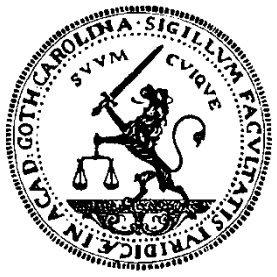

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The Protection against Refoulment in the framework of Exclusion Clause: A complex problem within Asylum institution

Case Study of Sweden Asylum System

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SUMMARY.

The study analysis the urgent problem on the protection against refoulment to the individual excluded from protection as a refugee in the context of exclusion clause. In principle, the non-refoulment on the possibility of international law and EU legislation allow alien to claim asylum and prohibit the return for offences committed prior the application for asylum to the state. The non- refoulment presumes that human rights are not violated by any member State to the Convention, which upholds the prohibition against the violation of non-refoulment. The trouble comes when individuals are criminal or suspected to be criminals. It is not clear as to what extent fundamental rights can be invoked to rebut the return of the individual and avoiding the violation of non-refoulment.

This thesis discussed the degree of protection against refoulment in the background of exclusion to individual regarded as a refugee in Sweden since it should implement the principle of non-refoulement in its migration law. The right of non-refoulement connotes to barrier for implementation of decision to return an individual to a place which exposed in risk of persecution in most cases violation of her/his rights. The international law and human rights instrument, mainly UNGCRS, ICCPR, ECHR, AND CAT have an impact on Swedish domestic legislation. Besides, the change of Swedish migration and asylum law has an impact on the implementation of those binding obligation effected by Conventions. Moreover, CEAS is part of European Union Law which has produced the AQD. The AQD have some of the articles which support the right to non-refoulment as embodied in the International law instrument

The discussion on the cases from ECHR and CAT and SC reveal the there is a complex problem as to the prosecution and possibility of refoulment of the person falling within the exclusion clause. It is not clear as to the extent that state should conduct and satisfied itself the assurance that the returnee would not face the risk of being persecuted. Nevertheless, also the state has no obligation to prosecute the individual suspected for crime; this leaves a complex problem unsolved particularly to a person not deserving protection in the light of serious crimes committed. Also, the legal limbo on the status of individual not deserving protection does not harden the protection against refoulment. Consequently, the conclusions highlight that invoking the exclusion without a genuine respect for fundamental rights that the Refugee Convention presumes to uphold deemed those rights do not exist.

ABBREVIATIONS

AAB	Alien Appeal Board
AQD	Asylum Qualification Directive
CAT	Convention Against Torture
ECC	European Commission Communication
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
SMB	Swedish Migration Board
TEC	Treaty establishing the European Community
UNGCSR	United Nation Geneva Convention Relating to the Status of Refugees
UNHCR	United Nation High Commission for Refugees

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CHAPTER ONE.

1.1. BACKGROUND OF THE PROBLEM.

The protection of an individual who excluded from the refugee status has not been taken seriously by state parties to the international refugee convention. Even though there has been an assumption that there is a duty of the state to protect those individuals within its territory, it usually does not rest upon a Convention basis.[1] Two contradictory views claimed among judges and scholars regarding the application of the exclusion clause. One point of view is that the extent that the exclusion clause attributed to an individual, it must found on the seriousness of the crime committed or suspected to commit.[2] The other position is that the exclusion of refugee status is an implied term in all case concerning an individual who is a suspect or criminal, it depends on the nature and circumstances of each individuals' case.[3] This existence, extent and the basis of exclusion of refugee status are still a matter of scholarly debate, and occasionally they focus on decisions of administrative tribunals and regional courts.

The use of the exclusion clause is the most traditional and a well-known measure to control the floor of refugee in a territory of the hosting state.[4] The state uses the exclusion clause as a convenient means to control the entering of refugee in its region far back as in the mid-1900s.[5] The development of the application of the exclusion clause by states traced back to the mid-1990s. During the civil war in Yugoslavian and the ethnical cleansing in Serbia and Bosnia,[6] the implementation of the exclusion clause was relatively small. It follows that the incident of the terrorist attack on 9/11 had moderately increased the use of the "exclusion clauses" by states which deny the personal protection as a refugee especially when that individual suspected of

[1]S.Kapferer, "Exclusion Clause-A Comparative overview of State Practice in France, German and United Kingdom", 7IJRL 2, 220.
[2]*Ibid*, 196
[3]*Ibid*, 217
[4]G. Gilbert, "Running scares since 9/11: refugee, UNHCR and the purposive approach to treaty interpretation" in J Simeon, *Critical Issues in International Refugee Law: Strategies towards Interpretative Harmony*. (CUP 2010) "while the 1951 Convention is international, its implementation is at the domestic level. There is no international refugee Court or tribunal to oversee treaty interpretation. This means that protection of refugees through the 1951 Convention is dependent on domestic legislation and national judges. in the wake of 11 September 2001, several states took the opportunity to make amendments to their legislation regarding those seeking refugee status."
[5]G. Gilbert, Current issue in the Application of exclusion clause: This paper was commissioned by UNHCR as a background paper for an expert roundtable discussion on exclusion organized as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees(2001). 1., "The second aim of the drafters was to ensure that those who had committed grave crimes in World War II, other serious non-political crimes or who were guilty of acts contrary to the purposes and principles of the United Nations did not escape prosecution."
[6]Kapferer, *Supra*, note 1, 197

committing a severe crime before or after had entered to a territory of the hosting state in Europe.[7] Moreover, the refugee crises situation in 2015 and 2016[8] has increasingly triggered off the European countries to apply the exclusion clause frequently which its consequences are more likely to affect that refugee who has excluded from refugee status.

