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TITLE: MASS INFLUX REFUGEE SITUATIONS: LAW AND PRACTICE

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DEDICATION

This work is dedicated to my mother, Violet Muchelemba. You are the best woman that I know. May God be with you always. God blessed me more than my fair share when he made you my mother.

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My greatest gratitude is to God. He makes all things possible. I would also like to thank my supervisor Professor Danwood Chirwa for his immense assistance, patience and kindness throughout my research. Thanks go also to my family for always being by my side. Ezra, you are the best. My friends, both those I had before I went to Cape Town and the amazing ones I met during my stay in Cape Town, you made the journey great. God bless you all.

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LIST OF ABBREVIATIONS

ACHR	African Charter on Human and People's Rights
AU	African Union
CAT	Convention Against Torture
ICRC	International Committee of the Red Cross
EU	European Union
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USA	United States of America

CHAPTER ONE

INTRODUCTION

1.1 HISTORICAL BACKGROUND

Movement of people has occurred throughout history in a repeated fashion.¹ Asylum as an institution developed during the age of antiquity and became established with the passage of time.² It can therefore be derived that the issue of refugees is not a new phenomenon and has existed for a long time.³ According to the United Nations (U.N), one in every 122 persons is either a refugee, internally displaced or seeking asylum.⁴ People that are forcibly displaced are in serious need of international protection, whether or not they have crossed an international border.⁵ The world has seen great number of refugees created by conflicts over the years. The First World War of 1914 to 1918 saw a huge resultant refugee population. It is estimated that around 10 million people were displaced during this conflict, counting both internally displaced persons and refugees.⁶

The Second World War of 1939 to 1945 also saw the creation of millions of refugees in Europe.⁷ The Arab-Israeli conflict has also resulted in the creation of about a million Arab and Palestinian refugees.⁸ These statistics relate to Europe alone. However, conflicts have been in existence for a long time and people will always be affected by such conflicts.

¹ V Vevstad, *Refugee Protection: A European Challenge* (Sats: Tano Aschenhoug, 2008) at page 17.

² Ibid at page 17.

³ <http://www.un.org/en/globalissues/briefingpapers/refugees/overviewofforceddisplacement.html> accessed on 3rd June, 2016

⁴ UNHCR website 'Worldwide Displacement Hits All-Time High as War and Persecution Increase' <http://www.unhcr.org/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html> accessed on 26th May, 2016

⁵ J Fitzpatrick (ed) *Human Rights Protection for Refugees, Asylum Seekers and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Transnational Publishers, 2002)

⁶ Article on numbers also the Terms 'Internally Displaced Person' and 'Refugee' will be discussed later in the paper

⁷ UNHCR <http://www.unhcr.org/news/latest/2014/6/53a155bc6/world-refugee-day-global-forced-displacement-tops-50-million-first-time.html> accessed on 25th July, 2016

⁸ Mitchell Bard 'The Palestinian Refugees: History & Overview' on

Africa has not been spared from this problem. During the early 1960's Africa began to undergo a decolonisation process. This led to the creation of many refugees and displaced persons and was the first time a major refugee problem was occurring on the Continent.⁹ The protracted conflict on the continent in countries such as the Democratic Republic of Congo (DRC), Somalia, South Sudan, Nigeria and so on has resulted in mass displacement and refugee creation.¹⁰ In sub-Saharan Africa, in the year 2014, the conflicts in the region resulted in 3.7 million people becoming refugees and about 11.4 million IDPs.¹¹ The DRC alone has generated about 500,000 displaced persons alone.¹² The world then responded that there was a need to come up with a legal regime that could tackle refugee status and protection.

In fact the complications of having mass influx refugee situation have also been in existence for a long time now. For example according to Ivor Jackson the war in Africa caused such problems for neighbouring countries. For example, in the 1970's and 80's there was a mass influx of refugee from Angola to Zambia, sometimes as many as 2000 people a day.¹³ In the year 1976 alone, more than 16,000 Angolans were in Zambia. This number continued to grow despite repatriation effort by the government of both countries.¹⁴ Repatriation was a reaction by the government of Zambia after seeking help from the United Nations High Commissioner for Refugees (UNHCR) to cope with the situation.¹⁵

Initially the Zambian government had stated that it would not repatriate bonafide refugees, that is, refugees according to the 1951 Convention on the Status of Refugees (Refugee Convention). Later their stance changed and they stated that 'since the people concerned had not left their

<http://www.jewishvirtuallibrary.org/jsource/History/refugees.html> accessed on 15th July, 2016

⁹ <http://www.unhcr.org/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html> accessed on 26th May, 2016

¹⁰ <http://www.unhcr.org/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html> accessed on 26th May, 2016

¹¹ <http://www.unhcr.org/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html> accessed on 26th May, 2016

¹² <http://www.unhcr.org/news/latest/2014/6/53a155bc6/world-refugee-day-global-forced-displacement-tops-50-million-first-time.html> accessed on 15th July, 2016

¹³ Ivor Jackson *The Refugee Concept in Group Situations* (The Hague: Kluwer Law International, 1999) at page 277

¹⁴ *ibid*

¹⁵ *Opcit* at page 278

countries of origin out of fear of persecution as anticipated by the Refugee Convention, but as a result of fear arising from fear of military operations so they were not refugees but displaced persons instead. They therefore argued that there was no reason why repatriations should not take place.¹⁶ This is a clear example of how states react when they can no longer bear the 'burden' of protection in mass influx situations. Other countries could have stepped in to assist but this was not done. Instead, repatriation was the option, with the threat that some of the Angolans may have been fearing persecution, therefore the act of sending them back home could amount to refoulement.

This research is therefore aimed at analysing the law and practice relating to such situations, burden sharing mechanisms, states responsibilities, legal obligations and so on.

1.2 Statement of the Problem

There is currently a refugee crisis worldwide. There is in existence a legal regime relating to refugee protection globally. However, the major refugee law conventions and international instruments do not have specific provisions relating to mass influx refugee situations. They are drafted in such a way that they encompass individual refugee status determination and protection. However, this leaves a gap in the law because refugees cross border in huge numbers and require legal protection of their human rights in such situations. States are still not providing lasting solutions and are still not in agreement as to who should bear the burden in such situations and also what form of burden sharing is required. The law exists in the general sense, but it does not outline the specific protection regime for mass influx situations and the role that states should play in the said situations.

¹⁶ Jackson, Ivor .. Supranote 13 at page 279

This study is important for purposes of analysing the law relating to refugee protection on the international arena, for example, the Refugee Convention and how it relates to refugee protection in mass influx situations. The analysis is important because it will help in the understanding of whether the law is adequate for protecting the refugees and ultimately if it is an adequate means of protecting refugees who move in big groups. The research in general could be used to build up knowledge of Refugee law in general.

1.3 Significance of the Study

The issue of refugees is not a new concept. However, the issue has become very topical now because of the refugee crisis that is currently plaguing Europe and other surrounding regions. It is estimated by the United Nations (U.N) that in the year 2015 alone there was an influx of just over a million refugees into Europe, in 2016 so far there is already an estimate that about one hundred and eighty thousand (180,000) migrants arrived in Europe already as at February 2016. It is important to note also that these statistics are only of those migrants that arrive by sea.¹⁷

This study is important for purposes of analysing the law relating to refugee protection on the international arena, for example, the Refugee Convention and how it relates to refugee protection in mass influx situations. The analysis is important because it will help in the understanding of whether the law is adequate for protecting the refugees and ultimately if it is an adequate means of protecting refugees who move in big groups. The research in general could be used to build up knowledge of Refugee law in general.

¹⁷ <http://data.unhcr.org/mediterranean/regional.php> accessed on 20th April, 2016

1.4 Objectives

The objective of this research shall be to:

1. Analyse and ascertain the historical background of refugee protection, especially mass influx refugee situations.
2. Analyse the international legal regime governing refugee protection and the provisions relating to mass influx refugee situations if any.
3. To ascertain the duties of states in mass influx refugee situations and to find out if any special obligations arise in such situations.
4. To analyse current trends in recent mass refugee influx situations and analyse if the current legal regime has been adequate in providing protection for refugees that enter new countries in mass influx refugee situations.

1.5 Research Questions

In order to fulfil the objectives of this research the following research shall be asked:

1. What is the historical background to refugee movements, especially mass refugee influx situations?
2. What is the international legal regime governing refugee situations and what are the provisions regarding mass influx situations?
3. What are the obligations or duties of states in mass influx refugee situations and what form should these obligations take?
4. What are the current trends in mass influx refugee situation and if they are achieving the requisite protection needed for refugees in the above mentioned situations for example, the current response to the mass influx refugee situation in Europe

1.6 Scope

The scope of this dissertation shall be international with a few case examples of how various countries have applied the requisite laws under scrutiny. So it will ultimately be limited to countries that have signed and ratified international instruments relevant to this research.

1.7 Research Methodology

The research methodology to be used for this paper is desk research. There shall be reference to text books in the relevant fields, journal articles, internet sources and some academic papers and presentations.

1.8 Definition of key terms

i. Refugee

The definition of who or what amounts to a refugee is widely misconstrued in everyday language. However, there is a uniform definition as provided for by the Convention. The Convention is the most widely ratified international Convention that defines the term ‘refugee’.

According to the Convention, a refugee is:

‘Owing to a well found fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside his or her country of nationality and is unable or owing to a well-founded fear, is unwilling to avail himself or herself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence... is unable or owing to such fear, is unwilling to return to it.’¹⁸

ii. Internally Displaced Persons

Article 1 A of the Convention is clear as to who a refugee is at law. However, there are situations where war, civil unrest or other disturbance affects people but they do not fall under the provisions of the Convention as defined in Article 1A. One such example is Internally Displaced Persons (IDPs).

¹⁸ Article 1 A of the Refugee Convention

According to the International Commission for the Red Cross (ICRC) IDPs are people that have fled their places of bode or their homes but they have not crossed an international border.¹⁹ The Unite Nations High Commissioner for Refugees (UNHCR) on its website further defines an IDP as a person who while they may have fled for similar reasons as a refugee, they do not cross an international border but stay in their country and remain under the protection of its government despite the fact that that government could actually be the reason for their displacement.²⁰

1.9 Chapter Outline

i. Chapter one

Chapter one shall be an introductory part of the research. It shall contain definitions of key terms that will be used in this paper, aims and objectives, significance of the study and the research question among other things.

ii. Chapter Two

This chapter shall contain a brief analysis of the law relating to refugee Protection. It shall then narrow down to specific provisions relating to refugee protection during mass influx refugee situations if any. These provisions and their adequacy in protecting refugees in mass influx refugee situations shall be brought out.

iii. Chapter Three

This shall be a chapter on the duties of states that arise in mass influx situations if any. What the obligations are under international law and refugee law. Then it shall focus on the manner of obligations that these duties should take.

iv. Chapter Four

This shall be chapter with an analysis of the current trends in refugee protection. The response of states that have been faced by this situation and if those response have been adequate.

¹⁹ <https://www.icrc.org/en/war-and-law/protected-persons/refugees-displaced-persons> accessed on 25th May 2016

²⁰ <http://www.unhcr.org/internally-displaced-people.html> accessed on 26th May 2016

v. **Chapter Five**

This chapter shall contain the findings, recommendations and the conclusion of the research.

2.0 CHAPTER TWO

THE LAW RELATING TO REFUGEE PROTECTION

2.1 INTRODUCTION

This chapter shall be an outline and discussion of the various legal instruments relating to refugee protection. The instruments that will be discussed will be regional agreements and ultimately the Refugee Convention as a global document. One way of protecting refugees is by creating laws that protect them. This chapter shall examine if any of the major instruments address specifically responses of states in the event of mass influx of refugees and to what extent they do provide for such situations.

2.2 INTERNATIONAL LEGAL REGIME RELATING TO REFUGEE PROTECTION

According to Hathaway, the process of governance is usually premised on a closed system of obligation. This system entailing a closed set of rules that citizens should follow including aliens that come onto that territory.²¹ In ancient times it was realised that rules that were friendly to outsiders encouraged the entry of desirable outsiders.²² One example is that of ancient Greeks who accepted that their rules that denied legal capacity or entry to foreigners posed a barrier to the attraction of foreign craftsmen that would have helped to enrich the communal life.²³ Ancient kingdoms then responded by creating some forms of association that granted advantages such as immunity or privileged to foreign merchants. In the sixteenth century, with the emergence of states, came the need to formalise these special rights granted by European rulers to traders.²⁴ These later resulted into the Conventions that now govern how aliens are treated on foreign land.

The early effort of the international community to actually protect refugees began from a series of exoduses in the year following the First World War. Unfortunately, the exoduses coincided

²¹ James Hathaway *The Rights of Refugees Under International Law* (New York: Cambridge University Press, 2005) at page 433.

²² Ibid.

²³ Opcit at Page 433.

²⁴ Hathaway, Supra Note 21 at page 433.

with the emergence of modern systems of social organisation throughout a great part of Europe. The European governments began to regulate huge parts of the social and economic lives of citizens and also to safeguard critical entitlements for the benefit of their own citizens. The result of this was the reassertion by states of definite boundaries between citizens and non-citizens especially in the manner of strict passport and visa controls being enforced at borders.

The regime relating to refugee protection is a wide one. There are international agreements that relate to refugee protection and also regional instruments such as the Organisation of African Unity (OAU) Convention. This chapter shall review the law relating to refugee protection and analyse whether or not it adequately protects refugees in mass influx situations. It will bring out what is unique about mass influx situations and if at all they actually need specific provisions to cater for such situations.

