounds of bad faith is clearly contrary to the Convention provision for non-refoulement. 247 The Convention’s failure to expressly elaborate on the conditions for the recognition of sur place claims to avoid the adulteration of its protection scheme by the practice of bad faith claims renders its protection of refugees from refoulement inadequate.

The internal protection alternative (IPA) is another strategy adopted by States to circumvent their Convention obligation of non-refoulement where refugees satisfy the alienage requirement 248 States invoke the IPA by considering whether a refugee could have relocated to another safe place in his country of origin or former habitual residence before seeking international protection. If an IPA is found, a refugee can be returned to her country of origin if she cannot rebut it. This adds an evidentiary hurdle to be surpassed

242 Re HB Refugee Appeal No 2254/94, RSAA New Zealand, (unreported, 21 September 1994)
243 Danian v SSHD [1999] EWCA Civ 3000 (UK Court of Appeal) In the UK bad faith has evidentiary relevance in assessing credibility but it is not a ground of exclusion from status by itself, .Mohammed v Minister for Immigration and Indigenous Affairs (2000) 98 Federal Court of Australia (FCA) 405 at 576 para 42. But Australian jurisprudence is mixed on this subject with other cases disregarding the acts done by an asylum-seeker to embellish his claim and other cases considering such conduct for evidentiary purposes. See Minister for Immigration and Citizenship v SZJGV [2009] HCA 40 and SZMLD v Minister for Immigration and Citizenship [2008] FMCA 1606. US approach Demirovski v INS, 39 F 3d 177 (US).
244 Annotated Comments on EC Directive 2004/83 at 17. There is no logical connection between the well-foundedness of fear of persecution and the fact that the person may have acted with bad faith.
245 Zimmermann and Mahler op cit note 149 at 334 para 166.
247 Ibid. Also Wouters (2009) op cit note 82 at 89-90 ‘There is neither a requirement to examine the ‘motive’ of a person lodging a claim for refugee protection nor can a person be excluded from refugee protection under the Convention because he intentionally created a well-founded fear.
by an asylum-seeker. This practice may expose refugees to refoulement.

The IPA appears to be fair in view of the surrogacy of refugee protection but it has no explicit legal basis in the Refugee Convention. Although the IPA is neither included in the exclusion clauses in Article 1 of the Convention nor the exceptions to Article 33(1) of the Convention, it has been implicitly read into the refugee definition in Article 1 A (2) of the Convention. Furthermore the UNHCR’s, probably inadvertent, recognition of the IPA has promoted State practice of determining whether an asylum-seeker had an IPA before recognition of status.

The IPA is an unwarranted extension of the conditions for refugee status prescribed by the Convention because it is not provided for by the Convention. Neither was it discussed during the drafting process of the Convention refugee definition. T Holterman accurately describes the IPA as ‘an attempt to define refugees out of existence’. The Convention does not adequately protect refugees from refoulement because it does not specifically prohibit the IPA or effectively regulate its use.

(III) Territorial scope from States’ perspective

(i) To which places are States prohibited from returning a refugee?

The Refugee Convention does not provide an explicit list of places where a refugee may not be returned to under the prohibition of refoulement.

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249 Ruth Khalastchi ibid at 2.
250 Zimmerman and Mahler op cit note 248 para 617-618.
251 Ruth Khalastchi op cit note 249. Also Rasaratnam v Canada (Minister of Employment and Immigration), [1992] 1 FC 706 (CA). at para 14 ‘… since by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee.’
252 UNHCR Handbook para 91 ‘... a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.’ The underlined phrase has been used by some authors like Zimmermann and Mahler op cit note 149 at 445-446 para 603 to reflect recognition of IPA although Wouters (2009) op cit note 82 at 104 footnote 424 argues to the contrary.
253 Zimmermann and Mahler op cit note 149 at 448 para 616.
255 The OAU Convention requirement in Article 1(2) for a refugee to have a well-founded fear of persecution in ‘either part or the whole’ of her country of origin or former habitual residence is an enviable protective provision.
Article 33(1) prohibits States from returning a refugee ‘… to the frontiers of territories…’ where he may face threats to life or freedom on account of his race, religion, nationality membership of a particular social group or political opinion. This ambiguous terminology facilitates the consideration of each case on its own merits although it is sometimes open to abuse by States with harsh asylum policies.\(^\text{256}\)

The risk of persecution is the decisive factor in identifying the prohibited destinations under the principle of *non-refoulement*.\(^\text{257}\) The prohibited destinations are not limited to the refugee’s country of origin or former habitual residence or its frontiers or border as expressly provided by Article 33(1).\(^\text{258}\) A refugee cannot be returned to any territory where she would face a risk of persecution including her former asylum country where she fears ‘secondary persecution’\(^\text{259}\) and a country where there is a risk of further dispatch to a territory of likely persecution.\(^\text{260}\) The reference to ‘territories’ not ‘countries’ or ‘States’ in Article 33(1) extends the prohibition of return to territories which are not internationally recognised as States.\(^\text{261}\) The legal status of the place is irrelevant to the prohibition of return under the principle of *non-refoulement*.\(^\text{262}\) There is therefore no requirement for a formally organised State entity in a territory for a refugee to be protected

