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**INTERNATIONAL OBLIGATIONS OF STATES IN THE PROTECTION OF REFUGEES IN THE 21st CENTURY: The Case of Mass Influx of Refugees to Europe**

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1. Introduction

Refugees face many challenges on their path to a safe destination country. Beside the fact that they do not have a shelter in their home country, it often happens that no other state agrees to host them. States refuse to provide a shelter in different ways. Some simply deny access to their territory, either as a part of a general border closure, or by erecting physical barriers. Others send refugees away by denying them access to a verification system of their refugee status. Sometimes that system fails to identify them as refugees although it should have done so. There is also the practice of forcing back refugees under the pretext of ''voluntary'' repatriation, to name but a few examples.

Could those states do that lawfully? Are the acts of those states in accordance with their legally binding international obligations? Do they have any obligations regarding these practices and, if they do, what are they?

The situation becomes even graver when a country is facing a mass influx of refugees it cannot handle on its own, like it is happening in Europe in the 21st century. In such a difficult situation every country may, under certain conditions and in the face of an actual need (which will be discussed at a later stage), limit its duties. However, such circumstances are no reason for states to give up on their commitments altogether. On the contrary, even in positive law there is a clear reference to the principle of solidarity which, acknowledging that a country cannot handle the burden of mass influx on its own, advises on how to fulfill its duties from refugee law.

In this paper I will present the legally binding obligations states have in refugee law according to the existing international law instruments, with the focus on the *non-refoulement* principle and the right to seek asylum, as two instruments which play an important role in case of a mass influx of refugees. The principle of *non-refoulement* may be the most important obligation of states in refugee law and especially crucial, yet doubtful in practice, when it comes to a large inflow of refugees. The right to seek asylum is inevitably connected with thisprinciple. However, special emphasis will be put on the principle of solidarity concerning the mass influx of refugees in Europe and the special needs of states in this situation. This particular principle tackles the questions arising when states fail to fulfill their duties, which is why I find it extremely important to invoke a more frequent application of this principle in the international refugee law.

Although we have witnessed an immense inflow of refugees to Europe in the 21st century, the decisions which have almost entirely been political in their nature, my goal is to present a legal framework inside of which countries can, should or must act in order to obey their international legal obligations and human rights in general.

In this paper I will neither examine what refugees want nor whether they accept what the states offer them. Nor will I examine whether refugees in these specific and serious situations have the right to refuse what is offered to them. As it could have been seen lately, there have been situations where states provided refugees the right to seek asylum, but refugees did not want to seek asylum in that particular country. They asked only for the right of transit towards their country of destination, either to join their families, because they have heard a particular state is more prone to granting asylum , or due to other mixed and personal reasons.

In this paper I will only examine the obligations of countries which arise from international law and which they have accepted via international treaties, mainly the United Nations Convention relating to the Status of Refugees[[1]](#footnote-1) (hereinafter: Refugee Convention).

In the first part (chapter number 2) I will define the obligations states have, their sources and title holders. In the second part (chapter number 3) I will shortly review the scope and the meaning of those obligations which I will, for the purpose of this paper, name *primary* obligations. Finally, in the third part (chapter number 4) I will review the *subsidiary* obligations, named so for the purpose of this paper.

1. International obligations of states and their title holders
	1. Primary and subsidiary obligations of states

States have obligations, founded in customary international law and undertaken in multilateral treaties, to accord protection and a basic standard of treatment to refugees; these obligations are binding and must be performed in good faith.[[2]](#footnote-2)

When it comes to the Member States of the European Union (hereinafter: EU), it is important to stress that the obligations of the EU Member States towards refugees stem both from EU law and a number of international documents which have been signed by all the Member States. In general, it could be argued that European Union law is a subsystem of international law.[[3]](#footnote-3)

The *primary* obligations of states are those covering the direct treatment of refugees. They consist of two important rights which I will focus on in this paper: the right (or principle) of *non-refoulement* and the right to seek asylum. Those two rights interfere with each other and they are inevitably interconnected.

Those are not the only rights refugees have. The Refugee Convention sets the minimum standards of treatment of refugees, including the basic rights to which they are entitled. Those rights are applied on a refugee depending on the level of attachment of refugee with the state-party. They range from the right to life, freedom from torture, access to healthcare and family unity to civil, economic, labour and social rights, e.g. property rights, tax equity, right to work, right to education, etc.

Each of these rights could form a topic for itself, yet the topics of this paper will be only the *non-refoulement* principle and the right to seek and enjoy asylum.

The most important obligation, summarized in the term of *non-refoulement*, is to refrain from forcibly returning a refugee to a country where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion. This principle, enshrined in a number of binding instruments and incorporated in declarations and the United Nations General Assembly resolutions, has acquired the status of a norm of customary international law.[[4]](#footnote-4)

The first need of a refugee fleeing his or her country is that of asylum, that there is a right of asylum – i.e. the right to seek and enjoy asylum. The right of asylum falls into three basic categories: territorial, extraterritorial, and neutral. Territorial asylum is granted within the territorial bounds of the state offering asylum and is an exception to the practice of extradition.[[5]](#footnote-5) It is designed and employed primarily for the protection of persons accused of political offenses. Extraterritorial asylum refers to asylum granted in embassies, consulates, warships, and merchant vessels in foreign territory.[[6]](#footnote-6) Neutral asylum is employed by states exercising neutrality during a war to offer asylum within its territory to troops of belligerent states, provided that the troops submit to internment for the duration of the war.[[7]](#footnote-7)

The *subsidiary* obligations of states simply arise when *primary* obligations cannot be successfully fulfilled by a particular state and on its own. These obligations are called *subsidiary* because they come into force when *primary* obligations are not single-handedly achievable.

Although I use the term *subsidiary,* they are not less important. Even more so, as I will try to present in this paper, in today's world they are in fact gradually getting on an equal footing with the *primary* obligations. Moreover, due to the increasing pace of globalisation, *subsidiary* obligations are gaining more and more importance. That could be especially said for the establishment of a common asylum system in the European Union, but also more broadly, in a joint struggle for a better future of refugees.

Finally, what would be *subsidiary* obligations of states, for the purpose of this paper?

As stated in the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter: Declaration on Principles): ''States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.''[[8]](#footnote-8)

In short, it would be the principle of solidarity in international law representing a duty of states to co-operate in international law and, more specifically, in refugee law, as a branch of the international law.

As the United Nations Secretary General Ban Ki-moon addressing the conference in Geneva on refugees from Syria, on 30 March 2016 said:

"We are here to address the biggest refugee and displacement crisis of our time [… ] This demands an exponential increase in global solidarity."[[9]](#footnote-9)

Furthermore, the principle of solidarity can be additionally summarized in the words of the conference[[10]](#footnote-10) host Filippo Grandi, the United Nations High Commissioner for Refugees, who emphasized that the responsibility for caring for refugees should not be left to neighbouring countries alone:

"The magnitude of this particular crisis shows us unmistakably that it cannot be business as usual, leaving the greatest burden to be carried by the countries closest to the conflict."[[11]](#footnote-11)

In the part three of the paper I will give possible definitions of the principle of solidarity from the doctrinal point of view and present where in particular it can be seen in refugee law.

States' obligations to protect refugees are derived from general principles of international law binding on all States and through adherence to international universal and regional instruments.[[12]](#footnote-12) States’ obligations to protect refugees were undertaken in multilateral treaties and developed in the second half of the 20th century.

For the first *primary* obligation of this paper, and that is the principle of *non-refoulement*, the most important is the United Nations Convention relating to the Status of Refugees[[13]](#footnote-13), adopted in 1951. The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol[[14]](#footnote-14) (hereinafter: Protocol). The principle of *non-refoulement* was reaffirmed in the 1967 Declaration on Territorial Asylum[[15]](#footnote-15).

This principle has also become part of other international human rights treaties either explicitly (Convention against Torture[[16]](#footnote-16)) or implicitly through the relevant jurisprudence (Convention for the Protection of Human Rights and Fundamental Freedoms[[17]](#footnote-17) and International Covenant on Civil and Political Rights[[18]](#footnote-18)) and, according to some scholars, it is also part of customary international law, making it universally binding. In that sense, according to Andrassy, the *non-refoulement* principle is also part of the customary law.[[19]](#footnote-19) On the contrary, Hathaway states the fact that many states fail to oblige the *non-refoulement* principle and therefore it is not a ''universally binding customary international law''.[[20]](#footnote-20)

The UNHCR holds that the *non-refoulement* principle has progressively acquired the character of a peremptory rule of international law.[[21]](#footnote-21)

The second *primary* obligation of this paper - the right to seek asylum - is set out in Article 14 of the Universal Declaration on Human Rights[[22]](#footnote-22) and recalled in the 1967 Declaration on Territorial Asylum.

In Europe, the most important document for the protection of human rights, the Convention for the Protection of Human Rights and Fundamental Freedoms[[23]](#footnote-23), does not explicitly mention the right to seek asylum. The case-law of the European Court of Human Rights established a series of standards for the protection of asylum seekers, especially regarding extradition or expelling of persons who are facing torture or other forms of brutality and punishment, as well as limiting the freedom of movement of foreigners.[[24]](#footnote-24)

Regional documents, such as the above mentioned European treaties, again, will not be a part of this paper.

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In July 1951, The UN General Assembly convened a Conference of Plenipotentiaries in Geneva to ensure the widest possible debate of the substance of the draft text of the Convention relating to the Status of Refugees by including also non-member states of the UN. Twenty-six states were represented and two were observing. The Conference of Plenipotentiaries completed the Refugee Convention and it was open for signature on 28 July 1951. The Refugee Convention has a total of 145 state-parties, while the Protocol has a total of 146 state-parties. The total number of state-parties to both the Convention and Protocol is 142.[[25]](#footnote-25)

Amongst other recommendations, the Conference also adopted unanimously the following Recommendation:

"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 they act in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement."[[26]](#footnote-26)

Therefore, international co-operation in the resolution of refugee problems was foreseen as a priority by the drafters of the Convention.[[27]](#footnote-27) Moreover, it reflects the recognition by the international community that refugee problems are international in character and scope.[[28]](#footnote-28)

The Office of the United Nations High Commissioner for Refugees (hereinafter: UNHCR) has also been affected by this because, naturally, he is not able to exercise his humanitarian functions without the co-operation of States. The Resolution 319 (IV) of 3 December 1949, which contains the decision of the General Assembly to establish the Office of the United Nations High Commissioner for Refugees, in fact opens with the words: "Considering that the problem of refugees is international in scope [...]"[[29]](#footnote-29)

We can conclude that the drafters of the Refugee Convention did also have in mind the co-operation between the States and with the UNHCR. In other words, they envisaged not only States' co-operation with UNHCR but, more broadly, an international co-operation among States.

* 1. Refugee law and human rights law

Refugees generally enjoy all human rights as other people. But unlike other people, they cannot safely remain in their home countries. And because of their specifically vulnerable position, refugees cannot depend only and exclusively on the general system of human rights protection. They need special protection which human rights cannot obtain due to the fact that general human rights norms do not address many refugee-specific concerns.

