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HUMAN RIGHTS AND THE NON-REFOULEMENT OBLIGATION: A COMPARATIVE STUDY

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ABSTRACT

The drive to protect human rights has been a priority in the global community. This task is mainly left for state parties to ensure the respect, implementation, and protection of these rights. However, as globalization shortens the gap between states, there is a constant conflict between observance of these rights and protecting a state's sovereignty. This conflict is mainly seen in inter alia, the clamor of self-determination, and every other cessationist demand anchored on human rights. The Non- Refoulement obligation is one of these international norms that conflict with the state's security interest. Most scholars have argued that the non-refoulment obligation could be interpreted as a jus Cogen; as ideal as this might be, states scramble with the ordeal of sustaining their national security, public health, and safety interest and fulfilling the non-refoulment obligation. Most states use many methodologies to evade this obligation, which eventually leads to little or non-application of the non-refoulment obligation.

This paper appraises the Non-refoulement obligation, compare and analyzes the refugee/Non-refoulement legislation of the EU and the Australian state. The comparison helped ascertain the extent to which this obligation conflicts with the national security and public safety interest of these states regarding when a refugee poses a security threat, especially in an issue involving terrorism. This work subscribes to the ideals of the non-derogable nature of the non-refoulement obligation on national security issues. However, it adds that the principle should not be a path to evade prosecution of crimes committed by refugees in their original states. It further holds that refugees should be prosecuted in accordance with the laws of the host states and if they pose national security threats, certain rights and freedoms like freedom of association and right to privacy which are derogable by law, should be restricted to ensure host states equally fulfill their obligation of protecting their sovereignty.

Keywords: Human Rights, Refugee Law, Non-Refoulement, State Interest, National Security, European Convention of Human Rights, Prohibition Against Torture.

List of Abbreviations

1. EU – European Union
2. UN – United Nations
3. ECtHR – European Court of Human Right
4. AAT - Administrative Appeals Tribunal
5. ECHR - European Convention on Human Right
6. ICCPR - international covenant on civil and political rights
7. CAT - Convention Against Torture

INTRODUCTION

The Non-refoulment obligation is a crucial feature on the adherence to refugees' rights; this obligation appears as a more significant burden on states who are equally obligated to ensure the protection of life and properties of their citizenry. Although states sign and ratifies conventions on refugees' safety, this obligation does not always offer absolute rights. States are sometimes reluctant to balance this obligation when it conflicts with other state interests. This research aims to identify legal frameworks on Non-refoulement obligation and its applicability in the European Union and Australia, vis a viz its conflict with the national security interest, it equally aims to add to works of literature on human rights as it relates to refugee rights.

Non-refoulement has been considered a customary norm; its right and status-based attribute derived from the 1951 refugee convention has giving room for refugees and other displaced individuals to assert these rights across national frontiers. While there is an obligation for all states to protect the rights of refugees as regards non-refoulement, states are equally obligated to protect their territorial integrity, more so the security of life and property of their citizens. A critical issue associated with non-refoulment is the conflict between the obligation and the state security interest. This issue has been visited by many scholars who analyze the obligation and renders an argument on the scope of its applicability. The point of a lesser evil is central to walzers analysis of just and unjust wars. Walzer's idea create an exception for Non-refoulement; he posited that a state must ensure that "such a return is necessary to avert some greater evil, and 2) no alternative to return is available."[1]

Andreu-Guzman analyzes the non-refoulment obligation and state national security interest. He sees the non-refoulment obligation to be under threat as a result of the emergent war on terror. In an attempt to protect national security interests, states circumvent legal procedures; this is done through a request for diplomatic assurance, use of diplomacy to coerce people to leave voluntarily

[1] Michael W. (1977), Just and Unjust Wars: A Moral Argument with Historical Illustrations, New York Basic Books P.6.

and giving no objective risk assessment in returning people to their countries. Andreu-Guzman further noted that as the war on terror deepens, more states who wish to evict individuals who supposedly pose a national security risk but who the state has no sufficient evidence to persecute or illegally expel them as this might lead to challenging the eviction or deportation order. To avoid this legal tussle, states hand over asylum seekers from one law enforcement unit to another and refusing contact to their attorney and family members. On the least of his position is the assumption that extradition treaties do not recognize terrorism as a political offense. This gets it outside the scope of the non-refoulment policy.[2]

Goodwin-GillS equates his position to the underlying tenet of non-refoulment; he posits that more consideration should be given to the refugee safety as against national security concerns in analyzing the risk factor.[3] Bruin et al. on analyzing the non-derogability of article 3 of the European convention and the working paper of December 5, 2001, on the relationship between safeguarding internal security and respecting international protection instruments appraise the balancing act. The balancing act will be a remedy to the non-derogable nature of article 3. It will reconsider majority interest over individual interest in issues of national security.[4] Nwaeze's position aligns with the enormous impact of security concerns on the policy; he acknowledged the adequate provision in the case of non-refoulment. However, his research shows that conflicts between the non-refoulment obligation and state security interest are primarily resolved in the latter's interest.[5] Droege analysis was based on the wording of the convention as seen in article 33(1) "in any manner whatsoever" he posits that non-refoulment applies to all forms of removal from a state's territory, including deportation or expulsion and extradition and in any issues inclusive on risk to national security, Non-refoulement obligation should retain its absolute nature.[6] Pirjola sees the conflict as a product of ambiguity in the definition of the terms associated with non-refoulment. Terms like inhuman and degrading treatment and punishment, torture, persecution are essential in the burden of proof; however, these terms are open for state interpretation.[7]

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[2] Andreu-Guzman, F. (2008). Legal Commentary to the ICJ Berlin Declaration: Counterterrorism, Human Rights, and the Rule of Law. Geneva, International Commission of Jurists.
[3] Goodwin-Gill, G. S. (1988). Non-Refoulement and the New Asylum Seekers. Immigration and Nationality Law Review,386.
[4] Bruin, R., & Wouters, K. (2003). Terrorism and the non-derogability of non-refoulement. International Journal of Refugee Law, 15 (1), 8.
[5] Nwaeze, O. (2014). The Obligation of Non-Refoulement of Refugees and Asylum-Seekers: Myth or Reality. *University of Botswana Law Journal*, 18, 2.
[6] Droege, C. (2008). Transfers of detainees: Legal framework, non-refoulement and contemporary challenges. International Review of the Red Cross, 90 (871), 669
[7] Pirjola, J. (2007). Shadows in paradise exploring non-refoulement as an open concept. *International Journal of Refugee Law* 19 (4), 639

This research seeks to uncover the meaning of non-refoulment obligation vis a vis the application of this customary norm amidst its conflict with national security within the European Union and the Australian state. It will seek to ascertain what the impact of non-refoulement obligation on the security interest of states is? And what is the ideal approach to the observance of the non-refoulement obligation? This research applies the qualitative research method; data from published articles in Journals, Information from United Nations, and its subsidiaries' websites and books on the subject matter will be utilized. These secondary data will be analyzed using descriptive and analytical research methods. The central focus will be on legal instruments on refugee law and its applicability to the compared states. Specifically, the first chapter will consist of the general introduction to global legal effort on Refugee law which is the pillar for the non-refoulment obligation. An emphasis will be on the 1951 refugee convention and its additional protocol of 1969 and the torture convention. The geneva convention relating to the rights of refugees ensured a great foundation in the fight to protect refugee rights. The convention is seen as a status right-based instrument. It inter alia unified and consolidated other international instruments on refugee law. The ideal definition of who is a refugee was first deduced from this document.

