**AFRICAN INSTUTUTE FOR PROJECT MANAGEMENT**

**(AIPM)-NIROBI-KENYA.**

**COURSE STUDY: FORCED MIGRATION STUDY**

**POST GRADUATE DIPLOMA**

**YEAR 2019.**

|  |
| --- |
| **COURSE UNIT ONE [1]:**  **INTRODUCTION TO REFUGEES AND FORCED MIGRATION**  **ATTEMPT QUESTION FIVE [5]:**  **DISCUSS THE LIMITS OF STATE RESPONSIBILITIES TO REFUGEES?**  **SUBMITTED BY:**  **OKETA DOMINIC LABOKE**  **ADMISSION NO: 256/003/2019**  **SUBMITTED TO:**  **MODERATOR: \_\_\_\_\_\_\_/\_\_\_\_\_\_ 2019.**  **SUBMISSION DATE: 04/05/2019; SIGNATURE:** |

|  |
| --- |
| **Introduction:**  The keywords are the refugees and state responsibilities, one must defined who a refugees is, and who is responsible for the protection of refugees and to what extend state responsibilities to a refugees. The refugee definition is well defined in the 1951 Convention relating to the status of refugees. Even if one can identify a just principle for allocating refugees between states, there remains the difficult question of specifying the limits of a state’s responsibilities to refugees. Is there a point at which a state is morally justified in refusing to accept any more refugees?  Most normative theorists accept that there is in principle such a point, even if states are a long way from reaching it in practice. Using a utilitarian calculus, Singer and Singer (1988) argue that a state must keep accepting refugees up to the point that the costs to the residents of the state of one extra refugee entrant are greater than the benefits yielded by that particular entrant. This situation, they think, might be reached when, for example ‘tolerance in a multicultural society is breaking down’ or strain on environmental resources becomes severe (Singer and Singer 1988: 127–8). Michael Walzer’s criterion also has a consequentialist flavour, though it is one that attempts to reconcile the claims of communities with minimal Universalist principles (1983).  He argues that states are morally required to accept refugees when the costs of doing so are low; once further intake jeopardizes the character of a political community, however, exclusion is justified (1983: 49–50). Gibney specifies a similar limit with his ‘humanitarian principle’, though he argues that states are obliged to undertake a range of actions shaping public opinion, participating in burden sharing, reducing the causes of refugee flight that create a more conducive political environment for the acceptance of refugees (2004:244). Joseph Carens, considering refugee policy from the perspective of non-ideal theory, accepts that ‘public order constraints’, including a fundamental threat to liberal society, would justify exclusion.  He states, however, that this kind of circumstance is unlikely to emerge in practice (2013).  Thus most theorists reach a similar conclusion on the question of limits; accepting refugees is of profound moral importance, but a state is not obliged to take in refugees though the heavens fall. However, does this conclusion justify states actually deporting refugees to egregious human right violations or even their likely death, not allowing more refugees to enter and therefore leaving them at risk of continued persecution, or simply refusing to accept refugees admitted elsewhere for resettlement, is one of the few scholars that confronts this issue directly.  Despite the limitations of the mutual aid principle and his partiality towards community independence, in a well-known passage in Spheres of Justice refuses to condone the expulsion of refugees. The duties of responding to refugees may have their limits, he argues, but ‘at the extreme, the claim of asylum is virtually undeniable’. This uncomfortable conclusion expresses powerfully the way the provision of asylum both relies upon and reveals the limits of closed forms of political community.  OTHER NORMATIVE ISSUES IN FORCED MIGRATION  If work on asylum has been the primary focus of normative investigation into forced migration, it hardly exhausts discussion in the field. Forced migration scholars have also addressed an array of questions that have implications far beyond the confines of forced migration. In a brief and necessarily selective discussion of these issues, this chapter now highlights how scholars have used different kinds of displacement to shed light on the following questions: what is the value of citizenship?; who should enjoy the protections of state members?; when is displacement justified?; and what are the conditions of just repatriation for refugees and displaced people? What is the Value of Citizenship?  Forced migration scholars have contributed to understanding of why citizenship matters largely through their examination of the phenomenon of statelessness: the situation of individuals who lack of nationality and citizenship in any state whatsoever. Legal scholars have rightly highlighted the way that statelessness involves a lack of state protection and its associated rights. But it has been normative theorists who have provided the richest account of the dangers of statelessness and its inevitable injustices. No one has been more influential in this regard than the émigré political philosopher Hannah Arendt who, writing in the aftermath of the Second World War, drew upon the experiences of 1930s and 1940s, to characterize the stateless as suffering a loss of the very ‘right to have rights. To be without citizenship, Arendt believed, was not to be liberated from state power but rather to become completely subject to it. The stateless, in the words of Krause, experience a kind of ‘total domination’ characteristic of totalitarian regimes yet evidently possible even in formally democratic societies (Krause 2011: 25). Discussion of statelessness’s normative underpinnings has served to open up the category to other marginalized groups. Arendt, for example, did not distinguish in her work between 38 formally stateless people (those with citizenship nowhere) and refugees (those who possessed citizenship but who faced persecution by their own government) (Bradley 2013a). For her, the normative core of the two groups was the same: each was denied political agency through the effective loss of membership, and each faced a situation of ‘rightlessness’ (Arendt 1986: 296).  