2.2.1 THE 1951 UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES

The 1951 The Convention is the most widely ratified international Convention that defines the term 'refugee'. As stated earlier, there have been numerous conflicts worldwide. The response of the international community when there is a crisis is usually to come up with an instrument that will regulate, control or stop the worrisome action.²⁵

The Convention came into force in 1951, after a meeting to complete the drafting of it was completed on the 25th of July 1951. Twenty-six (26) countries participated in the meeting in Geneva though it is important to note that no African country was present at these talks.²⁶ It was originally drafted and prepared in order to deal with people that had been displaced as a result of World War II.²⁷ It is grounded in Article 14 of the Universal Declaration of Human Rights which provides:

²⁵ <http://www.coe.int/en/web/compass/legal-protection-of-human-rights> accessed on 12th July, 2016

²⁶ Louis Sohn and Buergenthal Thomas (eds) 'The Movement of Persons Across Border' Studies in Transnational Legal Policy American Society of International Law. 23. At page 7

²⁷ Gina Clayton *Immigration and Asylum Law* (3rd ed) (New York: Oxford University Press, 2008) at page 40

- ‘1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.’

This provision implies the refugees the right to seek asylum in other countries. However, it is a declaration therefore the legal force of this is still questionable. The Convention now came to further narrow down who qualifies to actually seek this particular asylum. The question of a Convention came after the Second World War when there was a mass influx of refugees or asylum seekers that had to cross borders in order to obtain protection from the state they migrated to.²⁸ Furthermore, some countries such as Denmark that had ended up having a vast number of refugees became alive to the fact that there was need to find an international solution such as an international treaty.²⁹

The Refugee Convention is an important instrument for things such as defining a refugee, non-refoulement, exclusion clauses, cessation clauses and so on. It has been described as some as the ‘Magna Carta’ of refugees.³⁰ It set up some landmark standards for how refugees are to be treated. It incorporates the most important principles of refugee protection that were relevant at the time it came into force (1951) and continue to be so in contemporary times.³¹ One thing that it tries to do is balance the doctrine of state sovereignty and that of the requirement to protect refugees. This is no easy task hence issues such as the refugee crisis in Europe have sparked debate.

According to Feller the Convention was unique at the time because it managed to incorporate important concepts such as the following:

²⁸ G Ben-Nun 'The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention', (2015) *Journal of Refugee Studies*, vol. 28, no. 1, pp. 93-117. Available from: 10.1093/jrs/feu021. Accessed on 19th April 2016

²⁹ Ibid

³⁰ 'The 1951 Convention Relating to the Status of Refugees: It's Relevance in the Contemporary Context' A UNHCR Publication <http://www.refworld.org/pdfid/3ae6b3388.pdf> accessed on 1st November, 2016

³¹ https://www.icrc.org/eng/assets/files/other/581-606_feller.pdf accessed on 23 November, 2016

- a. Article 33 of the Convention prohibits the return of refugees to the place of persecution, this principle is referred to as the principle of non-refoulement;
- b. It prohibits discrimination on any grounds for refugee determination processes;
- c. It recognises that refugee protection is a humanitarian issue and not one that must cause any form of friction between states, and;
- d. It recognises that protection of refugees can sometimes be burdensome on some states more than others, therefore there is need for cooperation.³²

A refugee protection regime requires among other things that there is adequate protection of human rights and dignity of the refugees. The rights that are usually threatened in refugee situations include the right to life, liberty, freedom from torture or inhuman treatment, security of person, access to basic needs such as water, health, education and so on. The refugee convention in its provisions tries to cover all these areas.

The right to life is protected for example in article 1 of the Convention. This one provides the definition of a refugee. It can be argued that this provision protects the right to life by providing legal backing or persons who flee in order to save their lives for the grounds that fall under article 1A of the refugee convention. In article 33 also, the refugee convention seek to protect the rights of refugees from torture, cruel and inhuman treatment and even protect the right to life. Article 33 provides a complete prohibition of the refoulement of refugees.

One thing that is quite noticeable in the refugee convention more than fifty years later is the fact that it does not provide for a response in mass influx refugee situations.³³ It does not impose any form of burden sharing mechanisms on states. From the way it was drafted, it seems to have only envisioned small groups of people crossing borders. For example there have been arguments that the mere definition of a refugee in article 1A being ‘any person who...’ this here shows that the Convention is mostly a one person at a time determining document. At the time, this was mostly seen in Europe.

³² https://www.icrc.org/eng/assets/files/other/581-606_feller.pdf accessed on 23rd November, 2016

³³ Australian Parliament Website on http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp00/01/01RP05

The above stated inadequacies should be differentiated from the argument by some scholars that the Refugee Convention does not apply in mass influx situations, it actually does. According to Durieux and McAdam to assert this would be incorrect because even though the definition of a refugee in article 1A is individualistic in how it was framed, it still refers to individuals that could be part of a group. There is no evidence that the definition did not cover group persecution.³⁴ States even recognised the importance of applying the Refugee Convention in mass influx situations and stated that refugees that were given the status under an individualised status determination procedure are entitled to the same rights as those that receive temporary protection.³⁵

However, contemporary times have shown that refugees are now moving in huge groups. The European Union for example has been having a struggle to adequately control the influx of refugees coming onto their territories. In practice though, in order to meet with reality, former Ambassador of UNHCR, Felix Schnyder stated that “prima facie group determinations is not done in the exact same way as individual determination. In these situations, the determination is done bearing in mind that the people may be leaving a country for reasons other than those in the Convention.”³⁶ So it is done based on the objective determination of prevailing circumstances in the home country of the group of people that are seeking asylum.³⁷

Furthermore, in relation to the definition and groups situations again, on the one hand it has been said that nowadays the definition of a refugee has been strictly interpreted based on the Convention and has been used by many states to refuse to take in refugees, it has become a tool

³⁴ Durieux John Francois and Jane McAdam ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 Int’l J. Refugee L. 4 accessed on 18th November, 2016

³⁵ Stated during the Global Consultations Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ‘Chairperson’s Report on Roundtable 2: “International Cooperation to Protect Masses in Flight” (*inter alia* mass influx, burden and responsibility sharing, security and additional instruments)’ (13 Dec. 2001) 2. Taken from Durieux John Francois and Jane McAdam. ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies.’ 2004.

³⁶ Jackson, Ivor. ‘The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection.’ 1991. 3 Int’l J. Refugee L. 403 accessed from Heinonline on 18th November, 2016

³⁷ Ibid

for restrictive asylum policies.³⁸ On the other hand it is said that through history it has been seen that the definition can provide a very adequate legal basis for a liberal and humanitarian approach when dealing with individual asylum seekers.³⁹

Additionally, the Convention does however, cover the importance of family unity in refugee situations at all times.⁴⁰ This could possibly be the only time in which vast numbers of refugees are envisaged in it. One of the biggest challenges of contemporary times is the large numbers in which refugees are crossing borders. Whether the lack of provision for this situation in the convention is a huge setback or whether it is just a minor one is another thing.

It could be minor in that there is no reason why states cannot come up with supplementary legislation to help cure this ‘defect’. It could be major in that the Refugee Convention is the major statute for refugee protection and if a region does not decide to adopt a supplementary document then it is the only convention that binds states. Or if the supplementary legislation also leaves out the required provisions then there is no way of knowing the specific response by states to refugees in mass influx situations.

In fact, some scholars have argued that the Refugee Convention is more often invoked in Europe than in other regions because more and more refugees are attracted to the opportunities that Europe has to offer, unlike say African countries that are mostly poor. However, it goes without saying that the Refugee Convention is relevant in all regions.

³⁸Opcit

³⁹Jackson, Ivor. ‘The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection.’ Supranote 36.

⁴⁰Articles 4, 12 among others and also in Final Act of the 1951 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Recommendation B, ‘Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened...’ as cited on <http://www.unhcr.org/3bd3d4a14.pdf>

2.2.2 THE 1969 ORGANISATION OF AFRICA UNITY CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA (OAU CONVENTION)⁴¹

Africa has not been exempt to the conflicts that give rise to the creation of refugees. In fact the UNHCR argues that the continent is now the home of some of the biggest displacement crises in the world.⁴² When these conflicts arise, often the only real solution is to seek and obtain the physical and material safety of another state.⁴³ According to the UNHCR the OAU Convention was a response to the humanitarian crises that were prevailing in Africa, both refugees and IDPs included.⁴⁴ At the time that this regional instrument was created there was only the 1951 Refugee Convention that was the major international document on refugee protection. The 1951 Convention however was having major setbacks because it was designed mainly in relation to Europe but conflicts in Africa began to be a major world problem. At the time it was believed that the persecution-based approach as outlined in Article 1A was very limiting. Therefore African states saw it fit to create a document that would cater for the novel situations arising on the continent.

At the time the major reason for displacement was struggles for colonialism and also people fleeing persecution arising from the struggle to end apartheid in South Africa.⁴⁵ About 45 Africa states have ratified the OAU Convention and it now forms an important part of refugee protection in the African region.⁴⁶

The war in the Democratic Republic of Congo is not based on persecution but has been seen to be more of a political and power struggle based conflict. Here it would be difficult to categorise those that leave the DRC merely for safety because their home have been under attack for a reason other than persecution, for example the village could be situated on a military strategic

⁴¹ It should be noted that the OAU is now referred to as the African Union (AU)

⁴² 'The 1951 Convention Relating to the Status of Refugees: It's Relevance in the Contemporary Context' A UNHCR Publication <http://www.refworld.org/pdfid/3ae6b3388.pdf> accessed on 1st November, 2016

⁴³ Obbo-Okoth, George, 'The Problem of Refugees in Light of Contemporary International Law Issues.' Debbas-Gowland(ed) (1994) London: Martinus Nijhoff Publishers at page 11

⁴⁴ <http://www.unhcr.org/excom/scip/3ae68cd214/persons-covered-oau-convention-governing-specific-aspects-refugee-problems.html> accessed on 1st August, 2016

⁴⁵ Okello, Moses. 'The 1969 OAU Convention and the Continuing Challenge for the African Union.' Forced Migration Review on <http://www.fmreview.org/faith/okello.html> accessed on 1st November, 2016

⁴⁶ 'The 1951 Convention Relating to the Status of Refugees: It's Relevance in the Contemporary Context' A UNHCR Publication <http://www.refworld.org/pdfid/3ae6b3388.pdf> accessed on 1st November, 2016

position. However, the Convention can be applied with some form of ease to Tutsi persons who fled the country arising from the Rwandan genocide situation or conflict.

Therefore, the OAU Convention defined a refugee in a wider sense. Article I of the convention in defining a refugee provides as follows ;

‘For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

In article II it further states;

‘The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’

The widening of the definition then automatically increases the people that can ultimately flee as refugees. The AU Convention also does not make specific reference to mass influx refugee situations and does not provide for mandatory obligations on states in such situations. It has been argued that the above expanded definition, clearly matches the developments that have occurred with the U.N, and has also been proposed as the criterion that is generally to be applied in situations of mass influx, but care is required in calculating the exact legal implications.⁴⁷ It does however, envision a situation with mass influx in some of its provisions for example in article II(4) it states ; ‘Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the AU, and such other Member States shall in the spirit of African solidarity and international co-

⁴⁷ Guy S Goodwin-Gill *The Refugee in International Law* (New York: Oxford University Press, 1983) at page 14.

operation take appropriate measures to lighten the burden of the Member State granting asylum.’

Despite this argument, it is obvious that the above provision does not expressly provide for mass refugee influx situations but it does however, envision a situation where the refugee population is a lot more than usual and a country is then unable to cope. We could therefore stretch this to also encompass situations when there are mass influx situations. The above provision could also apply as a response to mass influx refugee situations for African states.⁴⁸ Furthermore, it does not have specific provisions for family unity.

Other regions like Europe have come up with regional agreement that regulate the conduct of asylum seekers or refugees and also the manner in which states deal with them. They have had to come up with ways to create a legal regime that relates to specifics in the way refugee situation are handled.

2.2.3 LATIN AMERICA: THE 1984 CARTAGENA DECLARATION

The Latin American region has also for a long time been familiar with the concept of diplomatic asylum and the concept of *asilado*.⁴⁹ In the late 1800s one of the treaties acknowledged that ‘political refugees shall be accorded an inviolable asylum’.⁵⁰ The Latin American tradition of asylum was put to a severe test in the 1980s. The outbreak of violence throughout the Central American region. The Cartagena Declaration (the declaration) is a Latin American refugee rights instrument that was developed to strengthen the human rights specific to the region. It is a non-binding agreement that was adopted by Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, in the country of Colombia.⁵¹ The declaration

⁴⁸ This provision will be discussed in detail as a response to mass influx situations in the next chapter.

⁴⁹ Guy S Goodwin-Gill *The Refugee in International Law* (New York: Oxford University, 1983) Press at page 14

⁵⁰ The provisions of Article 16 of the Montevideo Treaty on International Penal Law revised later by the 1940 Montevideo Treaty

⁵¹ <http://www.refugeelegalaidinformation.org/cartagena-declaration-refugees> accessed on 21st November, 2016.

was aimed at finding flexible and practical solutions to the refugee problem in the region that was aimed at promoting peace and human rights.⁵²

It also expanded the definition of a refugee in order to cater for a wider group of persons. In Article III it defines a refugee as:

To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

In the above provision, the definition of a refugee is widened for purposes of encompassing the mass migration of refugees. It also reiterates further in article III, paragraph k that participating states will ensure: 'To request immediate assistance from the international community for Central American refugees, to be provided either directly, through bilateral or multilateral agreements, or through UNHCR and other organizations and agencies.'