\(^{256}\) The UK Court of Appeal literally interpreted this phrase to justify the pre-entry clearance policy at the Prague airport in the Czech Republic. See *European Roma Rights Centre and Others v Immigration Officer at Prague Airport and the Secretary of State for the Home Department [2003] EWCA Civ 666, Court of Appeal (Civil Division)*, 20 May 2003, para. 31 Where the Court held that: ‘For good measure Article 33 forbids “refoulement ”to” frontiers” and, whatever precise meaning is given to the former term, it cannot comprehend action which causes someone to remain on the same side of the frontier as they began; nor indeed could such a person be said to have been returned to any frontier’. This decision was confirmed by the House of Lords in *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others [2004] UKHL 55, House of Lords*, 9 December 2004. (hereinafter *Roma Rights* case).

\(^{257}\) Lauterpacht and Bethlehem *op cit* note 3 para 116 argue that the prohibition on *refoulement* applies only in respect of territories where the refugee or asylum-seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum-seeker undertake a proper assessment as to whether the third country concerned is indeed safe. Gill (1996) *op cit* note 4 at 137 ‘… what counts is what results from the actions of State agents. If the asylum-seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution … then that is *refoulement* …’

\(^{258}\) Kalin *Ibid* note 4 at 1380 para 139, Hathaway and Dent *op cit* note 47.

\(^{259}\) Kalin *Ibid*. It is persecution which occurs in a refugee’s country of asylum.

\(^{260}\) Kalin *Ibid* at 1381 para140-141. For example, in the *Abdi* case *infra* note 280 the South African Supreme Court of Appeal held that the two applicants could not be removed to Kenya for further dispatch to Somalia where they could be persecuted.


\(^{262}\) Lauterpacht and Bethlehem *op cit* note 3 para 114.
from *refoulement*. This is a protective feature in view of the centrality of the concept of persecution to refugee status.263

Article 33(1) does not prohibit States from returning refugees to ‘safe territories’ where there is no risk of persecution. It unfortunately, does not provide for the criteria and procedural requirements for the return of refugees to safe territories. Some States use the policies of ‘safe country of origin’, ‘safe third State’ ‘first host country’ sometimes in breach of their obligation of *non-refoulement*. These policies are used in EU asylum law. Under the EU Procedures Directive all Member States are presumed to be safe countries of origin.264 Under EU asylum law265 a refugee’s ‘first country of arrival’ is responsible for her status determination. If she proceeds to another Member State, that State is entitled to summarily return her to the first host State.266 This policy potentially exposes a refugee to the risk of *refoulement* because it does not include a suitable individualised assessment of each asylum-seeker’s fear of persecution but it just presumes a country to be safe with no adequate investigation of the situation in a country.267 These criticisms are apparent in the return of refugees to Greece and Hungary by EU Member States under the Dublin II Regulation268 where they risked facing administrative detention and *refoulement* to Ukraine and Serbia.269 The UNHCR declared Hungary and Greece to be unsafe countries for asylum purposes so the return of refugees to those countries constitutes *refoulement* although sanctioned by a


266 Ibid.

267 EU Procedures Directive Article 27(1) To qualify as a 'safe third country' there must simply be a determination that the destination country is prepared to consider the applicant’s refugee claim and will not expose the claimant to … refoulement ‘. Also Hathaway (2005) at 295.


The Convention does not adequately protect refugees from *refoulement* because it does not specifically regulate the criteria and procedures for the implementation of ‘safe country rules’.

(ii) **Prohibition of *refoulement* within a State’s territory**

(a) **Within a Federal State**

Article 41 of the Convention provides for the applicability of the Convention in Federal States. Provisions of the Convention which fall within the legislative competence of the federal government are applicable within the whole Federal State as in unitary States. Provisions of the Convention which fall within the legislative competence of the constituent States of a Federal State are not immediately binding on the constituent States. Article 41(b) enjoins the federal government to persuade its constituent States to adopt such provisions. This clearly subjects refugee protection from *refoulement* to domestic constitutional arrangements in Federal States which confer provincial legislative autonomy to their constituent States. This renders refugee protection from *refoulement* under the Convention inadequate in Federal States because a State is not entitled to invoke its domestic law to avoid international obligations.

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271 Refugee Convention, Article 41(a).

272 Article 41(b) provides that ‘With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment’.

273 Vienna Convention on the Law of Treaties *op cit* note 12 Article 27 provides that ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty…’
(b) Within a Unitary State

There is considerable international consensus on the applicability of Article 33 of the Convention within a State’s territory in the context of a unitary State. Academic commentators of the early days of the Refugee Convention construed the words ‘expel or return (‘refouler’’) in Article 33 (1) of the Convention to imply that the principle of non-refoulement applies to refugees who had arrived in a State’s territory. This view has been maintained in State practice. The US Supreme Court adopted that interpretation to justify the Haitian Interdiction Programme in the case of Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council et al (hereinafter Sale case). The UK House of Lords adopted the same approach in the Roma Rights case to justify the deployment of immigration officers at the Prague airport to administer a pre-entry clearance procedure which intercepted Romani Czechs from travelling to the UK to seek asylum. The same position was adopted in Australia.

