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| **AFRICAN INSTUTUTE FOR PROJECT MANAGEMENT STUDIES**  **[AIPMS]-NIROBI-KENYA.**  **COURSE STUDY: FORCED MIGRATION STUDY**  **POST GRADUATE DIPLOMA**  **YEAR 2019.**  **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**  **COURSE UNIT EIGHT [8]:**  **THE PROTECTION OF REFUGEES AND THEIR RIGHT TO SEEK ASYLUM**  **ATTEMPT QUESTION ASSIGNMENTS FROM ONE-FOUR [1-4]:**  **SUBMITTED BY:**  **OKETA DOMINIC LABOKE**  **ADMISSION NO: 256/003/2019.**  **SUBMITTED TO:**  **MODERATOR: \_\_\_\_\_\_\_/\_\_\_\_\_\_ 2019.**  **SIGNATURE:** |

**1. Differentiate between the terms refugee and asylum seeker.**

**Refugees:**

In an attempt to analyze the complex definition of a refugee, we have to go back to its origins and see how it has evolved from a person seeking sanctuary in the past, into what is known today as a person fleeing home due to a well-founded fear of persecution, resulting into his inability or unwillingness to return. In a nutshell, a "migrant" is anyone who seeks to move overseas. A "refugee" does so in conditions where they have been forced from their homeland. And an "asylum seeker" is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.

According to Article 1 of the 1951 UN Convention, as modified by the 1967 Protocol, a **refugee** is **defined** as any person who “owing to a 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”. Considering the annotations made by the 1967 Protocol to the Article 1A (2) of the 1951 Refugee Convention, the definition of the term refugee, outlined in this article, has to be fully discussed. The interpretation of Article 1A (2) will contain the analysis of its key elements contained in the definition, such as well-founded fear, persecution, outside the country of nationality or habitual residence, unable or unwilling to avail of state protection, not having a nationality and being outside the country of his former habitual residence is unable or unwilling to return.

1.1.2 Interpretation of Article 1A (2) of the 1951 Refugee Convention, defining the term refugee Theoretical interpretation of terms. To give a better insight into the key elements outlined in Article 1A (2) we will proceed to an ad litteram interpretation of the aforementioned article. As a whole, the purpose of this definition is to set out guidelines for determining refugee status. What should be clarified from the beginning is that whenever an asylum application is introduced, it should be examined on an individual basis, meaning that the asylum States should analyze the background situation of each applicant in the view of the current definition. The definition of the term “refugee” set out in the 1951 Refugee Convention can be broken down, as follows: -

A] a person outside his country of origin or residence

B] for what reason may a person find himself outside his country of origin or residence: due to a well-founded fear of persecution

C] what types of persecution: for reasons of race, religion, nationality, membership of a particular social group or political opinion

D] thus, owing to such fear he is unable or unwilling to return.

**Asylum Seeker**.

An asylum seeker is a person who flees their home country, enters another country and applies for asylum, i.e. the right to international protection, in this other country. An asylum seeker is a type of migrant and may be a refugee, a displaced person, but not an economic migrant. Individuals, who seek international protection refugee status or subsidiary protection status are called asylum seekers. For many countries, the distinction between a refugee and an asylum seeker is still ambiguous. This is due to the lack of a clear definition of an asylum seeker in the 1951 Refugee Convention. For that reason, each country may set out the guidelines for granting asylum to those in need of protection. However, an internationally accepted definition of an asylum seeker may be found in various UNHCR documents, as asylum seekers are recognized as persons of concern for UNHCR. According to UNHCR, “asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined”. Thus, a refugee is initially an asylum seeker, as he originally applies for asylum in the host country, but an asylum seeker is not necessarily a refugee at the beginning, but can become one if he falls under the provisions of the 1951 Refugee Convention definition. However, certain provisions of the 1951 Refugee Convention may also apply to asylum seekers, like the principle of non-refoulement.