Paragraph K covers situations in which states are in a situation that requires them to seek assistance from other states or international organisations for assistance. This can be achieved by entering into multi-lateral or bi-lateral agreements that provide for the manner in which this assistance will be rendered.

The level of protection that this declaration offers is minimal. It is merely a declaration therefore it is not legally binding. However, it has done a good job of expanding the people that are covered by the Refugee Convention. It has become a major basis for refugee protection in the region and has been incorporated into the domestic legislative systems of states in the

⁵² Carlos Castillo 'The Cartagena Process: 30 Years of Innovation and Solidarity.' At <http://www.fmreview.org/climatechange-disasters/maldonadocastillo.html> accessed on 2nd October, 2016.

region.⁵³ It has also out rightly recognised that mass influx situations are unique and require extra assistance for the protection of affected persons.

2.2.4 EUROPE (SHENGHEN AND DUBLIN SYSTEMS)

In Europe, at first, the problem of refugees was thought to be a domestic one and not international in nature. States came up with stringent measures for dealing with refugee situations. It is the time that states came up with the controversial safe third party doctrine, here states could send an asylum seeker to another state on the basis that that state was safer.⁵⁴ Even just an ordinary reading of this doctrine shows that it has a sense of refoulement in it. Some states such as Germany further toughened the safe third party doctrine in their Constitutions, with other countries such as Poland following suit.⁵⁵

The next stage in the development of asylum law in Europe was characterised at first by ministers of foreign affairs coming up with bi-lateral or multi-lateral treaties amongst states which saw many soft law agreements come into existence.⁵⁶ States had already signed up to the Refugee Convention despite entering into these agreements.⁵⁷ The state came up with strategies and policies that were to either restrict entry into the territory, control those that had successfully entered and also expel those that were illegally on their territory.⁵⁸

Despite all this history, Europe has not strayed from basic norms such as to who can be classified as a refugee. The definition of a refugee under the Refugee Convention is the internationally accepted one. The European Union (EU) has adopted this definition too and applies it interpreted by European Directive 2004/83, and, if in any case the provisions in the Directive gave a lower standard of protection to refugees, then the provisions in the Convention prevail. Provisions of domestic law should provide a wider protection net for refugees.⁵⁹ In the

⁵³ <http://www.refugeelaidinformation.org/cartagena-declaration-refugees> accessed on 21st November, 2016.

⁵⁴ Rosemary Byrne, Gregor Noll and Jen Venstedt-Hansen 'Understanding Refugee Law in an Enlarged European Union' *European Journal of International Law* (2004) Vol 15. NO 2. 355- 377.

⁵⁵ *Ibid.*

⁵⁶ *Opcit.*

⁵⁷ Jean Allain 'The Jus Cogens Nature of Non Refoulement' (2001) 13 *International Law journal Refugee Law* 533.

⁵⁸ Byrne, Rosemary et al, *supranote 54.*

⁵⁹ Gina Clayton *Immigration and Asylum Law* (3rd ed) (New York: Oxford University Press, 2008) at page 450.

English case of *Adan v SSHD*⁶⁰ the court held that the Convention should be given a consistent interpretation among the member states in order to effectively protect refugees.

A. THE SHENGHEN CONVENTION

Before the treaty of Amsterdam the method of protecting asylum seekers was by way of agreements between states for example, the Shenghen Convention of 1985 which was entered into by all EU states except the UK and Ireland.⁶¹ This Convention was aimed at making a more unified Europe, one without borders, through methods such as abolition of checks at common borders.⁶² It had some major economic advantages at the time, however, states have been asking to lift it owing to the huge influx of refugees.⁶³ The European community was aware that they would now be exposed to third parties entering the country illegally.⁶⁴ They came up with measures to protect their borders from people who would be ‘asylum shopping’ by setting up rules restricting a person to only one country from which to seek asylum or at least only one country would be responsible for processing the application.⁶⁵ This Convention has since 1997 been superseded by the Dublin Convention.

B. THE DUBLIN II REGULATION (DUBLIN SYSTEM)

The migrant situation in Europe has led to the signing of some bi-lateral treaties and agreements have been concluded in order to address matters such as co-operation between states relating to accommodating of migrants, transit arrangements and the controversial control of in-flows.⁶⁶ In the early 1980’s, there was talk of creating a Europe without borders for various economic

⁶⁰ [2001] 1 All ER 593

⁶¹ Clayton, Gina. *Immigration and Asylum Law*. 3rd ed. 2008. New York: Oxford University Press at page 450

⁶² Byrne Rosemary, Gregor Noll and Jen Venstedt-Hansen. ‘Understanding Refugee Law in an Enlarged European Union’. *European Journal of International Law*. 2004. Vol 15. NO 2. 355- 377

⁶³ <http://www.axa-schengen.com> accessed on 21st April, 2016 Economic advantages include increased inter-country opportunities, increased intra-Europe trade and so on. See the European Parliament website on [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/579074/EPRS_ATA\(2016\)579074_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/579074/EPRS_ATA(2016)579074_EN.pdf)

⁶⁴ European parliament website on [http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/579074/EPRS_ATA\(2016\)579074_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/579074/EPRS_ATA(2016)579074_EN.pdf) accessed on 4th June, 2016

⁶⁵ Lax, Moreno Violetta. *Dismantling the Dublin System: MSS v Belgium and Greece*. 2012. *European Journal of Migration and Law*. 1-31

⁶⁶ Nascimbene B and Dipasquale A. ‘The Arab Spring and the Extraordinary Influx of People who Arrived in Italy from North Africa.’ *European Journal of Migration and Law*. 13. (2011). 341-360

and political benefits. However, with the increase of the refugee problem there was a concern that it would result in the loss of control of borders and create an enabling environment for illegal immigration.⁶⁷ It is for this reason that Conventions such as Shenghen Convention were concluded as discussed above. But later on came the Dublin Convention which give rise to what is called the Dublin system.

This was a system that provided for member states to equally take up responsibility in relation to asylum seekers. It operated on the debatable assumption that all states gave the same level of protection to asylum seekers.⁶⁸ One was to apply for asylum in only one country and that was to be the only country one could apply.⁶⁹

C. COUNCIL DIRECTIVE 2001/55/EC

This was created pursuant to a European Treaty provision and was aimed at tackling practical steps to be taken in the event of mass influx situations. It proposes that the response to treatment of refugees who come in large groups is to provide temporary protection for them.⁷⁰

A reading of these legal documents shows that there is generally reluctance among states to make binding legal obligations on the human rights of refugees in mass influx situations and also the duties of states in such situations.⁷¹ The lack of legal provisions leaves this area free for states to decide which actions to take in the event of mass influx refugee situations.

CONCLUSION

This chapter has brought out the major laws that are used for refugee protection. There have been major developments in the protection of refugees. There has also been a realisation that different regions require some specific protection suited to them. This had led to wider provisions being included in regional agreements. It is however even more evident that there

⁶⁷ Moreno Violetta Lax 'Dismantling the Dublin System: MSS v Belgium and Greece' (2012) European Journal of Migration and Law. 1-31.

⁶⁸ Rosemary Byrne, Gregor Noll and Jen Venstedt-Hansen 'Understanding Refugee Law in an Enlarged European Union' (2004) European Journal of International Law Vol 15. NO 2. 355- 377.

⁶⁹ Thilemann Eiko, Boswell C and Williams. 'What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers.' Policy document of the European Parliament for the Directorate General of Internal Policies. Civil Liberties, Justice and Home Affairs Department. Document can be accessed on <http://www.europarl.europa.eu/studies>.

⁷⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF> accessed on 22nd November, 2016.

⁷¹ <https://1.next.westlaw.com/Document/I45e4df014a8311dba16d88fb847e95e5/View/FullText.html?navigationPath=Search%2Fv3%2Fs> accessed on 21st November, 2016.

are no specific provisions that outline the protection regime for mass influx refugee situations. There is nothing outlined for purposes of the responsibility of states in such circumstances. The law leaves a vacuum in this respect. However, there have been some arguments that state burden sharing though not in legal instruments, could be a provision of international customary law.⁷²

⁷²<https://1.next.westlaw.com/Document/I45e4df014a8311dba16d88fb847e95e5/View/FullText.html?navigationPath=Search%2Fv3%2Fs> accessed on 21st November, 2016.

3.0 CHAPTER THREE:

DUTIES AND RESPONSES OF STATES IN MASS INFLUX REFUGEE SITUATIONS

3.1 INTRODUCTION

Having established the reasons the doctrine of asylum and why people leave their countries seeking the same, the next step was to analyse the law that applies in the event of such movements. After knowing the law or the legal regime it is important to establish how the law relates to what happens in practice and how states are applying the established legal or moral obligations.

This chapter shall focus on the duties of states that arise in mass influx refugee situations. It shall delve into what makes a mass influx situation unique from that of individual refugee entry. It shall then analyse the duties that arise for states in these circumstances. Then also what form that the duties should take. This is bearing in mind that the earlier chapter revealed that there is no specific international or regional binding legal agreement that spells out the legal requirements for states in these situations. This chapter will research into why states respond and how they should respond in such situations.

3.2 MASS INFLUX SITUATIONS: UNIQUENESS

The mass displacement of people from one country to another poses particular challenges for the country on the receiving end, for other states that are within the region and even the international community as a whole.⁷³ The sheer size of the numbers that are trying to cross the border are a huge challenge even on their own. Another challenge is that it comes with a huge task of creating an environment that protects all the refugees and the humanitarian

⁷³ Document on Global Consultations and International Protection 1st Meeting on <http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html> accessed on 23rd November, 2016.

workers that are working.⁷⁴ This task can be so long and challenging that it may end up overshadowing the other tasks or duties that international law prescribes, such as providing education, access to health, proper housing and so on. For starters, it makes the determination of refugee status on an individual level almost impracticable.⁷⁵ This means that there should be proper legal guidelines to protect refugees even in situations where determining their status as refugees is difficult. In fact, as an extra protection measure, in mass influx situations all asylum seekers are considered interim refugees until further determinations are performed.⁷⁶

3.3 THE DUTY TO CO-OPERATE

In the event that all efforts to prevent a situation of unrest fail, the expectation is that there will be an exodus of people. It is more desirable if the refugees stay within the region of unrest. This is because they will find it easier to return to their countries once the reason for the unrest has disappeared.⁷⁷ However, it has become evident that refugees are no longer restricting movement to only nearby countries. They are moving to places even out of their regions. For example in the earlier conflicts such as the Yugoslavia conflict, refugees were moving from Yugoslavia to as far as the Middle East.⁷⁸

Even presently, unrest in Syria has resulted in movements to countries such as Greece, France, all the way in Europe.⁷⁹ Therefore, the movement of refugees, especially in large numbers is a matter of concern to more than one state. Initially the receiving state will be the one that is primarily affected, however, in the event of mass influx, the receiving state becomes unable to control the situation and the refugees end up crossing to other neighbouring states. Therefore,

⁷⁴ Cornelius De Jong 'Elements for a More Effective European Union Response to Situations of Mass Influx' (1996) 8 Int'l J. Refugee L. 156 at page 164.

⁷⁵ Document on Global Consultations and International Protection 1st Meeting on <http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html> accessed on 23rd November, 2016.

⁷⁶ Suhrke, Astri 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.' (1998) Journal of Refugee Studies Vol. 11. No. 4 at page 397.

⁷⁷ De Jong, Cornelius 'Elements for a More Effective European Union Response to Situations of Mass Influx.' (1996) 8 Int'l J. Refugee L. 156 at page 164.

⁷⁸ Ibid at page 165.

⁷⁹ Stephanie Fitzgerald 'State interests and Migrant Rights: A Legal Dilemma?' (2011/2012) Interstate Journal of International Affairs. Vol 2. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016.

the mass influx of refugees should be seen not as the problem of only the receiving country, but all states should be concerned.

The logical response in this case would then be to find a way to co-operate and find effective solutions for the problem as a whole. The duty to cooperate among states arises from different conventions.⁸⁰ It is sometimes expressed in writing when states get together and actually draft a legal document outlining this duty.⁸¹ Organisations such as the League of Nations, the United Nations, and the European Union would not exist if states did not co-operate. The United Nations in its preamble even emphasizes this need to co-operate. Refugee issues by nature and definition relate to more than a single country, this transnational nature makes them the duty of more than a single state.⁸²

In fact, there is a general appreciation and acknowledgement that the unilateral efforts of one state will not be sufficient to meet needs of refugees in mass influx situations.⁸³ This research shall focus on two, among many others, of the widest reaching documents relating to state co-operation. The U.N Charter because of the universal nature of the U.N and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations because it specifically deals with co-operation among states.