Public international law confirms the position that the jurisdictional competence of a State is primarily territorial. However, some States have attempted to circumvent their territorial obligations by designating transit zones such as airports and sea ports to be ‘international’ zones which do not attract State responsibility for breach of international law. This argument could be raised because the Refugee Convention does not define the term "refoulement" specifically.

274 Bank op cit note 128 at 832 para 57 Kalin et al op cit note 4 at 1361 para 87.
277 Where the Court held that ‘The negotiating history, which suggests that the Convention’s limited reach resulted from a deliberate bargain,… solidly supports our reluctance to interpret article 33 to impose obligations on the contracting parties that are broader than the text commands. We do not read that text to apply to aliens interdicted on the High Seas.’ Supra note 169 at para 70 where Lord Hope held that ‘…the word “return” in article 33 is not an exact synonym for the word “refouler.” It refers to a refugee who is within the territory… the prohibition of non-refoulement may only be invoked in respect of persons who are already present in the territory of the contracting State, and that article 33 does not oblige it to admit any person who has not set foot there.’
‘territory’.

In the case of Abdi v Minister of Home Affairs and Others the government of South Africa argued that the two Somali appellants were not in law in South Africa when they were detained in the Inadmissible Facility at the Oliver Tambo International Airport in Johannesburg, pending their further dispatch to Somalia, so the South African authorities and courts had no jurisdiction over them. The South African Supreme Court of Appeal correctly invoked the Constitution and the jurisprudence of the European Court of Human Rights (ECt HR) to reject the government’s argument. It held this argument contrary to the Refugee Convention. Hathaway and Dent noted that the designation of airports as ‘international’ zones is an ‘insidious [method] of non-entrée’ which constitutes an evasion of the obligation of non-refoulement by States. The Convention does not adequately protect refugees from refoulement because it does not expressly prohibit the creation of ‘international’ zones within a State’s territory.

The Refugee Convention has no specific provisions for non-refoulement in the maritime context. The Convention on the Law of the Sea extends the territorial jurisdiction of a Coastal State to its territorial waters. This incorporates the activities of Coastal States in their territorial waters into the prohibition of refoulement although the Convention is silent on this aspect. The Convention on the Law of the Sea incorporates other rules of

280 (734/10) ZASCA 2 (Supreme Court of Appeal South Africa, 15 February 2011).
281 Ibid at 8 para 15.
282 Constitution of the Republic of South Africa, 1996 s7(1) which provides for the applicability of the Bill of Rights to ‘… all people in [the] country …’
283 Riad and Idiab v Belgium No 29787/03 and Amuur v France [1996] 25 ECt HR 533 (25 June 1996) at para 52 where the ECt HR held that ‘… even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial status.’ Also Medvedyev and Others v. France [GC], no. 3394/03, (ECt HR, 29 March 2010), para 67.
284 Abdi case supra note 280 para 20-25.
285 Ibid para 22.
286 Hathaway and Dent op cit note 47 at 16.
287 UN Convention on the Law of the Sea (UNCLOS), 10 December 1982, 1833 UNTS, 397 (Entered into force 16 November 1994) Article 2(1) provides that ‘The sovereignty of a Coastal State extends, beyond its land territory … to an adjacent belt of sea, described as the territorial sea’. Article 3 confers the discretion on every State to determine the breadth of its territorial sea but not to exceed a distance of 12 nautical miles from the baseline.
international law to govern State activities on the territorial sea. The Refugee Convention does not expressly incorporate the principles of international law into the prohibition of *refoulement*. Article 5 of the Convention which provides for access to better rights by refugees can only be used to incorporate international human rights standards into the Convention but it cannot be extended to facilitate the incorporation of general principles of jurisdiction and State responsibility under public international law.

Thus despite the consensus on the prohibition of *refoulement* within a State’s territory, the failure of the Convention to provide some guidelines on the meaning of ‘territory’ both in land-locked and Coastal States reduces the quality of refugee protection from *refoulement*.

(iii) **Prohibition of refoulement outside a State’s territory**

Article 33 of the Convention does not explicitly provide for an extra-territorial obligation of *non-refoulement*. Article 40 which provides for the extension of the provisions of the Convention to colonies is now irrelevant and, in any event, cannot be invoked to impose extraterritorial duties on States in all contexts since it is restricted to territories for whose international relations a State is responsible.