This circumstance denies an individual suspected of severe criminality the denial of protection against return as he or she lacks a refugee status and at the same time the combined fact of non-removability on a range of grounds, cause the numbers of those individuals termed as "undesirable and unreturnable" to grow large.[9] On the other hand, the literature survey about the actual number of un-deportable and undesirable case show a relatively small number of prosecuted cases.[10] Despite the action done by the states in the fight against impunity through pursuing justice in the domestic or international court, yet it is insignificant since most of those refugees who committed a crime might enjoy the privilege.[11] On the other hand, these individuals who commit serious crime out of the country which they are, tend to raise humanitarian concerns as they stay with no defined legal status but also their situation touches and challenging the principles of international criminal justices.[12]

The use of exclusion clause by the state traditionally considered as a cornerstone of security of the country.[13] It is an advantage to the state as it exercises its sovereignty.[14] Regardless of the apparent full acceptance of the exclusion clause, state parties may have different opinions as to the nature and scope of the obligation imposed by the convention, due to the variation in national legislation and migration policy.[15] Since a refugee status determination is a system of adjudication which provides the state autonomy and control over the process to accord individual protection, it is hardly surprising that state parties assume that a refugee status

[7]Gilbert, *Supra*, note 4, 89. The 9/11 terrorist attack has shaped the international community to restrict and change their migration law.
[8] L. Buonanno, The European Migration Crisis. In D. Dinan, N. Nugent, & W. E. Patterson (Eds.), *The European Union in Crisis* (PM 2017). "Refugee Crisis in Europe had not seen anything quite like the volume of post-2014 asylum-seekers since 1992, when the EU-15 received 672,000 asylum applications from Yugoslavian nationals. Subsequently, asylum applications fell to below 200,000 (2006) before beginning their upward trajectory to the 2015–16 record numbers when, from July 2015 to May 2016, 1 million people applied for asylum in Europe (Connor and Krogstad, 2016; Eurostat, 2016)."
[9]G. Gilbert, "Undesirable but Unreturnable: Extradition and other form of Rendition", (2017)JICJL 15, 56
[10]J.Rikhof, "Prosecuting Asylum seeker who cannot be removed; a Feasible Solution", (2017)JICJL 15,102
[11]J.Wjik, "Undesirable and Unreturnable? Prosecuting Non-removable alien suspected of Serious Crimes"JICJ 15 (2017) 52.
[12]The International Criminal Law Principle of prosecute or extradite.
[13]J Simeon, *Critical Issues in International Refugee Law: Strategies towards Interpretative Harmony*. (CUP 2010), 85.
[14]Article 3 of The Geneva Convention on the Status of the Refugee on 1951. The Convention provide sovereignty to the state to determine the need to accord a protection to the refugee.
[15]Kapferer, *Supra*, note 1, 220

determination includes an expressed obligation of excluding an individual from that status and eventually return him or her.[16]

Sweden supports this position of the restrictive interpretation of according the refugee status to the extent that, there should be a responsibility sharing in the protection of the refugee.[17] In Sweden, the government has taken the serious temporally measure concerning refugee if the government has increasingly used the clause to the individual seeking refuge in a country and upon the final and non-appealable refusal of the entry the individual returned as quick as possible to the state of origin. [18] In the same line of action, individuals who cannot accord a refugee status would also respond to the country of origin, which is likely to face persecution.

The strict interpretation of the exclusion clause position supported by the author, such as Geoff Gilbert who maintain that:

> "Nevertheless, given that Article 1F represents a limitation on a humanitarian provision, it needs to be interpreted restrictively. It only applies to pre-entry acts by the applicant. Given the potential consequences of excluding someone from refugee status, Article 1F must be applied sparingly and only where extreme caution has exercised."[19]

Therefore, the issue of application and interpretation of the exclusion clause in states is not consistent, while Sweden preserves the exclusion of refugee status to an individual as expressed, the refugee and human right convention requires states to obliged not to expel an individual who cannot accord the status of refugee. Therefore, this study, while acknowledging the perceived advantages of uses of the exclusion clause at exploring who is not granted the status of a refugee as applied in Sweden and other state position. The aim is to critically analyses the application of the exclusion clause to ensure that a refugee with no refugee status protection under the conventions.

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[16]Press Release, Regeringskansliet, Regeringen föreslår åtgärder för att skapa andrum för svenskt flyktingmottagande (Nov. 24, 2015), http://www.regeringen.se/artiklar/2015/11/regeringen-foreslar-atgarder-for-att-skapa-andrum-for-svenskt-flyktingmottagande/archived http://perma.cc/42YN-92FP,"the Swedish government announced that Sweden would align its asylum policy with that of the rest of the EU by limiting the number of grounds for asylum to include only refugees and persons in need of subsidiary protection, thus eliminating the third status type" https://www.loc.gov/law/help/refugee-law/sweden.php#_ftnref14 accessed 28th March 209

[17]Sweden's Migration and Asylum Policy https://www.government.se/information-material/2018/02/swedens-migration-and-asylum-policy/ accessed on 3rd April 2019

[18]*Idem.*

[19]Gilbert,G., *Supra*, note 5, 2.

The study focuses on the right not to be refoulment for an individual excluded from protection as a refugee in Europe, particularly in the legal systems of Sweden and the position of international law. Although the refugee status is one of the essential features of protection of an individual who has an intense fear of being persecuted, still such security against to an individual is not always guaranteed, and his or her status brings problems to the hosting states. The paper critically analyses the extent to which international law protects an individual excluded from the refugee status and the obligation of the hosting nation, particularly in Sweden. In so doing, decided cases from the human right court, and various administrative rules and decision reviewed, which guide on the application of the exclusion clause.

The focus is therefore on the Government of Sweden to protect the rights of non-refoulment for individuals with no refugee's status; with regards on the principle of non-refoulement as enshrined under international and regional instruments of which State has ratified. Since Sweden is a part of international refugee law convention and the European Union as well, but also it is a part of a European Union, faced with a mass influx of refugee which trigger the application of exclusion clause in the due process of refugee status determination. It is thus relevant to the topic discussed in this paper.

A task to undertake this research motivated because there is a lack of adequately documented research on those incidents of refoulement of those individuals who cannot be accorded a refugee status due to the ground that they are either convicted or suspected to the committee a crime. For that reasons, this research shall, therefore, provide legal analysis and opinions (if any) about the matter of the application of exclusion concerning international law obligation and offer suggestions of what would be better.

1.2. STATEMENT OF THE PROBLEM.

Sweden has an established system for protecting refugees under the international refugee law and the conventional European asylum system. Both the refugee law and asylum system provide for the obligation to the state to respect the principle of non-refoulement. However, recent events suggested that there has been growing fatigue in Sweden asylum policies. On the other hand, this has resulted in a breach of the principle of non-refoulement; the victim of this violations are those individuals who cannot be accorded the refugee status due to the range of grounds as per Article 1F of the Refugee Convention.