In perhaps the earliest formulation, the Supreme Court of Canada embraced the view that the essential purpose of the Refugee Convention is to identify persons who no longer enjoy the most basic forms of protection which a state is obliged to provide.[[30]](#footnote-30) In such circumstances, refugee law provides surrogate or substitute protection of basic human rights.[[31]](#footnote-31) However, it cannot be considered as a replacement for human rights law. In fact, it comprises human rights law, which makes it a complement rather than a surrogate. Its specific purpose is to ensure that those whose basic rights are not protected (for a Refugee Convention reason) in their own country are, if able to reach an asylum state, entitled to invoke rights of substitute protection in any state-party to the Refugee Convention.[[32]](#footnote-32)

From all of the above, we can conclude that the refugee law acts as *lex specialis* of human rights.

* 1. Refugee law title holders

While on the one side there are states which commited to certain obligations, on the other side there are subjects of this relation, people who seek protection and refuge – refugees. This is a specific relationship that involves states as subjects of international law on one side and individuals who lost the protection of their home country, on the other. Normally states guarantee human rights to their citizens. When civilians become refugees, this safety disappears from their home country and they rely on the help of other states even though they are not their citizens. It is a unique situation where states provide protection to people who are not their citizens, but they allow them to their territory and under their jurisdiction (or as we are going to see later in paper, they do not always allow them to the territory) in order to protect them because they have lost the protection of their home state. A refugee is a specific ''product'' of a failure of one state to protect him or her and, at the same time, of a success of another state to offer him or her the needed protection.

Who are refugees according to the international law?

As defined in the Article 1A (2) of the Refugee Convention[[33]](#footnote-33), a refugee is a person who:

"As a result of events occurring before 1 January 1951 and 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.''

As it can be seen from the text above, the Refugee Convention was initially restricted to persons who became refugees due to the events occurring in Europe before 1 January 1951, because at the time the problem seemed temporary. The years following 1951 showed that refugee movements were not only temporary.

The 1967 Protocol removes the time limits that were part of the Refugee Convention. It also removes geographical limits which offered the possibility to state-parties to limit the Convention protection only to refugees from Europe by giving a statement about it during signing, ratification or accession to the Refugee Convention. In conclusion, the state-parties had a choice to additionally limit the applicability of the Refugee Convention.

The state-parties which had earlier chosen to impose a geographical limitation and definition on refugees were allowed to keep it even after the Protocol came into force (unless they chose to withdraw such limitations, which the Convention, of course, allows, requiring those state-parties to notify the Secretary-General of the United Nations). At the same time, the Protocol does not any longer allow for the same kind of opt-out to other and newly admitted state-parties to the Convention.[[34]](#footnote-34)

When acceding to the Refugee Convention, States must make a declaration as to whether they choose alternative (a) or (b) of the Article 1B(1) of the Refugee Convention.[[35]](#footnote-35)

Most States have acceded to both; the Refugee Convention and the Protocol. Nearly all state-parties to the Refugee Convention have accepted the wider alternative and acknowledged events “occurring in Europe and elsewhere”; and almost all States that originally introduced the geographical limitation as per alternative (a) have since withdrawn it.

A very important question arises in the context of international legal refugee protection: when and under which circumstances does one become a refugee?[[36]](#footnote-36) This question may seem even more important considering that the application of almost all rights guaranted by international legal documents is ultimately left to the national authorities of host countries and it, therefore, depends on their application of domestic law.[[37]](#footnote-37) However, in the scope of international law, individuals do not become refugees after a state recognized their refugee status, but by objectively meeting the criteria from the refugee definition outlined in the (already mentioned) international legal documents.[[38]](#footnote-38) This is the principle of effectiveness in international law.

For a person to be a refugee under the definition from the Refugee Convention[[39]](#footnote-39), as cited above , the following elements have to be cumulatively fulfilled:

1. well-founded fear of being persecuted,
2. persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,
3. he or she is outside the country of his nationality and
4. he or she 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.

If all four elements are present, a person should be considered a refugee. Yet, there is still a process of determination on the part of the host state. To provide necessary protection to refugees, a state has to determine who is and who is not a refugee. To the persons who truly are refugees refugee law is applicable while to others it is not.

Persons considered not to be deserving of international protection under the Refugee Convention[[40]](#footnote-40) are all those regarding whom there are serious grounds for suspecting them of :

(a) having committed a crime against peace, a war crime, or a crime against humanity, as

defined in the international instruments drawn up to make provision in respect of such crimes;

(b) having committed a serious non-political crime outside the country of refuge prior to his

admission to that country as a refugee;

(c) having been guilty of acts contrary to the purposes and principles of the United Nations.

At the time when the Convention was drafted, the memory of the trials of major war criminals was still very much alive, and there was an agreement between the states that war criminals should not be protected. There was also a desire on the part of the states to deny admission to their territories to criminals who would pose a danger to security and public order.[[41]](#footnote-41)

The determination of refugee status under the 1951 Convention and the 1967 Protocol is a procedure conducted by the state on whose territory the refugee applies for the recognition of refugee status.

Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case.[[42]](#footnote-42) Secondly, the definitions in the Refugee Convention and the Protocol have to be applied to the facts thus ascertained.[[43]](#footnote-43) Given that the international legal refugee protection enters into force when the refugee defining criteria[[44]](#footnote-44) set by the Convention are objectively met, the effect of the recognition of refugee status by the host state is in fact the difference in scope and nature of the rights granted to the refugee, that depend on the host state’s relations to refugee’s the home state. [[45]](#footnote-45)

* 1. Distinction between refugees and migrants and refugees and asylees

For the purpose of this paper, in order to define the international obligations of state-parties in the 21st century, it is of great importance to distinguish refugees from migrants. It is also important to distinguish refugee law from migration law. Refugee law is not the same as migration law. The former provides wider protection to its subjects – refugees, and greater responsibilities to other subjects – state-parties of the Refugee Convention. In the early stages of the mass influx of refugees to Europe there was a widespread misconception of these two notions, especially in the media reports that did not distinguish one from the other, confusing the refugees with the migrants and consequently misinforming the public, whether intentionally or not.

According to the UNHCR, r**efugees** are persons fleeing armed conflict or persecution.[[46]](#footnote-46) Furthermore, ''their situation is often so perilous and intolerable that they cross national borders to seek safety in nearby countries, and thus become internationally recognized as 'refugees' with access to assistance from States, UNHCR, and other organizations. They are so recognized precisely because it is too dangerous for them to return home, and they need sanctuary elsewhere. These are people for whom denial of asylum has potentially deadly consequences.''[[47]](#footnote-47)

On the contrary, ''**migrants** choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government.''[[48]](#footnote-48)

The UNHCR stresses the importance of this distinction for individual governments. ''Countries deal with migrants under their own immigration laws and processes. Countries deal with refugees through norms of refugee protection and asylum that are defined in both national legislation and international law. Countries have specific responsibilities towards anyone seeking asylum on their territories or at their borders.''[[49]](#footnote-49)

Moreover, ''blurring the two terms takes attention away from the specific legal protections refugees require.''[[50]](#footnote-50)

Finally, it is also useful to make another distinction and that is the one between refugees and asylees or persons who have been granted asylum. These terms are very often confused, maybe even more than the terms ''refugees'' and ''migrants''.

There are four levels of attachment of refugees with the state-party, which define rights and privileges refugees have in a state-party. In that sense, the Convention on the full-fledged status of refugees has established four different types of links between refugees and their host countries[[51]](#footnote-51):

1. a mere jurisdiction of the host state over the refugee, without his or her physical presence on the host state’s territory
2. physical (*de facto)* presence of the refugee on the territory of the host state
3. legal (*de iure)* presence of the refugee on the territory of the host state
4. permitted residence (e.g. asylum) on the territory of the host state.

Permitted residence gives the refugee the broadest possible protection, i.e. the widest scope of rights guaranteed by the Convention relating to the legal status of refugees.[[52]](#footnote-52) This can result from granting them asylum, but also from different forms of permitted residence in the host state (e.g. “temporary protection”).[[53]](#footnote-53)

From the above mentioned, we can conclude that a *refugee* is not the same as an *asylee*. From the four levels of attachment of refugee with the state party, asylum is the fourth and the highest level.

National asylum systems are there to decide which asylum seekers actually qualify for international protection. Those judged through proper procedures neither as refugees, nor as in need of any other form of international protection can be sent back to their home countries.[[54]](#footnote-54)

Although refugees’ rights apply depending on their level of attachment to the state-party, in no case may refugee rights be denied simply because of the failure of a state-party to process a claim.

The term ''asylum seeker'' is used in practice, and will also be used in this paper, for a person who claims to be a refugee and therefore seeks the highest level of protection of a particular state - asylum.

Regarding the fact that a person becomes a refugee in the moment when all the criteria from the Refugee Convention definition are met, implying an objective fulfilment of the facts, yet the concrete realisation of refugees’ rights depends on a national process of determination of each state-party, the problems occur in this pending phase between those two events.

Hathaway rightfully warns of the dangers in the pending phase: ''It is, of course, true that the rights set by the Refugee Convention are those only of genuine Convention refugee, not of every person who seeks recognition of refugee status. But because it is one's de facto circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status, genuine refugees may be fundamentally disadvantaged by the withholding of rights pending status assessment.''[[55]](#footnote-55)

They are right holders under international law, but are precluded from exercising their legal rights during the often protracted domestic processes by which their entitlement to protection is verified by officials.[[56]](#footnote-56)

The UNHCR observes that potential refugees must be treated as refugees. Even, and especially, in the pending phase in which the state-party has not yet determined the refugee status of a particular person.

''Asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of *non-refoulement* would not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.''[[57]](#footnote-57) This does not apply to manifestly unfounded claims[[58]](#footnote-58).

And this is where we come to the part two of the paper about the *primary* obligations of states in the form of the above mentioned *non-refoulement* principle and the right of each and every refugee to seek asylum.

1. The scope and meaning of the *primary* obligations of states

According to Hathaway the rights set by the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered.[[59]](#footnote-59)

In this paper I will use this division to cover all the aspects of the refugee status, from their escape from the country of origin to their shelter in the host country.

Although the mass influx of refugees is a specific situation, the *primary* obligations of the *non-refoulement* principle and the right to seek and enjoy asylum are inevitably part of that process and therefore they will be shortly explained, to the extent relevant for *secondary* obligations of state-parties.

The *non-refoulement*, as one of the *primary* obligations of states, is placed in the subchapter 3.2. ''to be accepted'', while the right to seek and enjoy asylum is placed in the subchapter 3.3. ''to be sheltered''.

* 1. To escape

The Convention rights cannot be claimed until all requirements of the Convention refugee definition are met, including the departure from one's home state.

The freedom of movement of nationals of a State, including their right to leave the territory of that State, has been guaranteed in several international instruments[[60]](#footnote-60), and can by now be considered as a recognized human right.[[61]](#footnote-61) Yet, there are states that put restrictions on their citizens’ departure and in some cases those restrictions have been supplemented by penalties for unauthorized departure or unauthorized stay outside the home country.