⁸⁰ For example article 86 of the Rome Statute requires states to co-operate fully with the court in the carrying out of its functions, Environmental Law places a duty on states to co-operate in order to prevent causing trans-boundary harm to other states and also in how they treat shared water resources as state in the **Trail Smelter Case (USA v Canada)** Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1902 (1941) and the **Lake Lanoux Arbitration Case (Spain v France)** (1957) 12 R.I.A.A. 281; 24 I.L.R. 101

⁸¹ Egli Anne Vibeke. *Mass Refugee Influx and the Limits of Public International Law*. Martinus Nijhoff Publishers: Hague. 2002 at page 36

⁸² Fitzgerald, Stephanie. 'State interests and Migrant Rights: A Legal Dilemma?' (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016

⁸³ Egli Anne Vibeke *Mass Refugee Influx and the Limits of Public International Law* Martinus Nijhoff: Hague 2002 at page 36

A. Under the United Nations Charter

The UN Charter in its preamble emphasizes the need for cooperation among states in order for the aims of the organization to be achieved. It emphasizes the need for states to recognize and comply with obligations that arise under treaties and those that arise under other sources such as international customary law and general principles of law. The Dumbarton Oaks Proposals further addressed the importance of international cooperation in both economic and social spheres. Refugee matters in this case would fall under social sphere aspect of cooperation.⁸⁴

Furthermore, Article 1(3) of the Charter provides that States in achieving the objectives of the organization should, in order to ‘...achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...’

Article 1(3) has been used for the protection and promotion of human rights such as the political rights of women, the issue of racial discrimination in Apartheid South-Africa, enhancement of international co-operation in the area of human rights among other things.⁸⁵ The use of article 1(3) to promote state co-operation in the protection of human rights can be stretched to the sphere of refugee rights. In some cases, the best way to protect the human rights of refugees is by ensuring that there is cooperation among states.

B. Under the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations

The General Assembly in 1970 passed a resolution that was aimed at enhancing the need for friendly relations and co-operation among states.⁸⁶ It states also in its preamble that:

⁸⁴ Simma Bruno, Khan Dnaie, Nolte and others (eds). *The Charter of the United Nations, A Commentary*. 3rd ed. Vol 1. Oxford: Oxford University Press. 2012 at page 107

⁸⁵ Ibid at page 107

⁸⁶ Resolution 2625 (XXV) of 24th October, 1970

‘the faithful observance of the principles of international law concerning friendly relations and co-operation among States and the fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security and for the implementation of the other purposes of the United Nations’

This is again merely a preamble provision and does not in any way create legal obligations for states. However, they can be used to fill in gaps that exist in the treaty in which they appear.⁸⁷ The Vienna Convention in fact states that when interpreting the provisions of a treaty, both the text and the preamble should be construed together.⁸⁸ So, arising from this preamble provision, there is a need for states to co-operate as a matter of law.

The United Nations has shown a great element of requiring cooperation among states in order to achieve its objectives. This can be said generally about all agreements of international nature. Protection of refugees is an obligation arising from international treaties and therefore for it to effectively work, there is need for total cooperation amongst states. Also refugee protection entails human rights protection,⁸⁹ therefore there is need to attach much more importance to this issue. Bearing in mind, that when refugees are entering a country in vast numbers, there is need for extra effort to protect their rights.

3.4 TEMPORARY PROTECTION

Sometimes, when there is a huge influx of refugees crossing the borders into a country, the refugees could be hundreds, thousands or even millions of them, the recipient country may have difficulties providing the necessary items such as food, medicine and shelter for the refugees.⁹⁰ Sometimes the huge numbers could prove to be a challenge for state security or public order among other things, the response of some states would be to instead figure out a way to return them to their country of origin or even to send them to other countries. Integrating

⁸⁷ International Labour Organisation Manual for Drafting Legal Instruments, Office of the Legal Advisor at http://learning.itcilo.org/ilo/jur/en/2_1_2_1.html accessed on 29th November, 2016.

⁸⁸ Article 31 of the 1969 Vienna Convention on the Law of Treaties.

⁸⁹ James Hathaway *The Rights of Refugees Under International Law*.

⁹⁰ G.J Coles ‘Temporary Refuge and the Large Scale Influx of Refugees’ (1980) 8 Aust. YBIL 189 at page 192.

them into society is usually the last option.⁹¹ However obligations under international law must be observed and so the state needs to find alternatives that will not breach those obligations.

Temporary protection arises in situations of mass influx as a solution to the process of individual refugee determination that could be tedious in such circumstances.⁹² It is not a new concept and has been used earlier. It appears to be new because it has been referred to by different names in previous times, names such as ‘provisional asylum’, temporary asylum or even ‘temporary residence’.⁹³ ‘Then more recently, principally but not exclusively in Europe, States faced with large numbers of arrivals have adopted and indeed legislated for the device of “temporary protection”, which allows them to extend protection and assistance to the group without initially going into individual status determinations.⁹⁴ It is admission that is based on the sovereign right of a state to do so and has been included in different agreements that states have entered into.⁹⁵ Temporary protection entails protection that is granted on a less than permanent level. It was aimed at offering safety, protection from acts that would constitute *refoulement* and also to comply with basic humanitarian requirements that refugees would ordinarily require.⁹⁶

Europe for example has the Directive on Temporary Protection which though initially marred by suspicion was agreed upon by states requiring them to co-operate in times of mass influx.⁹⁷ It was the first binding legal document granting temporary asylum in Europe. Also it is only triggered when there is a mass influx of refugees as the system of determination when there is not a mass influx that would apply is different.⁹⁸

⁹¹ Ibid at page 191.

⁹² Stephanie Fitzgerald ‘State interests and Migrant Rights: A Legal Dilemma?’ (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016.

⁹³ Supranote 90 page 191.

⁹⁴ UNHCR Conclusion number 2 of 1981

<http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html> accessed on 23rd November, 2016.

⁹⁵ G J Coles ‘Temporary Refuge and the Large Scale Influx of Refugees’ (1980) 8 Aust. YBIL 189 At page 190.

⁹⁶ UNHCR Conclusion number 2 of 1981.

<http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html> accessed on 23rd November, 2016.

⁹⁷ Astri Suhrke ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.’ (1998) Journal of Refugee Studies Vol. 11. No. 4 at page 397.

⁹⁸ Ibid.

It has been used for refugee protection in mass influx situations in Africa, South Asia, Latin America and Europe.⁹⁹ The UNHCR states on its website that the very fact that mass influx situations are by nature difficult to handle, therefore temporary protection serves as a bridge towards the goal of providing protection as envisaged under the Refugee Convention. Temporary protection is a way that assists states to meet the requirements as set out in the Conclusion of the Executive Committee when it set out what amounts to minimum standards of immediate treatment in situations of large scale influx.¹⁰⁰

When it was used in the earlier times, it was with the belief that the causes of migration would not last long and the refugees would go back to their countries. However, most conflicts last very long and have almost no prospects of the existing threats diminishing.¹⁰¹ Clearly, the conditions that are appropriate for short term protection cannot be prolonged for longer times such as months or years without prejudicing the human rights of the affected persons.¹⁰² In fact, in some situations, some refugees who are given temporary protection may actually have suffered extreme grievous abuses that returning them to their countries should not be an option.

The question as to whether or not asylum should end in integration or whether it should merely be a means of providing protection to refugees until their repatriation has been a pertinent issue beginning from as early as the refugee problem stemming from the former Yugoslavia, the Vietnam War and the Pakistan war.¹⁰³ But one thing that is pertinent is that refugees cannot go back to a country in which the conditions for their departure are still prevailing.

⁹⁹ Ibid.

¹⁰⁰ Conclusion number 2 of 1981 accessed from <http://www.unhcr.org/protection/globalconsult/3ae68f3c24/protection-refugees-mass-influx-situations-overall-protection-framework.html> accessed on 23rd November, 2016.

¹⁰¹ UNHCR 'The State of the World's Refugees-In Search of Solutions.' 1995. Oxford; Oxford University Press at page 85-90 as cited in Chimni, B.S.ed. *International Refugee Law: A Reader* London: Sage Publication, 2000 at page 141.

¹⁰² Arenas Nuria 'The Concept of 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System' (2005) *European Journal of Migration and Law* 7: 435-450.

¹⁰³ UNHCR 'The State of the World's Refugees-In Search of Solutions' (1995) Oxford; Oxford University Press at page 85-90 as cited in Chimni, B.S.ed. *International Refugee Law: A Reader* (London: Sage Publication, 2000) at page 141.

Even in such situations, the states that receive refugees have obligations arising from international law to which they are parties that cannot be overlooked. The general obligations include non-discrimination, non-penalisation¹⁰⁴ and *non-refoulement*.¹⁰⁵ Even in the event that they are not parties to the above stated treaties they are mandated to provide protection arising from general *jus cogens* norms such as protection from torture, cruel inhuman and degrading treatment and slavery.¹⁰⁶

Temporary protection has some advantages. These include the fact that it provides immediate security for asylum seekers. The refugees in Europe generally have benefitted from this practice because the refugee status determination procedures in the areas are very rigid and strict. Temporary protection helps to alleviate fear and anxiety over a long process and provides protection while the applicant waits for the final determination. It also acts as a safeguard of the principle of *non-refoulement*.

However, there are some challenges that it comes with. For example the lack of a concrete definition for what amounts to a situation of ‘mass influx’. This means that there is no specific trigger for when an individual determination process must be done or when group determinations should be used instead.¹⁰⁷ However, if one looks at it from the angle of flexibility then this is a good thing. Flexibility in the sense that it can allow for states to set a lower threshold for what amounts to a mass influx. However, discretion could be detrimental if states set so high a threshold that the continued denial of temporary protection ends up causing some form of harm to the refugee. Also it has also been seen by some scholars as a method for some states to actually evade their international law duties to protect the refugees and avoid giving them permanent refugee status.

¹⁰⁴ Article 31.

¹⁰⁵ Article 33.

¹⁰⁶ Fitzgerald, Stephanie ‘State interests and Migrant Rights: A Legal Dilemma?’ (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016

¹⁰⁷ Arenas Nuria ‘The Concept of ‘Mass Influx of Displaced Persons’ ... at page 438 supra note 102.

3.5 BURDEN SHARING

The General Assembly has on numerous occasions stated that the flows of refugees that are released by a single country affect the international community as a whole.¹⁰⁸ Acceptance and accommodation of refugees is by itself challenging, the challenge is even more aggravated when there is a situation of mass influx.¹⁰⁹ The principle of burden sharing was emphasised during the period of the Cold War by the industrialised states. It has however, given way to a different practice of burden shifting instead.¹¹⁰ In the late 1970's, it was proposed by legal scholars who were of the view that assigning states a number of refugees equal to the wealth and population density of that state would lead to enhanced protection of refugees and the reduction of inequality among states, especially affected ones.¹¹¹ The rationale for burden sharing was firstly emphasized by governments that felt that one state would be over-burdened if other states did not assist.¹¹²

So instead of bearing burdens together as states, some states instead do not participate in the assistance of states that have received a huge number of refugees. In places such as Europe it is evident that it is states that are located along the coastal lines that receive the highest numbers of migrants as compared to those that are inland.¹¹³ In the post-war era in a refugee specific context can be traced to the 1951 Refugee Convention¹¹⁴ which states in its preamble that:

‘considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position, recommends that Governments continue to receive refugees in their territories and that

¹⁰⁸ Christian Tomuschat ‘State Responsibility and the Country of Origin’ citing UN Doc A/CN.4/444/Add.2 (1 June 1992) at paragraph 153 in Debbas-Gowlland, Debbas. ed. *The Problem of Refugees in the Light of Contemporary International Law Issues* (London: Martinus Nijhoff Publishers, 1998).

¹⁰⁹ JPL Fonteyne ‘Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees’ (1980) 8 Aust. YBIL 162 At page 166.

¹¹⁰ B.S Chimni ‘The Principle of Burden Sharing’ (2000) Unpublished paper. Chimni, B.S. ed. *International Refugee Law: A Reader*. (London: Sage Publication, 2000) at page 147

¹¹¹ Stephanie Fitzgerald ‘State interests and Migrant Rights: A Legal Dilemma?’ (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016

¹¹² Suhrke ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.’

¹¹³ <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed 28th November, 2016 sup

¹¹⁴ Supranote 110 at page 146

they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.’¹¹⁵

Furthermore, protracted warfare in the Eastern part of Africa, the Gulf War, the Iranian revolution and other skirmishes and disturbances in the Arab and Islamic regions produced several millions of refugees. Seeing that this was a situation warranting international co-operation, the Arab and African Muslim states decided to sign the Refugee Convention and its protocol, and the OAU¹¹⁶ Convention. Initially most Arab states had not been party to these conventions. The real trigger was the co-operation between Saudi-Arabia and the western states during the Gulf War. The Organisation of the Islamic Conference signed agreements with UNHCR relating to international co-operation.¹¹⁷

There is however, no provision in it that specifically states this principle and also the preamble does not automatically create legal obligations. Since then, this has been interpreted as requiring two main sorts of action. The first has been providing financial assistance for countries of asylum—usually less-developed states—to help them with the care and maintenance of refugees, mainly through funding the activities of the United Nations High Commissioner for Refugees (UNHCR) in countries of asylum.¹¹⁸

The other rationale for burden sharing is the idea of reducing inequities between states.¹¹⁹ So in order to alleviate the differences, there is a need to share the burden. Burden sharing can come in various forms, for example financial transfers of money from one state to the state experiencing the refugee problem, financing refugee camps, physical dispersion, harmonization of legislation among others.¹²⁰ These mechanisms are not limited and can vary

¹¹⁵ Part D

¹¹⁶ Now African Union (A.U)

¹¹⁷ Chimni B.S article at page 146

¹¹⁸ Christina Boswell ‘Burden Sharing in the New Age of Immigration.’ (2003) from <http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration> accessed on 25th November, 2016

¹¹⁹ Suhrke, Astri. ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.’ Supranote 97.