For instance, the case of *Bundesrepublik Deutschland v. B and D*[20] the court was of the view that the exclusion of refugee status is not conditional on the assessment of proportionally concerning a case; the estimate is analysed in a case by case basis. The violation of the right of those individuals needs to come out the surface and addressed to ensure that individuals fall in that category are not subjected to a breach of either refugee rights or human rights. Observing them dependently as they are vulnerable individual because they are neither accorded refugee status and neither returned to places where their lives and freedom are in danger. The attention, they generate under the international criminal law on fighting against impunity and the determination of the state to strike a balance on the efforts to ensure respect for refugee rights at one hand and fighting impunity has motivated the researcher to undertake this research.

1.3. OBJECTIVE OF THE RESEARCH

This paper is on the protection against refoulment of the individuals who excluded from refugee status. Once the person does not deserve the refugee status as per the exclusion clause, the person by recognition is a refugee; however, individuals' rights and protection accompanied by the identification are differently perceived. The following are the main objectives of this research paper

a) To analyse the compliance of government of Sweden obligation and its international commitments towards respect for the principle of non-refoulement while enhancing in promotion and protection of refugee rights within their territory.

b)To examine the action or inaction of the states about individual excluded from the refugee status and the roles of the government of Sweden in the European community in fighting against impunity with emphasis on how the principle of non-refoulment is respected.

c)To expose the legal challenges and complex issues come out to the surface when the application of different international law regime overlaps in dealing with the individual excluded from refugee status.

d)To document and publish the data obtained to inform, influence and create awareness and continue with the debate on the matter of individual excluded from protection against refoulment as a refugee.

[20] https://www.asylumlawdatabase.eu/en/content/cjeu-c-5709-and-c-10109-bundesrepublik-deutschland-v-b-and-d

e)To suggest (if any) what would be useful to Sweden and European states but also for other countries and institution with similar situations.

1.4. THE PURPOSE AND RESEARCH QUESTION

This research paper aims to expose a complex problem of considerations of prosecution and protection against refoulment in the cases of an individual excluded from a refugee status based on the exclusion clause, focusing on the common crime of view.

This research paper argues that the policy and legal practise towards the individual excluded from the protection as a refugee was due to the failure in the CEAS. The fault, in its itself, has manifested in the strict application of the exclusion clause which conflicts with the principle of non-refoulment as articulated in international, regional and human rights treaties that the CEAS is bound to uphold.

The research question for this thesis is: To what extent does Sweden protect from refoulment those individuals excluded from the protection as a refugee under exclusion clause?

1.5. RESEARCH METHODOLOGY

The research study is carried out in the library. The methodology employed is the formal-legal method. The thesis answers the research question through analysing International law instruments and EU legislation, the relevant case law, scholarly books, commentaries and articles, factual materials as well. The core legislative materials used and analysed are International law and International Human Rights document notably, International Convention on Refugee Status, Convention against Torture, International Covenant on Civil and Political Rights and Universal Declaration on Human Rights; the method of interpretation of both instruments based on the rules set on Vienna Convention on the Law of Treaties of 1969. Concerning EU legislation materials particularly TEC, the ECHR, the directives and the case law from ECtHR analysed in a teleological perception on fundamental rights in cases of exclusion. To be intense, the document from a UNHCR Committee and ECC discussed as well.

Regarding the domestic law, the bills and preparatory work employed in interpreting the law concerning the refugee situation. Furthermore, the work of prominent scholars' books, articles and reports on refugee law, as well as EU law on topics of asylum, exclusion, refoulment, extradition, fundamental rights used for the purpose of aiding interpretation; statistical materials, news articles for empirical data and facts of cases are also used to establish a realistic

situation. To illustrate the problem concretely the examples of the occurrence of individuals who have sought asylum while being accused of committing a crime and the possibility of being extradited (or not extradited) for an economic crime. A case from the SC that of Qiao Jianjun illustrates the complex problem faced to a person denied refugee status on the ground of misconduct suspected to commit. To strengthen the argument and elaborate the refoulment on the exclusion settings, which might be not in the scope of the Qiao Jianjun case, other instances an explained as well. The study focuses on Sweden since the state has set into motion the implementation of new temporal law, which is more likely to have an impact on refugee and individual seeking asylum which Sweden is obliged to support.

1.6. SCOPE AND LIMITATION

The study examines the interrelation of the exclusion clause and the non- refoulment principle. This research is limited to and stress on the complex debate on the protection against refoulment on the framework of exclusion clause in a country within a Common European asylum system notably Sweden focusing on the article 1F(b) and Article 33 the principle of non-refoulement in 1951 of the Convention on Refugee Status and Human Right treaties. The other issues concerning protection against refoulment on the grounds of international crimes as well as the on the grounds of an act contrary to the purpose of UN are outside of the scope of this study. The protection against refoulment that concerning the refugees committed a crime within the territory of hosting state are also exterior of the scope of this thesis.

The research examines the enforcement of the new temporal law, the move which aimed at limiting the refugee to seek asylum towards its territory. The limitation affects those individuals falling within the exclusion clause who are more likely to be returned and not to mention the complexity process on its application and interpretation of the exclusion clause particularly on that crime supposedly to be committed. The paper explores the degree on which the respect of the right to non-refoulement regarding person excluded from refugee status upheld concerning the relevant international, regional and human rights instrument. The study intends to contribute to the current complex debate and research through an illustration of an intricate problem within EU, where the fundamental rights of a refugee may be violated through the exclusion and eventually return, which on the contrary presupposes the protection of fundamental rights. The demonstrated case highlights the composite problematics of the non-refouler of the refugee falling in the exclusion clause on the grounds of ordinary crimes.

1.7. LITERATURE REVIEW

There is literature on refugee rights, including researches on the principle of non-refoulement in Europe. Not so much has also been written about the situation of the power of an individual excluded from refugee status. This research focuses on non-refoulment consideration in the context of exclusion in Sweden. This focus motivated by the need to discuss the complex issue arises on the protection of an individual excluding from refugee status in the asylum institution, which changes the policy and legislation. However, also the impact of such change on the right of the individual excluded from the refugee status, human right and the obligation under international refugee law as well as the prosecution of the person denied refugee status.