The UNHCR has stated that, where there is a reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties, his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the Refugee Convention.[[62]](#footnote-62)

* 1. To be accepted: the *non-refoulement* principle

Before embarking on the protection of ''to be accepted'', it is necessary to answer the question of where states exercise refugee law as the Refugee Convention imposes the duty of protecting persons only where they exercise jurisdiction. That is easily answered because it is well known that states exercise their jurisdiction presumptively on their territory. Extraterritorial jurisdiction over refugees (either on the high seas or in an occupied territory) will not be a part of the topic of this paper. The territory is the state's primary physical manifestation *vis-à-vis* other states.[[63]](#footnote-63) Territory thus serves in international law as the expression of national sovereignty, and as such has become instrumental in solving legal disputes.[[64]](#footnote-64)

As is known from before, the refugee rights depend on a required level of territorial attachment (being present within a state's territory, being lawfully present, lawfully staying, and having durable residence). The entire Refugee Convention protection ''is predicated on the ability of refugees to invoke rights of protection in state-parties''.[[65]](#footnote-65)

As a general matter, of course, states do not assume international legal duties in the world at large, but only see them as constraints on the exercise of their sovereign authority – thus, normally applicable within the territory over which they are entitled to exercise jurisdiction.[[66]](#footnote-66)

* + 1. The definition of the *non-refoulement* principle

The *non-refoulement* principle as enshrined in Article 33 of the Refugee Convention reads as follows:

1. ''No Contracting State shall expel or return (‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''

First time encountered in the 1933 Convention relating to the International Status of Refugees[[67]](#footnote-67) as an explicit obligation of states not to expel authorized refugees, and to avoid *refoulement*, defined to include ''non-admittance at the frontier''.[[68]](#footnote-68)

* + 1. The limitations of the *non-refoulement* principle

To define the reach of the *non-refoulement* principle it is equally important to define its limitations.

Article 33 (2) of the Refugee Convention states the following:

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

* + - 1. ''[...] national security [...]''

This is a concept that remains to be defined by each contracting State, in accordance with its margin of appreciation. There is no definition of national security in international law.

According to Zimmermann, the core meaning of ''national security'' relates to political independence, territorial integrity, and the functioning of government or other vital public institutions.[[69]](#footnote-69) For example, he states that national security could be affected if and when aliens plan to overthrow the government, if they engage in espionage, or in case of gathering and revealing of classified information of the country. Among acts customarily labelled as threats are acts of terrorist activities. On the other side, national security is not threatened when aliens are sick, unemployed, destitute or when international relations turn sour.[[70]](#footnote-70)

Moreover, dangers to goods such as property or economic interests or the international reputation of the receiving state cannot, however, *per se* be considered as dangers to national security.[[71]](#footnote-71)

* + - 1. ''[...] or who, having been convicted by a final judgment of a particularly serious

 crime [...]''

The respective judgment needs to be final in the sense that appeal rights should have been exhausted or should have expired.

The severeness of the crime will depend on the criminal law of a specific state, yet there is no doubt that the most severe crimes such as those against life and body, morality, etc. will qualify as such. [[72]](#footnote-72) Those who committed such crimes will be considered fugitives from justice by the host state and not refugees in the international legal sense, which means that host states have the obligation of extradition or, alternatively of bringing legal proceedings before their own courts, following the general principle *aut dedere, aut iudicare*.[[73]](#footnote-73)

Crimes such as war crimes and crimes against humanity can by their nature be considered as ''particularly serious'' and should be qualified as such in the light of Art. 1 f (a) of the Refugee Convention.[[74]](#footnote-74)

* + 1. Meaning and scope of the non-refoulement principle

There is an intense debate over the exact scope of the *non-refoulement* principle. In this part we face all the gaps of international legislation. According to Stenberg, G., the non-refoulement encompasses all measures of rejection at the frontier, expulsion and extradition[[75]](#footnote-75) – yet, nowhere in the Refugee Convention is that expressly stated because none of the *non-refoulement* provisions mention specific forms of action that are prohibited. As explicitly held by the Refugee Convention, refoulement is prohibited ''in any manner whatsoever''.

Many scholars have opted for the same interpretation. Lauterpacht and Bethlehem hold that ''it precludes any measure, regardless of form, which would have the effect of putting an individual at risk by removing them from a place of safety to a place of threat. It precludes the expulsion, return, or other transfer of an individual both to a territory where they may be at risk directly or to a territory from which they may be subsequently removed to a third territory where they would be at risk.''[[76]](#footnote-76)

Thomas Gammeltoft-Hansen in his book ''Access to Asylum'' advocates that term *non-refoulement* also comprises expulsion: ''while the direct reference to non-admittance at the border was taken out in subsequent drafts, it was emphasised that the French term ''refoulement'' was thought to cover situations both of expulsion or of return from the territory and non-admittance at the frontier.'' [[77]](#footnote-77)

During the drafting discussions, it was also pointed out that the word ‘refouler’, as known only in French and Belgian law, clearly also covers non-admission to the territory.[[78]](#footnote-78)

According to the Declaration on Territorial Asylum, granting the asylum is an act within state's sovereignty. However, no person ''shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.''[[79]](#footnote-79) Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.[[80]](#footnote-80) Yet, even such cases require caution as will be underlined in the part three of this paper.

This would mean that for a refugee who seeks asylum in a particular state, the admittance to the territory is guaranteed, except for, of course, in case of the above mentioned exceptions. However, as it has already been stated, a refugee is not the same as an asylum seeker. Does a refugee still have the right to enter the territory if he does not want to seek asylum in that particular country (i.e. he only seeks transit)? As will be seen, it is difficult to give a general answer. More about this question will be presented in the subchapter about the ''first country of arrival''[[81]](#footnote-81).

* + 1. ''Fencing up'' Europe

Whether it comes to turning back a refugee or a big group of refugees (due to mass influx), the consequences for each individual are extremely severe and potentially even life-threatening. This arises from the very definition of a ''refugee'' as stated above, which has given impetus to the entire branch of refugee law with the aim to protect people, whether they sought protecton individually or in bigger groups as it has recently been the case in Europe. However, what also needs to be taken into consideration is the capacities of each state to cope with such challenges. This is where the novelty in form of the principle of solidarity comes into play; it was introduced into a number of legal documents and now, owing to better relations between states of the 21st century international community, it can also be invoked in practice.

Refugees who are turned back at the borders risk going back to their home country where they fear persecution, or in another scenario, they wander around seeking another country that would be willing to accept and to shelter them. Would that not be a breach of the *non-refoulment* principle?

There are different kinds of turn-back policies: closure of borders, physical barriers (such as wires, walls, etc.), ejection by officials of those refugees who manage to cross borders, physical force back of refugees to their country of origin, the refusal to process claims to refugee status, removal because of practical weaknesses in the operation of domestic asylum systems. And recently we have seen almost all of these examples in Europe!

One of the most common ways to seek to avoid the arrival of refugees is by the adoption of relatively inconspicuous *non-entrée* policies. The classic mechanism of *non-entrée* is to impose a visa requirement on the nationals of genuine refugee-producing countries, enforced by sanctions against any carrier that agrees to transport a person without a visa.[[82]](#footnote-82) A particularly insidious mechanism of *non-entrée* is the designation by some states of part of their airports as a so-called ''international zone'', in which neither domestic not international law is said to apply.[[83]](#footnote-83)

Another mechanism of *non-entrée* is the deportation chain that can be set in motion by ''first country of arrival'' and ''safe-third country'' rules.[[84]](#footnote-84) Taken together, ''first country of arrival'' and ''safe-third country'' rules have traditionally posed a legal barrier to the entry into Europe of very large numbers of refugees.[[85]](#footnote-85)

''First country of arrival'', as predicted in the Dublin Convention and Dublin Regulation in the European Union, assigns responsibility to the first partner state in which a refugee arrives. Other participating states are authorized summarily to remove the refugee to that single designated state, without conducting any examination of the merits of the claim to protection.[[86]](#footnote-86) In this way, only one state is responsible for the asylum procedure and that is the bordering country of the European Union.[[87]](#footnote-87)

''Safe-third country'' means that a country in which refugee are present can send them to any ''safe'' state through which they may have passed. To qualify as a ''safe third country'' there must simply be a determination that the destination country is prepared to consider the applicant's refugee claim, and will not expose the claimant to persecution, (generalized) risk of torture or related ill-treatment, or *refoulement*.[[88]](#footnote-88)

There is also the category of a ''safe country of origin'' - a tool of *en bloc* exclusion of nationally defined groups. It has been codified in the European Union law.

On 14 September 2015, Austria followed Germany's suit and instituted controls of its own at the border with Hungary.[[89]](#footnote-89) Austrian authorities also deployed the Austrian Army at the border with Hungary. On 28 October 2015, Austria decided to build a fence along its border with Slovenia (that has a total length of 91 km).[[90]](#footnote-90)

In late December 2015, Slovenia put up a razor-wire fence on the border with western Croatian regions of Istria and Gorski kotar. The World Wide Fund for Nature (deer and other animals were killed by the fence) and the inhabitants of the regions from both sides of the border have protested against the decision to put up the razor-wire fence.[[91]](#footnote-91) On 9 March 2016, Croatia started implementing border restrictions on the border with Serbia, aiming to reinstate the Schengen rules.[[92]](#footnote-92)

The entry routes through the Balkans have experienced the greatest intensity of border restrictions in the 2015 EU migrant crisis, according to The New York Times.[[93]](#footnote-93)

Table 1: More examples of the recent bordure closures

|  |  |  |
| --- | --- | --- |
| **From** | **To** | **Situation** |
| Tukey | Greece | Greece built a razor-wire fence in 2012 along its short land border with Turkey.[[94]](#footnote-94) In September 2015, Turkish provincial authorities gave approximately 1,700 migrants three days to leave the border zone.[[95]](#footnote-95) |
| Turkey | Bulgaria | As a result of Greece's diversion of migrants to Bulgaria from Turkey, Bulgaria built its own fence to block migrants crossing from Turkey.[[96]](#footnote-96) |
| Greece | Macedonia | In August 2015, a police crackdown on migrants crossing from Greece failed in Macedonia, causing the police to instead turn their attention to diverting migrants north, into Serbia.[[97]](#footnote-97) However, in November 2015, Macedonia began erecting a fence along its southern border with Greece, with the intention of channeling the flow of migrants through an official checkpoint as opposed to limiting the inflow of migrants.[[98]](#footnote-98) Beginning in November 2015, Greek police permitted only Syrians, Iraqis, and Afghans to cross into Macedonia.[[99]](#footnote-99) In February, Macedonian soldiers began erecting a second fence meters away from the previous one.[[100]](#footnote-100) |
| Serbia | Hungary | Hungary built a 175-km (109-mi) razor-wire fence along its border with Serbia in 2015.[[101]](#footnote-101) |
| Croatia | Hungary | Hungary built a 40-km (25-mi) razor-wire fence along its border with Croatia in 2015.[[102]](#footnote-102) On 16 October 2015, Hungary announced that it would close off its border with Croatia to migrants.[[103]](#footnote-103) |
| Croatia | Slovenia | Slovenia blocked transit from Croatia in September 2015, pepper spraying migrants trying to cross.[[104]](#footnote-104) Although re-opening the border, by 18 October 2015, Slovenia restricted crossing to 2,500 migrants per day.[[105]](#footnote-105) |
| Hungary | Austria | Austria planned to put border controls into effect along its border with Hungary in September 2015, and officials said the controls could stay in effect under European Union rules for up to six months.[[106]](#footnote-106) |
| Russia | Norway | On 25 January, it was reported that Russia closed its northern border checkpoint with Norway for asylum seekers to return to Russia.[[107]](#footnote-107) |
| Russia | Finland | On 4 December 2015, Finland temporarily closed one of its land border crossings by lowering the border gate and blocking the road with a car. The closure was reported to only apply for asylum seekers and lasted only a couple of hours.[[108]](#footnote-108) On 27 December 2015, Finland closed its Russian border for people riding on bicycles, reportedly enforcing the rule only on Raja-Jooseppi and Salla checkpoints. Earlier, more and more asylum seekers had crossed the border on bikes.[[109]](#footnote-109) |
| Austria | Germany | Germany placed temporary travel restrictions from Austria by rail in 2015,but has imposed the least onerous restrictions for migrants entering by the Western Balkans route in 2015, in the context that Chancellor Angela Merkel had insisted that Germany will not limit the number of refugees it accepts.[[110]](#footnote-110) |

Twelve EU countries have national lists of the so-called safe countries of origin[[111]](#footnote-111). The European Commission is proposing a common EU list designating as 'safe' all EU candidate countries[[112]](#footnote-112), as well as the potential EU candidates Bosnia and Herzegovina and Kosovo. The list would allow for faster returns to those countries, even though asylum applications from nationals of those countries would continue to be assessed on an individual, case-by-case basis.[[113]](#footnote-113)

In Macedonia police officers have even been accused of beating up refugees, asylum seekers and migrants who tried to slip past the built border fence.[[114]](#footnote-114)

This was only a short summary of many of the latest examples of border closures and breaches of refugee law in the Europe.