This foundation will extend to the introduction of refugee law vis a vis, the ratification of various international instruments in the compared states. The European Union and Australian state have been at the forefront of the right to protect refugees. They are founding members of these instruments and have ratified these instruments. The Second chapter will introduce the principle of non-refoulement and explore the legal mechanisms and issues bordering on the conflict between non-refoulment and national security within the EU and Australia. Through the review of case studies, it will equally analyze the Absolute nature of Non-refoulement on the grounds of article 3Echr. Chapter 3 will introduce the rule of necessity to remedy the conflict between observance of non-refoulment and national security consideration.

1. OVERVIEW OF REFUGEE LAW

The second world war ensued the emergence of new world order. The dynamism created by the League of Nations' dissolution in 1946 resulted in the emergence of the United Nations, whose methodology birthed international refugee law. As a result of the II world war, many displaced individuals seek help, and there was a need for protection. Subsequently, the number of displaced persons increased rapidly to about 7.9 million, and 35% of them, which is about 26 million, were refugees.[8] As a result of the Syrian armed conflict, many were displaced, a considerable number which surpassed the displacement caused by the second world war. And this heat has been felt by the European states.[9] Although the United Nations instituted a committee for refugees' protection, the 1951 convention provided a landmark consensus for refugees' protection. shortly after the Universal declaration of human right which was a common standard of achievement for all people in every nation, adopted in Paris by United Nations General Assembly Resolution 217A(iii)[10]

The Universal Declaration of Human Rights created the bedrock of all state's obligation to accept refugees. Article 14 of this declaration grants individuals the right to seek asylum in other states in persecution cases. This declaration gave rise to the 1951 convention, widely quoted as the bedrock for asylum. This instrument is seen as a status and right-based instrument which, inter alia, consolidated another international instrument on refugee law and created a robust and comprehensive paper on refugee rights, more so gave its definition of the term "Refugee."[11] According to this convention, a person can be considered a refugee if he "Has been considered a refugee under the Arrangements of May 12, 1926, and June 30, 1928, or under the Conventions of October 28, 1933, and February 10, 1938, the Protocol of September 14, 1939, or the Constitution of the International Refugee Organization a person can have the title of a refugee if as a result of events occurring before January 1, 1951, and owing to a "well-founded fear of being persecuted

[8] United Nations High Commissioner for Refugees, "Global Trends: Forced Displacement in 2019" (Denmark: UNHCR Global Data Service, 2020)
[9] United Nations High Commissioner for Refugees, "Forced Displacement Worldwide at its Highest in Decades", 19 June 2017, http://www.unhcr.org/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its highestdecades.html.
[10] Anupam M. (2017) international refugee law, Indian Journal of Social Legal Studies, 3.
[11] *Ibid.*, 4.

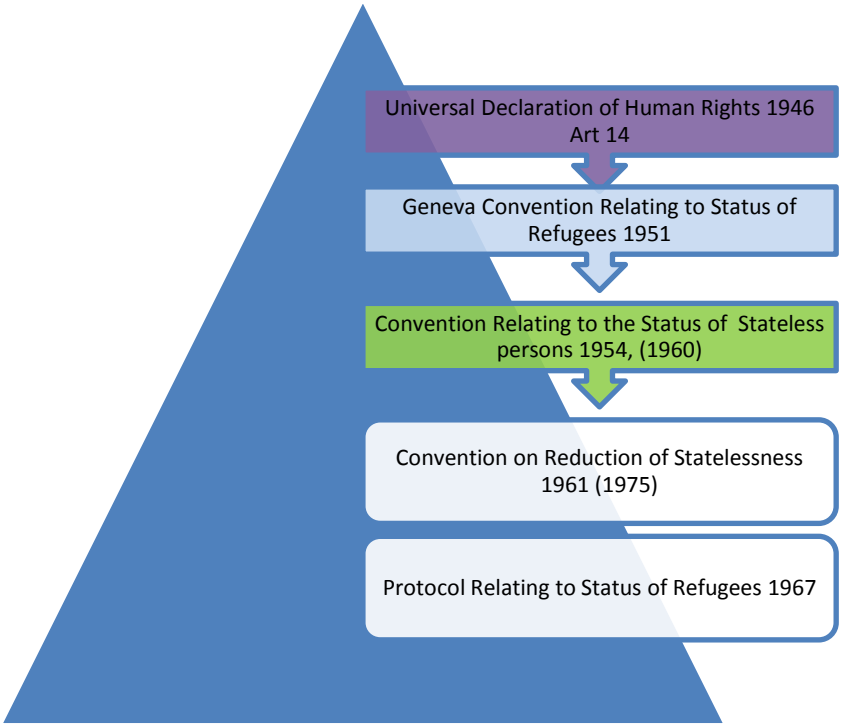
for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside 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."[12]

Though this convention was seen as a comprehensive instrument, the scope of its applicability was questioned. This resulted in an amendment in 1967 that added a protocol and removed the limits in the convention's scope as the convention earlier applied mostly to refugees before January 1 1951, and mainly within the European border.[13] Unlike the 1946 declaration that set the roadmap for refugees, the convention saw the inclusion of certain essential principles, which have been seen to date as guiding principles in asylum and refugee laws. These principles include:

- The principle of Non-Discrimination entails that a refugee shall not be discriminated against due to his status.
- Non-Penalization principle, Pursuant to article 31 of the convention, a refugee shall not be penalized for illegal entry into the state where he wishes to seek protection from persecution
- Non-refoulment principle this principle holds that a refugee or Refouler shall not be returned to a place where there is a substantial threat to his life, freedom, and liberty.[14]

[12] UNHCR, Convention and Protocol Relating to the Status of Refugees: https://www.unhcr.org/3b66c2aa10
[13] See article 1A (2) of the convention: https://www.unhcr.org/3b66c2aa10
[14] Article 33 of the convention,1967 protocol: https://www.unhcr.org/3b66c2aa10 .

Table 1 Remarkable Timelines in Refugee law



While there are previous efforts in the drive to protect refugees and stateless persons, such as the general Arrangements of May 12, 1926, and June 30, 1928, the Conventions of October 28, 1933, the arrangement of February 10, 1938, and the Protocol of September 14, 1939, the Graph above captures great dates in this struggle. As it is evident that refugee law is domesticated in almost all states, it is pertinent to add that international refugee law was designed to protect people with a higher risk of prosecution by a particular state; it is designed to proffer backup should state fails in their protection obligations. The applicability of refugee laws draws literary conflict. Authors offer their ideas sometimes based on the real-life relevance of these laws by courts; for instance, the supreme court of Canada held that "The international community was meant to be a forum of second resort for the persecuted, a 'surrogate,' approachable upon the failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but to provide refuge to those whose home state cannot or does not afford them protection from persecution."[15]

[15] James C, International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative, Refworld, April 1999, P.2.