Contemporary scholars have (not without controversy) extended the concept of statelessness even further. For example, Krause sees the ‘undocumented’ as in many ways the inheritors of Arendt’s stateless (2008: 26). Others have seen appropriate analogies to statelessness in the experience of groups including irregular migrants, guest- workers, even victims of internally displacement (Walzer 1983; Somers 2008; Gibney 2011; Sawyer and Blitz 2011). However, if recent work illustrates the importance of citizenship, for some it also attempts to put citizenship in its place. Increasingly, scholars have used statelessness to highlight the practical reality and moral need for forms of membership beyond national citizenship. Agamben signals something of this change with his comment that the refugee (or stateless person) is ‘nothing less than a border concept that radically calls into question the principles of the nation State and, at the same time, helps clear the field for a no longer delay able renewal of categories’ (1995). Other scholars, including have seen something transformative in the paradoxical situation of undocumented migrants demonstrating publicly in support of their rights in countries like the US;  The stateless have thus been used to underline not only citizenship’s current importance but also its evident limitations. To be incorporated into the order of national citizenship is to take on a range of obligations (as well as rights) and to be a member of an international system that chains people to states in a way that mocks consent-based governance and consigns some of the world’s denizens to appallingly low life chances  However, identifying States’ Responsibilities towards Refugees and Asylum Seekers debates about which states should provide refugee protection and how they should do so are not new. Nevertheless, they have taken on a new dimension over the last few years as states are exploring elaborate proposals to “manage” refugee movements and/or “improve” refugee protection. At the heart of these discussions sometimes lies a confusion as to exactly what duties states owe to refugees and asylum-seekers under international law.  The question aim in this paper is thus to go back to some fundamental issues in international refugee law and identify what specific responsibilities states have towards refugees and asylum-seekers. Do states have a duty to admit a refugee and if so, for how long? Do states have a duty to process asylum applications lodged on their territory and if not, to whom can they transfer this responsibility? Are these duties Dependent on the number of refugees concerned? Which states should protect which refugees?  The questions that will be explored in this paper are relatively basic, but the answers are definitely not simple. One of the main reasons for this is that despite the 1951 Refugee Convention’s tremendous contribution to defining states’ responsibilities towards refugees, important gaps in the protection regime still remain. To some extent, the aim of this paper is to explore the limits of the international refugee regime and reflect on the possible approaches to filling these gaps.  It should be argued that do State have Responsibilities to Admit Refugees and Process Asylum Requests?, Part of the difficulties encountered by refugees’ lies in the obvious gap between the existence of a right to asylum and the lack of a corresponding state duty to grant asylum. The 1948 Universal Declaration of Human Rights famously provides that “everyone has the right to seek and enjoy in other countries asylum from persecution” (article 14). However, this right to seek asylum has not been included in any legally binding instrument. Most notably, there is no mention of this right in the 1951 Refugee Convention. This suggests that states have been very reluctant to give to this “right” any substantive legal content. In any case, international law clearly does not provide for a duty to grant asylum. Again, the 1951 Refugee Convention does not make any mention of such a duty. Attempts to introduce any reference to asylum and admission were vigorously opposed during the negotiations leading to the adoption of the Convention.  It is generally argued that states have a right, rather than a duty, to grant asylum, which follows from their sovereign right to control admission into their territory. There have been numerous attempts to establish a right of territorial asylum. Following the adoption of the UN Declaration on Territorial Asylum in 1967, the various texts under discussion only indicated that states shall use their ‘best endeavours’ to grant asylum. Even then, the 1977 Conference miserably failed to adopt the draft Convention, and no further attempt has since been made to develop a right of territorial asylum. While there is no obligation under international law to grant asylum to refugees, states are still bound by the principle of non-refoulement as defined in article 33 of the 1951 Convention? This principle provides that no refugee shall be returned to any country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This principle is now generally considered to be part of customary international law.  