Geoff Gilbert, in his paper on "Undesirable but Unreturnable: Extradition and Other Forms of Rendition" explained about how the state can ensure an alien who can be neither removed nor deported can prosecute the severe crimes committed overseas. The author argues that the application of the law on surrender and extradition, and another form of rendition the alien suspected for a serious crime cannot run away from prosecution. The author further claims that through those form and extradition law the balancing of the objective of the twin goal of non-impunity and non-refoulment, which under the International Criminal Law could barely b met, as in principle the court has limited jurisdictional competence. I acknowledge the author point of view, and they provide an excellent and clear insight on the issue. However, the author does not explain how this could achieve as there is little development of extradition and the law on surrender.

Moreover, the author does not explain the situation of Human right of the individual excluded from refugee status in case of successful extradition and how state balance the obligation on both human right law and refugee law.

Furthermore, what sort of serious crime which state could justify their deportation of an individual through that law. This research paper discovers that the author has not discussed the situation when the domestic law on refugee has changed and strictly implemented. This paper examines the consequences follow on the human right, and the position after the protection against refoulment has been offered and analyse how the individual right can undermine through the implementation of obligation by state.

Goodwin-Gill, Guy S., in his book "The Refugee in International Law" has written and explained extensively on refugee situations in on non-refoulement principle. The author

explained and acknowledge that in distinct to the Refugee Convention, most of the norms, especially the principle of non-refoulement has incorporated and proclaimed without exception in the domestic legal law. The author work is excellent, and it provides fundamental insight into the principle of non-refoulment. However, the author does not explain how the principle is vital in the context of a person, not deserving refugee status, and how the state strives to balance the conflicting norms of protection and prosecution.

Hathaway, J.in his work on "The Law of Refugee Status, second edition, 2014" explained and commenting on the person not deserving protection under the refugee law. The author's remarkable work focuses on the interpretation of the exclusion clause, which warranting the requirements for excluding an individual from status and eventually, protection. The author insight is outstanding, and it gives an in-depth overview of the issues of a person not deserving protection. However, the author did not touch and link on the impact of that interpretation regarding the right of non-refoulment. This research paper set to discuss and explain the aftermath of the interpretation of the person, not deserving protection.

Marriangiulia Giuffre on her article on "Deportation with Assurances and Human Rights: The Case of Persons Convicted or Suspected of Serious Crimes" stressed on the issue of diplomatic assurance in the sense of bilateral instrument; which used by the state to balance the twin goals. The author was of the view that this legal tool facilitates the extradition of an individual convicted or suspected to commit serious crimes in a country other than the host country. The author opinion seems to affirm that diplomatic assurance somehow may pursue the fighting against the impunity of those individual falls under within the exclusion clause. Giuffre, however, acknowledges the problem and challenges faced when applying the proper tool about the human right law. The work of the author is indeed instrumental, and all credits belong to the author's opinion. However, this research paper view that the author does explain the challenge liked to be faced by the interpretation of the legal tool apart from the compatibility with human rights. This research paper addresses the crimes which the assurance may seem to work and those which may not. How the human rights are assured in case the warranty could work, and the receiving state fails to honour the assurance arrangement what is the legal consequence would follow. The paper discusses and exposes the extent and manner which the diplomatic assurance formalised, and the circumstance where there is no diplomatic assurance and how the individual excluded from the protection are protected.

The view of Joseph Rikhof on “Prosecuting Asylum Seekers Who Cannot Be Removed: A Feasible Solution?” advocates and analyses the possibility of the country which alien seeks asylum to initiate and prosecute any alien suspected of serious crimes committed outside the country. The author presented a broad-ranging overview of attempts made by different states to prosecute an alien in terms of Article 1F of the 1951 Refugee Convention, the paper demonstrated the problem the course and showed strategically the relevant result of a limited number of cases which prosecuted by the states. The work of the author is useful, and acknowledged, the insight explained and illustrated on the prosecution of an individual excluded from refugee status are helpful in this paper. However, the author work is limited in the crimes of an international character, meaning that the author has not touched in all crimes with Article 1F. This research intends to reveal those crimes which are not international as political, yet they are serious crime. The research paper aims to provide an insight into the complication on cases which fall on those crimes and how to state change on asylum law undermines the right of an individual excluded from refugee status.

Emma Irving “When International Justice Concludes: Undesirable but Unreturnable Individuals in the Context of the International Criminal Court”, focused and addressed on the possibility and implication of prosecution of an individual who committed a crime of international nature before the international criminal tribunals and the potential migration-related issue after an individual had saved the sentence or acquitted. The author highlights several problems arise after an alien has served a sentence or acquitted based on a small number of cases; in those cases, an alien cannot return to his or her home country. The author findings represent but not limited to, a political issue as a problem for the international criminal institution to arrange the return of an alien. The work of Irving is fundamental to this research. Although the author put to light the several problems, it would be of interest to draw the significant conclusions after analysing the recent change on protection and the return of an individual before and after entering the hosting state. The research paper explains the possibility of expulsion and its implication on the right of an individual who has committed or suspected to commit a crime.

Therefore, the contribution which this research paper exposes is the discussion unattended by the above authors on the protection against non-refoulment to the individual who excluded from protection as a refugee. By analysing the various migration and asylum law Sweden and the cases from the European Court of Human right, a reasoned and justifiable solution and recommendations have given in this research. The stated country is treated as examples, since

it is a country which has taken a different approach with regards to the asylum seeker, and thus the researcher has decided to select the state to limit his research.

1.7. CHAPTERISATION

Starting with chapter 2 explains the legal basis of the exclusion clause and its connection to the right of refoulement in international law. This chapter seeks to elaborate on the recognition and of both term international refugee law, European Union Law and international human right law. After that, part 3, mainly focus on the interplay between exclusion clause, prosecution and refoulment right. The paper will analyse the problem, which affects the individual excluded from the refugee status about the implementation of the exclusion clause and prosecution in international refugee and international criminal law.

Furthermore, the associated term which is relevant to conditions such as crime, extradition and diplomatic assurance described. Chapter Four is more of the practice and treatment aspect of the person not deserving international protection, in Sweden explained concerning the case from ECtHR and Committee against torture and Swedish Supreme Court. However, also, the motive and impact by the Government to those individuals highlighted as well. The last chapter sets the finding and paragraphing the discussion on the issues.