* + 1. A refugee – until proven a migrant

The most urgent need of refugees is to secure entry into a territory in which they are sheltered from the risk of being persecuted.[[115]](#footnote-115) This fundamental concern must somehow be reconciled to the fact that all of the earth's territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens.[[116]](#footnote-116) This clash of priorities has led to proposals to lease land from states on which to shelter refugees, and even to attempts to establish internationally supervised sanctuaries for would-be refugees within the territory of their own states.[[117]](#footnote-117)

The question here is: does the *non-refoulment* principle apply if a refugee has not yet entered the territory, i.e. if he or she is at the border asking for a permission to enter? What can be derived from this concerning refugees ''standing on the border''? They are not yet on the territory, they are not yet recognised as refugees by their state of destination because the process of determination of their refugee status has not yet begun, their asylum-application (if any) is still pending or even worse; a refugee has not even been able to submit his or her application because he or she has not yet been admitted to the territory. They are refugees in the sense of the international law definition, but do they enjoy any refugee protection of the state which has not yet by granted them refugee status? Can they be *refoulés* (to drive back) or are they also protected under the *non-refoulement* principle?

The answer to this question is important because for a refugee first encountering a state's border, the protection against *refoulement* is the right on which invoking virtually all other rights depends.

As already stated, this particular state exercises its powers, including the refugee protection, within its territory. Every other act would be unlawful. Yet, these people seek protection.

The answer is quite simple and evident: the state can always let them in, at least until their refugee status and their potential asylum application are examined.

When it comes to mass influx of refugees that happened lately in Europe, according to the UNHCR, there is not a capacity to conduct individual interviews for everyone, nor is it necessary because it is generally evident why they have fled. As a result, such groups are often declared *prima facie* refugees.[[118]](#footnote-118)

According to Hathaway, that is exactly what state-parties should do:''States which, because of their geographical situation or otherwise, are faced with a large-scale influx persons who claim to be refugees are generally entitled to enter and to remain in the territory of a state-party until and unless they are found not to be Convention refugees.''[[119]](#footnote-119) This statement is a guiding principle of this paper in defining the scope and meaning of *non-refoulment*, when it comes to individuals, but also groups of refugees due to mass influx, of course, within logistic, organisational, financial and other limits of each state. This is connected with the presumption of the refugee status, tackled above in the definition of a ''refugee''.

 As Hathaway sums it up:

''(...) Since refugee rights are defined to inhere by virtue of refugee status alone, they must be respected by state-parties until and unless a negative determination of the refugee's claim to protection is rendered. This is because refugee status under the Convention arises from the nature of one's predicament rather than from a formal determination of a status. Refugee rights, however, remain inchoate until and unless the refugee comes under the de jure or de facto jurisdiction of a state-party to the Convention. This is because the Convention binds particular state-parties, each of which is required to meet obligations only within its own sphere of authority.''[[120]](#footnote-120)

According to R. Weinzierl, who similarly as Hathaway stated that states are required to admit any asylum seeker to whom the *non-refoulement* principle is applicable to its territory for at least the duration of the determination of their refugee and/or asylum status (if there was an asylum application).[[121]](#footnote-121) Zimmermann offers an even more obvious solution: ''From the moment the refugee has approached a border guard or post, he or she is under the (effective) control of the country of refuge.''[[122]](#footnote-122) The same is claimed by Goodwin-Gill: ''As a matter of fact, anyone presenting themselves at the frontier post, port or airport will already be within state territory and jurisdiction.''[[123]](#footnote-123) Moreover, Noll states: ''As the actual border checkpoint is presumably located inside the territory of the host state this is consequently where the asylum seeker meets the state.''[[124]](#footnote-124)

Since 1977, the UNHCR Executive Committee has consistently underlined that the principle of *non-refoulement* includes non-rejection at the frontier. States have the obligation to admit refugees to their territory: admission in that sense implies a prohibition of refusing them access without determining their refugee status[[125]](#footnote-125) and the obligation to process asylum requests, as well as assisting those who expressed their intention to file one.[[126]](#footnote-126)

As Zimmermann states, ''the purpose of the *non-refoulement* principle is to ensure that a refugee who managed to escape the country of persecution is not sent back there.''[[127]](#footnote-127) Article 33, para. 1 does not require that a refugee seeking protection at the border be granted asylum.[[128]](#footnote-128)

In the light of the recent developments in Europe it is of extreme importance to determine whether an individual is a refugee or a migrant. We should not withhold protection from those who genuinely need it due to a faulty judgment or, even worse, due to a lack of one. Everything else would imply breaking the *non-refoulement* principle and other legal obligations.

* + 1. A question of the illegal entrance, as a consequence of ''fencing up Europe''

After what has been said, it seems difficult to envisage scenarios of effectively complying with the *non-refoulement* obligations without admitting asylum seekers to a national asylum procedure, either refugees *prima facie* or individual asylum requests. Yet, that is not expressly written anywhere in the Refugee Convention. What has become common in such situations is that refugees take illegal routes, as it has recently been the case in Europe.

First we shall define the consequences of illegal entrance as set out in the Refugee Convention. Under certain circumstances there are no consequences for a refugee. What are those circumstances?

Article 31, paragraph 1 of the 1951 Convention prohibits punishing refugees[[129]](#footnote-129) who reside illegally in the host state, provided that they arrived directly from the territories where their lives and freedom had been endangered, that they report to the authorities upon their arrival (without delay) and present valid reasons for their illegal entry / residence. All three criteria must be cumulatively met.[[130]](#footnote-130). According to the Convention, refugees are obliged to report to the authorities of the host state without delay.[[131]](#footnote-131) They are not punished because many asylum seekers and refugees cannot enter another state in order to seek protection legally (e.g. because they cannot obtain personal document in their home country).[[132]](#footnote-132)

To some countries, refugees will always be legally admitted to the territory. At a meeting of the drafters of the Convention Relating to the Status of Refugees ''The Chairman, speaking as the representative of Canada, observed that the question raised by the initial reception countries did not apply to his country, which was separated by and ocean from the refugee zones. Thanks to that situation, all refugees immigrating to Canada were ipso facto legally admitted and enjoyed the recognized rights granted to foreigners admitted for residence.''[[133]](#footnote-133) On the other hand, '''several European countries were already faced with what has today become the dominant pattern of refugee flows, namely the unplanned and unauthorized arrival of refugees at a state's borders. ''[[134]](#footnote-134)

''As the definition of refugee made no distinction between those who had been admitted and the others, however, the question arose whether the initial reception countries would be required under the convention to grant the same protection to refugees who had entered the country legally and those who had done so without prior authorization.''[[135]](#footnote-135)

The compromise reached was that any unauthorized refugee, whether already inside or seeking entry into a state-party's territory, would benefit from the protection of the Refugee Convention.[[136]](#footnote-136)

The problem here arises from the fact that refugees who lawfully present themselves at the borders may face refusal, rejection, expulsion, or some other measure already mentioned before. They may never be admitted to the territory and could, therefore, not benefit from all the privileges of the Refugee Convention because refugees’ rights apply depending on the level of attachment of a refugee to a state-party. They may never be able to exercise their right to seek asylum in a particular state.

Both scholars and international bodies have argued that it would seem illogical that the refugee who succeeds in crossing the border illegally would enjoy greater protection than the refugee who lawfully presents him – or herself to the authorities at the border.[[137]](#footnote-137) Although it was said that a refugee, whether already inside or seeking entry into a state-party's territory, would benefit from the protection of the Refugee Convention - in practice, however, some or all refugee rights are at times withheld by states pending the affirmative validation of entitlement to Convention refugee status.[[138]](#footnote-138)

In its Report on the Granting of the Right of Asylum to European Refugees[[139]](#footnote-139), the Council of Europe Parliamentary Assembly states that it ''seems illogical a priori that a person who has succeeded in crossing the frontier illegally should enjoy greater protection than someone who presents himself legally.'' Furthermore, in Resolution 14[[140]](#footnote-140) the Council urges member governments to ensure that ''no one shall be subjected to refusal at the frontier, rejection, expulsion, or any other measure which would have the result of compelling him to return to or remain in a territory where he would be in danger or persecution.''

As Nehemiah Robinson concludes in his commentary:

''Art. 33 concerns refugees who have gained entry into the territory of a Contracting State, legally or illegally, but not to refugees who ask entrance into this territory... In other words, if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck.''[[141]](#footnote-141)

According to Grahl-Madsen this means that a contracting state that manages to fence off its entire territory ''so that no one can set foot on it without having been permitted to do so, the State may refuse admission to any comer without breaking its obligations under Article 33.'' [[142]](#footnote-142)

It is clear just from this brief sketch that there is far from a consensus on the applicability *ratione loci* of Article 33 of the Refugee Convention.[[143]](#footnote-143)

Additionally, by admitting the rights to the refugees who entered the country illegally (under the above mentioned circumstances) and at the same time discouraging the refugees from lawfully crossing the border by fencing them up, states encourage the smuggling of people illegally into the country as an attempt of realising their rights guaranteed by the Refugee Convention. Smuggling, besides being dangerous for the lives of refugees and punishable for the smugglers, does not benefit the states either. Soon enough states find themselves out of control in this kind of situation where they cannot exercise their jurisdiction because they do not know over whom to exercise it.