It must be noted that the principle is not limited to those formally recognised as refugees. In other words, asylum-seekers should not be returned to any country where they would face persecution and they benefit from such a prohibition until they are declared not to be refugees.  There has been an on-going debate over the exact scope of the principle of non-refoulement. It is clear that the prohibition of refoulement applies to all refugees who are already on the territory. Whether it also applies to refugees who arrive at the border and seek admission into the territory has been the subject of disagreement. As mentioned earlier, international law does not contain any obligation to grant asylum. Nevertheless, states should not be free to reject refugees at the frontier and it has been argued that rejection at the frontier does amount to refoulement.  This interpretation can be partly based on the fact that article 33 is entitled “Prohibition of expulsion or return (‘refoulement’)” It may be argued that rejection at the border does not necessarily result in return to a country where the refugee would fear persecution, and thus does not necessarily lead to refoulement. The difficulty with this argument is that it leads to an examination on a case-by-case basis of whether the rejection at the border of a refugee automatically leads to his return to a country where he would fear persecution. Where the refugee is situated at the border between his country of origin and a neighboring country, it appears obvious that rejection at the frontier would amount to refoulement.  There are many other situations in which it may not be so obvious that rejection at the border amounts to refoulement. The fundamental difficulty lies in the possibility of every state adopting the view that rejection at the border is lawful under international law. This would result in the refugee being denied admission to each state. This phenomenon is usually referred to as “the refugee in orbit”.  If we adopt the broader interpretation of the principle of non-refoulement which encompasses a prohibition of rejection at the frontier, it is not entirely clear where this leaves us. A question come about do states have a duty to admit a refugee who presents himself at the frontier? One line of argument could be that treaty obligations must be performed by state parties in good faith. It follows that in order to perform their obligation under article 33 of the 1951 Refugee Convention, state parties may be required to grant temporary admission to those claiming to be refugees in order to determine whether they are indeed refugees and deserving of the protection granted under article 33. If states did not do so, they would be in effect unable to perform their treaty obligation not to reject refugees at the frontier. Consequently, it has been argued that “the peremptory norm of non-refoulement secures admission”. Similarly, UNHCR has declared that;  “A state presented with an asylum request, at its borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures”.  In practice, states have recognised some linkages between non-refoulement and admission. Indeed, some refugees are in fact granted temporary admission into the territory in order to lodge an asylum application: it was noted that “despite the reluctance of states to commit themselves formally, in practice states have generally admitted persons who arrive at their borders which claims to protection which are palpably without merit.” When an asylum-seeker has lodged an application, whether at the border or within the territory, the state in question has usually taken upon itself to examine that application. Where the asylum-seekers is recognised as a refugee, the state has almost invariably granted him permanent asylum, i.e. the right to remain in the country indefinitely. This has been the consistent practice of states, and more specifically Western states, and may have led to the belief that some international legal obligations could be deduced from such practice. In order to establish a rule of customary international law, the existence of state practice is insufficient: it must be accompanied by opinion juris. However, it is doubtful that those states have followed these practices out of a sense of legal duty. Problems emerged when states started to deviate from these established practices.  **Firstly**, since at least the early 1990s, an increasing number of states have transferred the responsibility to examine some asylum applications to “safe third countries”. This suggests that they felt under no legal obligation to examine in their territory the applications lodged there. For instance, the UK believes that “there is no obligation under the 1951 Refugee Convention to process claims for asylum in the country of application.”  **Secondly**, some states have become more reluctant to grant permanent asylum to refugees. This growing reluctance can be exemplified by the use of temporary protection schemes since the early 1990s. Australia was the first country to break ranks permanently by deciding to grant temporary protection visas to recognised refugees who entered the country in an unauthorized manner. It is crucial to determine exactly by which duties states are bound with regard to these two issues. The first difficulty is that the 1951 Refugee Convention does not mention asylum procedures and makes no reference to which state is responsible for determining whether a person is a refugee or not. The assumption has always been that the state where the application was made is responsible for assessing the merits of the claim. As mentioned earlier, this had been the practice of states until the 1990s.  To some extent, it could be argued that the transfer of responsibility to examine an asylum application to a ‘safe third country’ is not incompatible with the duties of the sending states, since the principle of non-refoulement is not violated. The crux of the matter obviously lies in the definition of ‘safety’. This should include at a minimum physical safety and protection of the refugee’s human rights as defined under international law. The idea of safety should also encompass a guarantee of access to fair asylum procedures. Transfers of responsibility for examining an asylum procedure have raised numerous problems for refugees.  For one thing, the 1951 refugee definition has not been uniformly interpreted and it may happen that a person is recognised as a refugee in one country, but not in another. In practice, states are not able to transfer responsibility to any ‘safe third country’: the receiving state usually accepts a transfer only where a link between the refugee and that state has been demonstrated, e.g. transit, family link, etc. So far, transfers of responsibility have mainly taken place within a defined region and amongst states with equivalent refugee protection systems.  More recently, states have envisaged the setting up of transit processing centres. These centres would be located in states whose protection capacities are much more difficult to assess. Transfer of responsibility to these states would be much more problematic. As a result, the sending state would retain the responsibility to process asylum applications, but on the territory of a third state. Such proposals have now been, seemingly, abandoned, but they have raised interesting legal questions. Strictly speaking, the concept of ‘safe third country’ does not violate the letter of the 1951 Refugee Convention to the extent that the refugee is not sent to a country where he would face persecution. Nevertheless, the repeated application of this concept may produce chain deportations which could ultimately lead to refoulement. The refugee has no guarantee of access to protection in a safe country.  They may involve the prolonged detention of the asylum-seekers. If the Centres are set up by EU Member States collectively and human rights violations occur, it may be impossible to determine which state is responsible for the violations. As far as state responsibility for processing asylum claims is concerned, it is difficult to identify the legal basis of a duty to process claims in the state where the application is lodged. It could, once again, be advanced that if states are to implement their duty of non-refoulement in good faith, they should process the asylum application themselves, rather than transfer that responsibility to a third state. Turning to the issue of duration of protection, the 1951 Refugee Convention suggests that its provisions apply only for as long as there is a well-founded fear of persecution. It follows that once such a fear ceases to exist, the state of asylum is once again free to decide on the immigration status of the person concerned, i.e. to let him remain in the country or remove him. Indeed, if the person is no longer a refugee, the state is no longer bound by the provisions of the Convention. Refugee protection is, in essence, temporary to that effect, the Convention even contains cessation provisions.  In practice, these have not been applied by all Western states So far, transfers of responsibility have mainly taken place within a defined region and amongst states with equivalent refugee protection system. More recently, states have envisaged the setting up of transit processing centres. These centres would be located in states whose protection capacities are much more difficult to assess. Transfer of responsibility to these states would be much more problematic. As a result, the sending state would retain the responsibility to process asylum applications, but on the territory of a third state. Such proposals have now been, seemingly, abandoned, but they have raised interesting legal questions. Strictly speaking, the concept of ‘safe third country’ does not violate the letter of the 1951 Refugee Convention to the extent that the refugee is not sent to a country where he would face persecution. Nevertheless, the repeated application of this concept may produce chain deportations which could ultimately lead to refoulement. The refugee has no guarantee of access to protection in a safe country. Paradoxically, the proposal of processing asylum applications in a transit processing Centre may be less controversial because the recognised refugee will be resettled and is thus guaranteed protection at the end of the procedure. However, transit processing centres can be criticised on many other legal grounds. They may involve the prolonged detention of the asylum-seekers. If the centres are set up by EU Member States collectively and human rights violations occur, it may be impossible to determine which state is responsible for the violations.  