CHAPTER TWO

2. INTERNATIONAL LEGAL FRAMEWORK GOVERNING THE IMPLEMENTATION OF EXCLUSION CLAUSE.

2.1. INTRODUCTION

The status of refugee is on the title of article 1 of the 1951 UN Convention. Its lays out the pre-requisite for according refugee status to the asylum seeker. At the same time, it sets out the circumstance in which the asylum institution cannot grant the condition to the asylum. The latter operates as the general exception to the refugee in the sense that those individuals who fall within the ambit of the wording of the provision of exclusion cannot benefit from the protection offered by the Convention.[21]

The term exclusion clause connotes the substantive rules which formulated to achieve the abuse of refugee status and the interest of states: According to Hathaway 'exclusion', means 'to opt-out an individual from recognition as a refugee due to the crimes.[22] Goodwill is of the view that to exclude a person from refugee status is because of a particular fact which brings into light the antisocial behaviour of the person in need of protection; then James Simeon explain it to mean the act or not according to the person the rights and protection even though is recognised as a refugee.[23]

The essence of articulate the provision in a convention was to protect the integrity of asylum protection institution and not allow the perpetrator of crimes to enjoy impunity.[24] In the deliberation on the possibility of the gap which the provision could allow those refugees who had committed a crime and try to escape justice to had refugee status.[25] In the end, the member

[21]Article 1F of the Convention on the Status of the Refugee of 1951.
[22]J. Hathaway & M. Foster, Persons not deserving protection in, *The Law of Refugee Status*, Cambridge University Press 2014, 526.
[23] Simeon, *Supra*, note 4,89
[24]Background Note on the Application of the Exclusion Clauses: Article: 1F of the 1951 Convention relating, "The rationale behind the exclusion clauses is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection as refugees. Secondly, the refugee framework should not stand in the way of serious criminals facing justice." https://migration.ucdavis.edu. Accessed on 21st April 2019
[25]Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-fourth Meeting, A/CONF.2/SR.24, 27 November 1951, statements of Herment, Belgium, and Hoare, United Kingdom. However, there was a degree of confusion between the fear that asylum might confer immunity upon serious international criminals and the issue of priority between extradition treaties and the 1951 Convention, although that was inevitable where extradition was the sole method of bringing perpetrators of such serious crimes before a court with jurisdiction to prosecute - see A/CONF.2/SR.24, SR.29 and SR.35, Item 5(a), 27 and 28 November and 3 December 1951,

state favoured the extradition arrangement as a tool to the gateway and eventually solved the gap, but the issue which remains at stake was which of the two regimes will prevail than the other; extradition or the Convention.[26]The underlying objectives as mentioned cannot be taken in a vacuum as they implemented in line with the prevailing object and purpose of the 1951 Conventions since its enforcement was for humanitarian reason[27]: Nevertheless, paragraph 7(d) of the UNHCR set the extent to which the high commissioner competence can use her mandate in respect of the refugee.[28] This cement the fact that the exclusion clause should restrictively be applied and correctly.

This chapter seeks to establish the basis for the operation of exclusion clause lies in the charter, declarations, conventions and UNHCR practices. In turn, this gives a foundation upon which states are obliged to implement the exclusion clause against refugees while taking into consideration the right of non-refoulment.

2.2. THE LAW GOVERNING THE OPERATION OF THE EXCLUSION CLAUSE.

The exclusion clause was deliberated and incorporated at the time of the 1951 Geneva Convention enacted. The phrase was solely introduced to serve the primary two purpose of filling the loophole which could be used as the umbrella of protection on humanitarian ground and on the other hand to deny refugee who is criminals to escape prosecution; although it ratified by many states, the operation of the exclusion clause has increased in past years.[29]

Due to the massive number of refugees in Europe resulted from the civil war, economic migrant and the terrorist attack, the UN General Assembly passed a resolution arguing that the member state to restrictive implement their rules regarding the refugees and to satisfy that the refugee has not participated in any criminal act of terror.[30] Nonetheless, this issue has raised the concern

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Conference of the Plenipotentiaries. See also, Weis, *supra n*, at p.332. *Cf.* SCIP Interim Report on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, EC/SCP/66, 22 July 1991. "54 Most States which have replied permit the extradition of refugees in accordance with relevant legislation and/or international arrangements if the refugee is alleged to have committed an extraditable offence in another country. A number of States, however, exclude the extradition of a refugee if, in the requesting State, he or she would be exposed to persecution on the grounds mentioned in Article 1 of the Convention, if he or she would not be given a fair trial (Article 6 of the European Human Rights Convention) or would be exposed to inhuman and degrading treatment (ibid, Article 3) as quoted by G. Gilbert, the Current issue on the Application of Exclusion clause, 2001.

[26]*Idem.*

[27] *Idem*

[28] Paragraph 7(d) of the UNHCR Statute provides that the competence of the High Commissioner shall not extend to a person: In respect of whom there are serious reasons for considering that he [or she] has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the 1945 London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the 1948 Universal Declaration of Human Rights.

[29]Gilbert, *Supra*, note 5,3.

[30]Simeon, *Supra*, note 4, 86.

in the 1951 UN Convention relating to the Status of Refugees, which embodied the right of non-refoulement.31In addition to that fact, it played a vital role in how state parties should deal with the individual excluded from protection as refugees concerning the right of non-refoulment and human right.