All the refugees who have arrived in the European Union illegally could as well have arrived legally. Money and operating capacities could have been spent on coordinated transfer activities instead of on fortifying the border controls in the EU Member States on the Western Balkans route, even between the EU Member States themselves, inside or outside the Schengen system.[[144]](#footnote-144) The ability of EU Member States to handle immigrants, refugees and asylum seekers, while preserving human rights standards, might have positive consequences for all the EU Member States, as it reduces irregular migration and increases internal security.[[145]](#footnote-145)

Additionally, in support of legal entrances to the territory of the European Union:

The European Uion is facing a lack of highly qualified worforce – a trend that is about to grow in the coming year.[[146]](#footnote-146) Without migrants, in the next ten years the EU worforce will drop by 17, 5 million people.[[147]](#footnote-147) What the European Commission is trying to improve in this area is allowing acces to EU to highly educated and talented individuals from third countries in order to regenerate the labor market and contribute to the EU becoming one of the world’s lead economies.[[148]](#footnote-148)

* + 1. Conclusion

From the above mentioned, we may conclude the following: the *non-refoulement* principle applies solely within the territory of an acting state and it does not explicitly grant the right to be admitted to a state's territory, but states should anyhow admit any asylum seeker to its territory for at least the duration of the asylum procedure. States are bound to respect the *non-refoulement* principle presumptively until it has been proven that a person who claims to be a refugee is or is not one.

If states are obliged to protect persons without another state's protection – meaning the refugees – then in a situation where those persons ask for a refuge through admittance to the territory, the states should answer positively in order to respect their voluntarily accepted legal obligations. This should be limited by the fact that this protection still may be denied if the national determination process points that they were not refugees in the first place. In such a scenario states presumptively determine that those persons truly are refugees under the Refugee Convention definition, which is how they should act because the opposite would constitute a breach of the Convention norms claiming that a person becomes a refugee in the moment when he or she satisfies the conditions of Article 1A (2) of the Refugee Convention, regardless of whether the state's determination process of the refugee status is over or has not even begun.

The doctrinal approach mostly tries to fill this gap in wording *in favorem* of refugees.

Without regard to this doctrinal approach, state-parties are in practice not so willing to take on additional obligations. In the particular context of refugee law, [moreover], governments were emphatic in their rejection of a duty to reach out refugees located beyond their borders, accepting only the more constrained obligation not to force refugees back to countries in which they might be persecuted.[[149]](#footnote-149)

There are many gaps in international legislation and we will try to find the opinions of scholars and search for the doctrinal view, but it is not an easy task to convince the state-parties to implement those views as standards, especially if they are asked for more than they have expressly committed to. The problem is that the *non-refoulment* principle is, as defined in the Refugee Convention, full of gaps which state-parties are not always willing to fill in line with the intention of the Refugee Convention.

* 1. To be sheltered: the right to seek asylum

The right of asylum is an immensely wide topic that cannot, therefore, be fully covered here. It will be covered only as much as it is relevant to understand the mass influx of refugees in Europe in this paper.

The right of asylum has been said to comprise certain specific manifestations of state conduct:

1. to admit a person to its territory;
2. to allow the person to sojourn there;
3. to refrain from expelling the person;
4. to refrain from extraditing the person; and
5. to refrain from prosecuting, punishing, or otherwise restricting
6. the person's liberty[[150]](#footnote-150)

According to Eurostat[[151]](#footnote-151), EU Member States received over 1.2 million first time asylum applications in 2015, a number more than double that of the previous year. Four states (Germany, Hungary, Sweden, and Austria) received around two-thirds of the EU's asylum applications in 2015, with Hungary, Sweden, and Austria being the top recipients of asylum applications per capita. The main countries of citizenship of asylum seekers, accounting for more than half of the total, were Syria, Afghanistan and Iraq.

According to the UNHCR, the number of forcibly displaced people worldwide reached 59.5 million at the end of 2014, the highest level since World War II[[152]](#footnote-152). Of these 59.5 million, 19.5 million were refugees and 1.8 million were asylum-seekers[[153]](#footnote-153).

Evidence has shown that EU Member States do not display a high degree of trust among each other when it comes to granting asylum, but also that asylum seekers already know that in some states it is easier to get asylum than in others, as well as that social rights given to asylees vary from one state to another.[[154]](#footnote-154)

Measures implemented to control the access to EU territory and prevent undesired migrations in practice limit the access to those who indeed need international protection.[[155]](#footnote-155) For this reason over 90% of asylum seekers are forced to resort to illegal routes to access EU territory.[[156]](#footnote-156)

State authorities (immigration bodies or border police) should be instructed on what to do in case asylum seeking occurs at the border, including airports, in line with the relevant international instruments.[[157]](#footnote-157) The role of border police officers should be limited to securing an undisturbed procedure of asylum seeking and to preventing *refoulement*.[[158]](#footnote-158)

If it appears that asylum seekers are indeed in fear of persecution[[159]](#footnote-159), dužni they should receive protection, i.e. they should be granted asylum or a subsidiary protection status[[160]](#footnote-160), regardless of where they come from.[[161]](#footnote-161)

One could conclude from the above that all refugees, if they truly are refugees, although it was stressed that they are not the same as asylum seekers, should benefit from asylum protection. Yet, as it was stated above as well, asylum reamins defined as 'the right to seek asylum', not the right to get asylum. States, therefore, get to decide whether to grant asylum or not. It seems that refugees do not benefit from a lot of protection of other states, after all.

As a matter of fact, if the states are obliged by the principle of *non-refoulement* (as defined above), yet they do not want to grant asylum to the asylum seeker who truly is a refugee (though they have to according to the international instruments), it is unclear which options that particular refugee has other than leaving that country and trying to find another country that would shelter him or her. This is why, in order to avoid any responsibility for withholding protection from those who truly are refugees, it is easier for states not to admit them to their territory in the first place and thereby refrain from any responsibility, especially in case of a mass inflow of refugees, under the excuse of national and EU security.

Here we also encounter the contrary situation and that is when the states are willing to shelter refugees, but the refugees arrive in such a great number that they start becoming too much of a burden for a state to process. In such circumstances the UNHCR also invokes the obligation to respect the right of *non-refoulement*, but underlines the obligation of third countries to help a state facing a massive influx of refugees by sharing the burden of accommodating them, in order to prevent endangering the overwhelmed host state’s national security.[[162]](#footnote-162) This is the case of mass influx and its inevitable connection with the principle of solidarity, which will be discussed in the part three of this paper, as follows.

1. The principle of solidarity – *subsidiary* obligations of states
	1. The principle of solidarity

The *subsidiary* obligations of state-parties will be summarised in the term of the principle of solidarity. This principle plays a huge role in international relations and in international cooperation among states. Although often neglected in practice, because it is characterised as a philosophical term which has nothing to do with the reality, lately its meaning and importance has become more and more recognized due to the situations it concerns.

''It is now broadly accepted that international solidarity is a guiding principle determining international resolution of refugee problems. This has been made explicit in virtually every United Nations resolution concerning the work of UNHCR adopted by the General Assembly.''[[163]](#footnote-163)

As the UNHCR states: ''International solidarity is a concept which plays an extremely important role in the protection of refugees, partly as it assists States to meet their non-refoulement and asylum obligations.''[[164]](#footnote-164)

We can find the principle of solidarity in the United Nations Charter provisions on maintenance of international peace and security[[165]](#footnote-165) as the guiding principle of international peace: ''To achieve international co-operation 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].''[[166]](#footnote-166)

Universal Declaration of Human Rights states in Article 1 that: ''All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.''[[167]](#footnote-167) The brotherhood concerns the duties each person has from the community and has towards the community at the same time. As clearly said in article 29; ''Everyone has duties to the com­munity [...].''

Poetically speaking ''No man is an island''[[168]](#footnote-168) and we have all been living in communities since the beginning of the mankind. We can consider a community as a person’s neighbourhood, a person’s country or even a person’s whole world. If we observe them through the lens of a state, the communities nowadays are more developed and they have highly functional organs and mechanisms of exercising their power. They have their jurisdiction and each of them has its level of sovereignty.

States are, however, not the only actors of the principle of solidarity. The Declaration of Human Rights shares that burden with each and every human being. In realising the right to development, civil society can be a vital actor in the com­mon interests of all. Solidarity manifests itself through the daily actions of a range of stakeholders, including states, civil societies, global social movements, corporate social initiatives and people of goodwill, especially in the aftermath of major dis­asters.[[169]](#footnote-169) When the UNHCR notes the importance of the development of emergency preparedness and response strategies in anticipation of situations that are likely to lead to a mass influx, it refers to potential host states and the UNHCR, but also to other relevant humanitarian organisations, with support of the international community.[[170]](#footnote-170) The outcome of Pope Francis’ recent visit to the Greek island of Lesbos confirms that the UNHCR’s directions are not merely an unattainable ideal. Namely, on 16 March 2016 the Pope rescued 12 Syrian refugees from the island and brought them to Vatican. The fact that the Pope is not a representative of any state as an international subject, but of the Holy See which is a separate international legal entity that should not be confused with the State of Vatican City, is an indicator that the principle of solidarity does not only apply to states, but instead *erga omnes* -to all entities of the international community.

Their arrival brings to about 20 the number of refugees living in the Vatican, which has fewer than 1,000 inhabitants. A similar intake across Europe would see 6 million people given asylum on the continent of 300 million.[[171]](#footnote-171) Last year, the pope appealed to every Catholic diocese in Europe to take in a refugee family, an appeal that fell on deaf ears across most parts of the continent.[[172]](#footnote-172)

But, since people are represented by their states which make the legislation, it is obvious that the real burden falls upon the states. States are the duty bearers under international human rights law. After all, human rights are designed to limit the exercise of state power and impose legal obligations on states.

The Declaration on Territorial Asylum (1967)[[173]](#footnote-173) provides:

"Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider in a spirit of international solidarity, appropriate measures to lighten the burden on that State."[[174]](#footnote-174)

The 1969 Organization of African Unity (hereinafter: OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa contains a similar provision: ''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 OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.''[[175]](#footnote-175)

Preamble of the Refugee Convention states: "Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."[[176]](#footnote-176)

The definition on the international level of such basic principles governing the treatment of refugees as *non-refoulement* or a right of asylum is, in fact, one important example of the effective functioning of international solidarity.[[177]](#footnote-177)

The principle of international solidarity is essential in responding to current global challenges, including refugee protection problems as we face them today. Simply, when we talk about solidarity we talk about a conception of human relations among persons, groups, peoples and states. It is an expression of a fundamental moral principle found in virtually all major religions and cultures: "treat others as you would like to be treated"[[178]](#footnote-178). This is the essential principle of human development and should be the basic principle inspiring relations between the developed and developing countries. Ideally, this solidarity should be preventive, to avoid or mitigate harm, especially during disasters.[[179]](#footnote-179)

40 years ago, Michel Virally laid the conceptual foundation for the subsequent evolution and development of solidarity: first as a notion, then as a political and finally as a legal principle of international law. The principle has played a dual role: responding to dangers or events (*negative solidarity*) and creating joint rights and obligations (*positive solidarity*).In various branches of international law it has reached different stages of development.[[180]](#footnote-180)

Nowadays it has been integrated into various norms of positive international law; international human rights, international humanitarian law, international environmental law, refugee law and even international trade law. In different branches of law it, indeed, has a different role to play. The elaboration of the principle of solidarity has given rise to three separate but interconnected rights: the right to receive assistance, the right to offer it, and the right of access to victims.[[181]](#footnote-181)

Virginia Dandan, the Independent Expert on human rights and international solidarity, appointed by the United Nations Human Rights Council, in her message on the International Human Solidar­ity Day 2011, said:

''Global challenges require multilateral global responses. Efforts undertaken in isolation no longer work in [view of] the enormity and expanse of the problems involved. These chal­lenges also require a change of mindset in the way decisions are made, and how actions are taken, to recover and redis­cover the time-honoured common values of humanity such as solidarity[…].''[[182]](#footnote-182)

The former Independent Expert on human rights and international solidarity, Rudi Mohamed Rizki, also said:

''International solidarity is not limited to inter­national assistance and cooperation, aid, charity or humanitarian assistance; it is a broader concept and principle that includes sustainability in international relations, especially international economic rela­tions, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens[...].''[[183]](#footnote-183)

It is important to stress the equitable sharing of burdens each state is faced with.