Just like UNHCR’s definition on asylum seekers, the European Union has developed a similar view. In the 2003/9/EC Directive laying down minimum standards for the reception of asylum seekers, the Council of the European Union defines an “applicant” or an “asylum seeker” as “a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken”. This definition has been unanimously accepted in the European Union and has been reproduced in all the European directives on the topic of asylum.

In addition to these legal definitions, many authors identify the distinctions between the notions of refugees, asylum seekers and economic migrant. Liza Schuster in the Use and abuse of political asylum in Britain and Germany, considers that asylum seekers are the largest group that comprises refugees, a much smaller sub-group, and the economic migrants, a much larger sub-group than that of refugees.

**In conclusion**, an asylum seeker has been generally defined as a person who seeks asylum or shelter in other country than his country of origin, for a series of reasons like persecution, aggressions, conflicts, human rights abuses, threats to life etc., and who is waiting for his application to be examined. After applying for asylum, this asylum seeker may become a refugee or an economic migrant in the host country. However, sometimes, an asylum seeker may not meet the Refugee Convention criteria and may not be entitled to refugee status, but may suffer persecution if he were to be returned to his country of origin. In this case, he may be granted “de facto” legal status to be able to enjoy the protection of the asylum country. This type of status was defined, under European law, in the form of “subsidiary protection”.

**Question 2. Under the EU law, what are the rights of asylum seekers?**

That "Everyone has the right to seek and to enjoy in other countries asylum from persecution" is enshrined in the United Nations Universal Declaration of Human Rights of 1948 and supported by the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. A refugee has the right to safe asylum. However, international protection comprises more than physical safety. Refugees should receive at least the same rights and basic help as any other foreigner who is a legal resident, including freedom of thought, of movement, and freedom from torture and degrading treatment**.**

The origins of the right to asylum can be traced back to ancient times, when Greek and Roman cities offered sanctuary to anyone in need of a safe place to hide. Today, this right has become part of the fundamental rights and freedoms to which all humans are entitled to without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. At the international level, this right has been codified in article 14 of the Universal Declaration of Human Rights, stating that:

“1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. The Right of a State to Grant Asylum. The right of a state to grant asylum is well established in international law. It follows from the principle that every sovereign state is deemed to, have exclusive control over its territory and hence over persons present in its territory. One of the implications of this generally recognized rule is that every sovereign state has the right to grant or deny asylum to persons located within its boundaries.' Traditionally, thus, in International law, the right of asylum has been viewed as the right of a state, rather than the right of an individual.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”. The Right of an Individual to Seek Asylum. The second aspect of the right of asylum is the right of an individual to seek asylum. This is an individual right that an asylum-seeker has vis-a-vis his state of origin. Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. The basis for this right is the principle that "a State may not claim to 'own' its nationals or residents. This right is enshrined in several international and regional instruments. Article 13[2] of the Universal Declaration of Human Rights proclaims that, "everyone has the right to leave any country, including his own."' While strictu sensu the Universal Declaration of Human Rights is not a legally binding instrument, it has been declared to set forth "the inalienable and inviolable rights of all members of the human family and [to constitute] an obligation for the members of the international community

Asylum may be thus defined as a form of protection granted to people who flee their homes for fear of persecution or for being at risk of suffering serious harm. These people have then the right to seek and enjoy asylum in any country willing to protect them. The protection offered by countries to these people, may be in the form of "refugee status", "subsidiary protection status" or "on humanitarian grounds" an authorization given by countries, under their national laws, to individuals who cannot be removed for humanitarian reasons, such as unaccompanied children, for example. Furthermore, under international law, people applying for asylum, also called asylum seekers, should also be protected from refoulement in a country where they could suffer persecution, torture, inhuman or degrading treatment or punishment. This idea that Member States should comply with their international obligations in relation to nonrefoulement, has been reinforced by the Council Directive 2004/83/EC also called the Qualification Directive. At its Article 21, Protection from refoulement, the EU directive states:

“1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognized or not, when:

[a] there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

[b] he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”.