1.1. European Refugee law

The European States has been at the forefront of the struggle to protect refugees and stateless persons. I will focus on the legal framework that guarantees refugee's rights within the European Union. The Universal Declaration of Human Rights 1946 Art 14 and the Geneva Convention Relating to Status of Refugees 1951 is seen as the bedrock of Refugee law within the European Union. Among every effort within the Eu to protect refugees and stateless people, I will focus on the Common European Asylum System; this is based on this research's scope, which focuses specifically on the general legal framework in the Eu system.

Before the emergence of the single European asylum system, the Eu established a legal basis for refugee protection within the EU states. The legal basis was established in Treaty on the Functioning of the European Union (TFEU). This was demonstrated in Art 67(2) of the Treaty. This section shows explicitly that the union shall have a common policy in general external border control, immigration, and asylum policy.[16] Article 78 was more explicit in delating powers on the methods of actualizing this protection. It states that a common asylum policy will be formed, which is consistent with international instruments, especially in conformity with the non-refoulement obligation, and this task shall be executed by the European parliament and the council through the ordinary legislative procedure.[17] A more explicit legal instrument was depicted in the charter of fundamental rights of the European Union. Article 18 of this charter states, "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of July 28, 1951, and the Protocol of January 31, 1967, relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')"[18] These legal provisions was the foundation for the creation of the common European asylum system.

The Common European Asylum System is rooted explicitly in the previous international effort to protect refugees and stateless persons. This inter alia include the 1951 convention relating to the status of refugees and article 14 of the Universal Declaration of human right. The common

[16] EU Treaty. (2008) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official journal of the European Union 2008/C 115/01 source: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2008:115:TOC
[17] *Ibid*
[18] European Union. (2012),Charter of Fundamental Rights of the European Union, Official Journal of the European Union, Source: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT

European Asylum system was created to ensure minimum standards in protecting refugees and stateless persons. However, states are obligated to develop procedures for obtaining and withdrawing international protection while keeping to the CEAS minimum standards. The CEAS was developed in phases; the first phase of its development, dating from 1999- 2004, saw the creation of three directives, these directives include the:

- Reception Condition Directive
- Qualification Directive
- Procedures Directive

Subsequently, the CEAS was revisited to ensure more harmonized standard in refugee handling within the EU states this consist of three directives and two regulation, they include:

- Revised Asylum Procedure Directive ((Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013, on standard procedures for granting and withdrawing international protection)
- Revised Reception Directive ((Directive 2013/33/EU of the European Parliament and of the Council of June 26, 2013, establishing standards for the reception of applicants for international protection)
- Revised Qualification Directive (Directive 2011/95/Eu Of The European Parliament And Of The Council of 13 December 2011on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and the content of the protection granted)
- Dublin Regulation (Regulation No 604/2013 Of The European Parliament And Of The Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person)
- EURODAC Regulation(Regulation (Eu) No 603/2013 Of The European Parliament And Of The Council of 26 June 2013on the establishment of 'Eurodac' for the comparison of fingerprints for the practical application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on

requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security, and justice)[19]

1.2. Australian Refugee law

Like many EU states, Australia was a significant player in the post-war movement that lead to the establishment of the legal foundation for refugee protection. Australia cannot be regarded as one of the countries with colossal refugee crisis when compared to Europe and other countries; However Australia has been seen to apply controversial refugee policies which conflict with many international instruments on refugee protection, these abnormally ranges from lack of respect for international refugee law, the politicization of refugee law and lack of political support.[20] While the Australian methodology has been criticized, it raises the need for a more consistent legal framework that will be tendon with the international instruments on refugee protection, offering a sustainable solution to the global refugee crisis. Australian migration crisis engineered a quicker response to accepting and protecting refugees. The first phase of refugees was from the displaced Vietnamese people who arrived on Australia's shores through boats. This necessitated the first legislative arrangement of 1978, which was an advisory committee whose task was to determine whose claim will be granted or refused.[21] Although Australia was part of the struggle that led to the emergence of a global legal framework for refugee protection, being party to the refugee convention, and the subsequent ratification of the additional protocol, it took the state over 20 years to create a formalized method of refugee determination procedures. Before the current framework on refugee management, the migration act of 1958 was mainly applicable, and this instrument conflicts with inter alia, non-refoulment, and non-penalization, and Non-discrimination obligations enshrined in the international instruments on refugee rights.[22] The 1958 migration act

[19] Janderová, J., & Gyamfi, S. (2018). Common European asylum system evolution and its perspectives. In 5th International Multidisciplinary Scientific Conference on Social Sciences and Arts SGEM (235-244)
[20] Gammeltoft-Hansen, T. (2014). International refugee law and refugee policy: The case of deterrence policies. Journal of Refugee Studies, 27 (4), 579.
[21] Crock, M. (2004). Judging refugees: The clash of power and institutions in the development of Australian refugee law. Sydney Law Review, 26 (1), 51.
[22] *Ibid*

led to the personalization process; the personalization process was used to depict the enormous powers vested on ministers to decide who can be granted asylum or not.

A remarkable effort in reducing the personalization process was the passage of the administrative decision review act of 1977. This inter alia saw the creation of freedom of information legislation and a permanent resident award to an individual who meets the requirement of the definition of a refugee; the subsequent effort was made, which shifted the trajectory from the personalization process to a rule of law process. Judicial effort assisted the 1985 reforms and created precedents to support the non-refoulment obligation, this was illustrated in the case law in the federal court of Australia where the action was filed under the administrative, judicial review act to stay the removal of Mr. Azemoudeh for illegal entry into Australia with intent to seek asylum.23 Subsequently, Kioa v West's judiciary.[24] Condemned the personalization process and made precedents that enthroned procedural fairness. Despite these efforts, the judicial struggle to ensure procedural fairness, rulings that reflect the ratified international instruments on refugee protection has met counter legislation by ministers to undermine these efforts, and this conflict continues unabated25 the migration act of 1992 saw a suitable base approach to refugee protection. Under the 1958 Act, Section 36 of this act made provision for a visa class for non-citizens. However, it was emphatic in section 2(a) that the minister must be satisfied that the state has protection obligation. In essence, this shifts the responsibility to grant asylum from the law to the political interest of ministers.[26] The migration act was further reviewed in 2001 to allow for the pacific solution, which allowed refugees to be transferred to Nauru island and Papua New Guinea. This was followed by the character test bill, introduced 2014-character test bill seeks to ensure that non-citizens are deported or their visa application rejected if there are signs that they pose a risk to national security. The Medevac bill was later passed to ensure refugees are evacuated to Australia from the island where they are detained.[27]