As far as state responsibility for processing asylum claims is concerned, it is difficult to identify the legal basis of a duty to process claims in the state where the application is lodged. It could, once again, be advanced that if states are to implement their duty of non-refoulement in good faith, they should process the asylum application themselves, rather than transfer that responsibility to a third state.  Turning to the issue of duration of protection, the 1951 Refugee Convention suggests that its provisions apply only for as long as there is a well-founded fear of persecution. It follows that once such a fear ceases to exist, the state of asylum is once again free to decide on the immigration status of the person concerned, i.e. to let him remain in the country or remove him. Indeed, if the person is no longer a refugee, the state is no longer bound by the provisions of the Convention. Refugee protection is, in essence, temporary. To that effect, the Convention even contains cessation provisions.  In practice, these have not been applied by all Western states See for instance Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communitieswhich have granted permanent asylum to those recognised as refugees. It may be that Western states have not found it necessary to reassess every few years the need for protection of each refugee because of the costs involved in such periodical reassessments. However, this state practice is far from uniform since most developing countries have consistently denied refugees the right to remain permanently and integrate locally.  Moreover, State practice has not been accompanied by expressions of opinio juris. It is thus doubtful that states feel bound by a rule of customary international law obliging them to grant indefinite leave to remain to refugees. Identifying states’ responsibilities towards refugees and asylum-seekers has, so far, proved to be a frustrating exercise. States have a duty of non-refoulement. They do not have a duty to grant asylum to refugees. Beyond that, it is not entirely clear that they have a duty to process asylum applications lodged in the country. Where refugee status is granted, states do not have a duty to grant permanent asylum to the refugee. To some extent, what is confusing is that for the last fifty years, state practice has gone beyond what was required by international law. One could argue that for practical reasons, states have decided to examine the asylum applications lodged on their territory themselves, and that the economic, social and political costs for doing so have not been perceived as a problem until recently. Unfortunately, it is difficult to formulate solid arguments in favour of the proposition that state practice has led to the establishment of a rule of customary international law requiring states to examine all asylum applications lodged on their territory.  Works Cited:  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  G. Noll, ‘Visions of the exceptional: legal and theoretical issues raised by transit processing centers and protection zones’ (2003) 5  The Convention Relating to the Status of Refugees, 189 UNTS 150 (hereinafter the 1951 Refugee Convention), amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267.  The Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948.  The EU Charter of Fundamental Rights which is part of the Treaty establishing a Constitution for Europe (article II-78). However, this right is only guaranteed in accordance with the 1951 Convention and its Protocol, and the Constitution itself.  G. Goodwin-Gill, The refugee in international law (Oxford: Oxford University Press, 1996, 2nded.), 175.s  **European Journal of Migration and Law:** *Geneva Convention” (article 3(3)).* See article 1(c) of the 1951 Refugee Convention. See also J. Fitzpatrick and R. Bonoan, “Cessation of refugee protection”, in E. Feller, V. Trk and F. Nicholson (eds.), Refugee protection in international law: UNHCR’s Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 491-544. 6(apart, now, from Australia)  UN Declaration on Territorial Asylum in 1967, the Carnegie Endowment Working Group proposed its first draft Convention on Territorial Asylum in 1972, which led to the United Nations Conference on Territorial  Asylum in Geneva in 1977.  Arendt 1986: 296). Joseph Carens (2005, 2009) has provided an influential account of state responsibilities to non-citizens.  E. Lauterpacht and D. Bethlehem, “The scope and content of the principle of non-refoulement: opinion”, in E. Feller, V. Turk and F. Nicholson (eds.), Refugee protection in international law: UNHCR’s Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 87-177, at 149.  Article 26 of the 1969 Vienna Convention on the Law of Treaties, 1155 ILM 331. This Convention applies only to treaties concludes after its entry into force, i.e. 1980, but the principle has always been considered to constitute a rule of customary international law.  Goodwin-Gill, The refugee in international law, 202.  Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers, FORUM/CG/SM/03, 11 March 2004, 7.  T.J. Farer, “How the international system copes with involuntary migration: norms, institutions and state practice” (1995) 17 Human Rights Quarterly 72, at 79 |