The first paragraph of this article may be seen as a reference to the definition of the principle of nonrefoulement, found in various international treaties, like the UN Refugee Convention or the UN Convention against Torture. As for the second paragraph, it explicitly notes the two exceptions to the principle of non-refoulement: national security and particularly serious crime, similarly formulated at Article 33 of the UN Refugee Convention.

**Conclusion:**

Under refugee law, the principle of non-refoulement plays an important part. It is the main right to which both refugees and asylum seekers are entitled to. It applies from the very moment a person claims protection and must be respected by all States, whether parties or not to the international refugee instruments. Because of its jus cogens nature, the principle of non-refoulement binds States to take measures on protecting people who run the risk of being tortured or ill-treated if returned to their country of nationality or former habitual residence.

**Question 3. Explain the applicability of the European convention on human rights to asylum seekers**

The applicability of the European Convention on Human Rights to asylum cases Contrary to the EU Charter of Fundamental Rights, the European Convention on Human Rights doesn’t contain any explicit reference to the right to asylum. In Lilia, Julia and Eleonora Alimzhanova and Alexijs Lisikov v. Sweden the Court held that “the Convention does not guarantee a right to asylum or refugee status but only prohibits the expulsion of persons to a country where they may be subjected to treatment contrary to Article 3”. Even if the applicants can only complain about a matter being regulated by the Convention, a number of case-laws have claimed the applicability of the Convention on asylum situations, like the detention or the expulsion of asylum seekers which will be further examined in this subchapter. At first sight, the Convention may seem like not covering asylum cases, but through the various interpretations of Article 3 provided by the European Court on Human Rights, the Convention has now become one of the most important juridical instrument to protect asylum seekers throughout Europe. Apart from cases dealing with the protection from refoulement, raised under Article 3 European Convention on Human Rights [ECHR], the Court was requested to consider whether other articles could apply to asylum situations too. In the rulings that follow we will discuss the protection provided to asylum seekers under Article 3 ECHR, as well as under other articles relevant to asylum or expulsion cases.

The Procedural aspects of asylum law: the detention of asylum seekers with respect to the detention of asylum seekers in an international transit zone, an important case is Amuur v. France. Even if it does not rely on the interpretation of Article 3 ECHR, this case deals with the deprivation of liberty of asylum seekers, under Article 5 [1] ECHR. The applicants, a group of Somali nationals, arrived at the French airport Paris-Orly, via Syria, claiming that “they had fled Somalia because, after the overthrow of the regime of President Siyad Barre, their lives were in danger and several members of their family had been murdered”. Even if they fled their country of nationality due to a well-founded fear of persecution, they could not apply for asylum straight away and were detained by the French police for having fake passports. They were confined in a hotel near the airport for a period of 20 days. After 20 days in detention, France rejected their asylum application and decided to send them back to Syria. Even if in Syria they were recognized as refugee by UNHCR, the applicants claimed that their detention in the international zone was unlawful and constituted a deprivation of liberty contrary to Article 5 [1] ECHR.

The European Commission of Human Rights which referred the case to the Court considered that there was no deprivation of liberty as defined under Article 5 [1] in this case, because the applicants were not deprived of the right to leave to another country and claim asylum there. The Commission’s view which was also supported by the French government, was considered deficient by the Court since it could not exclude the possibility of imposing restrictions on the liberty of an asylum seeker, while waiting for his asylum application to be examined. Furthermore, if a person, who has fled his country of origin due to a well-founded fear of persecution, is detained in the country where he intends to apply for asylum, “such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status”. Finally, the Court established that there was indeed a breach of Article 5 [1] by the French government, which “did not sufficiently guarantee the applicant’s right to liberty”.