[23] Azemoudeh, M. v Minister for Immigration and Ethnic Affairs [1985] FCA 518; 8 ALD 281
[24] KIOA v. WEST (1985) 159 CLR 550, 1985
[25] Cooney, Sean. & Australia. Bureau of Immigration. (1995). Multicultural and Population Research. The transformation of migration law. Canberra: Australian Govt. Pub. Service.
[26] Kneebone, S. (2004). What we have done with the refugee convention: The Australian way. Law in Context: *Socio-Legal Journal*, .5
[27] *Ibid*

2. THE PRINCIPLE OF NON-REFOULEMENT

Non-refoulement as a principle of International law seeks to protect refugees and asylum seekers. Non-refoulement is a principle that guarantees the right of any individual (Refouler) from being returned or expelled to a state where there is an imminent threat to his life or freedom as a result of his affiliation, which includes his race, religion, political affiliation, and membership to a particular social group.[28]This definition aligns with the idea of Tamás Molnár, who defined Non-refoulement as "forbidding to send back," he historically deduced Non-refoulement to be a product of the 1892 Geneva Session of the institute de Droit international(institute of international law), which hold that no refugee should be delivered to another state that he is wanted for persecution unless the conditions outlined in the Geneva extradition agreement is met.[29]

The principle of non-refoulment is an essential principle in international law which is mainly seen as customary international law, in essence, binding to state parties that have not ratified the convention on non-refoulment. Jean Allain argued on the jus cogens nature on non-refoulement. Among other instruments, the Vienna convention saw the incorporation of peremptory norms, which states cannot deviate from through their national legislation. Allain posited that in practice, the non-refoulment position had become a customary practice among states, even states who are not signatory and have not ratified the 1951 convention.[30] The non-refoulment obligation is further deduced from article 33 of the refugee convention of 1951, which holds that states should not "expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."[31]

[28] Riyanto, S. (2009). The Refoulement Principle and Its Relevance in the International Law System. Indonesian J. Int'l L., 7, 695.
[29] Molnar, Tamas, (2016). The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell, *Corvinus Journal of International Affairs* (COJOURN) Vol. 1.
[30] Allain, J. (2001). The Jus Cogens Nature of Non-Refoulement. *International Journal of Refugee Law*, 13.
[31] Goodwin-Gill, G. S. (1986). Non-refoulement and the new asylum seekers. *Virginia Journal of International Law*. 6

The definition of non-refoulment has gone beyond refugees' expulsion in practice to include the rejection of asylum seekers at a state's frontier.[32] A pivotal instrument that aided the united nation' instrument against torture was the amicus curiae brief, seen in Filartiga v Peita-Iral.[33] The united states court of appeal held that state-sponsored torture was a violation of customary international law. This was pivotal in the formation of article 3 on the prohibition against torture. Article 3 of The United Nations Convention against Torture, Inhuman or Degrading Treatment and Punishment holds that "No State Party shall expel, return ('Refouler') or extradite a person to another State where there are substantial grounds that he would be in danger of being subjected to torture."[34]

2.1. Analysing Non-Refoulement Obligation and National Security in The European Union

The argument against the absolute nature of the non-refoulment policy could be traced to the founding document that gave rise to the obligation. The assertion that national security interest is a crucial consideration in determining refugee states and plausible deportation or eviction from a state's territory is seen under the 1951 refugee convention. Article 33(2) of the convention states that "The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds regarded as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a severe crime, constitutes a danger to the community of that country."[35] This assertion was further proven to be inapplicable in cases of torture, inhuman and degrading treatments, and the standing of the international convention on civil and political rights.

The definition of non-refoulment does not only entail returning a Refouler to a place where there is an imminent threat to his life on the ground of his religious, social, and other related ideologies;

[32] *Ibid.*
[33] Filartiga v. Pena-Irala,(1980) Court of Appeals, Second Circuit, Source: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/27721c1b47e7ca90c1256d18002a2565?openDocument
[34] United Nation Refugee Agency, (1984) article 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, source, https://www.unhcr.org/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html
[35] The UN Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

it includes instances where states cooperate, leading to rules that deter or make inaccessible to asylum seekers asylum procedures and reaching points to seek asylum.[36]

EU, through many legislations, has supported displaced migrants, inclusive of asylum seekers and refugees. It is trite to ask to what extent do Eu states give this support. Poon noted in her paper ongoing cooperation within the Eu comprising of visa regimes, pushbacks, carrier sanctions with intent to stop asylum seekers from arriving at the EU state borders.[37]

The Non-refoulement obligation within the EU is centered on adopting and ratifying the Universal Declaration of Human Rights, 1951 refugee convention, and ratification of the additional protocol of 1967. Remarkably, in the interpretation of the non-refoulment obligation, the ECtHR has played a crucial role by implementing Article 3 of the European Convention on the human right offering an absolute right to Non-refoulement in cases where there is objective anticipation of violation of the right against torture, inhuman and degrading treatment. This was demonstrated in Saadi V Italy.[38] Saadi v Italy case of 2008 came at a time when many Eu states argued national security to be rationale to deviate from the non-refoulment policy. This judgment inter alia addressed two pertinent issues. First, the practice of sending asylum seekers to third countries to seek asylum on the ground of diplomatic assurance made by third countries, the court ruled that diplomatic assurance can not remove an existing risk. It equally created a precedent that the non-refoulment obligation is absolute and unconditional when accessed on the ground of article 3 of ECHR.[39] In Soering V. The United Kingdom, the non- refoulement principle brought pursuant to article 3Echr on the prohibition against torture, inhuman and degrading treatment was a legal basis to stay the extradition request of the united states for Mr. Soering for a case of murder allegedly committed by the accused and his girlfriend. The applicant prayed the court to halt the extradition and claimed that he would be subjected to torture, inhuman, degrading treatment, and the death penalty. The judgment of the European court of human Rights heard the prayer. It ruled that "in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3 (art. 3)".[40]

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[36] Hathaway, et al (2014) Non-Refoulement in a World of Cooperative Deterrence, Michigan Law & Econ Research Paper No. 14-016, Available at SSRN: https://ssrn.com/abstract=2479511

[37] Poon, (2020), "Safeguarding the Principle of Non-Refoulement in Europe: Counteracting Containment Policies in the Common European Asylum System" Electronic Thesis and Dissertation Repository. 7111

[38] Case of Saadi V. Italy, (2008),The European Court of Human Rights, Source- https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-85276%22]}

[39] De Londras, F. (2008). Saadi V. Italy. *The American Journal of International Law*, 102(3), 616-622. doi:10.2307/20456649

[40] Case of Soering V. The United Kingdom (1989) Source: https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Soering%22],%22itemid%22:[%22001-57619%22]}

The interpretation of non-refoulment in light of Art 3 ECHR was further applied in Chahal v United Kingdom.[41] In the reviewed case, Mr. Chahal was arrested and detained pursuant to the prevention of terrorism act of 1984, premised on suspicion and conspiracy to assassinate the Indian prime minister. He was equally charged in 1986 for assault during a riot in London; he was discharged in the former for lack of evidence and acquitted in the latter as the court ruled that having him on handcuff in court was prejudicial to him. Mr. Chahal was served with a notice for an intention to be deported on August 14, 1990, as the state argued that his continual stay in the United Kingdom poses a significant risk to the state's national security.