The absence of an explicit provision for the extraterritorial scope of the obligation of *non-refoulement* under the Convention has resulted in divergent interpretive approaches to Article 33(1) of the Convention. Some

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288 *Ibid* Article 2(3) provides that ‘The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.’
289 Bank *op cit* note 128 at 833 para 58 For the absence of an effective general territorial clause in the Refugee Convention.
291 Gil Bazo *ibid* Article 40 of the Convention provides for the possibility of an extension of the provisions of the Convention to territories for the international relations of which a State is responsible if such a State makes a declaration to that effect upon ratifying the Convention. Such a declaration is rescindable in terms of Article 44(3) of the Convention. Article 40 was relevant during the colonial period in the early practice of the United Nations when States could assume governmental authority over territories beyond their borders under the UN Trusteeship Council system. It is now of no practical relevance because of the completion of the decolonization process. However, it shows the longstanding relevance of the principle of State responsibility for wrongful acts committed by its agents outside its territory because it was used to impute extra-territorial responsibility for acts committed by imperial powers in their colonies.
States strictly construe Article 33(1) to support their restrictive policies towards refugees and avoid extraterritorial obligations.

The Sale, Roma Rights and Ibrahim cases discussed in the section on the territorial prohibition of refoulement above, restrictively construed Article 33(1) to limit it to the territory of States. The US Supreme Court, the UK House of Lords and the Australian High Court relied on academic commentary on the Convention during its early days for the restrictive interpretation which confines the obligations of Article 33(1) of the Convention in a State’s territory. The US court in the Sale case also utilised the reference to ‘… a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is …’ to imply that Article 33(1) protected only refugees within a State’s territory. The dissenting opinion of Justice Blackmun in the Sale case which pronounced the extraterritorial scope of Article 33(1) of the Convention demonstrates the vagueness of Article 33(1) of the Convention. The House of Lords and the US Supreme Court arrived at different conclusions on the applicability of Article 33 at the border. They differently interpreted the terms ‘return’ and ‘refouler’ in Article 33(1) of the Convention. This divergence shows the malleable nature of the wording of Article 33(1).

Article 29 of the Vienna Convention on the Law of Treaties which provides for a presumption of the applicability of a treaty within a State’s entire territory unless a contrary intention appears from the treaty, can be used to argue against the extraterritorial scope of the Refugee Convention in

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292 Supra note 276.
293 Supra note 169.
294 Supra note 278.
296 Sale case ibid at 179-180.
297 Justice Blackmun argued that Article 33(1) had a different wording and purpose from Article 33(2) of the Convention. The two provisions are incompatible at p 194 of Sale case. ‘…The tautological observation that only a refugee already in a country can pose a danger to the country ‘in which he is’ proves nothing.’ Also UNHCR ’s Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (2007) para 28.
298 Roma Rights (2004) supra note 169 para 17, 64 and 70. Article 33(1) of the Convention is not applicable from a State’s border and beyond. Sale case supra note 276 at 181-182. Article 33 is applicable at a State’s border but not beyond its borders.
299 Ibid.
the absence of a specific provision for an extraterritorial obligation of non-refoulement.\textsuperscript{301} This view was confirmed by the European Court of Human Rights (ECtHR) in the Bankovic case when it held that:

‘…In keeping with the essentially territorial notion of jurisdiction, the court has accepted only in exceptional cases that acts of the contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them …’

This remark gives primacy to territorial obligations over extraterritorial obligations. Subsequent jurisprudence of the ECtHR adopted the notion of effects-based State responsibility for extraterritorial government actions in situations where State officials exercised effective control over foreigners beyond borders.\textsuperscript{302}

Regional\textsuperscript{303} and global\textsuperscript{304} human rights practice is gradually deviating from a purely territorial notion of jurisdiction and State responsibility to an extraterritorial notion based on effective control of foreigners beyond a State’s borders which produces harmful effects. The UNHCR,\textsuperscript{305} its EXCOM,\textsuperscript{306} the International Court of Justice,\textsuperscript{307} regional\textsuperscript{308} and global treaty bodies\textsuperscript{309} and contemporary authors\textsuperscript{310} argue for the extraterritorial scope of

\textsuperscript{301} Bank \textit{op cit} note 128 at 833 para 58. Also Wouters \textit{op cit} note 82 at 17. ‘’[Article 29 of the Vienna Convention on the Law of Treaties] concerns only the possibility of restricting the application of the treaty to parts of the territory and does not deal with its application beyond a State’s territory’’.

\textsuperscript{302} Issa and Others \textit{v Turkey} Decision No. 31821/96, ECt HR, (16 November 2004) para 71. Arrests, ill-treatment and summary executions conducted by Turkish armed forces in Northern Iraq were held to constitute extraterritorial exercise of jurisdiction which attracted Turkey’s responsibility towards the applicants. \textit{Hirsi} case \textit{supra} note 82 at para 180. Interception of asylum-seekers from Libya by the Italian Revenue Police and Coastguard on the High Seas were held to constitute an exercise of jurisdiction sufficient to attract State responsibility.

\textsuperscript{303} \textit{Ibid.}


\textsuperscript{305} UNHCR Advisory Opinion \textit{op cit} note 297.

\textsuperscript{306} EXCOM Conclusions No 6, 15, 22 and 53.