¹²⁰ Supranote 118.

depending on the situation. For example in 1994, as a burden sharing mechanism, Germany proposed that states should share the refugees amongst states by using a criteria based on GDP, size of the territory and also the geographical distribution of the state.¹²¹

There are however three major forms of sharing that are used currently. The first form is burden sharing by financial techniques, the second is burden sharing using policies that relate to physical assistance for example moving migrants from a crowded country one that has a less saturated population of migrants. The third form is burden sharing is by way of international relations, that is, the entering into international agreements with other states.¹²²

For effective methods of burden sharing, there is need for a clear definition as to what amounts to a 'burden'. If the "burdens" imposed by receiving large numbers of refugees were simply financial, in some cases it could be sensible for richer countries to pay poorer ones to assist refugees.¹²³

Another cardinal issue is to determine the criteria for distribution of the 'burden'. Boswell suggests that the criteria to be used are the outcome based and the justice based approaches.¹²⁴ She defines the justice based approach as one that will focus on static indicators such as the GDP of the country, the size of its population, its geographical location and so on. The outcome based approach focuses more on the effects or consequences of hosting the refugees. Examples include the socio-economic effects that the new refugees will have on the ethnic distribution of the state, state security issues, and the assistance that is given to the refugees.¹²⁵ The two criteria are both very vital for determining the burden distribution of refugees.

¹²¹ Christina Boswell article.. Supranote 118.

¹²² Fitzgerald, Stephanie article on <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 29th November, 2016.

¹²³ <http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration> accessed on 25th November, 2016.

¹²⁴ Christina Boswell 'Burden Sharing in the New Age of Immigration.' (2003). Accessed from <http://www.migrationpolicy.org/article/burden-sharing-new-age-immigration> on 2nd December, 2016.

¹²⁵ Ibid.

3.6 BURDEN SHARING AS PART OF CUSTOMARY INTERNATIONAL LAW

According to B.S Chimni, the principle of burden-sharing which requires that states should cooperate in dealing with global refugee problems is not merely a moral but is a legal principle.¹²⁶ Some scholars have further argued that the principle of burden sharing has obtained the status of international customary law.¹²⁷ In order for an international norm to obtain customary law status it must meet the two requirements set out by the International Court of Justice in the North Sea Continental Shelf Cases¹²⁸ which are uniform state practice and *opinio juris*. They argue that burden sharing and *non-refoulement* are so closely linked that they should be deemed to have both obtained customary law status. The question that arises stemming from this whether the two concepts co-exist, does *non-refoulement* envision burden sharing as a fundamental element?

Chimni further states that ‘while the absence of burden-sharing can never be a pretext to violate the principle of *non-refoulement*, the willingness of the international community to share the burden of the global refugee problem will encourage greater respect for it.’¹²⁹

Additionally, Chimni proposes the following as the evidence that burden sharing should be considered a customary law principle. Firstly he suggests that the principle exists in universal and regional treaties and conventions and also in declarations relating to refugees. However, as seen in chapter 2, the provisions of these legal instruments are rarely in the text of the instruments themselves, but in the preambles mostly. Additionally, the other documents that contain the principle are declarations; therefore they are not supposed to be legally binding. The OAU Convention could be the exception but it also merely gives an option for states that are burdened to request assistance. There is nothing stated about the assistance that should be granted, or if it should even be granted.

¹²⁶ Chimni ‘The Principle of Burden Sharing’ (2000) Unpublished paper. In Chimni, B.S. ed. *International Refugee Law: A Reader* (London: Sage Publication , 2000) at page 146.

¹²⁷ Fitzgerald, Stephanie article on <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> .

¹²⁸ [1969] ICJ 1 (German v The Netherlands and Denmark).

¹²⁹ Chimni, B.S ‘The Principle of Burden Sharing’ (2000) supranote 126.

Secondly, he proposes that the conclusions and resolutions adopted by the UNHCR Executive Committee and the UN General Assembly respectively show the importance of the principle. He further cites the vast number of conventions, treaties and declarations that endorse the general principle of international cooperation in many areas in the international sphere. Furthermore, Fitzgerald proposes that the concept has obtained customary law status by virtue of the fact that it is present in other pieces of international legislation and it is persistently used to help states that have mass influx situations.¹³⁰

Relating to *opinio juris* Chimni suggests that the resettlement and local integration as well as financial assistance by one state to a host state and to international organisations such as UNHCR shows compliance as a matter of law. This is however, not convincing. After all, some states do not offer any assistance at all. Even the states that do offer assistance do not show in any way that they are complying as a matter of law.

The assistance of refugees is a two-staged system. Stage one entails assistance of a short term nature with an approach that is at ‘emergency’ level, for example providing shelter, food, water and proper sanitation services. The second stage entails assistance of a permanent or durable nature.¹³¹ Both stages require different forms of protection and each mode of protection is just as important. It seems to be simpler to provide a regime for emergency assistance. It would be more difficult for states to accept to be bound to provide permanent solutions for protecting refugees on their territory. Burden sharing can be used as a tool to help states to fully implement the achievement of protection at both stages.

Burden sharing by way of assistance through financial and technical means at protection stage is not the only way of sharing the burden. The need goes deeper than these and must continue

¹³⁰ Stephanie Fitzgerald ‘State interests and Migrant Rights: A Legal Dilemma?’ (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016

¹³¹ Fonteyne JPL. ‘Burden Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees.’ (1980) Citation: 8 Aust. YBIL 162 At page 167.

to exist even in the second phase of refugee protection which is, to find a durable solution. These durable solutions can be in any of these three forms; voluntary repatriation, resettlement in a third country or local resettlement.¹³² The need for countries to participate at this stage also cannot be overemphasized. Burden sharing is supposed to subsist throughout the two step process. Burden sharing as a tool for refugee protection is an effective method of providing asylum and also serves as an incentive for states to avoid rejection of refugees.

3.7 BURDEN SHARING: LEGAL OR MORAL OBLIGATION?

The duty to assist states that are receiving vast numbers of refugees has been established. However, classifying it as either legal or moral is important to know if it has a binding nature or not. The fact that it is found in legal documents implies that there is a sense of legal characterization. Also if one accepts the argument that it is now customary international law then it is legal in nature and no derogation or breach is permitted.

However, the concept also has some moral or special roots. A moral obligation is defined by the Black's Law Dictionary as 'an ethical imperative arising not from the law (and not legally enforceable) but from a universal or nearly universal view of what is good and right.'¹³³ It is accepted that it would be good and right for states to assist one another in times of refugee crisis. One other moral obligation that arises is, the country that caused the unrest that leads to the mass influx taking steps to make amends for the crisis that has ensued. For example the intervention of the USA after the attack on Afghanistan resulted in a mass displacement of refugees into other countries.¹³⁴

The obligation to co-operate has a legal basis and based on the cases and the legal provisions is a binding legal principle. Burden sharing is an element of co-operation, therefore it is a legal principle. Legal theorist Dworkin argues that for there to be an effective legal system, there must be both rules and principles.¹³⁵ Legal principles as defined by Dworkin are, 'broad reasons that lie at the foundation of a rule of law; they are wide formulations of reason or generalizations which underlie and comprehend particular rules. The principles are wider than

¹³² Ibid..

¹³³ Bryan Garner (ed) *Blacks Law Dictionary* 10th edition (USA: Thompson Reuters 2014) at page 1243.

¹³⁴ Stefanie Fitzgerald Article, supranote 130.

¹³⁵ Ravindra Singh 'Hart's Concept of Law and Justice' (2006-2008) www.bhu.ac.in/lawfaculty/blj2006-072008-09/BLJ_2006/8_RAVINDRA.doc accessed on 12th December, 2016.

rules...'¹³⁶ Legal principles are so important that they cannot be changed by an ad hoc body, in fact, human rights are legal principles first before they are written into law.¹³⁷ One effect of a legal principle therefore is that it imposes legal obligations, for example the proportionality legal principle in criminal law. Breaching a legal obligation usually results in some form of sanctions, but that element of sanctions is what is lacking from the burden sharing argument. Ultimately burden sharing is such a vital principle and having its origins from the legal duty to co-operate makes it a legal obligation on states. Therefore the need to co-operate has both moral and legal connotations to it.

3.8 NON REFOULEMENT AND REFUGEE PROTECTION

Burden sharing, temporary protection and even co-operation are aimed at refugee protection and avoiding the *refoulement* of refugees. *Non-Refoulement* is a concept set out in the 1951 Refugee Convention. The Convention in Article 33 (1) provides in summary for the prohibition of the return or expulsion of a refugee to the state or place where his freedom would be threatened based on his race, nationality, religion, membership of a particular social group or political opinion.¹³⁸

Furthermore, the drafters of the Article 33 of the Convention saw the inclusion of *non-refoulement* into the Convention as extremely important.¹³⁹ The drafting of this Convention came after World War II and the large number of people who became refugees and had to cross borders in order to obtain protection. Also, countries such as Denmark that had received a huge number of refugees woke up to the magnitude of the problem of refugees and strongly campaigned for the inclusion of Article 33 into the Convention.¹⁴⁰

¹³⁶ *ibid*

¹³⁷ Daci, Jordan 'Legal Principles, Legal Values and Legal Norms: are they the same or different?' From <http://www.academicus.edu.al/nr2/Academicus-MMX-2-109-115.pdf> accessed on 12th December 2016.

¹³⁸ The 1951 Convention Relating to the Status of Refugees.

¹³⁹ Ben-Nun, 'The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention' (2015) *Journal of Refugee Studies*, vol. 28, no. 1, pp. 93-117. Available from: 10.1093/jrs/feu021. Accessed on 19th April 2016

¹⁴⁰ *Ibid* Ben. Nun, G. 2015.

The principle of *non-refoulement* can be found in a number of other international human rights instruments, such as the EU Charter of Fundamental Rights and Inter-American Convention on Human Rights (“I-ACHR”).¹⁴¹ It has even been argued by some scholars that this principle is of an absolute nature and that it must therefore not be subject to and reservations, exceptions or limitations.¹⁴² It can also be found in the jurisprudence of Article 3 of the European Convention of Human Rights and Article 3 of the International Convention on Civil and Political Rights (ICCPR). It is explicitly put out in the Convention against Torture (CAT) that *refoulement* is prohibited in international law under Article 3(1).¹⁴³ CAT prohibits the return of an individual to a state where that individual is likely to suffer cruel, inhuman or degrading treatment or torture in the country they are being returned to. It is also in Article 22(8) of the American Charter of Human Rights (ACHR)¹⁴⁴ and Article 5 of the African Charter for the Protection of Human and People’s Rights (Banjul Charter).¹⁴⁵

At the regional level, *non-refoulement* is spelled out in Article III (3) which provides that ‘No person may be subjected by a member State to measures such as rejection at the frontier, return or expulsion, which should compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2.’ According to this Convention, the return of a refugee at the frontier amounts to *refoulement*. Therefore, if states refuse to accept refugees onto their territory that amounts to *refoulement*. This is especially so if the refusal to admit the refugees results in the refugee having no choice but to return to the country I which they may face persecution of any nature.

¹⁴¹ Written comments by Amnesty International accessed from www.amnestyinternational.org accessed on 21st April, 2016.

¹⁴² Ibid at page 4.

¹⁴³ Javid Rehman *International Human Rights Law* (2nd ed) (London: Pearson Education Limited, 2000) At page 669.

¹⁴⁴ It provides ‘In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.’

¹⁴⁵ It provides ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation torture, cruel, inhuman and degrading punishment and treatment shall be prohibited.’

3.9 BURDEN SHIFTING AS OPPOSED TO BURDEN SHARING

Redistribution of refugees from one state to another is another method of burden sharing though it has been controversial.¹⁴⁶ The controversy stems from the argument that some states are transferring migrants from one territory to another that may have lower standards of refugee protection. One example of this is the agreement relating to the transfer of asylum seekers to Turkey as opposed to general distribution among E.U states.¹⁴⁷

Furthermore, instead of sharing the burden, states have resorted to burden shifting instead. This system entails a situation where states move the migrants to states that are willing to accept them whether for political or socio-economic benefits or just states simply allowing one state to suffer the burden alone.¹⁴⁸ Burden shifting as a practice completely violates the notion of burden sharing.¹⁴⁹ In the event of a huge number of refugees entering a country it is widely acknowledged that it is impossible for one state to shoulder the burden of looking after all the refugees.

Some states do not intervene in any manner to assist the state that is suffering the big burden. After all, some scholars have argued that such actions are as a result of the actual nature of refugee law. Hathaway in explaining the reason for the existence of refugee law states that it exists 'because it is a pragmatic and politically acceptable means of maximising border control in the face of recurrent involuntary migration... it acts as a sluice gate in the dam of immigration control.'¹⁵⁰

¹⁴⁶ Stephanie Fitzgerald article on <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 29th November, 2016.

¹⁴⁷ Amnesty International 'No Safe Refuge: Asylum Seeker and Refugees Denied Effective Protection in Turkey' from <https://www.amnesty.org/download/Documents/EUR4438252016ENGLISH.pdf> accessed on 1st Marh, 2017.

¹⁴⁸ Fitzgerald article on <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 29th November, 2016.

¹⁴⁹ B.S Chimni 'The Principle of Burden Sharing' (2000) Unpublished paper. Chimni, B.S. ed. *International Refugee Law: A Reader* (London: Sage Publication, 2000) at page 90

¹⁵⁰ James Hathaway 'Temporary Protection of Refugees: Threat or Solution?' (2001) In *Perspective on Refugee Protection in South Africa*, edited by J. Handmaker et al., 41-9. Pretoria, South Africa: Lawyers for Human Rights at page 41.