Going beyond the simple analysis of the circumstances and the Court’s decisions, it would be pertinent to enquire if an issue under Article 3 ECHR could have been raised in this case. At the time when the case was referred to the Court [1996], the European States were confronted with an increasing number of asylum seekers, crossing their borders each year. Thus, the decision of the French authorities to send the applicants back to Syria could be seen as a mere response to this situation. But did France take the right decision of sending the applicants back to Syria, knowing that it was not bound by the 1951 Refugee Convention and was, then, not a “safe third country”? There was no way of knowing that the applicants wouldn’t have been subjected to torture in Syria or, even worse, wouldn’t have been returned to Somalia. In this case, the fact that Syria accepted to take the applicants back and grant them refugee status only became possible after intense negotiations between the French and the Syrian authorities. Even if Syria was not a State party to the 1951 Refugee Convention, France sent the applicants there only after obtaining guarantees that the UNHCR office in Damascus would consider their case. In the end, they were granted refugee status in Syria and were not in danger of being returned to their country of origin. For this reason, an issue under Article 3 could not have been raised, seeing that the applicants were granted refugee status and were protected from refoulement.

Nevertheless, a violation of Article 3 ECHR is likely to occur when an asylum seeker has been detained in unacceptable conditions amounting to degrading treatment. This is the case of S.D. v. Greece, where the Court was asked to determine whether there was a breach of Article 3 for the reason of holding an asylum seeker in a detention Centre where he lacked physical activity, contact with the outside world or medical attention180 and of Article 5 [1] and [4] for the unlawfulness of the detention while an asylum seeker181. After examining the findings of the European Committee for the Prevention of Torture, which visited the Greek detention Centre and found that the conditions of detention were unacceptable, the Court established that the poor conditions of detention of asylum.

Non-refoulement under Article 3 ECHR Other than rulings on the conditions of detention of asylum seekers, the majority of cases of the European Court of Human Rights have dealt with the application of Article 3 to refoulement situations. In the cases that follow, we will see how the European Court of Human Rights, through its interpretation of Article 3 has enlarged the application of the principle of non-refoulement to extradition and expulsion cases.

The landmark judgement on refoulement was Soering v. The United Kingdom, where the Court had to handle the case of a German national, convicted for capital murder in the United States. Even if Mr. Soering was neither a refugee nor an asylum seeker, his extradition to the United States, where he could suffer degrading treatment awaiting execution of the death penalty, would constitute a breach of Article 3. In the Court’s view, other means of punishing him could be found “which would not involve suffering of such exceptional intensity or duration”. After Soering, the Member States of the Council of Europe had to make sure that when returning an individual to a third country; he would not be subjected to torture, inhuman or degrading treatment, contrary to Article 3. The Soering judgement is extremely important because it enlarges the application of the principle of nonrefoulement to extradition cases

**Conclusions**

The idea behind this case study was to enforce the legislation presented in the previous chapters on the right to asylum and the principle of non-refoulement and see to what extent the European Court of Justice and the European Court of Human Rights have applied and interpreted the law in a joint manner and have developed new approaches on the matter. While the European Court of Justice [ECJ] was mostly confronted with cases dealing with the right to asylum, the European Court of Human Rights was mostly confronted with cases on the principle of nonrefoulement. For the majority of cases on the right to asylum, the ECJ was asked to provide guidance on the interpretation of the Qualification Directive. As for the ECtHR it was only able to provide interpretation of the provisions laid down in the European Convention on Human Rights. Even if they relied on the interpretation of different legal documents, the findings of the Courts offered new means of improving the asylum system and procedures throughout Europe. What is more, the judgements of the two Courts will become even more connected in the following years, with the European Union being able to become part of the Convention, after the entry into force of the Treaty of Lisbon.

**Question 4. Explain the issue of non-refoulement under EU law**

“Our asylum policy is our opportunity to stand up for and demonstrate and in the most tangible way our values of human dignity and collective solidarity. I am therefore committed to developing Europe into a single area of protection for those fleeing persecution and injustice. We must develop a common policy on temporary protection and asylum based on solidarity, predictability and shared responsibility. Europe must be able to offer protection for those most in need, in compliance with the Geneva Convention and the principle of non-refoulement”. In her opening remarks at the European Parliament Hearing in the Committee on Civil Liberties, Justice and Home Affairs, the Commissioner designate for Home Affairs, Cecilia Malmström recalled the importance of creating a Common European Asylum System that should allow those in need of protection to benefit from a coherent asylum system within the European Union, to receive legal status such as status of asylum or subsidiary and temporary protection, as well as to benefit from the right to non-refoulement.