\textsuperscript{307} \textit{supra} note 304.

\textsuperscript{308} Issa and Hirsi cases \textit{supra} note 302.

\textsuperscript{309} Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 12, underlining that a State must respect the principle of non-refoulement “for all persons in their territory and all persons under their control” \textit{JHA v Spain} (“Marine I”) Decision No. 323/2007 UN Committee Against Torture, (21 November 2008) para 8(2) where the Committee Against Torture imputed responsibility on Spain for the \textit{de facto} control of persons from a rescued vessel by Spanish officials.
the Convention and other treaty obligations.

The UNHCR is of the view that the extraterritorial scope of Article 33(1) is clear from its text, the object and purpose of the Convention and developments in related areas of international law. It cites its EXCOM’s Conclusions No 6, 15, 22 and 53 in support of the argument that State practice subsequent to the adoption of the Convention indicates the extraterritorial scope of Article 33(1). EXCOM Conclusions are considered as State practice because the EXCOM consists of representatives of a number of states parties to the Convention. However, the Conclusions cited by the UNHCR do not provide for the extraterritorial scope of non-refoulement. They just refer to the importance of non-refoulement at the border and Coastal States’ obligations to accommodate vessels in distress in their waters. Even assuming that these Conclusions refer to extraterritorial obligations, there is no consistent State practice on the extraterritorial scope of Article 33 in view of the US, UK and Australian cases discussed above which restrict the principle of non-refoulement to a State’s territory.

It is evident from State practice that States are not prepared to comply with the principle of non-refoulement. Instead they have sought to circumvent it by adopting harsh practices against refugees in the High Seas, and policies of non-entrée like visa requirements for citizens from refugee-producing countries and carrier sanctions against transporters who bring undocumented asylum-seekers into their territories. These policies were not contemplated by the drafters of the Convention so the Convention does not explicitly exclude such policies because they had no historical antecedent at the time of drafting the Convention.

It is now incumbent upon regional human rights bodies to remind States of their obligation of non-refoulement under the Convention. The

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Inter-American Commission of Human Rights criticized the Sale decision in the case of Haitian Center for Human Rights et al v United States.\textsuperscript{316} The ECtHR held the Italian push-back policy on asylum-seekers to Libya contrary to the ECHR and the Refugee Convention although Italy had concluded agreements with Libya for the interception of asylum-seekers from Libya and their summary return contrary to Article 33 of the Convention.\textsuperscript{317}

The Convention like all other treaties, binds only State parties. Libya is not a party to the Convention\textsuperscript{318} and Italy concluded push-back agreements with Libya in defiance of the Convention.\textsuperscript{319} The Convention depends on the political goodwill of States especially in the absence of a specific treaty body to enforce its provisions. The immense standard-setting efforts of global and regional human rights bodies may be of theoretical value only because States are not fully committed to comply with the Convention. This is apparent from the case law of municipal courts which justifies harsh State practices against asylum-seekers while regional and global bodies insist on refugee rights.\textsuperscript{320} This creates the impression that States collectively enter into international commitments which they are not individually prepared to honor and the Convention cannot prevent this situation because its provisions for non-refoulement are vague enough to accommodate State discretion.

No definite legal position on the extraterritorial scope of non-refoulement under the Convention can be discerned from the divergent interpretations of Article 33(1) adopted by the various authorities outlined in this section. The developments in international human rights law are not, by themselves, determinative in the interpretation of Article 33(1) of the Convention although they are of considerable importance.\textsuperscript{321} Furthermore, the views of treaty-monitoring bodies are not binding. They are therefore of little practical assistance to refugees in need of effective remedies for breach

\textsuperscript{317} Hirsi case supra note 82.
\textsuperscript{318} http://www.unhcr.org/3b73b0d63.html
\textsuperscript{320} Sale, Roma Rights and Ibrahim for adverse municipal case law. Hirsi and Haitian Center for Human Rights et al for regional case law.
\textsuperscript{321} Lauterpacht and Bethlehem op cit note 3 para 75.
of the fundamental principle of non-refoulement. Gill and McAdam accurately noted this anomaly in the European context when they commented that:

“Individuals complaining against a European State are more likely to seek protection under the ECHR, which gives rise to binding judgments by the European Court of Human Rights rather than a non-enforceable ‘view’ by the Human Rights Committee.”

Unlike the OAU Convention which expressly prohibits rejection at the border and measures which compel refugees to remain in a territory of likely persecution, the Refugee Convention does not adequately protect refugees from refoulement because it does not set its own clear standards on the extraterritorial scope of non-refoulement as a refugee-specific instrument. The clear prohibition of extra-territorial measures which result in the return of refugees will avoid the repetition of indirect refoulement similar to the incident in the Roma Rights case where the Romani people were forced to remain in the Czech Republic because of the UK pre-entry clearance policy.

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PART E- \textit{RATIONE TEMPORIS}

This part examines the duration of the principle of \textit{non-refoulement} under the Refugee Convention. It assesses the adequacy of refugee protection from \textit{refoulement} from its commencement through its continued existence and subsequent termination.