On August 16, 1990, he was arrested pending deportation; his arrest was on the ground of the immigration Act 1971 paragraph 2(2). On his continued detention pending deportation, Mr. Chahal filled for asylum pursuant to article 3 ECHR that there is evident fear of torture, inhuman and degrading treatment. Against the precedents of his prosecution and that suffered by his family, his asylum claim was rejected. Mr. Chahal's attorney communicated his intention to appeal the decision but would wait for the advisory panel decision on national security concerns on Mr. Chahal as deportation cases with national security concerns has no right of appeal. The advisory panel investigation found Chahal guilty of sponsoring terrorism both in India and in the United Kingdom.[42]

Consequently, a judicial review application was filed on the government's decision to refuse asylum and order for the deportation of Mr. Chahal. The court found inadequate the reason for the asylum rejection and quashed the refusal order on September 2, 1991. The court judgment of September 2, 1991, was short-lived following a court judgment of July 16, 1992, which ruled for a chance to apply for a judicial review of the earlier ruling and upheld the asylum refusal and to proceed with deportation of Mr. Chahal. A Panel for the hearing for the judicial review was instituted. It took place within 18-21 January 1993, and the judicial review was rejected on February 12, 1993, and a bail application was equally refused.

The court, analyzed the submission of the state and the counsel to Mr. Chahal, was set to determine the provision of article 3 ECHR against national security interest. The counsel to Mr. Chahal has proved beyond a reasonable doubt a possible violation of the standings of article 3ECHR should the deportation verdict be carried out. The state's submission was on the national security concern

[41] Beata R. (1998) Chahal v. United Kingdom, *The American Journal of International Law,* 70-74
[42] *Ibid*

and prayed the court to weigh the personal interest of Mr. Chahal against the general security interest of the state. The court analyzed this evidence and ruled that if the deportation order is carried out, it will constitute a violation of article 3ECHR.

2.1.1. Absolute Nature of Article 3 European Convention of Human Right

Article 3 of the European convention on human rights prohibits torture, inhuman and degrading treatment, and punishment in its entirety. The rising conflict between observance of the freedom enshrined in this article and the obligation to protect the state's national security does not alter the non-derogable standard of article 3Echr. Although these cases point to the absolute nature of freedom from torture, inhuman and degrading treatment as captured in Article 3ECHR, in the Chahal case, the prosecuting counsel argued that the protection giving by article 3 is not absolute in cases where a state in defense of national security interest wishes to remove a criminal from its territory. That, it is only applicable in situations where there is uncertainty in the treatment the criminal may experience in the state where he will be deported to. "In accessing the problem, a key consideration must be made to accommodate the danger that the criminal poses to the host state."[43] This was addressed earlier in the Soering case. the interpretation of the applicability of the law; the applicant submitted that the prohibition by article 3Echr, does not only concern the contracting state from engaging in torture, inhuman and degrading treatment, it further obligates a contracting state from deporting an individual to a state where there is the likelihood of such abuse. In the commission report in the soaring case, the commission in paragraph 94 reaffirmed that deportation and extradition might give rise to issues under article 3ECHR.

2.1.2 What Constitutes Torture?

For the protection or the absolute nature of article 3ECHR to apply, or any treatment, considered as torture, inhuman and degrading treatment, certain essential element must be established. These elements were established in Ireand v united Kingdom where the court held that for a treatment to be considered torture it must “Attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”[44] The court further in Selmouni v. France lowerd the threshold of what constitute torture. Certain tratments which are

[43] Beata R. (1998), *Supra nota* 40
[44] Ireland v. United Kingdom(1978) Judgement of 18 January

mainly regarded as inhuman and degrading treatment will in time regarded as torture as this is essential in ensuring inclusive implementation of human right in any democratic society.[45]

The European Court of human rights, through several case laws, has continually ruled to establish the absolute nature of article 3 ECHR. The case of Saadi v Italy forms a more modern assertion of the absolute nature of article 3 amidst national security concerns the issue of national security interest ways higher when compared to individual rights. However, this does not necessitate derogation from the prohibition against torture, inhuman and degrading treatment when there are objective reasons to believe such will occurs should a Refouler be deported. This puzzle on the illegality of deporting an asylum seeker who has claims under article 3 ECHR is still without a known solution.

2.2. Non-Refoulement Obligation and National Security in Australia

Australia's role in refugee protection and its concomitant national legislation ensues a puzzle when analyzing the trend in the conflict between a national security interest and observance of this customary norm. Australia refugee protection history shows its interest in granting protection. Australia was a party to the 1951 convention on refugees' status, and an integral part of this convention is the prohibition against refoulment. Australia further in the creation of the legal instrument against torture, inhuman and degrading treatment, mainly referred to as the torture convention. This convention entered into force on June 26, 1987, and the Australian state ratified this convention on August 8, 1989.[46] It was equally a party to the international covenant on the civil and political right, which prohibited torture, inhuman and degrading treatment and gave the state party no derogation rights therein.[47] Despite ratification of these international documents, the Australian state's national legislation seems to a more considerable extent lean in consideration of national security interest above an individual right to protection. This is done by creating a hostile environment in terms of procedures for determining who has prima facie right to asylum and who does not use sanctuary cities and third-country options.[48]

[45] Selmouni v. France (1999), European Court of Human Rights.
[46] Taylor, S. (1996). Australia's safe third country' provisions their impact on Australia's fulfillment of its non-refoulement obligations. *University of Tasmania Law Review*, 196-2
[47] *Ibid*
[48] Taylor, S. (1996), *Supra nota*. 44

Early-stage of the Australian national protection framework was mainly centered on national security consideration above individual rights protection. The Australian migration act, to a more considerable extent, reinforced this national security methodology. A subsequent review of the migration act saw a milder approach in balancing the conflicting variables. Among Australians, the search for a balance between national security consideration and protection obligation is the introduction of the character test bill of 2014. The non-refoulment commitment argument can only be applicable when an asylum seeker qualifies to be called a refugee. From the migration act, which gave the ministers sole right to ascertain who qualifies to be called a refugee, to the character test bill, which seeks visa rejection and deportation if an individual poses a national security risk, the state approach was more in consideration of national security interest. An argument against this assertion could arise on the ground of court rulings which seemed to enthrone legal provision based on ratified international instruments over the personalization process.

The disparity between the international legal instrument and national legislation is equally captured in the united nation committee against Australia's torture report. The report focused on inter alia Australian counter-terrorism legislation and non-refoulement legislation. On the counter-terrorism legislation, the report shows that the Australian definition of terrorism does not align with international standards. This gives limitless power to the security agents to detain suspects to the extent of refusing access to lawyers and family members. More relative to the issue in context is the Australian policy on non-refoulment; this report equally found a disregard to the state's obligation under article 3 by state agents who intercept boats and return them to their roots without consideration of the provisions of article 3.