2.3. THE EXCLUSION CLAUSE UNDER UN CHARTER.

The UNSC has made declarations to address refugee status particularly in the application of exclusion clause in its effort to suppress the terrorism; some of the resolutions made are important like the UNSCR 1361,1269 and 1363: These Resolutions has raised a concern about the rights of refugee.[32]

The UNGA has also addressed the issue of refugee specifically in the right non-refoulment to complement the Convention on the Status of Refugee such vital declaration are Declaration on Territorial Asylum of 1967 and Declaration on the Human Right of Individual who are not Nationals of the Country which they live of 1985.[33] Unlike the former declaration the latter supplementing the 1951 Convention as it provides, in the broader sense the exception to the right of non-refoulment: It stresses that the expulsion of a refugee must be only for the ground of national security or for safeguarding the population of the host country.[34]

2.3.1. The Universal Declaration of Human Right 1948.

The UDHR as a soft law is the most important document on the foundation of human rights universally. Almost all human rights norm derives their basis in this document. Driven by natural law principles and concepts, the paper set the basis for worldwide concern in providing the solution to the refugee problems since the right of refugee, and human rights linked. Article 3 of the UDHR provides for a right to life; an essential right of which is the etymology of the exercise of all other.35 Upon the violation of refugees' rights, a person can seek asylum in other countries under article 14 of the UDHR. The Hosting Countries should protect these very rights. Although it is the toothless legal document, the UDHR norms and principles embodied in have acquired universal acceptance and recognised as customary international. Since the State have

[31]The principle of non-refoulment is found on Article 33 of the Convention on the Status of Refugee of 1951
[32]Simeon, *Supra*, note 4, 87
[33]The Declaration on the Human Right of Individual who are not Nationals of the Country which they live adopted by UNGA resolution 40/144 of 13 December 1985
[34]Declaration on Territorial Asylum of 1967 adopted by UNGA resolution 2312 (XXII) of 14 December 1967
[35]J. Chambo, "The principle of Non-Refoulment in the Context of Refugee operation in Tanzania" Master Thesis (Published) https://repository.up.ac.za/handle/2263/1140 accessed 15th June 2019.

endorsed their commitment to the purposes and principles contained in the UN Charter, for that reason, states have accountability to protect refugees against refoulement.

2.3.2. The 1951 UN Geneva Convention on relating to the Status of Refugees.

The International Convention on the Refugee status leaves liberty to the state parties on the process of admitting a refugee in their territory. Article 1F is one of the provisions in respect of which states parties could use such liberty. It is; however, the wording of the article contains specific requirements that limit that discretion. It goes on and provides that:-

> "The provisions of this Convention shall not apply to any person for whom there are serious reasons for considering that: (a) he has 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) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."[36]

This provision set a threshold to the state parties not to exclude an individual but rather to play a pivotal role in implementing the spirit of the Convention and protecting an individual fundamental right guarantee. It is through severe considering the reasons as they would be for protection in the light of persecution thought by the refugee. The systemic objective of the provision and the protection of the right of an individual depends on the application and interpretation of the exclusion clause. However, the option remains to the state once it established that a person is not deserving protection under the Convention, yet in any case, the country is required to uphold the right of non-refoulment which articulated in Article 33(1) and it is to the effect that;

> "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 threaten on account of his race, religion, nationality, membership of a particular social group or political opinion." [37]

It is enough to mark that during the draft of the 1951 UN Geneva Convention the provision of non-refoulment intended to be absolute because of the magnitude given to the fundamental

[36]The United Nation Geneva Convention on the Refugee Status 1951
[37]*Idem.*

human right; right to life and freedom as enshrined in the provision. It follows that there is a duty to the state to provide temporary refuge to a person excluded from protection as a refuge while searching for a permanent solution. This because there is no provision in the 1951 Convention which deals with the issue of the temporary shelter of the person with no status; and the right of non- refoulment recognised by many states as customary international law and all state is under obligation to uphold it. On his comment on the decision of the Haitian Case, Goodwin-Gill emphasised that:

> "The principle of non-refoulement has crystallised into the rule of customary international law, the core element of which is the prohibition of return in any manner whatsoever of refugees to countries where they may face persecution."[38]

In respect to that, the convention much as it requires some of the individuals excluded from the refugee status; at the same time, it gives a mandatory duty to the member state not to expel or return an individual unless the states have satisfied that the life and freedom of such individuals are not threatened.

2.4. UNHCR COMMITTEE.

The UNHCR as delegated by the UN General Assembly, the office has been entrusted with the task of international protection of refugees. In respect to that, the Member States have formal obligation undertaken to cooperate with UNHCR in the implementation of its functions; and the committee shall set in motion the supervision responsibility on the operation of the articles of the Convention on the Status of Refugee and its protocol of 1951 and 1967 respectively. In discharging its duties, UNHCR has issued the number of documents which clarifies the implementation on the exclusion clause:[39] The UNHCR Handbook Procedure on Criteria of Determining Refugee Status and the Guidelines on the International Protection which offer in-depth insight on the interpretation on the operation of the exclusion clause.[40] Moreover, the Committee advocated and continue to stress the respect of refugee rights worldwide; including the right of non-refoulment through its Background note documents on the operation of

[38]G. Goodwin-Gill, "The Haitian Refoulment Case: A Comment, 6 *International Journal of Refugee Law* 1(1994) 103.

[39]https://www.unhcr.org/3d58e13b4.html

[40]*Idem*, The UNHCR remark that "The "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" (the Handbook) is issued in accordance with UNHCR's supervisory responsibility under its Statute, the 1951 Convention, its 1967 Protocol and regional instruments. It is intended to guide government officials, judges, practitioners, as well as UNHCR colleagues in applying the refugee definition. The latest Handbook was issues in February 2019.

exclusion and non-refoulment which they have implemented through committee (expressed concern on international protection).[41]Although they adopted guidelines, they are an integral part of the UNHCR and act as inspiration, they may, however, use as a contribution to the formulation of Opinion Juris regarding the protection of refugees.[42] All of these documents are relevant to the implementation of the exclusion clause and the right of non-refoulment as secondary legal sources; they are broadly interpret these norms.

2.5. CONCEPTUAL PERSPECTIVE.

The operation of the exclusion clause usually is rest on the individual assessment of a person apply for asylum. It may lead to some of the individuals to be unfairly accessed in an unclear assessment procedure or remain an unknown person in the country of refuge and even in worst-case returned to its country of origin. In anticipation of this situation, the refugee legal framework has provided a solution: that is the principle of non -refoulment.