(I) \textbf{Commencement}

The Convention does not prescribe a definite time for the commencement of refugee protection from \textit{refoulement}. Refugee protection from \textit{refoulement} commences upon a refugee’s initial contact with State officials at any stage after crossing the border of her country of origin or former habitual residence.\textsuperscript{323} This proposition is implicit from a conjunctive reading of Articles 1 A (2), 31(1) and 33(1) of the Convention and academic commentary on the temporal scope of \textit{non-refoulement} under the Convention, but in practice, the time of commencement of refugee protection from \textit{refoulement} is subject to a State’s understanding of the territorial scope of \textit{non-refoulement}. Some States restrict the obligation of \textit{non-refoulement} within their borders while others offer extraterritorial protection.\textsuperscript{324}

Article 1 A (2) prescribes crossing the border of a country of origin or former habitual residence among the eligibility criteria for refugee protection.\textsuperscript{325} Article 31(1) provides for non-penalization for illegal entry or presence while Article 33(1) prohibits the return of refugees to territories of likely persecution. These provisions reflect a sequential outline of refugee protection from \textit{refoulement} with satisfaction of the alienage requirement as the initial threshold for entitlement to protection and subsequent exemption from penalty for irregular arrival and entry. This position is buttressed by the declaratory nature of recognition of refugee status propounded by the UNHCR.\textsuperscript{326} Academic commentators postulate the concept of \textit{non-}

\textsuperscript{323} UNHCR Advisory Opinion \textit{op cit} note 297 paras 9 and 24. Wouters \textit{op cit} note 82 at 53 refers to the exercise of effective \textit{de facto} control by a State party to the Convention over a refugee as attracting a refugee’s right to be protected from \textit{refoulement}.
\textsuperscript{324} There is no settled State practice on the territorial scope of Article 33(1) of the Convention as shown in Part D of this paper.
\textsuperscript{325} See Part D above.
\textsuperscript{326} UNHCR Handbook \textit{op cit} note 6.
refoulement through time as a realization of the peremptory and immediate nature of non-refoulement under the Convention.\(^{327}\) Hathaway comments that;

‘The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted….persons who claim to be refugees are generally entitled to enter and remain in the territory of a State party … they should not be arbitrarily detained or otherwise penalized for seeking protection.’\(^{328}\)

Refugee protection from refoulement under the Convention therefore commences at the stage of a refugee’s first need of international protection in her journey in flight from persecution although there is need for careful discernment of the link between the relevant provisions of the Convention for the commencement of that protection.

(II) Continued Existence

The Convention does not explicitly provide for the continued existence of the obligation of non-refoulement. Concomitantly, the continued existence of refugee protection from refoulement depends on the context of each situation. Article 33(1) of the Convention does not create a positive obligation on States to receive refugees at their borders.\(^{329}\) Where a safe third State is prepared to receive and protect a refugee from refoulement she may be returned to that State thereby extinguishing the returning State’s obligations.

Denial of entry at the border should not result in return to a territory of likely persecution. Article 33(1) of the Convention therefore creates a de facto duty on States to admit refugees if returning them will expose them to the risk of persecution.\(^{330}\) The continued existence of the obligation of non-refoulement depends on the existence of a risk of persecution upon return.\(^{331}\)

The Convention does not prescribe a definite period within which a


\(^{328}\) Hathaway (2005) op cit note 21 at 279.

\(^{329}\) Ibid at 301.


\(^{331}\) Hathaway (2005) op cit note 21 at 302.
refugee is supposed to be recognized as such by the host State and acquire other rights where the principle of *non-refoulement* facilitates entry into a State’s territory. Durieux and McAdam remark that;

‘The challenge … lies in regulating the manner in which the passing of time affects the accrual of State obligations under the Convention beyond *non-refoulement* alone.’\(^{332}\)

This remark shows that the Convention inadequately protects refugees from *refoulement* because it does not expressly provide for a specific timeframe for the progressive accrual of rights after a refugee’s entry into a State’s territory on the basis of the principle of *non-refoulement*. Refugee protection from *refoulement* under the Convention is not properly linked to the progressive acquisition of rights by a refugee after entry into a State’s territory. Concomitantly, it can be argued that the subsequent treatment of refugees after admission into a State’s territory is beyond the prohibition of *refoulement* under the Convention because the Convention does not explicitly prohibit States from indirectly returning refugees to territories of persecution by subjecting them to harsh and intolerable conditions which result in their involuntary return to territories of persecution.