In the proposed draft Declaration on the right of peoples and individuals to international solidarity[[184]](#footnote-184) the following is stated:

''International solidarity shall be made evident in the collective actions of States that have a positive impact on the exercise and enjoyment of human rights by peoples and individuals within and outside of their respective territories, notably in the ratification of the United Nations international human rights treaties [and international labour standards] and the adoption of commitments and decisions agreed upon voluntarily between and among States at the regional and international levels.''[[185]](#footnote-185)

* 1. The challenges of mass influx

Mass influx of refugees has a place in this part of the paper because it is directly connected with the principle of solidarity.

Mass influx of refugees is a specific case which is not easy to deal with. Many challenges arise for state-parties in this situation, starting from the fact that it is almost impossible to conduct individual asylum interviews for everyone who crossed the border to the fact that this presents quite a burden for one state.

Mass influx has been characterized by the UNHCR Executive Committee as a situation marked by four elements:

1. a considerable number of people arriving over an international border;
2. a rapid rate of arrival;
3. inadequate absorption or response capacity in the host State;

or

1. the inability of the asylum procedures, if they exist, to deal with the assessment of such numbers.[[186]](#footnote-186)

The UNHCR in itsNote on the Principle of Non-Refoulement[[187]](#footnote-187) affirmed the essential need for the humanitarian legal principle of *non-refoulement* to be scrupulously observed in all situations of large-scale influx. From the above mentioned we can read the *primary* obligations of state-parties. Furthermore, the UNHCR recalled the conclusions on the question of temporary refuge adopted by the Executive Committee at its thirtieth session, in particular: ''in the case of large-scale influx, persons seeking asylum should always receive at least temporary refuge'' andthat ''States which, because of their geographical situation or otherwise, are faced with a large-scale influx, should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing.''[[188]](#footnote-188) From this second part we can clearly read the *subsidiary* obligations of the state-parties, i.e. the principle of solidarity. Although the UNHCR calls it ''the principle of equitable burden-sharing'', the meaning is the same. The term used by the UNHCR sounds even more ringing.

When it comes to the problem of determination of refugee status in case of mass influx, according to the UNHCR, during such a mass movement of refugees (usually as a result of conflicts or generalized violence as opposed to individual persecution), there is neither - and never will be - capacity to conduct individual [asylum] interviews for everyone who has crossed the border, nor is it usually necessary, since in such circumstances it is generally evident why these groups have fled. As a result, such groups are often declared *prima facie* refugees.[[189]](#footnote-189)

* 1. Mass influx and the provisional measures

A mass inflow of refugees is one of the circumstances in which international refugee law allows a host state to exceptionally limit certain refugee rights due to the need to, essentially, protect its own national security.[[190]](#footnote-190) Historically, Article 9 of the Refugee Convention was intended to accommodate the interests of Western European States who were, prior and during the Second World War, overwhelmed by an influx or people claiming to be refugees.[[191]](#footnote-191)

Provisional measures in Article 9 of the Refugee Convention were introduced with the intention to release the contracting States from their obligations laid down by other articles by restricting them or even nullifying them.

Thus the Refugee Convention states:

''Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.''[[192]](#footnote-192)

While provisional measures may be taken collectively against all refugees, or in relation to a national or other subset of the refugee population, this kind of wholesale suspension of rights will be justifiable as ''essential'' only in response to an extremely compelling threat to national security.[[193]](#footnote-193) Thus, for example, there can be no presumption that the existence of a ''mass influx'' of refugees necessarily grants states the authority provisionally to suspend rights.[[194]](#footnote-194)

Article 9 also interrelates with Article 31 and 32 of the Refugee Convention, however they differ in their purpose. Article 31 aims at enabling contracting State to process great numbers of refugees in an orderly manner (by either admitting them or tolerating their stay until they can proceed to another country).[[195]](#footnote-195) Notwithstanding their numbers, the refugees are not seen as a threat to their host country.[[196]](#footnote-196) Article 32 aims at expelling the refugee because his further presence is harmful to national security or public order.

While the measures under Article 9 are purely preventive or precautionary: in a situation qualifying as war or bordering on war, contracting States may check on refugees or persons claiming to be refugees in order to make sure that they pose no threat to national security.[[197]](#footnote-197) Article 9 thus complements the authorizations given by Art. 31 and 32.[[198]](#footnote-198)

Like Article 31 and 32, Article 9 leaves it to discretion of a State to apply measures.

Even though a mass influx brings an exempt from states’ primary obligations, meaning that states can limit certain refugee rights to protect their national security, the question that remains is which rights might be limited and whether the *non-refoulement* principle is one of them. The UNHCR claims that no exemption from the *non-refoulement* principle is allowed.

In 1981, while acknowledging that a 'mass influx may place unduly heavy burdens on certain countries' and emphasizing the importance of international cooperation ''within the framework of international solidarity and burden-sharing'', the UNHCR Executive Committee held:

''In situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis... In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.''[[199]](#footnote-199)

Hathaway allows for a degree of exception in the interpretation and underlines that it is important to conclude that the same derogation from the respect for *non-refoulement* is justified in case of mass influx ''only where it is the sole realistic option for a state that might otherwise be overwhelmed and unable to protect its most basic national interests''.[[200]](#footnote-200) There can be no presumption that the existence of a ''mass influx'' of refugees grants states the authority to provisionally suspend rights of refugees, including the right of *non-refoulement.*

In the subchapter of this paper devoted to the *non-refoulement* it was already discussed what should and what should not be considered a threat to national security[[201]](#footnote-201).

* 1. Mass influx and the principle of solidarity

In case of a mass inflow of refugees as defined above, the UNHCR points at the need for a timely support from other states in order to prevent a threat to national security of a single host state that could potentially limit some refugee rights.

However, the UNHCR stresses, in this regard, that ''access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community.''[[202]](#footnote-202) That means that the states should, not even in this situation neglect their *primary* obligations.

There is a close nexus between international protection, international solidarity and burden-sharing implementation in the refugee law.

The 1967 Declaration on Territorial Asylum combines the two obligations of states (the *primary* and the *subsidiary* obligations) most evidently.

The Declaration on Territorial Asylum firstly declares the *primary* obligations of states by recognising that ''the grant of asylum by a State [to persons entitled to invoke article 14 of the Universal Declaration of Human Rights] is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State''[[203]](#footnote-203), along with recalling the *non-refoulement* principle. Furthermore, the Declaration even complements it with *subsidiary* obligations of the states affirming that: ''Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.''[[204]](#footnote-204)

As Virginia Dandan, the Independent Expert on human rights and international solidarity further expresses: ''International cooperation rests on the premise that some members of the international community may not possess the resources necessary for the full realization of the rights set forth in international human rights treaties. States in a position to do so should provide international assistance, acting separately and jointly, to contribute to the fulfilment of human rights in other States in a manner consistent with the fundamental principles of international law and international human rights law.''[[205]](#footnote-205)

Applying this principle, as cited above, to the situation of mass influx makes more than a logical answer to the question what to do in this, at first sight, tough situation. International cooperation here should play a role in supplementing the efforts of States directly affected by too big of a burden.

When it comes to the European Union, Iris Goldner Lang states that ''Solidarity is one of the core values of the European Union and has been recognised as a guiding principle of the EU asylum policy since the coming into force of the Treaty of Amsterdam.''[[206]](#footnote-206) Solidarity among EU Member States is mentioned in the treaties in a number of instances and within different policy areas and it applies both to EU institutions and Member States. Goldner Lang outlines the articles of EU treaties tackling the principle of solidarity and she further on remarks: ''It is now incorporated into Article 80 Treaty on the Functioning of the European Union (hereinafter: TFEU)[[207]](#footnote-207), which provides that EU policies on border checks, asylum and immigration must be 'governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'. Article 80 TFEU is the most explicit formulation of the principle of solidarity. However, the 'principle of sincere cooperation' laid out in Article 4(3) TEU and invoked by the Court of Justice on a number of occasions also has important implications in the area of asylum, immigration and border control area, as it obliges EU Member States to 'assist each other in carrying out tasks which flow from the Treaties'. This means that the EU and its Member States are obliged to help and support each other in matters related to asylum, migration and border controls.''[[208]](#footnote-208) The fact that Article 80 TFEU explicitly refers to the ''financial implications'' of solidarity, but does not limit itself only to this manifestation of burden-sharing (as implied by the phrase ''including its financial implications''), suggests the importance of financial burden-sharing, but also calls for other forms of cooperation among Member States that could lead to burden-shifting to Member States under less pressure.[[209]](#footnote-209) However, it is questionable whether Article 80 TFEU has direct effect, as it can only become effective once certain legislative and policy measures have been taken.

* 1. Mass influx and the resettlement of the refugees

As Goldner Lang states ''A range of measures could be used to support the functioning of solidarity, such as: financial assistance, practical cooperation, relocation, resettlement, and joint processing.''[[210]](#footnote-210)

One of the most efficient ways of dealing with this issue is when third countries admit a share of refugees, or at least financially support the host state to accommodate refugees. [[211]](#footnote-211) Unfortunately, third countries often tend to disregard the principle of solidarity.[[212]](#footnote-212)

Resettlement is defined as the ''transfer of refugees from a state in which they have sought asylum to a third state that has previously agreed to admit them as refugees and grant them a form of legal status, with the possibility of acquiring future citizenship.''[[213]](#footnote-213)

Back in 1936 the League of Nations had a similar idea of resettlement in its Provisional Arrangement concerning the Status of Refugees coming from Germany. Unlike the European countries, most overseas countries of resettlement were ''inclined to offer greater facilities for the naturalization of refugees.''[[214]](#footnote-214) The League of Nations therefore decided that ''... [a] suitable distribution of refugees among the different countries might help to solve the problem.''[[215]](#footnote-215)

Between 1938, the year when the Convention concerning the Status of Refugees coming from Germany was adopted, and the adoption of the present Refugee Convention in 1951, a consistent emphasis of a succession of treaties and intergovernmental arrangements was to resettle overseas all refugees who could not be expected to integrate or to repatriate within a reasonable time.[[216]](#footnote-216)

This trend of resettlement has continued. Between 1947 and 1951, the International Refugee Organization (hereinafter: IRO) relocated more than 1 million Europeans to Americas, Israel, Southern Africa, and Oceania.[[217]](#footnote-217) The IRO has thus regularly negotiated bilateral agreements with resettlement states to ensure the protection of refugees, particularly in the period before they were naturalized.[[218]](#footnote-218)

In 1989 and 1990 the UNHCR, noting that ''countries of first asylum carry a major burden of refugees''[[219]](#footnote-219), in its Conclusions recalled that ''resettlement is not only a possible solution for some refugees, but is also an urgent protection measure in the individual case.''[[220]](#footnote-220) The UNHCR suggested ''that States together with the High Commissioner explore possibilities for the more effective and flexible use of this measure.''[[221]](#footnote-221)

Recently it was agreed with the UNHCR that the EU will annually admit around 20.000 refugees until 2020.[[222]](#footnote-222) This refers to those who have been confirmed as refugees by the UNHCR and who are in search of legal paths out of the states where they are not safe.[[223]](#footnote-223)

Although this may seem as a release of responsibility, it may also be classified as a kind of a burden-sharing method which reflects the principle of solidarity. In a situation where states are not capable of handling their legal obligations by themselves, they should seek assistance, while at the same time, other states should answer to this call. This is the core meaning of the principle of solidarity.