A more critical area for adjustment is the 2014 migration and maritime power legislation. This legislation states that "an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 [of the Migration Act 1958] arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulment obligations in respect of the non-citizen"[49] the provision of section 198 majorly leads to non-refoulment. Non-penalization is an integral element in the protection of refugee rights. In cases of illegal entry into a state's territory, states are obligated to receive the migrants and ascertain their claims' merits. Although states have the right to detain asylum seekers to capture data and review their claims, such detention must

[49] Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014: https://www.legislation.gov.au/Details/C2014A00135

conform with recognized detention guidelines. Further detention will be regarded as arbitrary in the absence of objective reasons.

A critic against the Australian national refoulment policy regarding conflict with national security interest is that, posed by the character test bill brought pursuant to the Australian Security Intelligence Organization's Act 1979 (ASIO Act). This act empowers the ministers to decide on granting asylum claims of deporting asylum seekers even on grounds not in conformity with international best practices if the likelihood of a threat against national security interest exists. To remedy this, the migration amendment bill of 2013 was introduced. This bill seeks to, among other things, ensure that the Australian security intelligence organization does not assess a refugee and that such a report on national security interest does not form a yardstick for the minister's decision. This bill passed through legislative proceedings and was passed on May 14, 2015.[50] The migration and maritime powers amendment bill equally aided the non-refoulment policy. In many instances, a fast-track decision is made on character test bills and security considerations. These decisions are mostly left without a chance for administrative appeals. This act, among other things, ensured that the administrative appeal Tribunal could review much fast track applicant's national security-related rulings to avoid refoulement.[51]

As earlier captured in my paper is the lining towards national security interest of the state as against individual right protection in cases which result to refoulment and the conflict between the judiciary and the personalization drive. This conflict and national security lining of ministers is captured in FTZK v Minister for Immigration and Border Protection [2014] HCA 26.[52] As to the facts of the case, the applicant's claim for protection was refused due to his alleged kidnapping and murder roles in china. The Administrative Appeals Tribunal (AAT) premised their judgment on the convention's exclusion clause in article 1F(b), which grants such rights on severe non-political crimes. The AAT information against him was a transcript of the interrogation of two other convicts who named the appellant as a co-offender, the appellant's attempt to escape from the detention center and escaped the Chinese territory after committing the crime and gave false information to the Australian authority. The court, in its ruling, made considerations to the non-

[50] Migration Amendment Bill 2013. Source: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r5161%22
[51] Parliament of Australia, Migration and Maritime Powers Amendment Bill (No. 1) 2015, Source: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r5532%22
[52] FTZK v Minister for Immigration and Border Protection [2014] HCA 26,Source: https://www.kaldorcentre.unsw.edu.au/publication/ftzk-v-minister-immigration-and-border-protection-2014-hca-26

refoulment policy, although not in its entirety; they held that article F should be interpreted with caution so as the application will not remove protection for people who the act should protect.[53]

Central to the non-refoulment policy is the prohibition from returning a Refouler to a region where there is the possibility that his life will be in danger. In essence, several arguments are seen to consider not only the individual right of the Refouler but the general rights and safety of the indigenous people. Creating this balance becomes a major conflict between questions on the observance of this right and the security interest of the state, which they are equally legally obligated to protect. The non-refoulment obligation has emerged to be a customary norm. Although this assertion is debated, in practice within the European Union states and many other countries where this conflict of interpretation exist, the apex courts have continually demonstrated in their rulings that the provision of nonrefoulement weighs above the security interest of a state, primarily when accessed through the torture, inhuman and degrading treatment parameters. The non-derogable nature of the non-refoulment policy, especially in relation to prohibition from torture, inhuman and degrading treatment, has made the policy a customary norm.

2.2.1 Absolute Nature of the Prohibition on Torture in Australia

The conflict between applying the non-refoulment obligation and maintaining national security can be seen in the continual conflict between the court and the ministers. The court in FTZK v Minister for Immigration and Border Protection.[54] ruled on the non-derogable nature of the non-refoulement principle. An integral element seen in this ruling is the prohibition against torture, inhuman and degrading treatment element of the non-refoulment obligation brought pursuant to article 3 of the convention against torture and other cruel, inhuman, and degrading treatment. The Australian states have ratified both the convention against torture (CAT) and the provisions of the international covenant on civil and political rights (ICCPR); at the core of these legal provisions are issues of its limit and clause on both reservations and derogation. On the ground of torture, inhuman and degrading treatment, and punishment, the CAT is seen as an absolute right and does not require derogation even in times of war or public emergency. This is equally applicable in immigration-related issues where derogation or limitation from these provisions are not allowed.

[53] *Ibid*
[54] FTZK v Minister for Immigration and Border Protection Supra nota 50

2.3. Comparison Between the EU and Australian Approach to Non-Refoulement and National Security

The European and Australian effort towards refugee protection is both similar and distinctive. The initial effort to protect refuge rights saw the full participation of the European and the Australian state. Not negating other earlier efforts, the universal declaration of human 1946 marked the most visible effort towards refugee protection. The European state was a founding member of this legal instrument and the Australian state also. The subsequent Geneva convention relating to the right of refugees of 1951and the additional protocol of 1967 has been ratified by both states.

Both the European Union and the Australian state have ratified the international instruments on refugee protection, both the refugee convention of 1951, the additional protocol of 1967, the torture convention, and the international covenant on civil and political rights, etc. The Eu further made refugee protection a bedrock of the union as evident in the Treaty of the functioning of the European Union article 67(2), and Article 78 confers this right to general protection. This was more explicitly covered in article 18 of the European Union charter of fundamental rights. The Australian state, equally by ratifying the conventions, voluntarily agree in good faith to be bound by the conventions more so making it a bedrock for the promulgation of its national legislation. Although Australia is expected to act in good faith when it adopts and ratify international instrument, unlike in the European Union where most of these international instruments apply expressly or used as a reference for adjudication purposes, international instruments can only be a legitimate reference when asserting individual human right when such international instrument has been legally incorporated to national legislation. This practice stems from the political division of power between the executive and legislative arm of government in Australia.[55]

The European Union operates a more human approach to nonrefoulment in any conflict with national security than the Australian state. In Eu states, there is a holistic approach to determining who the European union owes protection. This is done through the qualification directive revised in 2013 to be changed qualification directive. This directive does not consider the security details of an individual as a critical yardstick for rejection which inadvertently leads to refoulement, it looks at the merit in the asylum claim and in issues relating to torture, inhuman and degrading treatments, there is greater certainty of giving protection to that individual. In contrast, the Australian minister's fixation on national security results in a different approach and result. In

[55] Roberts, S. (1995) Teoh v Minister for Immigration: The High Court Decision and the Government's Reaction to it, Australian Journal of Human Rights 1.

many instances, procedural mechanisms are used as a yardstick to change the merits of asylum claimants' cases. In some other cases in which clear threats to national security are seen, more extended processing and unlimited detention are used as an alternative to non-refoulment, especially when there are greater chances to challenge such decisions in court.