Gill noted the paradoxical relationship between the peremptory nature of *non-refoulement* and the discretionary nature of the granting of refugee status in the following terms;

‘There is nevertheless a certain discontinuity in the protection regime established by the 1951 Convention … Refugees benefit from *non-refoulement* and refugee status … but there is no necessary connection between *non-refoulement* and admission or asylum… the discretion to grant asylum and the obligation to abide by *non-refoulement* remain divided …’\(^{333}\)

Refugees do not always incrementally acquire rights with time in the host State because of the unregulated gap between emergency admission through *non-refoulement* and the subsequent discretionary granting of refugee status. Some States utilize this protection gap to subject refugees to harsh policies like encampment under harsh conditions which indirectly result in involuntary return or secondary movement to territories of persecution.\(^{334}\)

\(^{332}\) Durieux and McAdam *op cit* note 122 at 4.

\(^{333}\) Gill *op cit* note 4 at 203.


Noted that the indefinite detention of refugees pending status determination in Australia and
The doctrine of ‘constructive *refoulement*’\(^{335}\) is emerging to address this protection gap. It is not explicitly part of the Convention but it is emerging through academic commentary and judicial decisions.\(^ {336}\)

The Convention therefore does not adequately guarantee the continued existence of refugee protection from *refoulement* to meet the protection needs of refugees after entry into a State’s territory.

(III) **Termination**

Article 33 of the Convention does not provide for the termination of refugee protection from *refoulement*. Refugee protection under the Convention, including *non-refoulement*, terminates upon cessation of refugee status.\(^ {337}\) Article 1 C of the Convention provides for the conditions for cessation of refugee status. Article 1C consists of six paragraphs which will be assessed under three categories namely; resumption of national protection on the refugee’s voluntary efforts, ceased circumstances and the ‘compelling reasons’ exemption from cessation. Cessation of refugee status is based on the principle of surrogacy which implies that refugee status is a temporary and transitory phenomenon dependent upon the absence of protection in the country of origin or former habitual residence.\(^ {338}\)

(i) **Voluntary efforts**

Article 1C (1)-(4) provides for cessation of refugee status upon a refugee’s voluntary; re-availment of the protection of his country of nationality\(^ {339}\) or reacquisition of nationality\(^ {340}\) or acquisition of a new

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\(^{335}\) Penelope Mathew (2012) *op cit* note 330 at 98 Defines ‘constructive *refoulement*’ as ‘… a situation where a refugee is forced to return voluntarily because of conditions that are insupportable. It is an intuitive idea that bears some similarity to constructive eviction in tenancy law or constructive dismissal in labour law.’


\(^{337}\) Hathaway (2005) *op cit* note 21 at 278.


\(^{339}\) Article 1 C (1).

\(^{340}\) Article 1 C (2).
nationality and the protection of his new country of nationality\textsuperscript{341} or re-establishment in his country of origin or former habitual residence.\textsuperscript{342}

Article 1C (1)-(4) is an appropriate compromise between inclusion and exclusion from protection.\textsuperscript{343} It considers both aspects of inclusion and exclusion from refugee protection. It incorporates the notion of a refugee’s ability and willingness to avail himself of a country’s protection which is inherent in the refugee definition and the principle of non-refoulement.\textsuperscript{344} Although it does not provide the explanatory details for its implementation, Article 1C (1)-(4) indicates that a refugee must voluntarily engage in the acts which result in cessation of status with an intention to acquire alternative effective national protection.\textsuperscript{345} Article 1C (1)-(4) confirms the principle that refugee protection is necessary only where the legal bond between a citizen and her State has been severed.\textsuperscript{346} This is implicit in the reference to the acquisition of nationality and the attendant protection. Article 1C (1)-(4) requires a mental element of intention to obtain alternative protection by including the aspect of voluntariness. This is supplemented by the physical element of obtaining actual protection.\textsuperscript{347} Repatriation without these constituent elements constitutes refoulement.

Therefore Article 1C (1)-(4) does not expose refugees to refoulement although it can be criticized for accommodating State discretion because of its silence on the details of its invocation.

(ii) Ceased circumstances

Article 1C (5)-(6) provides for cessation of status on the basis of a change of circumstances. Paragraph 5 applies to refugees with nationality while paragraph 6 applies to Stateless refugees. These provisions are based on similar principles despite this difference in their beneficiaries. Article 1C

\textsuperscript{341} Article 1 C (3).
\textsuperscript{342} Article 1 C (4).
\textsuperscript{343} Susan Kneebone et al ‘Definition of the Term Refugee: Article 1 C of the 1951 Convention’ in Zimmerman (ed) \textit{op cit} note 4 481-535 at 533 para 214 ‘The provision for cessation of status in the 1951 Convention falls between inclusion and exclusion …’
\textsuperscript{344} \textit{Ibid} at 520-522 para 153-159.
\textsuperscript{345} Gill \textit{op cit} note 4 at 80-83.
\textsuperscript{346} Grahl-Madsen ‘The Status of Refugees In International Law’ Volume 1 (1966) Sijthoff, Leyden at 384. Also Shacknove \textit{op cit} note 231 at 275.
\textsuperscript{347} UNHCR Cessation Guidelines 1999 para 8.
(5)-(6) is based on the notion that the international protection of refugees should end upon the cessation of the circumstances that produced the need for international protection.\footnote{348}