2.5.1. Right of Non-Refoulment

The aftermath of the refugee status assessment usually ends with the status to be granted or not; in case the state authority refuses not to declare, it implies that the operation of the exclusion which leads to the expulsion or extradition of that individual from the country.[43] However, the right of non-refoulment may act as a legal bar to remove the individual. It is evidenced in several Human right Instrument as they are going to discuss shortly. The international human right instrument, such as CAT the right of non-refoulment is absolute with no derogation provisions. However, again, the ECHR prohibits a refoulment; the same has strictly affirmed by ECtHR that the protection is absolute and should prevail even under challenging circumstances such as the fight against terrorism and organised crimes or even in times of public emergency.[44] The right of the non-refoulment bar a state to remove a refugee; it is basing on the human right: This has currently been justified by individual not deserving international protection which in turn

[41]The Executive Committee Conclusions (ExCom) on international protection. For instance, in 1977 the Executive Committee issued a conclusion on non-refoulement. It expressed its deep concern on the lack of respect of the principle of non-refoulement. It then reaffirmed the fundamental importance of the observance of the principle of non-refoulement of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees. This was reaffirmed in the ExCom on Detention of Refugees and Asylum-Seekers of 1986. UN High Commissioner for Refugees (UNHCR), Note on Non-Refoulement (Submitted by the High Commissioner), 23 August 1977, EC/SCP/2, available at: https://www.refworld.org/docid/3ae68ccd10.html

[42]Chambo, *Supra*, note 35, 17

[43]N. Larsaeus, "The Relationship Between Safeguarding Internal Security and Complying with International Obligations of Protection"; The Unresolved Issue of Excluded Asylum Seekers. Master Thesis (Published 2003)

[44]*Chahal v. the United Kingdom, Application No. 22414/93 ECtHR 15th November 1996*

is likely to challenge the refugee system of protection.[45] While after being excluded from international protection, the individual has the right to stay under the human right prohibition of the refoulment realm: This is not the case on UNGCRS, which embodied a regulated status. The question, however, remains how the state proceeds with those individuals not meriting international protection due to the crimes suspected to the committee or committed by them; as they can neither deported nor extradited.

The responsibilities of the states towards the refugees steered by the 1951 UNGCRS and its Protocol of 1967. Both of the international legal instruments do not cover all the issues needed to be pressed in a current evolve world especially on refugee movements: For the reasons, the UNHCR launched a consultation on the protection of refugee worldwide in 2000 to access and explore the existing international refugee regime to address new emerging and challenging problems.[46] In 2002 the institution put in motion the agenda on protection to improve on the protection of refugees all over the world; the focus was to continue building on the 1951 UNGCRS through the Declaration of States Parties and a Programme of Action.[47] States were required to continue to respect their international responsibility towards refugees by strengthening international solidarity, but also one among the action programme goals were stress on building capacities to receive and protect refugee and sharing responsibilities equally.[48]

Furthermore, the UNHCR has settled and organised different documents with different procedures which can be used by the state to advance a mechanism for execution of the exclusion clause and return of the refugee. These documents from UNHCR implemented side by side with countries to develop a device which performs the use of the exclusion clause and detect the non-violation of the right of non-refoulment. The Executive Committee of UNHCR has also permitted several suppositions on the operation of the exclusion clause in refugee safety, these conclusions have confirmed and underscored that refugees' problem and the concern of right of non- refoulment there should be a balance with the security of the state.[49]

[45] Larsaeus, *Supra*, note 40, 9
[46] Chambo, *Supra*, note 35, 38
[47] *Idem*
[48] *Idem*
[49] UN High Commissioner for Refugees (UNHCR), Note on Non-Refoulement (Submitted by the High Commissioner), 23 August 1977, EC/SCP/2, available at: https://www.refworld.org/docid/3ae68ccd10.html accessed 20th May 2019.

2.5.2. Exclusion Clause in the international Framework.

The principle of non-refoulment recognised in the refugee law regime. However, bearing in mind, there is a claim of state sovereignty on the party of countries hosting refugees; however, the preamble of the 1951 UN Geneva Refugee Convention provides the affirmation of the principle of human beings to enjoy the fundamental rights and freedom without discrimination. It is not obligatory on member states, but its inclusion in the 1951 UN Geneva Refugee Convention shows its importance. Literature surveys show that at the time the exclusion clause was incorporated in the 1951 Geneva Refugee Convention for the refugee assistance and protection was indeed a qualified criterion; this was because at the beginning there was no such clause in the Convention and the member states were to rethinking about the assistance and protection of refugee.[50]

The rationale behind from the drafted was their wish to protect the gap which at that time used behind the coat of refugee status, but again to do away the situation for those who enjoyed impunity from justice.[51] It believed that through excluding these individuals would maintain the integrity of the refugee institution and made state to co-operate and eventually strength the Convention on refugee status. As they go by the name of individual not deserving international protection or unreturnable or undesirable asylum in the eyes of UNHCR Executive Committee[52], they reflect a moral and ethical standard because they do not meet criteria stipulated in the Convention.

Consequently, if the criteria of Article 1F(b) met, the provisions of the convention with regards to the fundamental fundamentally rights of a refugee "shall cease to have effect ". then what follows then an asylum seeker is at once not offered the considerable protective framework instead the gate is open to a person's met the requisite provided in Article 1A. The phrasing of the clause was precisely intended to be so, and there was also an alternative proposal of phrasing the provision, but due to the French initiative, they disagree as they were concerned about the current compulsory exclusion.[53]

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[50]Grahl-Madsen, A., *The Status of Refugees in International Law*, I (Leyden: Sijthoff, 1966), 262 as quoted by Larsaeus, *Supra*, note 40, 6.

[51] *Idem*

[52]ExCom "Note on the Exclusion Clauses" the UNHCR Executive Committee affirms this reading, declaring that "the protection as a refugee is related to the intrinsic links between ideas of humanity, equity, and the concept of refuge" Note on the Exclusion Clauses (30 May 1997), [EC/47/SC/CRP.29]

[53]Hathaway & C. Harvey, 'Framing refugee protection in the new world order', *Cornell International Law Journal* 34 (2001) 257-230

However, the implementation of the original clause was watered down as the result of the cold war: The problem was that asylum easily granted as long as the individual had a fear of persecution, and this primarily was a reference to a good cause and excused one's grave crimes.[54] The lesson learned from Rwanda and the former Yugoslavia genocide, which then state undertook a different way and started to scrutinise the background and activities of the asylum seeker. Following the rise of terrorism renaissance, the exclusion clause, it was, however, not enough as the requirement continues to gain a notable implementation due to the experience from the refugee crisis in Europe.