A more distinct approach is seen in the applicability of a safe third-country approach. The safe third country approach has been criticized as a result of various human rights violation concerns. This includes a greater possibility for violation against torture, inhuman and degrading treatment, non-penalization, non-discrimination, and non-refoulement principle of international law. The third safe country approach is used by the Eu states and Australia. This approach involves sending asylum seekers to a third country where the state believes their asylum claims can be accepted. This process is based mainly on diplomatic assurance of the recipient country that the asylum seekers' claim will be assessed on the merits and refugee protection gives. The safe third country provision is equally a tool by states to evade protection obligation as states insist that the applicant could have obtained protection in the other country without crossing many different borders to their country. Within the Eu, for a country to qualify as a safe third country, it must meet five essential criteria. This criterion is captured in recast Asylum Procedure Directive Article 38(1). These criteria include that the asylum seeker must receive refugee status in accordance to the Geneva convention, the reasonableness attribute must be met, this is to ensure there is a compelling reason for the asylum seeker to be referred to a safe third country, the applicant should have a sought of connection to the third country, the safety component of the claim must be assessed in a case by case basis, and the applicant must be able to challenge the choice of a third safe country plan.[56] It is trite to add that under Eu law, the subsidiary protection can be an option when the merits of an applicant's claims have been assessed and a refugee status is declined. This contrasts with the Australian method that the merits of the applicant's case are evaluated in the third country.

A key area in comparison on the non-refoulement policy of both states in relation to threats to national security is the state's approach in claims involving torture, inhuman and degrading treatment. Article 3 of the convention against torture, inhuman and degrading treatment obligate states not to deport or extradite a person to a frontier where there is the likelihood of violation of this right. in the Australian state, the court maintained in FTZK v Minister for Immigration and Border Protection [2014] HCA 26 that non-refoulement obligation on the concerns of torture,

[56] Article 38(1) of the recast Asylum Procedures Directive (rAPD)

inhuman and degrading treatment should override national security concerns.[57] This judgment is comparable to the Case of Saadi V. Italy.[58] Where the court re-established the absolute nature of article 3 ECHR. Although the court in the compared states based their interpretation to the obligation of non-refoulement and torture convention, there is harmony in the applicability of this norm in all arms of government in the European union unlike in Australia where the ministers roles signals differently from the courts' opinions and use procedural methods to evade protection responsibility. Through the comparison, the European union approach signals better compliance to the ideals of non-refoulement than the methodology used by the Australian state.

2.4. Non-Refoulement And National Security

The idea of Non-refoulement is to ensure the protection of refugees from persecution, and this obligation raises questions on what is the priority of states in its protection obligation? And does the non-refoulement obligation impede national security interest? Many research has analyzed the security implication of refugee migration and its effect on national security (terrorism). Among these research is Choi et al., their study compared the data of 154 countries from 1970-2007. They found that countries that host refugees are more likely to experience terrorism and other security risks[59] this aligns with the work of Pedahzur et al., who posited that if immigrants come from terror-prone states, there is the likelihood of such ties being exploited by terrorist network leading to radicalization and greater chances of terrorism in the host state.[60] From their analysis, migrants with dissenting ideologies are more susceptible to the call of terrorist networks to invade and attack the security architecture of their host states. The likelihood of such threats leads to the idea of using procedural mechanisms to evade the nonrefoulment obligation. Other studies suggest that migration of refuges can impede national security in cases where such refugees dislike the host countries regime and when they exact social and economic pressure on the host country[61] States in this regard argue that deportation of a migrant with terrorism or other national security threat is preferable than other option which either waste state resources or cause harm to its internal security framework.

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[57] FTZK v Minister for Immigration and Border Protection, supra note 45
[58] Case of Saadi V. Italy *supra note* 35
[59] Choi S, Salehyan I. (2013) No Good Deed Goes Unpunished: Refugees, Humanitarian Aid, and Terrorism. Conflict Management and Peace Science. 53-75. doi:10.1177/0738894212456951
[60] Arie P. Ami P., (2016), Counter Cultures, Group Dynamics, and Religious Terrorism, *Sage Journals*, 64 (2) 297–314
[61] João E., (2018), Migration crisis in the EU: developing a framework for analysis of national security and defence strategies, Comparative Migration Studies, 5

From the preceding, it can be inferred that non-refoulement, when read from the grounds of the prohibition against torture, does not give room for reservation, and states cannot equally derogate from the obligation. Hence a refouler cannot be deported even if he poses a national security risk. This, in essence, have both economic effect, insecure mental health as a result of fears emanating from the possibility of an attack. The economic impact of the fears could lead to fright by establishments, which could equally lead to relocation to safer areas, thereby increasing unemployment and general insecurity in the state.

3. PROPORTIONALITY AND JUSTICE

"If we are to adopt or defend the adoption of extreme measures, the danger must be of an unusual or horrifying kind."[62]

It is trite to explore the complex dilemma of states in their attempt to fulfill the non-refoulement obligation. This has become pertinent as globalization shortens the gap between states and migration, and its accompanying security concerns become a global threat/discourse. The idea of non-refoulement emanated from the fear of protecting helpless migrants who are being prosecuted in their states. This obligation ensures absolute right when read in the context of freedom against torture, inhuman and degrading treatment, and punishment. As ideal as this obligation to protect is, there is imminent fear of security violations which poses a greater danger to the host state. This line of thought was appraised by Pedahzur et al., who posited that if immigrants come from terror-prone states, there is the likelihood of such ties being exploited by terrorist networks leading to radicalization and greater chances of terrorism in the host state.[63] The principle of proportionality is essential in the human rights protection. The proportionality principles hold that a punishment to a crime should be related or equivalent to the gravity of the crime committed. The proportionality principle holds other contextual meaning in law. For instance, in the law of war, rule 14 of the customary international humanitarian law explains the rationale for proportionality in attacks. This rule holds that launching an attack which may cause incidental loss of civilian life or many damages to life and civilian object should be avoided even if this will add to military advantage of the attacker. [64] Within the European Union, the proportionality principle is applied in many regulations and subsequently used by courts as bases for rulings. In Marine Harvest ASA v European Commission, the court ruled in paragraph 58, pursuant to the proportionality principle, that every measure adopted by the Eu should not exceed the acceptable limits required to achieve the particular objective pursued by the measure.[65]

3.1 Analysing Proportionality in Non-refoulment

[62] Walzer (1977) *Supra nota* 25,253
[63] Arie P, *Supra nota* 57.297.
[64] Rule 14. Proportionality in Attack, Customary international law, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14
[65] Marine Harvest ASA v European Commission (2017), Case number T-704/14, https://curia.europa.eu/juris/liste.jsf?language=en&num=T-704/14 .