The ceased circumstances clauses do not provide details for their implementation. The UNHCR EXCOM stressed that the application of cessation clauses is the exclusive duty of states with the appropriate involvement of the UNHCR.\footnote{349} The UNHCR has contributed in the elaboration of the cessation clauses.\footnote{350} It has approved the invocation of cessation clauses by States but sometimes in paradoxical breach of its own standards.\footnote{351}

Article 1 C envisages the invocation of the cessation clauses on an individual basis but it is sometimes invoked in group situations with the acquiescence of the UNHCR. Kelly McMillan deplores the arrangements for the invocation of Article 1 C (5) by the government of Uganda on Rwandan refugees. She criticizes the group invocation of Article 1 C (5) before a fundamental and enduring change in Rwanda as ‘constructive cessation’ which exposes refugees to \textit{refoulement}.\footnote{352} Group cessation is contrary to the individualistic nature of the Convention refugee definition, cessation clauses and Article 33.

The Convention’s failure to expressly regulate the implementation of the cessation clauses to protect refugees from \textit{refoulement} through premature group cessation creates a protection deficit.

(iii) \textbf{Compelling reasons exemption}

Article 1 C (5)-(6) provides for exemption from cessation of status for refugees recognised under earlier arrangements if they can show compelling reasons, against cessation, arising out of previous persecution. The UNHCR


\footnote{349} Conclusion No 69 (XLIII) (1992) Second preambular paragraph.

\footnote{350} UNHCR Handbook \textit{op cit} note 6 para 135-139. UNHCR Guidelines on Cessation (1999) and (2003) and \textit{amici curiae} briefs in litigation.

\footnote{351} Hathaway (2005) at 289-294 for UNHCR approval of forced repatriation of refugees from Kenya and Tanzania.

\footnote{352} McMillan \textit{op cit} note 348.
has extended this to beneficiaries of the current Convention on humanitarian grounds. Gill aptly criticised this provision by commenting that;

‘The Convention acknowledges the weight to be accorded to compelling reasons arising out of previous persecution, yet perversely limits the right to invoke such reasons to refugees recognised under earlier arrangements’

The limitation of the ‘compelling reasons exemption’ from cessation under the Convention to its former beneficiaries renders refugee protection from refoulement inadequate in view of the importance of the ‘compelling reasons exemption’ to refugees who may have a continuing need of international protection despite a change of circumstances in their country of origin or former habitual residence.

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353 UNHCR Handbook *op cit* note 6 para 136.
354 Gill *op cit* note 4 at 87.
PART F – CONCLUSION

The Convention strives to ensure the adequate protection of refugees from *refoulement*. It protects all persons who meet the requirements of the refugee definition from *refoulement* including those who illegally enter into the putative host State. The Convention provides special protection by exempting refugees from penalization for illegal entry. Other non-refugee treaties subject refugees to immigration penalties.355

The Convention prohibits the return of refugees to territories of likely persecution. The reference to territories not States dispenses with the need for a formally recognised State structure in the place where refugees should not be returned. The Convention prohibits both direct and indirect *refoulement*. The obligation of *non-refoulement* under the Convention prohibits measures which result in the return of refugees to territories where they are likely to be persecuted as shown by the use of the phrase ‘… in any manner whatsoever…’ in Article 33(1) of the Convention.

The Convention provides protection from *refoulement* at the stage of first need to refugees who manage to cross the borders of their countries of origin or former habitual residence. It does not prohibit refugees from accessing better rights where its protection is inadequate. Furthermore, no reservations can be made to Articles 1 and 33 of the Convention which are the most important provisions to *non-refoulement*. The Convention properly provides for voluntariness and the enjoyment of real alternative national protection by a refugee before cessation of status.356

Despite its protective features, the Convention does not adequately protect refugees from *refoulement*. Its definition of a refugee is susceptible to restrictive interpretations especially in view of its failure to define the concept of persecution which is crucial to status determination.

Article 33(1) of the Convention is couched in negative terms which simply prohibit return to territories of likely persecution without a positive duty to admit refugees into a State’s territory. This has led to indirect *refoulement* through restrictive State practices of *non-entrée*, interdiction or

355 Clark and Crepeau *op cit* note 72 at 397.
356 Refugee Convention Article 1C.
interception of refugees before arrival at a State’s border. This situation is worsened by the absence of a specific treaty body under the Convention to ensure strict adherence to the standards set by the Convention. The Convention’s effectiveness depends on the political goodwill of States where refugees cannot access human rights treaty bodies.

The territorial clause in Article 40 became archaic upon the completion of the decolonisation process. It can be improved to explicitly impose extraterritorial obligations on the current State parties. The ‘compelling reasons exemption’ from cessation clause in Article 1 C (5)-(6) protects beneficiaries of previous arrangements rather than current beneficiaries.

Despite its shortcomings, the Convention remains a resilient source of refugee protection from refoulement as the sole legal instrument in the international refugee protection regime.\(^{357}\)

\(^{357}\) Declaration of States Parties to the 1951 Convention *op cit* note 27.
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