Unlike resettlement, which is a system of redistribution from third countries to the European Union, relocation is a system of redistribution among the Member States of the European Union.

Relocation and resettlement, two types of arrangements for refugees and asylum seekers listed as priorities in the European Commission Programme, are today among the most debated questions in the EU and a point of disagreement among some Member States.[[224]](#footnote-224) Relocation implies burden-sharing of refugees and asylum seekers among the EU Member States.[[225]](#footnote-225) The formula for redistribution set by the European Commission (so that every Member State receives asylum seekers from other EU Member States which host more than they can process) is estimated on the basis of the size of the population, the GDP, the number of asylum seekers and already resettled persons in the country and the Member State’s unemployment rate.[[226]](#footnote-226)

However, the problem with relocation in the EU is that under the framework of relocation only refugees 'who already sought asylum in the frontline Member States' would be relocated to other Member States who then take over the obligation of processing their asylum claims. This presumption must [again] be placed in a real-life context where most refugees, especially as witnessed in the case of Croatia, do not want to seek asylum in frontline Member States.[[227]](#footnote-227) Yet, there are countries that will accept refugees even though they do not seek asylum in frontline Member States. Germany accepted approximately one million refugees in 2015 in this way.[[228]](#footnote-228)

As Bačić Selanec concludes, ''the only real-life option is to let them through, disregarding the Dublin legal framework. The alternative is to violate the Refugee Convention and the Member States' international and humanitarian obligations.''[[229]](#footnote-229)

Finally, we should also not forget the founding principles of the EU - a European community founded on the values of ''respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities''.[[230]](#footnote-230)

Lately, good news regarding resettlement came from the United Kingdom. According to BBC, the United Kingdom is to take in 3,000 more vulnerable child refugees from the war torn-Syria region by 2020.[[231]](#footnote-231) The government called the move the "largest resettlement programme for children in the world", which is complementary to the United Kingdoms prime minister's pledge to take 20,000 refugees by 2020.[[232]](#footnote-232) However, this plan has been dismissed by British Members of Parliament and charities as “not good enough” after it emerged it will do nothing to help the hundreds of thousands stuck in camps across Europe.[[233]](#footnote-233) Refugees who have already risked their lives to reach Europe are excluded from the plan, which applies only to those currently living in the Middle East and North Africa.[[234]](#footnote-234)

* 1. (Non)solidarity in ''first country of arrival'' and ''safe third country'' rules

The situation in Europe is tough. Distrust rules among the states as they do not agree on mutual solutions. In certain states xenophobia and nationalism are on the rise and criminal acts of migrants and refugees, although isolated and very rare, yet intensely covered by media, do not help.

The Union still lacks a coherent and systematic approach to crisis management in a timely manner.[[235]](#footnote-235) Instead, political particularities of individual Member States now seem to be prevailing, blocking an approach of solidarity that ought to be taken by an ever-closer and integrated Union.[[236]](#footnote-236)

As Goldner Lang states ''Solidarity is one of the core values of the European Union and has been recognised as a guiding principle of the EU asylum, migration and border control policies. However, studies have shown that in these areas of EU law there is little agreement as to the exact meaning and scope of the term ‘solidarity' (...)''.[[237]](#footnote-237)

It was stated that ''first country of arrival'', as predicted by the Dublin Convention and Dublin Regulation in the European Union, assigns responsibility to the first partner state in which a refugee arrived, while a ''safe-third country'' signifies any safe state through which a refugee has passed, to which he or she could be sent back by the country in which he or she is now present. If asylum seekers had passed through or had resided in a country in which they could and should have asked for protection (the so-called third country), it should be estimated on a case-by-case basis whether this third country was safe for them.[[238]](#footnote-238) What should thereby be taken into account are the specific circumstances of asylum seekers, such as close relatives or other points of reference in the potential host country, important humanitarian reasons (e.g. health) and having passed through third countries on their way to final destination (the host country) without having resided there.[[239]](#footnote-239)

Does that mean that an asylum seeker can seek asylum only and exclusively in the first country of arrival? According to the Dublin Regulation, in the EU, only frontline Member States are responsible for providing international protection (and processing asylum application). It would go against the principle of solidarity if only some frontline Member States kept taking on the same burden. Instead of sharing the responsibility, the system has resulted in shifting the burden onto the Member States on the EU's external borders.[[240]](#footnote-240)

At a time of crisis, the starting point should be a shared responsibility of all Member States based on solidarity, not the shift of responsibility only onto frontline Member States. By not providing Member States with a functioning legal framework to work with, the EU is forcing its Member States to act individually, allowing their particular political interest to prevail.[[241]](#footnote-241) One part of the Member States pursued those interests to fulfill the true Refugee Convention purposes, thus taking on almost the entire burden for Europe.[[242]](#footnote-242) Some scholars point that the problem lies in the Dublin Regulation, which not only was not envisaged to function at the times of crisis, but also brings into question the conformity of the core set of EU actions with the Refugee Convention, and they suggest the enforcement of the so-called Temporary Protection Directive. In the words of the Commission, this Direcitve should be activated in cases of a mass influx of displaced persons in order to 1) deal with the influx in a uniform, balanced and effective way, based on solidarity; 2) ensure that the default asylum system does not collapse, and 3) preserve intact the operation of the Refugee Convention.[[243]](#footnote-243)

However, not only Europe is facing a mass influx of refugees. For decades Jordan welcomed people escaping wars on its borders - Palestinians, Iraqis, and now so many Syrians make up nearly 20% of the population.[[244]](#footnote-244) Jordan has almost 1.5 million Syrian refugees. That's far more that Europe took in 2015. On an absolute basis, according to the UNHCR's data from December 2015, Turkey is the world's biggest hosting country with 1.84 million refugees on its territory as of 30 June, while Lebanon hosts more refugees compared to its population size than any other country, with 209 refugees per 1000 inhabitants.[[245]](#footnote-245) And Ethiopia pays most in relation to the size of its economy with 469 refugees for every dollar of GDP (per capita, at PPP).[[246]](#footnote-246) Overall, the lion's share of the global responsibility for hosting refugees continues to be carried by countries immediately bordering zones of conflict, many of them in the developing world.[[247]](#footnote-247)

Armed conflict in the Syrian Arab Republic and Ukraine predominantly accounted for the new displacement, as half of the displaced persons originate from one of these two countries. According to the UNHCR, the number of Syrians arriving in Europe seeking international protection continues to increase. However, it remains low compared to Syria`s neighboring countries, with slightly more than 10% of those who have fled the conflict seeking safety in Europe.[[248]](#footnote-248)

It is important to note the varying impact of refugee arrivals on individual European states. Since the Syrian conflict began, only five countries[[249]](#footnote-249) in Europe received more than 5,000 asylum applications from Syrians; in contrast, 17 countries[[250]](#footnote-250) received fewer than 200 applications in the same period.[[251]](#footnote-251)

Finally, Europe should not forget the last mass migration, during which Europeans themselves where refugees and migrants. It was one of the greatest migrations in human history.[[252]](#footnote-252) From 1846 to 1940, some 55 million Europeans packed their bags and sought a new life abroad, mostly in the United States and South America.[[253]](#footnote-253)

More of the above mentioned statistics can be seen further in this chapter, in photos that follow.



Photo 1: The number of Syrians in neighbouring countries and in Europe.[[254]](#footnote-254)



Photo 2: European Union versus Lebanon – population number and refugees number.[[255]](#footnote-255)



Photo 3: ''Who is hosting the world's refugees? Mid 2015.''[[256]](#footnote-256)



Photo 3: Major refugee-hosting countries.[[257]](#footnote-257)

1. Conclusion; not idealism, but pragmatism

There are many gaps in international legislation regarding protection of refugees, especially because the main treaty of the refugee law, the Refugee Convention, is 65 years old. Many provisions are fractional and concrete obligations cannot be identified. The situation of mass influx was not legislated in more detail. The wording of the Convention, as the example of the principle of the *non-refoulement*, is inadequate, imprecise and not meticulous enough. The above mentioned international treaties only generally prohibit *refoulement*, while the interpretation of every single case is up to the states, courts and international organisations.

 Driven by political and economic reasons, States tend to interpret the 1951 Convention provisions, especially those defining the notion of *refugee*, differently[[258]](#footnote-258). However, the Refugee Convention should be interpreted in accordance with the Vienna Convention on the Law of Treaties:

''A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.''[[259]](#footnote-259)

The UNHCR stresses the importance of the interpretation of international instruments for the protection of refugees and application by States ''in a manner consistent with their spirit and purpose.''[[260]](#footnote-260) In other words, according to the preamble to the Convention, they are obliged to ensure that refugees enjoy the highest possible degree of basic rights and freedoms of the UN Charter and the Universal Declaration of Human Rights.[[261]](#footnote-261) After all, the purpose and objective of the 1951 Convention is to secure the protection of persons who face a well-founded fear of being persecuted, in absence of the protection of their country of origin.[[262]](#footnote-262) If the *in favorem* of the title holders of refugee rights –the refugees -was always a guiding principle in the interpretation and the implementation of the Refugee Convention, the gaps in its scope and meaning would not be relevant.

Once the Refugee Convention is interpreted properly, it is of no less importance to educate border police officers to ensure a proper appliance of the *non-refoulement* principle and the access to national asylum procedure in practice. Difficulties in the application of international instruments should not result in withholding rights from their subjects.

As stated in the UNHCR's Note on International Solidarity and Refugee Protection:

''The real problems faced by asylum countries cannot be allowed to generate a situation, either nationally or globally, where refugees fleeing persecution, or threats to life, liberty or security are unable to find a safe haven.''[[263]](#footnote-263)

Criticism of the point of view of this paper could be that it is grounded on idealism and not the law. Maybe it can seem so at first, but it is not idealism, it is pragmatism and this is exactly what the pillars of the modern international law themselves are. Following World War I, the League of Nations was founded in order to protect peace. After World War II, as after the World War I, there was a strong desire to never again endure the horrors of war, which is what stirred founding the United Nations- a successor of the League of Nations and a second attempt to achieve the same goal. Nearly two hundred nations are now members of the United Nations and have voluntarily bound themselves to its Charter, all with one common goal – to secure peace and human rights.