It is important to note that granting asylum to seekers is not a human right of the one seeking it, neither is it a duty for the state in which the asylum is being sought to grant it.¹⁵¹ Therefore there is no requirement for states to take on the refugees that are imposing a burden on another state. However, the earlier discussion showed that for protection of human rights of all people, there is need for co-operation from states. Ignoring the burden and hoping that a single state or even a few states will deal with it exposes the refugees to risk of human rights violations such as human trafficking of refugees who want to cross to a country they deem will offer better future prospects, xenophobia from locals, poor sanitation and shelter among other things.

3.10 THE ROLE OF NON-STATE ACTORS IN MASS INFLUX SITUATIONS FOR EFFECTIVE CO-OPERATION AND RESPONSIBILITY SHARING

The task of providing services to refugees is not only a country effort but has been taken up by international organisations also. The UNHCR is the organization that is primarily responsible for refugee protection. The UNHCR Charter provides that the office of the High Commissioner shall be tasked with assuming the function of international protection and seeking permanent solutions for refugee problems.¹⁵² In order to achieve this mandate, the UNHCR works with the governments of affected countries to assist, protect and to find long term solutions to the refugee situations. One example is the resettlement of vulnerable refugees in third countries which resulted in the resettlement at the time (1995) of about 30000 to 50000 refugees.¹⁵³

In fact, burden sharing by some states is done by providing financial aid to UNHCR in order to for the organization to assist the country that is bearing the burden. UNHCR has stated that in order for there to be proper burden sharing, there is need for co-operation at all levels; national, regional and international.¹⁵⁴ Antonio Guterres High Commissioner of Refugees has stated that in addition to countries finding burden sharing mechanisms amongst themselves, other methods of assistance should be given to states. He suggests that companies or businesses

¹⁵¹ Lauterpacht Elihu Q.C AND Bethlehem Daniel 'The Scope and Content of the Principle of Non-Refoulement: Opinion' (2003) in Feller Erika, Turk V and Nicholson F (eds) *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at page 88.

¹⁵² Statute of the United Nations High Commissioner for Refugees Adopted by the General Assembly on 14th December, 1950 as cited by Jane V Egli in her book *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 20012) at page 38.

¹⁵³ Suhrke, Astri. 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action.' (1998) *Journal of Refugee Studies* Vol. 11. No. 4 at page 397.

¹⁵⁴ Stephanie Fitzgerald article. Supranote 146.

should consider investing on a long term basis in countries that receive huge numbers of refugees, also international financial institutions and bi-lateral agreements should focus on making these countries priority partners.¹⁵⁵

3.11 CONCLUSION

In conclusion this chapter has sought to bring out the duties that states assume in times of mass influx refugee situations. The tools that are used ultimately need to be in conformity with international law, especially refugee and human rights law.

The methods or duties discussed have been seen to have some legal backing but this chapter has revealed that states are reluctant to sign up to agreements that make the responses such as burden sharing mandatory obligations. This shows to a great extent that the duty to co-operate though found in various conventions and even though it is practiced in various spheres of the law such as environmental law, has had difficulties in receiving full acceptance and application in refugee law. This shows to a certain extent the fragility of refugee law and how it faces legal challenges from other legal concepts like state sovereignty.

Additionally, the responses that arise in mass influx situations have not attained the status of customary international law. There is not enough evidence to show *opinio juris*. There is however, enough evidence to show state practice. However, the two must go hand in hand. But it has been established that the duty to co-operate in whatever form is both a legal and moral obligation on states.

Also, in the environmental law cases discussed, there was an action by the affected state and there was a payment of compensation for the damage caused. In refugee law however, there have been arguments for claims for compensation but these have not gained enough traction.¹⁵⁶ If there was an option to claim back financial expenses from the state of origin maybe then states would have no problem with sharing the burden. However, because burden sharing entails issues such as financial assistance, acceptance of a large number of foreigners on the territory of a host state, this is met with some resistance. The next chapter shall look into the

¹⁵⁵ Countries Hosting Syrian Refugees, Solidarity and Burden Sharing. Background Papers for the High Level Segment, September, 2013. <http://www.unhcr.org/excom/excomrep/525fe3e59/hls-solidarity-burden-sharing-background-papers-high-level-segment.html> accessed on 9th December, 2016

¹⁵⁶ These shall be discussed in Chapter 4

actual contemporary responses of states to mass influx situations and also shall look specifically at the refugee crisis in Syria.

4.0 CHAPTER FOUR:

THE SYRIAN REFUGEE CRISIS AND THE RESPONSE OF STATES IN MASS INFLUX SITUATIONS

4.1 INTRODUCTION

It has already been established in the earlier chapters that refugee protection is not the responsibility of one state. It is instead the responsibility of all states, especially those that are closest in proximity to the state that is receiving vast numbers of refugees. There is need for adequate co-operation among states in order for there to be adequate refugee protection. The legal and moral requirements are there as was established in chapter three. Despite these requirements, the manner in which states respond is important to ascertain whether or not they are fulfilling the obligations required of them.

According to the World Bank, in the event of war or unrest, the largest number of refugees is found in the country that is closest to them, in this case, about 75% of refugees. These countries are more often than not those that have weak border systems with weak or low incomes where the impacts of such refugee inflows hit the hardest affecting economic, social, environmental and physical spheres.¹⁵⁷ The first thing to pick up from this statistic is that in the event of unrest, people will move and some will cross borders into other countries. Another vital detail to pick up is that African states have generally had to accommodate and receive bigger numbers of refugees and more frequently in European states.¹⁵⁸ For example a country such as Zambia that is surrounded by countries that have had protracted civil unrest have had to accommodate large numbers of refugees for decades. The UNHCR estimates that Zambia has been accommodating refugees from neighbouring countries such as Angola and Congo DR since the 1960s and as at the year 2014 was still housing approximately 54,000 refugees and other persons of concern.¹⁵⁹ States that cannot control their borders are the states that receive the biggest numbers.

¹⁵⁷ Margarita Puerto Gomez and Asger Christensen, "The Impacts of Refugees on Neighboring Countries: A Development Challenge," World Development Report (2011) citing Background Note, World Bank, July 29, (2010).

¹⁵⁸ Alexander Betts, *Protection by Persuasion International Cooperation in the Refugee Regime* (New York: Cornell University Press, 2009).

¹⁵⁹ www.unhcr.org/Zambia accessed on 25th January, 2016.

Therefore refugee issues have been seen more as south problems while the north has had little or no obligation or interest in assisting states with refugee problems in the south.¹⁶⁰ But current trends show that nowadays, refugees are moving such great distances seeking asylum in countries that are far off from their homes. The European refugee crisis is one good example of this.

This chapter examines the manner in which states have responded during mass influx refugee situations and if they have been complying with international obligations that arise as was discussed in chapter three. This chapter shall do this by using the example of the refugee crisis arising from the conflicts in the Middle East, and Syria to be specific.

4.2 THE POLITICS BEHIND REFUGEE PROTECTION

Refugee issues just like other cardinal state matters that affect domestic or foreign policy are also influenced by politics. An analysis of the political nature of refugee issues assists in understanding the way in which states respond to mass influx refugee situations. Chimni has argued that, refugee issues are too important to be left solely to international agencies like the UNHCR and in order to fully be implemented, require state participation.¹⁶¹ This is why they have been the subject of major Security Council decisions also.¹⁶² Hathaway further states that ‘notwithstanding the rhetoric of humanitarianism that abounds in our field, the hard truth is that refugee law exists because it is a pragmatic and politically acceptable means of maximising border control in the face of recurrent involuntary migration.’¹⁶³ The manner in which states will respond will have to take into account political considerations of doing so. Initially, states decided that under the current international regime, refugees who arrive in an asylum state are

¹⁶⁰ Margarita Puerto Gomez and Asger Christensen, “The Impacts of Refugees on Neighboring Countries: A Development Challenge,” *Supra* note 157.

¹⁶¹ BS Chimni ‘Globalisation, Humanitarianism and the Erosion of Refugee Protection’ (2000) RSC Working Paper, University of Oxford found at <http://purochioe.rojasdatabank.info/workingpaper3.pdf> accessed on 19th December, 2016.

¹⁶² *Ibid.*

¹⁶³ James Hathaway ‘Temporary Protection of Refugees: Threat or Solution’ (2001) In *Perspective on Refugee Protection in South Africa*, edited by J. Handmaker et al., 41-9. Pretoria, South Africa: Lawyers for Human Rights accessed from http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1088&context=book_chapters on 30th November, 2016.

solely the legal responsibility of that state.¹⁶⁴ However this proved erroneous and at both a regional and international level, there have been calls for co-operation between states.¹⁶⁵

Fitzgerald argues that, there is no right to freedom of movement from one state to another. International law recognizes that people will leave one country to enter another but there is no duty on the receiving state to admit them.¹⁶⁶ This is what makes refugee law different, it tries to invoke humanitarianism to work hand in hand with state sovereignty. She further argues that, it is not inconceivable that states should be wary about the people that cross their borders. One of the biggest challenges that states have is the balancing of a proper functioning migration policy and maintaining the security of the state.¹⁶⁷

As was stated earlier the politics of refugee protection initially were ignored by most northern states because refugee problems were a lot more rampant in Southern states. In recent times however, the UNHCR has been advocating for northern states to get more involved in southern states refugee problems as this in turn is beneficial to them.¹⁶⁸ It will have an impact on their immigration controls, state security and also it will allow them to continue to have control of their immigration situations.¹⁶⁹

Despite all the political complexities that come with refugee law and how refugee law plays out on the political arena, there is a need to understand that adhering to the protection regime of human rights and refugee rights does not mean that the protection must be done at the

¹⁶⁴ Ibid.

¹⁶⁵ This can be seen from the OAU Convention, the Dublin II Regulation of Europe and also the United Nations General Assembly Declaration GA/11820 in which states "agreed to acknowledge a shared responsibility to manage large movements of refugees and migrants through international co-operation while recognising the varying capacities of nations and resources in responding to these mass movements.."

¹⁶⁶ Stephanie Fitzgerald 'State interests and Migrant Rights: A Legal Dilemma?' (2011/2012) Vol 2. Interstate Journal of International Affairs. <http://www.inquiriesjournal.com/articles/1066/2/states-interests-and-migrant-rights-a-legal-dilemma> accessed on 28th November, 2016.

¹⁶⁷ Ibid.

¹⁶⁸ Gomez, Margarita Puerto and Asger Christensen, "The Impacts of Refugees on Neighboring Countries: A Development Challenge," supra note 157.

¹⁶⁹ Ibid.

expense of the needs of a state.¹⁷⁰ Kjaerum argues that ‘it is a matter of adhering to an international order, which is governed not only by power but also by law, in particular when it comes to issues related to the protection of the individual.’¹⁷¹ Therefore, states need to acknowledge the seriousness of this area of international law and tie it in with their political ambitions instead of adopting a ‘hands-off’ approach.

Proposals to share burdens or to find sharing mechanisms typically come from states that believe that they are being over-burdened by the refugee crisis. To most other states, sharing the burden seems like an additional burden.¹⁷² Therefore there is a common attitude of ignoring the situation if one is not the receiving state. In fact, the failure to provide support in mass influx situations results in some receiving states refusing to take more refugees or putting stringent measures that will not allow refugees to cross into their borders.¹⁷³ Ultimately this is just a form of *refoulement* and constitutes a breach of international law, refugee law and human rights law obligations.

The economics of refugee protection also affect the decisions that states make relating to refugees. Refugee protection is obviously not cheap for states. This can be seen clearly in the refugee crisis that resulted in the Calais region of France. The French government strongly called on other countries especially the U.K to assist in the financial and resettlement options for the refugees.¹⁷⁴ The issue of how much it costs states to resettle refugees is a political issue because it affects how the electorate respond to how the government is spending their money.¹⁷⁵ That then has an impact on their voting. This is why when the media states to the public the big figures that refugee resettlement costs, political leaders feel the pressure from the electorate which translates into reluctance to admit more refugees.

¹⁷⁰ Morten Kjaerum, ‘Human Rights, State Security and Burden-sharing: People or States First?’ (2001) 14 J. Refugee Stud. 116 at page 119.

¹⁷¹ Ibid.

¹⁷² Astri Suhrke ‘Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action’ (1998).

¹⁷³ De Jong, Cornelius ‘Elements for a More Effective European Union Response to Situations of Mass Influx’ (1996) 8 Int’l J. Refugee L. 156 at page 164.

¹⁷⁴ <http://www.npr.org/sections/parallels/2016/09/13/493721794/for-one-french-woman-an-eye-opening-visit-to-calais-refugee-jungle?ft=nprml&f=> accessed on 25th January, 2017.

¹⁷⁵ The Washington post reported to the U.S public that the U.S government spends approximately \$1,000 per refugee on resettlement.