Several literary and legal arguments are seen in support of balancing the obligation to protect the citizens of the refugee host state and the non-refoulement obligation.[66] Be it as it may, the conflict arising from these arguments bothers proportionality and explicit interpretation of laws. In Saadi v United Kingdom,[67] the state argued in line with the proportionality principle, proportionality in the context of national security considerations in cases that poses a security threat. A similar argument is put forward in the minister's defense against the strict observance of the non-refoulement obligation in Australia. Should proportionality be regarded as choosing a lesser evil? Or adoption of the utilitarian model? Although proportionality is yet to be considered as a general principle of international law despite its continual usage. The modality of its operation is still vague, amounting to academic positions in this regard. In analyzing the nature of the principle of proportionality, Thomas posited that "It remains to be defined whether proportionality operates as a self-standing principle in its own right, or whether it merely operates in the context of particular fields of international law and in different ways."[68] In protecting human rights, the international community gives greater consideration to this principle in human rights law, Contract law, and in the law of war, penal law, etc. For instance, in the area of human right law, manned by the European court of human right with the European convention on the human right as the legislative instrument, has continually applied the principle of proportionality in every determination of human rights, more so in ascertaining that legislations are proportional to the aims which it seeks to achieve.[69]

There is no conflict in the interpretation of the non-refoulement policy. The policy has established itself through case laws to stand against any proportionality argument or consideration. This is more pressing when the claim sought is standing on the legal basis of Article 3(prohibition against torture, inhuman and degrading treatment, and punishment). The absolute nature of this obligation in this context raises more questions on what constitutes justice and justice for who? Justice can be defined as a quality of being impartial, just, or fair. I choose to align with this than justice in the context of the administration of law, which is centered on the dispensation of fairness according to the rule of law. There is equally no argument that when the threat to life or torture, which is premised on article 3, CAT, is raised, the Refouler is meant to be protected despite any security threat he might pose to the host community. For the host state to fulfill its obligation to protect the

[66] Beata R. (1998) *Supra nota* 41
[67] *Ibid*
[68] Franck, T. (2008). On Proportionality of Countermeasures in International Law. *The American Journal of International Law*, 102(4), 715-767. doi:10.2307/20456680
[69] Emiliou, N. (1996). The principle of proportionality in European law: a comparative study. Springer.

state/its citizens from all form of security threat while fulfilling its non-refoulment obligation, it is pertinent to redefine proportionality through legislative effort.

3.2 Balancing Non-Refoulement Rights

It is to be answered in the affirmative if there is a question to determine if there is a need for a balance. The refugee host states have two obligations to fulfill. One is the non-refoulment obligation to ensure a Refouler is not deported or sent back to a frontier where is an inherent risk to his life or the possibility of torture, inhuman and degrading treatment, or punishment. The other is the obligation to protect its territorial integrity, including the protection of its citizens' life and properties. While both responsibilities are permitted by law, the former cannot be fulfilled to the continued detriment, hence the need for a balance.

The legal framework guarantying non-refoulment is, among other things, the prohibition against torture, inhuman and degrading treatment, and punishment. This is seen in article 3 of the convention against torture and other cruel inhuman and degrading treatment and punishment, article 3 of the European convention on human right, adoption of many international instruments on torture this include article 7 of the in International Covenant on Civil and Political Rights (ICCPR), etc. Balancing the non-refoulment obligation, especially on the ground of torture which guarantees its absolute nature, was equally proposed by bruin et al. in his analysis of the absolute nature of non-refoulement policy even amidst issues of terrorism advocated for a balance. His idea of a balance is choosing majority interest over personal interest. This connotes derogation from the obligation on national security issues. This paper believes in creating a balance, not based on derogating from this obligation on national security issues. Certain fundamental human rights can be derogated in times of public emergency to protect public health and safety. These rights include freedom of association, freedom of speech, right to privacy.

The first phase of the balance will be a derogation from the freedom of association. A refugee convicted of terrorism or other national security-related threat could pose a more significant threat through association, both while serving his sentence and after completing his sentence. He should be kept in partial seclusion to avoid exchanging communication with other inmates with similar security threats while serving his sentence. After doing the prison sentence, he should be restricted from joining an association, including religious association, where there are chances of influencing

or sharing information that will increase the threat. The right to privacy should equally be restricted this is to ensure that the other applicable restriction will not be violated and creating an avenue to better monitor compliance.

The idea of non-refoulement is not to ensure that criminals evade prosecution; hence it is pertinent first to ensure that while a Refouler should not be deported base on the non-refoulment obligation, that he is prosecuted for the crime he has committed in line with the host domestic laws and in accordance with international regulations. While deportation ad mist fear of torture, inhuman and degrading treatment is not permitted, to protect the host state from a security threat, there should be a derogation from freedom of association and right to privacy for the accused until it is certain that such threat no longer exists. To ensure this right to derogate is not abused, legal modality on what connotes a security risk and when and how the derogation should happen should be incorporated in the legal provisions.

CONCLUSION

The aftermath of the 9-11 attack on the world trade center signals a new era for states in the fight against terrorism. This fight extends to all areas that increase the threat to national security. The idea of non-refoulement was meant to protect refugees from persecution. However, in certain situations, these refugees are found to pose a national security risk, which leaves states with the dilemma of neglecting the application of the non-refoulement obligation on the grounds of national security.

The nexus between migration and terrorism has been widely researched. These researches show that migration increases the likelihood of terrorist attacks, especially when the migrants are from a particular region characterized by terrorism. This could equally be seen when a refugee from such terrorist-prone areas, who perhaps is wanted for a terrorism-related crime, migrates and starts to spread his beliefs which in most cases reinforces the zeal for terrorism. In such cases, such refugee when protected through the non-refoulement obligation appears as a threat to the host state.

The conflict between the national security arguments by the states is rendered inapplicable owing to international instruments which these states have ratified. Among these legal instruments is the torture convention, which obliges states to ensure that refugees or asylum seekers are not deported to frontiers where there are chances that they will face torture, inhuman and degrading treatment, and punishment. This convention possesses a greater dilemma as it gives room for no derogation. From the comparison of refugee laws in the European Union and Australia. It could be seen that the non-refoulement obligation continually conflicts with states' national security interests. States have argued for a balance between observance of the obligation and their obligation to protect their sovereignty. The non-derogable attribute of the non-refoulment obligation on the grounds of the prohibition against torture leads to systematic evasion of the obligation by both states, despite that the state's courts have explicitly ruled on the absolute nature of the obligation. While through the reception and other directives, the European Union has narrowed the gap, the Australian state still faces broader conflict from observing this obligation and protecting its citizens.

Through the reviewed case laws and literatures on the discourse, the State's idea of a balance connotes derogation from the non-refoulement policy in issues of national security. This paper argues against derogating from every legal provision that supports non-refoulment, especially the prohibition against torture, inhuman and degrading treatment, and punishment. However, the

author believes that non-refoulment is not an instrument that facilitates criminals to evade prosecution, hence after application of the non-refoulment obligation, which ensures that a Refouler is not deported to the frontier where there are chances of violation against his rights and freedoms, the refugee should be tried in accordance to the domestic laws of the host states and if found guilty, and that he equally posses a threat to the host state, there should be a restriction to some of his rights which are equally derogable by law. This right includes his freedom of association, freedom of speech, and his right to privacy. These restrictions will help ensure that the threat is controlled, thereby giving the host state the chance to fulfill its other obligation to protect its sovereignty.

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