''When the key drafters, representing States, wrote the UN Charter and drew up the protective fortress of treaties and laws making up our international system, they did not do so because they were idealists only. They did it for security, and because they were pragmatists.  They had experienced global warfare, dispossession and the oppression of imperialism. They had lived “balance-of-power” politics, and its consequences – thrown violently into imbalance as it was by the feral nationalisms and ideologies of the extreme left and right. They knew, from bitter experience, human rights, the respect for them, the defence of them, would not menace national security – but build more durable nations, and contribute (in their words) to “a final peace”. And so, after the cataclysm of global war and the development of nuclear weapons, they created the UN, and wrote international laws, to ward off those threats. ''[[264]](#footnote-264)

Although when speaking about international law, human rights and obligations of states we usually have in mind negative obligations - to abstain from human rights violations, positive obligations are equally important in international law, which consist of states’ obligation to engage in activities that secure an effective enjoyment of fundamental rights. Positive obligations corresponds more to the refugee law. When states fail to follow negative obligations, it is already too late. In the refugee crisis of today it is still not too late.

Even though many political decisions have been made and the very source of the problem is in itself often political, that does not justify withholding rights in the process. The available international instruments offer responses to all the questions arising from the current conditions; they just need to be implemented.

AsAntonio Guternes, High Commissioner for Refugees 2005-2015, in the UNHCR's video 'Global Refugee Trends 2013 - June 2014' [[265]](#footnote-265) says: ''The solution is political. There is only one way to stop displacement and that is to stop the conflict. To find peace. And that capacity is what is lacking in today's world. But in the between, people suffer.''

The UNHCR stresses that ''Politics has a way of intervening in such debates. Conflating refugees and migrants can have serious consequences for the lives and safety of refugees. We need to treat all human beings with respect and dignity. We need to ensure that the human rights of migrants are respected. At the same time, we also need to provide an appropriate legal response for refugees, because of their particular predicament.''[[266]](#footnote-266) Politics should neither stand in the way of identifying refugees and separating them from migrants, nor of treating both groups in line with the principlesof human rights and refugee law to those belonging to this vulnerable category.

As already underlined, some scholars point at the gaps in international legislation and appeal for further standard-setting in this area. Everyone, however, agrees that the problem is both multidimensional and global. What is a novelty of the 21st century is a mass influx of refugees in Europe, yet it may neither be as massive as presented in the statistical data, nor can one categorically claim that states have never faced similar situations before. The advantage of today's situation is that states are more connected than ever before. When I say that this is the advantage the states could make the most of, I am pointing exactly at the principle of solidarity as their *subsidiary* obligation. We live in the times when the whole world is interconnected and the gains of co-operation have never been more evident and more easily attainable – but only if that is what international players wish to attain. International law is a relatively young branch of law and it is still in the process of development. Refugee law, as a part of the international law, has all the features of international law– among other things, it depends on the good will of its main actors – the states.

So far, all progress in the international law has been reached when international actors chose to; refugee law will in that sense be no exception.

The principle of solidarity, which is only yet emerging, is not only a right, but also a duty imposed on the states. It has been prescribed in a number of positive international legal documents and, at the same time, it presents the right to act in the face of a mass influx. Even more importantly, it presents a commitment aiming at a timely and efficient response to the influx. Were there no commitments to obey the principle of solidarity, this would, as we witnessed, result in legal gaps. The principle of solidarity applies *erga omnes* -to all states and other subjects of the international community, such as the UNHCR, international humanitarian organisations and even, as mentioned in this paper, the Holy See. Yet, despite an increasingly broad understanding of the principles of international protection, the basic rights of refugees in practice had been disregarded in a number of areas in the world. The principle of solidarity has been laid down; it is now up to the international subjects to implement it when the situation requires. In spite of all the downfalls of the current EU regulation, some EU Member States have acted in line with the international obligations, including the Refugee Convention. The deficient EU regulation should by all means be further harmonised with the international instruments of refugee protection and human rights protection in general, as well as with that international documents entailing the principle of solidarity. The EU is, after all, a community driven by the idea that European Member States give a stronger response to challenges when united, the principle of solidarity being at its very core. Good practices of some states indicates that this is indeed possible, but more importantly, that there is willingness among the refugee law actors – the states, the UNHCR and others - to follow the principle of solidarity.

As Filippo Grandi, the United Nations High Commissioner for Refugees, on 4 March 2016, stated: "Europe has successfully dealt with large-scale refugee movements in the past, during the Balkans Wars for example, and can deal with this one, provided it acts in a spirit of solidarity and responsibility sharing."[[267]](#footnote-267)

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33. Summary

Andrea Konjević

**Internation obligations of states in the protection of refugees in the 21st century:**

 **The Case of Mass Influx of Refugees to Europe**

Since the beginning of the mass influx of refugees to Europe, many questions appeared unanswered, ranging from how to distinguish refugees from migrants, the question of the meaning and the scope of the *non-refoulement* principle, its interpretation and application in practice, to the question of its potential limitation. Although the decisions regarding the recent refugee crisis in Europe have been almost entirely political in nature, the goal of this paper is to present the legal framework in which states should act, with special focus on the principle of solidarity as an answer to many questions which still arise today as a challenge not only for Europe, but also for the rest of the world.

A mass inflow of refugees, as the one that lately occurred in Europe, is one of the circumstances in which international refugee law allows a host state to exceptionally limit some refugee rights if certain requirements are met. However, this limitation is not the same as an exemption from the liability for all future acts of states. What will be demonstrated in this paper are some positive and some negative examples of reactions of European states and other subjects of international law, the obligations states have in order to protect refugees and how to fulfill them despite the mentioned limitations.

Using the methods of legal research the paper will present the principle of solidarity in positive law and its purpose as part of subsidiary obligations of states in the protection of refugees, when they are not capable of handling mass influx individually. More specifically, the principle of solidarity and its effect *erga omnes* in the international community will be examined as an obligation, not only a right.

Key words: refugees, mass influx, *non-refoulement*, solidarity

1. Sažetak

Andrea Konjević

**Međunarodnopravne obveze država u zaštiti izbjeglica u 21.-om stoljeću:**

**Slučaj masovnog priljeva izbjeglica u Europu**

Od samog početka masovnog priljeva izbjeglica u Europu javila su se mnoga pitanja - od toga tko su izbjeglice, a tko migranti, pitanja dosega i značenja načela *non-refoulement* u praksi, njegovog tumačenja i primjene, pa sve do njegovog eventualnog ograničenja. Iako su se u nedavnoj izbjegličkoj krizi donosile uglavnom političke odluke, u ovome radu se nastoji prikazati jedan pravni okvir unutar kojega države trebaju postupati, a s posebnim naglaskom na načelo solidarnosti, kao odgovorom na brojne nedoumice koje se i danas postavljaju kao izazov pred Europu, ali i cijeli svijet.

U slučaju masovnog priljeva izbjeglica, kakav se zbio nedavno u Europi, pod određenim uvjetima, države svoje obveze mogu iznimno i ograničiti. Međutim, to ograničenje nikako nije isto što i isključenje apsolutno svake odgovornosti za daljnje postupanje prema izbjeglicama od strane te države. U radu se prikazuju neki pozitivni i neki negativni primjeri reakcija europskih država, ali i drugih subjekata međunarodnog prava, nastoji se prikazati koje su to obveze koje države imaju, te se nastoji dati odgovor na pitanje kako zaštiti izbjeglice unatoč spomenutom ograničenju i koje su preostale obveze države u tom slučaju.

Primjenom metoda pravnog istraživanja se nastoji prikazati postojanje načela solidarnosti u pozitivnome pravu i njegova uloga kao dijela supsidijarnih obveza države u zaštiti izbjeglica, u slučaju kada ne mogu same odgovoriti na pitanja masovnog priljeva. Osobito se ispituje načelo solidarnosti kao obveza, a ne samo pravo, te njegovo djelovanje prema svim subjektima međunarodne zajednice (*erga omnes*).

Ključne riječi: izbjeglice, masovni priljev, *non-refoulement*, solidarnost

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January 1951' in Article 1, Section A, shall be understood to mean either:

(a) 'events occurring in Europe before 1 January 1951' or

(b) 'events occurring in Europe and elsewhere before 1 January 1951',

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.'' Convention relating to the Status of Refugees, *op. cit.* (fn. 1) [↑](#footnote-ref-35)
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The International Covenant on Civil and Political Rights recognizes the right to leave any country in Article 12 (2) as ''Everyone shall be free to leave any country, including his own.'' The right to leave may be restricted when ''[...] provided by law, [and] are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'' in accordance with Article 12 (3) of the International Covenant on Civil and Political Rights, *op. cit.* (fn. 18). [↑](#footnote-ref-60)
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155. Lalić Novak, *op. cit.* (f. 126), p. 52. [↑](#footnote-ref-155)
156. *Ibid.* [↑](#footnote-ref-156)
157. Lalić Novak, *op. cit.* (f. 126), p. 30. [↑](#footnote-ref-157)
158. UNHCR, *Determination of Refugee Status*, Executive Committee Conclusion No. 8 (XXVIII) – 1977, 12 October 1977, para. e (i) [↑](#footnote-ref-158)
159. Meaning: ''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.'' [↑](#footnote-ref-159)
160. Croatian Law on International and Temporary Protection (Narodne Novine 070/2015), among others, contains Article 20 (Asylum) and Article 21 (Subsidiary protection). Namely, Croatian law recognizes categories of aliens under subsidiary protection – persons who do not meet requirements of getting asylum protection, yet there is ''a serious reason to believe that by returning to their country of origin they would be exposed to real risk of suffering serious injustice and therefore he or she is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.'' [↑](#footnote-ref-160)
161. Jurković, *op. cit.* (fn. 146) [↑](#footnote-ref-161)
162. Lapaš, *op. cit.* (fn. 34), p. 35. [↑](#footnote-ref-162)
163. UNHCR, *op. cit.* (fn. 2) [↑](#footnote-ref-163)
164. *Ibid.*  [↑](#footnote-ref-164)
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 Grandi's plan to EU Member States to manage and stabilize the refugee situation calls for:

1) The full Implementation of the so-called "hot spot" approach and relocation of asylum seekers out of Greece and Italy and, at the same time, to return individuals who do not qualify for refugee protection, including under existing readmission agreements.

2) Step up support to Greece to handle the humanitarian emergency, including for refugee status determination, relocation, and return or readmission.

3) Ensure compliance with all the EU laws and directives on asylum among Member States.

4) Make available more safe, legal ways for refugees to travel to Europe under managed programmes – for example humanitarian admission programmes, private sponsorships, family reunion, student scholarships and labour mobility schemes – so that refugees do not resort to smugglers and traffickers to find safety.

5) Safe-guard individuals at risk, including systems to protect unaccompanied and separated children, measures to prevent and respond to sexual and gender-based violence, enhancing search and rescue operations at sea, saving lives by cracking down on smuggling, and countering xenophobia and racism targeted at refugees and migrants.

6) Develop Europe-wide systems of responsibility for asylum-seekers, including the creation of registration centres in main countries of arrival, and setting up a system for asylum requests to be distributed in an equitable way across EU Member States. [↑](#footnote-ref-267)