The first reference to the principle of non-refoulement dates back to the Tampere European Council of 15 and 16 October 1999, noting at paragraph 13 that: “the European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement”. Nevertheless, the Tampere European Council is not defining nonrefoulement, but just affirming that EU Member States should comply with their international obligations, including the prohibition of refoulement, recognized as a peremptory norm. This may result from the language used in the above quotation, application of the Geneva Convention, maintaining the principle of non-refoulement, meaning that non-refoulement was universally recognized by all States.

This idea that Member States should comply with their international obligations in relation to nonrefoulement, has been reinforced by the Council Directive 2004/83/EC also called the Qualification Directive. At its Article 21, Protection from refoulement, the EU directive states:

“1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognized or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”.

The first paragraph of this article may be seen as a reference to the definition of the principle of nonrefoulement, found in various international treaties, like the UN Refugee Convention or the UN Convention against Torture. As for the second paragraph, it explicitly notes the two exceptions to the principle of non-refoulement: national security and particularly serious crime, similarly formulated at Article 33 of the UN Refugee Convention. Article 78 of the Consolidated version of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon, invites Member States to develop a Common European Asylum System, “ensuring compliance with the principle of non-refoulement”140. Just like the Tampere European Council, the Treaty of Lisbon quotes the principle of non-refoulement without defining it.

Therefore, the European Convention on Human Rights [ECtHR] jurisdiction and its interpretation of article 3 of the Council of Europe’s Convention on Human Rights, in relation with the principle of non-refoulement, has become relevant under EU law. As we have already seen, the principle of non-refoulement is a fundamental principle in international law, thus universally accepted by all States, including EU Member States. Moreover, EU Member States are both parties to international instruments on human rights and the protection of refugees and are also members of the Council of Europe. This means that any development on the principle of non-refoulement under international law, including the Council of Europe’s law, should be implemented and respected under EU law, as well. Besides the classical cases brought before the Courts, other forthcoming issues on the agenda of the ECJ and ECtHR relevant to refugee law, may comprise the fight against terrorism or climate change. On the fight against terrorism, both the ECJ and the ECtHR have already dealt with cases concerning the exclusion of a suspected terrorist from refugee status [Bundes republic Deutschland v. B and D] or from the principle of non-refoulement for being a person who poses threat to the national security of the host country [Chahal v. The United Kingdom and Saadi v. Italy]. The approaches of the Courts, in both cases, showed that even if a person is suspected of terrorism, Member States should not just ban him from their territory without analyzing all the circumstances of the case.

Work cited:

1. Sadako Ogata, “Refugees in the 1990s: Changing Reality, Changing Response”, lecture at Georgetown University on 25 June 1991, in Eduardo Arboleda, Ian Hoy, “The Convention Refugee Definition in the West: Disharmony of Interpretation and Application”, in Selina Goulbourne, Law and Migration, Edward Elgar Publishing, Cheltenham, 1998, p. 77.
2. See GRAHL-MADSEN, supra note 5, at 23 [noting that "the right of a State to grant asylum flows from its territorial integrity, which is a pillar of international law;] " International law gives every state exclusive control over persons on its territory" and that consequently, absent contrary treaty obligations, a state may admit whoever it chooses on whatever terms it desires;
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4. Article 1 (3) of the Protocol relating to the Status of Refugees, United Nations, Treaty Series, vol.606, p.270. vol.26, issue 3, 2007, p.138.
5. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention.
6. Treaty on European Union, O.J. C.191, 29 July 1992.
7. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, O.J. C340, 10 November 1997.
8. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C 306, 17 December 2007, pp.1-271. and the 1967 Protocol relating to the Status of Refugees, p.9.
9. Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217