Hathaway argues that the distribution of state responsibility towards refugees is based primarily upon accidents of geography and the relative ability of states to control their borders. Any assistance received from other countries or the UNHCR is seen as a matter of charity, not of obligation. This system of unilateral, undifferentiated state obligations is unfair, inadequate, and ultimately unsustainable.¹⁷⁶ As states have no reliable means of looking to their neighbours or the international community at large for assistance and solidarity, there is a perverse logic to the option of simply closing borders and pre-emptively avoiding any responsibility for providing protection.¹⁷⁷

4.3 THE SYRIAN REFUGEE CRISIS AS AN EXAMPLE OF MASS INFLUX

The Syrian refugee crisis began as a result of the conflict between the ruling Bashar Al-Assad government and various other forces in 2011.¹⁷⁸ The actual uprisings began when about three years ago, a small group of students wrote slogans on their classroom blackboards against the current regime.¹⁷⁹ According to the UNHCR, the conflict in Syria has resulted into the creation of 4.8 million refugees fleeing into the neighboring countries of Syria, such as Lebanon, Jordan and Turkey.¹⁸⁰ About 7.6 million Syrians had become (Internally Displaced Persons) IDPs, by the year 2014¹⁸¹ and over hundreds of thousands had migrated to Europe.¹⁸² It has been described by some as the biggest refugee crisis of ‘our time.’¹⁸³

¹⁷⁶ James Hathaway ‘Temporary Protection of Refugees: Threat or Solution?’ (2001) In *Perspective on Refugee Protection in South Africa*, edited by J. Handmaker et al., 41-9. Pretoria, South Africa: Lawyers for Human Rights at page 41.

¹⁷⁷ Ibid.

¹⁷⁸ Nicole Ostran, ‘The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom and the United States’ (2015) JMHS Volume 3 Number 3: 255-279.

¹⁷⁹ Phillipe Fargues, ‘Europe Must Take on its Share of the Syrian Refugee Burden, but How?’ Migration Policy Centre Policy Brief, (2014) at page 2. Accessed from http://cadmus.eui.eu/bitstream/handle/1814/29919/MPC_PB_2014_01.pdf?sequence=3&isAllowed=y on 16th January, 2016.

¹⁸⁰ Arianne Rummery, ‘Syria conflict at five years’ Tim Gaynor(ed) (2016) accessed from <http://www.unhcr.org/news/latest/2016/3/56e6e1b991/syria-conflict-at-five-years.html> on 16th December, 2016.

¹⁸¹ Ostran Nicole Article at page 2, supra note 178.

¹⁸² Rummery, ‘Syria conflict at five years’ Tim Gaynor(ed) (2016) supranote 180.

¹⁸³ Rummery, Arianne, ‘Syria conflict at five years’ Tim Gaynor(ed) (2016) accessed from <http://www.unhcr.org/news/latest/2016/3/56e6e1b991/syria-conflict-at-five-years.html> supranote 180.

Furthermore, the Syrian conflict has been reported to have resulted in the deaths of at least 250,000 people and out of these, 100,000 of whom were civilians.¹⁸⁴ There have been reports of attacks that violate the Geneva Conventions such as the use of chemical weapons, the indiscriminate killing of civilians and even the destruction of national heritage sites among other things.¹⁸⁵ Children have also been displaced and killed in this conflict. The conflict in Syria has highlighted some of the challenges that arise in international law such as state sovereignty, mass influx refugee situations, Security Council powers and international state co-operation.¹⁸⁶

The UNHCR Committee Report on Ensuring International Protection and Enhancing International Co-operation in Situations of Mass Influx reiterate the fact that there is no legal definition for a ‘mass influx’ situation. It however outlines the major features that are common in mass influx situations. The first is that there is a considerable number of refugees trying to cross an international border and this crossing should be at a rapid rate. The big numbers of refugees crossing the borders into other states in and of themselves are able to show that the conflict in Syria meets the first criteria of a situation of mass influx.

The third requirement for the mass influx criteria is that there should be inadequate absorption of the large numbers and fourthly that the procedure for individual refugee status determination should be unable to be conducted owing to the large numbers. Once again the situation in Syria meets these two criteria because firstly there have been difficulties with absorbing refugees as the earlier example of Calais has shown. Furthermore, the option to determine refugees on an individual basis is difficult as can be seen by the response of states to grant temporary protection to refugees. The pressure on the receiving states and their inability to cope with the numbers has also shown that the Syrian situation is one of mass influx.

¹⁸⁴ ‘Syria Events of 2015’ Human Rights Watch at <https://www.hrw.org/world-report/2016/country-chapters/syria> accessed on 19th December, 2016

¹⁸⁵ John Balouziyeh, ‘Humanitarian Crisis in Syria: International Law, Genocide and the Responsibility to Protect - See more at: <https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/archive/2016/03/21/humanitarian-crisis-in-syria-international-law-genocide-and-the-responsibility-to-protect.aspx#sthash.hmCDErcl.dpuf> accessed on 19th December, 2016.

¹⁸⁶ The UNHCR has decided to treat the situation in Syria as a mass influx situation

The expected reaction of affected Syrians is to migrate to other countries in search of safety and security. According to Amnesty International, the neighbouring countries of Syria have been the recipients of the highest number of refugees.¹⁸⁷ Apart from the neighbouring countries to Syria such as Jordan and Lebanon, some Syrian refugees are moving across the Mediterranean Sea to regions such as Europe in search of stability.¹⁸⁸ By the year 2013, for the first time in history Syria became the first country of origin for asylum seekers in about 44 countries in North America, Europe and the Asia Pacific.¹⁸⁹

According to UNHCR, the European Union (E.U) first felt the hit of the Syrian refugee crisis in 2015 when approximately 1 million refugees and migrants reached Europe by the end of 2015.¹⁹⁰ Most refugees coming into Europe come in through the coast of Greece, with an approximately 856,000 documented entries by 2015 through Greece alone.¹⁹¹ Of course not all refugees and migrants are Syrian but the statistics show that they are definitely the majority. Other countries that have received vast numbers of refugees from Syria include Egypt, Turkey, Lebanon and Jordan.¹⁹² The International Labour Organisation (ILO) has labeled it as ‘one of the largest and most protracted and complex humanitarian emergencies of modern times.’¹⁹³

¹⁸⁷ <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/> accessed on 29th January, 2017.

¹⁸⁸ Ibid.

¹⁸⁹ Nicole Ostran, ‘The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom and the United States’ supra note 20.

¹⁹⁰ ‘Gulf States Response to the Syrian Refugee Crisis: A Myth Debunked’ article on <http://www.opensourceinvestigations.com/syria/gulf-states-response-to-syrian-refugee-crisis-a-myth-debunked/> accessed on 22nd December, 2016.

¹⁹¹ Tanaia Karas, ‘UNHCR chief says Greece needs EU help to manage its refugee crisis’ accessed on UNHCR website at <http://www.unhcr.org/news/latest/2016/8/57bdcb144/unhcr-chief-says-greece-needs-eu-help-manage-its-refugee-crisis.html> accessed on 22nd December, 2016.

¹⁹² S Bidinger, Lang et al. ‘Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing’ Report by Boston University School of Law Human Rights Clinic at page 1 on <file:///C:/Users/user/Downloads/FINALFullReport.pdf> accessed on 22nd December, 2016.

¹⁹³ ILO Response ‘The Syrian Refugee Crisis’ at <http://www.ilo.org/beirut/areasofwork/syrian-refugee-crisis/lang--en/index.htm> accessed on 22nd December, 2016.

4.4 EUROPE AND THE SYRIAN REFUGEE CRISIS: AN EXAMPLE OF STATE RESPONSES

In 2015 alone, over 1 million people crossed the borders into Europe as either refugees or displaced persons or economic migrants.¹⁹⁴ These figures show that Europe though not the region with the highest number of Syrian refugees, is still a popular destination for displaced persons. Europe compared to Turkey, Jordan, Lebanon, Egypt and Iran has taken a small number of Syrian refugees.¹⁹⁵ Dennison argues that not all refugees living in the E.U are from Syria, however, they make up about 40 per cent of the refugees.¹⁹⁶ This is despite the fact that according to the World Vision only slightly over 10 per cent of Syrian refugees have fled to Europe. This means that Syrian refugees are entering Europe in big numbers. The vast numbers of refugees that have been crossing the border into the E.U have made the situation in Europe a good example of the fact that defining mass influx using numbers alone is not an adequate method of defining them and also a good example of the response of states in mass influx refugee situations. Currently, large inflow of refugees onto E.U territory has become the norm¹⁹⁷. The refugees that enter E.U territory are for the most part crossing the borders through dangerous means such as crossing the Mediterranean Sea using crowded rubber boats and unsafe rafts.¹⁹⁸ They use unsafe means such as turning to smugglers to provide a means of entering Europe. That being said, still a good number of refugees that fled the Syrian conflict fled to Europe.¹⁹⁹

¹⁹⁴ Article by European Commission European Civil Protection and Humanitarian Aid Operations website 'Refugee Crisis in Europe' accessed at http://ec.europa.eu/echo/refugee-crisis_en on 16th January, 2017.

¹⁹⁵ Susie Dennison, 'A new deal on EU burden-sharing' (European Council on Foreign Relations, 2016) from http://www.ecfr.eu/article/commentary_a_new_deal_on_eu_burden_sharing accessed on 17th January, 2017.

¹⁹⁶ Ibid.

¹⁹⁷ Opit.

¹⁹⁸ Melissa Fleming, 'Crossings of Mediterranean Sea exceed 300,000, including 200,000 to Greece' (UNHCR website, 2015) on <http://www.unhcr.org/news/latest/2015/8/55e06a5b6/crossings-mediterranean-sea-exceed-300000-including-200000-greece.html> accessed on 30th January, 2017.

¹⁹⁹ Susie Dennison, 'A new deal on EU burden-sharing' Supra note 195.

The first issue is that the Refugee Convention will allow for them to be admitted onto European territory. However, it is silent as to the obligation in mass influx situations. So for

A. Duty to Co-operate

One required response to mass influx situations is the need for co-operation amongst states. There is generally a positive response to state co-operation among European States. For example, the creation of the Dublin II regulations that are supposed to outline which state takes on the duty of processing asylum claims.

There have been efforts by the international community to bring an end to the conflict in Syria but these have not yielded desired and lasting results so far. The Syrian government has argued that any intervention from external forces would amount to a breach of state sovereignty and without a Security Council resolution this would amount to a serious violation of international law.²⁰⁰ There have been attempts by some of the Security Council to obtain authorisation for international intervention in Syria. However these attempts have failed, one of them being the Security Council passed on 31st December, 2016 when the Security Council passed a resolution unanimously calling upon the international community to find a solution and put an end to the conflict in Syria.²⁰¹ Russia and China as at 28th February 2017, vetoed a proposal for the imposition of sanctions against Syria.²⁰²

The duty to co-operate so far in term of coming up with agreements relating to co-operation among states has been fairly positive. Also, the number of time that there have been attempts to pass resolution that will allow for some form of intervention in Syria. However, the problems comes in when the issue of burden sharing is looked at specifically.

²⁰⁰ Balouziyeh, John article supra note 185.

²⁰¹ Resolution 2336 (2016) accessed from <http://www.un.org/apps/news/story.asp?NewsID=55897#.WI8o6398O00> on 30th January, 2017.

²⁰² Reported by Time Magazine on <http://time.com/4686643/russia-china-veto-un-syria-sanctions/> accessed on 1st March, 2017.

B. Burden Sharing

Initially, in cold war times, states were willing to admit refugees, especially before and slightly after the cold war because states derived a benefit from it.²⁰³ Nowadays the opposite is true, refugees are seen as a burden on the economic, political and ethnic stability of a state and therefore should be avoided by states at all costs.²⁰⁴ This is obviously an erroneous view, refugees should not be seen as a burden but as a responsibility for states to play a role in the application of humanitarian and refugee law requirements. Also terms such as ‘burden-sharing’ in reference to refugees helps to enforce this stereotype, more friendly and progressive terms would be a better option.

It is sad to note that more than ten years after the crisis in Bosnia, European nations still have not come up with an adequate mechanism for burden sharing.²⁰⁵ Fargues has argued that one of the problems with the European situation is that the response to the manner in which E.U states have responded has been greatly uneven.²⁰⁶ This means that the manner in which states have accommodated the refugees that they receive has not been evenly distributed. For example, as at the year 2014, only two states had ended up taking up two-thirds of the refugees received by Europe.²⁰⁷ Most times refugees end up staying in the country of first arrival.

The expected result would be for refugees to be accepted and a proper mechanism for their settlement be put in place. The mechanisms would include burden sharing, granting temporary asylum or resettlement to safe third countries that will provide adequate protection. However some big countries such as the United Kingdom have not participated adequately in the accommodating of refugees from Syria.²⁰⁸ There has been a rise in the use of smugglers to

²⁰³ Mathias Czaika, ‘Asylum Co-operation Among Asymmetric Countries; The Case of the European Union’ (2009) Volume 10 (1): 89–113 at page 90.

²⁰⁴ Ibid at page 90

²⁰⁵ Morten Kjaerum, ‘Human Rights, State Security and Burden-sharing: People or States First?’ (2001) 14 J. Refugee Stud. 116 at page 118.

²⁰⁶ Phillipe Fargues, ‘Europe Must Take on its Share of the Syrian Refugee Burden, But How?’ Migration Policy Centre Policy Brief, 2014 at page 2. Accessed from http://cadmus.eui.eu/bitstream/handle/1814/29919/MPC_PB_2014_01.pdf?sequence=3&isAllowed=y on 16th January, 2017.

²⁰⁷ Ibid., at page 3. The two states being Germany and Sweden.

²⁰⁸ Fargues, ‘Europe Must Take on It’s Share of the Syrian Refugee Burden, But How?’ supranote 206 at page 3.

enter the E.U and this in itself is a sign that there is refusal to admit refugees at borders.²⁰⁹ One good example is that of Greece. Greece has admitted a very small number of Syrian refugees, in the first three years of the conflict in Syria, only 25 Syrians were admitted into Greece out of 1,015 applicants despite it being a country of first arrival for most refugees.²¹⁰

This in itself shows a harmful trend in the manner in which refugees are treated. If one country admits such small numbers then the numbers are too huge for the remaining countries. Additionally, as at the year 2014, Austria had not received a single Syrian refugee.²¹¹ Apart from Austria, many other countries have actively refused to admit any migrants, refugees or asylum seekers onto their territory including Macedonia, Hungary and Croatia that have actually built fences along their borders to prevent migrants from entering their borders.²¹² Countries such as Slovakia have refused to admit muslim migrants citing reasons such as lack of mosques, which is really quite difficult to comprehend.²¹³

With the growing numbers of refugees, the states within the E.U suggested strongly that burden sharing be used as a means of easing the burden on recipient states. The idea has not been met to the full as the example of Greece and Austria above have indicated. The refusal to admit refugees either explicitly or by using stringent measures amounts to refoulement. It is a breach of international legal and moral obligations as set out in chapter three. Also the refusal to admit more refugees means that other countries are left to bear a bigger portion of the responsibility than others.

It was stated earlier in chapter 3 that burden sharing is not a problem of only the surrounding nations but one that affects all states. Furthermore, the chapter outlined that burden sharing can take different forms like offering financial assistance or the physical settlement of refugees on the territory of a state. Furthermore, Fargues outlines that the neighbouring countries of Syria face challenges in addressing the refugee problem in Syria. Israel for example is still at war with Syria. Lebanon, Iraq and Jordan are not signatories to the Refugee Convention and

²⁰⁹ Ibid.

²¹⁰ Op cit at page 4

²¹¹ Fargues Philip supra note 45.

²¹² This is according to an Amnesty International report entitled 'Fear and Fences: Europe's Approach to Keeping Refugees at Bay' on <https://www.amnesty.org/en/documents/eur03/2544/2015/en/>

²¹³ ibid

therefore consider Syrian refugees as guests and not as refugees. Finally, Turkey has not ratified the 1967 Protocol to the Refugee Convention therefore it is legally limited to refugees before 1st January 1951.²¹⁴ This is why countries such as those in the E.U and even those as far as the U.S.A and Canada are expected to play a role in alleviating the Syrian refugee problem.

Despite this fact, the USA began to enforce stricter measures on refugees entering the country after the terrorist attack of 11th September, 2001.²¹⁵ The agencies in charge of refugee status determination investigated applicants a lot more thoroughly, newer stringent checks were enforced, all refugees had to be fingerprinted upon entry into the USA.²¹⁶ This led to a shortage of man power at refugee centers so fewer refugees had their claims processed with claims from refugees who hailed from the Middle East being the slowest in being processed.²¹⁷ According to Fargues, another interesting fact is that no Syrian refugee has tried to cross into Israel which is closer to Syria than European states are. This is owing to the fact that the borders of Israel are heavily guarded and the current disputes between Syria and Israel.²¹⁸

In Burden sharing matters, the issue of state sovereignty plays a role in this dilemma too because ultimately a state should be free to decide who enters onto its territory. It is described by Emma Larking as the “organising principle of international law and moral bedrock of the modern international order.”²¹⁹ Sovereignty can also be used to describe the legal competence which states have in general or to refer to a particular function of this competence, it refers to legislative competence over national territory, the power to acquire title to territory and the rights that accrue from that particular power.²²⁰ That means that states should be able to decide who steps onto their territory and who does not. A state does not have a duty to grant asylum.

²¹⁴ Fargues Phillipe and Christine Fandrich ‘The European Response to the Refugee Crisis, What Next?’ (2012/2014) Migration Policy Centre Research Paper at page 8

²¹⁵ Chishti Muzaffar and Bergeron Claire. ‘Post 9/11 Policies Dramatically Alter the U.S Immigration Landscape’ Migration Policy Institute at www.migrationpolicy.org/artil/post-911-olicies-drammatically-alter-us-immigration-landscape accessed on 31st January, 2017.

²¹⁶ *ibid*

²¹⁷ *opcit*

²¹⁸ Fargues Phillipe and Christine Fandrich ‘The European Response to the Refugee Crisis, What Next?’ (2012/2014) Migration Policy Centre Research Paper at page 8

²¹⁹ Emma Larking *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* Ashgate Publishers: England, 2014 at page 138.

²²⁰ Ian Brownlie *Principles of Public International Law*, 7th ed (New York: Oxford University Press 2008 at page 291)

Sesay however argues that by virtue of being party to the refugee regime, which consists the Refugee Convention and its protocol, regional conventions and also domestication of these conventions means that states can no longer fully enjoy the pleasures of state sovereignty in full.²²¹ They are now saying that they will abide by what they have signed including how it relate to rights under state sovereignty. Sadly when it comes to rights of refugees, most times human rights take up a mythical nature.²²²

Furthermore, the E.U made a decision to transfer what they term as ‘irregular migrants’ that arrive in Greece to Turkey.²²³ The aim was to prevent unchecked arrivals into the E.U. the legality of this agreement is doubtful because it gives a sense of refoulement.²²⁴ One is sent to turkey either if they are deemed irregular or if they do not qualify for asylum in Europe and therefore can be sent to Turkey as a ‘safe third country,’ as a result, Turkey hosts the largest Syrian refugee population.²²⁵ The European commission reports that about 90% of Syrian refugees in turkey are actually not living within the confines of the camp.²²⁶ They are instead facing situations where their basic human needs are not being met.²²⁷ This makes it doubtful as to whether Turkey actually is a safe third country to which refugees can be safely sent without breaching the prohibition against refoulement.

However, as at December 31st 2016, the USA had admitted and settled about 18,007 Syrian refugees surpassing it’s 10,000 target.²²⁸ Setting a target in itself is problematic for a situation like that of the Middle East or Syria to be precise because it is a protracted situation. It is only beneficial if the target is flexible to increase those being admitted and not to limit or to reduce.

²²¹ Abu Bakar Sesay ‘State Sovereignty a Hindrance to Refugee Protection’ (2010) The Patriotic Vanguard on www.thepatrioticvanguard.com/state-sovereignty-a-hindrance-to-refugee-protection accessed on 31st January, 2017.

²²² Emma Larking *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* supra note 219.

²²³ Elizabeth Collet ‘The Paradox of the EU-Turkey Deal’ (2016) Migration Policy Institute at www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal accessed on 31st January 2017.

²²⁴ Ibid.

²²⁵ Op cit, about 3 million Syrian refugees in Turkey

²²⁶ Angeliki Dimitriadi ‘Deals Without Borders: Europe’s Foreign Policy on Migration’ (2016) European Council on Foreign Relations at www.ecfr.eu/publications/summary/deals-without-borders-europes-foreign-policy-on-migration6054 accessed on 31st January, 2017.

²²⁷ Ibid.

²²⁸ Zong Jie and Batalova ‘Syrian Refugees in the United States’ Migration Policy Institute on www.migrationpolicy.org/article/syrian-refugees-united-states accessed on 22nd January, 2017.

The increase in the number of Syrians being admitted by the USA even after 9/11 is a positive move for refugee protection and human rights. Canada as at the year 2016 had taken in about 40,000 Syrian refugees.²²⁹

However, the picture is not completely grim. The form of burden sharing by contributing finances to support countries that are hosting a majority of refugees has also been a popular response by states. According to Ostrand, the USA and the United Kingdom (UK) have been the countries that have contributed the most financial assistance to the Syrian refugee crisis than any other single states.²³⁰ According to Fargues, the total contribution of the E.U to solving the refugee problem has been the highest at about €230 million in aid.²³¹

Situations such as the said September 11 attacks in the USA, the rising attacks by terrorist organisations such as the so called Islamic State (I.S), ISIS and even Al Shabab have led to some citizens and governments of states being reluctant to admit refugees from certain regions.²³² Obviously this is a discriminatory way of looking at individuals and breaches the provisions of article 3 of the Refugee Convention²³³ and article 1²³⁴ and 2²³⁵ of the Universal Declaration of Human Rights (UDHR).

Despite there being a good number of countries that refuse to adequately participate in the showing some reluctance of states to co-operate, there is also evidence that states actually want to co-operate. One example is the one above of Germany and Sweden in the year 2016 alone, Germany had taken in about a million refugees into the country.²³⁶

²²⁹ *ibid*

²³⁰ Nicole Ostrand article at page 3 *supra* note 178.

²³¹ Phillipe Fargues and Christine Fandrich 'The European Response to the Refugee Crisis, What Next?' (2012/2014) Migration Policy Centre Research Paper at page 8

²³² Zong Jie and Batalova 'Syrian Refugees in the United States' Migration Policy Institute on www.migrationpolicy.org/article/syrian-refugees-united-states accessed 22nd January, 2017.

²³³ Prohibiting all forms of discrimination.

²³⁴ Provides that all humans are equal in the rights and dignity that they possess.

²³⁵ Prohibition of discrimination of any form based on race, ethnicity, religion, political opinion or place of origin

²³⁶ Ostran 'The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom and the United States' *supra* note 178.

C. Temporary Protection

On 20th July, 2016 the E.U Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such²³⁷ came into force. Article 3 (2) provides that states shall apply temporary protection with due respect for human rights.

4.5 CONCLUSION

After an analysis of the law relating to refugee protection and then the responses of states in mass influx situations, this chapter has sought to bring out an example of a mass influx situation and the actual manner in which states have responded. This chapter has shown that despite the need for a strong response in mass influx situations, some states have had challenges with performing as is expected of them in international law. It has been established that the Syrian refugee crisis is a mass influx refugee situation. Also that there is still more effort that needs to be put toward coming up with more unified methods of co-operation.

Burden sharing mechanisms rely on the co-operation of states and if states do not co-operate then there is a failure to share the burden. The Syrian refugee crisis has shown the vast effects that a single protracted civil war can have on the population of a state. The civil war has created a huge number of refugees across the globe but the states closest to Syria have been the hardest hit. The reactions of some states has been to refuse to participate in the resettlement process of refugees. Other states have shown a preference to assist in the bearing of the responsibility through providing finances and not as a location for resettlement. The correct position would be for all the states in the region to partner with the NGOs and play a role in refugee protection. There needs to be strong condemnation for the states that have refused to play a part. There is also a need for the response in the European Union to be more cohesive and spread over to a

²³⁷ COUNCIL DIRECTIVE 2001/55/EC

wider group of states. The lack of universal legally binding documents leaves the countries with room to decide how they will take up the responsibility in mass influx situations.

5.0 CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

The challenge of protecting refugees in mass influx situations cannot be overstated. However, it is an urgent need for every country to take steps towards protection of refugees. The previous chapters have outlined the law that relate to refugee situations. It has also become apparent that the law does not have specific rules regarding the duties of states during situations of mass influx. Mass influx situations have been around for a long time and still continue to be on the rise. Examples, of the Syrian crisis, the Congolese civil war, the conflict in Yemen have shown that this is a current issue of concern. This chapter shall be a summation of findings and also shall provide recommendations for filling in the gaps in the current situation.

5.2 FINDING LASTING SOLUTIONS TO THE CONFLICTS

The best way to solve the problem of refugees is to fix the root cause. For refugee situations such as the Syrian one, the key would be to find a lasting solution to the actual political conflict. The international community needs to find a manner in which the conflict in Syria can be resolved, with humanitarian interests put first and political ones after. Other migrations may require other political and economic solutions. But those that actually result in the creation of refugees need to find solutions to the humanitarian crisis at the same time as the political solution.

5.3 BINDING PROVISIONS RELATING TO MASS INFLUX REFUGEE SITUATIONS

One thing that has come out clearly is that there are no binding legal provisions that are specific to mass influx situations. The refugee convention gives an air of individual status determination and that makes it difficult to rely on in times of mass influx. One way to help solve this problem is for states to formulate binding rules that will apply in situations o mass influx. They should take the form of a convention. The convention should outline possible measures that states can take in times of mass influx. Also the convention in question should strengthen the current

response mechanisms such as temporary protection, burden sharing, and so on. Burden shifting should be strongly discouraged as it does not achieve the purpose of refugee protection.

The creation of a binding legal convention would assist in the sense that it would outline the responses that states need to take in mass influx situations. Also it would help by allowing for sanctions in the event that a state does not comply.

5.4 IMPROVING BURDEN/RESPONSIBILITY SHARING MECHANISMS

This can only be achieved after binding legal documents have been agreed to by states. The need for more effective burden sharing mechanisms has become evident stemming from the example of the Syrian refugee crisis. The new mechanisms require that each state is compelled to play a role in the bearing of the responsibility. This can be done with the help of a binding convention. The burden sharing mechanisms should include lasting resettlement as a vital component.²³⁸ The binding agreements should include provisions that allow for flexibility for when the agreements are applicable. Additionally the agreements that are drafted should avoid refoulement type provisions. They should also encompass all forms of assistance, which should be financial technical and also emergency assistance.²³⁹

There is also a need for stricter measures for avoiding and preventing burden shifting. The agreements that states enter into for burden sharing purposes need to have improved compliance mechanisms. Despite all the problems that come with mass influx situations, the efforts that have been made so far are steps in the right direction. There is still room for improvement.

²³⁸ Burden-Sharing - Discussion Paper Submitted By UNHCR Fifth Annual Plenary Meeting Of The APC <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/17.html> accessed on 1st March, 2017.

²³⁹ Ibid.

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