The state point of view that of genuine and legitimate interest to preserve and safeguard the border and internal security shall prevail as the same as the asylum seeker when relied on the mutual trust and cooperation between states. However, the argument mainly on the human rights basis, such development and implementation of the clause have a serious concern as it has an impact on international human right law regime concerning Resolution 1373.[55] The balancing of the two situation lies in the operation of the exclusion clause in which it is not clear as to the extent it can distinguish between individual owes pure international protection and one of the fugitive traits. Otherwise, if incorrectly applied the Article 1F (b) can be used to implement both the violation of non-refoulment and give privilege to the fugitive which in turn defeat the underlying objective and the purpose of the Refugee Convention and the asylum institution as well.

2.5.3. The relationship between Article 1F(b) and Article 33.

Article 1D, 1E and 1F of the Refugee status[56] enshrine several circumstances for an individual who do not deserve refugee protection. The provision of law portraits three aspects of the person who cannot accord the refugee status such as those already received the shield from UN, those who do not need protection and those who committed crimes in their country of origin before fleeing to the hosting country.[57] In respect to the above position, it follows that the exclusion in refugee law means the persons who have the right to be documented as a refugee but cannot be

[54]Larsaeus, *Supra*, note 40,7.
[55]From a human rights point of view this is a development worth watching closely. Mary Robinson and late Sergio Vieira de Mello both expressed serious concerns about the possible impact of Resolution 1373 on human rights worldwide.
[56]The United Geneva Convention on the Status of Refugee 1951.
[57]Chapter IV of the Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees Reissued Geneva, February 2019. paragraph 140. https://www.unhcr.org/3d58e13b4.html

accorded the fundamental rights from the Convention for the reason of the criminal act(s) that she has committed outside the country of refuge.

Article 1F provision is different from the other two requirements, which are Article 1D and 1E of the UNGCRS. They are both termed as the exclusion clause but substantively, the latter provision is specially formulated to deal with those individuals who are not in need of protection: On the Contrary the UNGCRS is not applicable to a person receiving protection from the organs of the UN with exclusion of UNHCR unless there is a changing of circumstance.[58] Moreover, if a person recognised by the competent body of the state as a resident and having right and obligation as a national of that country, then by default the UNGCRS is not applicable; these are usually those people who had already enjoy the protection provided from the Convention in a country which had refuged them.[59] Once the exclusion clause is applied then the person asylum application is rejected, and the only option the state has is to send the person back, but usually, such option is not the last resort as it considers the human right of the person.

In respect to that, the current and common prevail confusion is on Article 33 particularly article 33(2); the requirement under Article 1F is for those person who are not qualified for a refugee status which in any case they cover under article 33(1), unlike Article 33(2) applies to persons whom asylum application has already granted a refugee status but later on become a dire threat to the state because of the severity of crimes perpetrated by them. For this reason, it follows then Article 33(1) has always considered as the shield of last resort, no matter what kind of offence has been committed and taking precedence over and above criminal law sanctions and justified by the risk of exposure to the fear of persecution on the right to life and freedom.[60] A threat that it can counter by sending the person to the country of origin.[61]

[58]"They may, however, fall within the scope of the 1951 Convention in the event that "such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" Note of Application" Background Note on the Application of the Exclusion Clauses: Article: 1F of the 1951 Convention relating the Status of Refugees (HCR/GIP/03/05, 4th September 2003)
.https://migration.ucdavis.edu/rs/more.php?id=130 accessed on 3rd July 2019
[59]*Idem.*
[60]Migration News. http://migration.ucdavis.edu/rs/ceme/printfriendly.php?id=130_0_3_0
[61] The Landmark case of Case *Omar Othman a. k. a Abu Qatada v. Secretary of State for the Home Department* [2013] EWCA Civ 277 (27 March 2013)

2.6. THE RIGHT OF NON-REFOULMENT UNDER HUMAN RIGHTS INSTRUMENTS.

Apart from enjoying rights exclusively in the refugee instruments because of their vulnerable situation, the human rights instrument protect the rights of refugees and they have a right to enjoy all other rights stipulated in human rights instruments: However, it is a different phenomenon for individual excluded from refugee status as the state is must respect protect and not violate their fundamental human rights. Human rights tools play a vital role in accompanying the refugee instruments, exclusively in the most important right: the right of non-refoulement.

2.6.1. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

The wording of article 3 of CAT constructed on Article 33(1) of the 1951 UN Convention, which applies to an individual who faces torture upon return. It offers that no state party shall expel, return ('refouler') or transfer individuals to another state where they would be in danger of being exposed to mistreatment. Unlike refoulement in the 1951 UN Convention, CAT guarantees the absolute prevention of refoulement under Article 2(2).[62] Furthermore, the CAT provides for the conditions in defining the actual danger or real risk of being subjected to torture.[63] A central section of the CAT is the Committee against Torture (Committee), a monitoring body initiated to ensure implementation of CAT's provisions.[64] In addressing communications claiming the violations of article 3, the Committee has resolved that non-refoulement does not only applied on the situation of direct expulsion, return or extradition, it embodied indirect sending of person to another country from which the transferred individual might face the danger of being returned to the country where there is a risk of being subjected to torture.[65]

The Committee (CAT) has always been of assistance to victims of law enforcers who try to side-step the obligation imposed on the international human right law. Several cases from the institution show the legal practice on refugee fall within the line of the Article 1F(b) particularly, in Sweden. In the fact of ***Agiza v. Sweden***,[66]the applicant was the criminal who

[62]The United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984
[63]Chambo, *Supra*, note 35, 19
[64]*Idem*,
[65] *Idem*
[66]CAT/C/34/D/233/2003, UN Committee Against Torture (CAT), 24 May 2005

incarcerated Egypt. The applicant applied for asylum on the ground that he had been sentenced to 'penal servitude for life' in absentia on account of terrorism, and upon his deportation, his execution would be implemented as other accused in the same trial. As the case falls under the security case AA. Through its Security Police and after SMB seeking opinion Sweden investigated which leads to the allegation that the applicant was a leader and in-charge of the activities of an organisation guilty of terrorist acts, the charge denied by the applicant. The case forwarded to the Swedish Government. The view of SMB was that the complainant is entitled to claim refugee status, but upon SP assessment, which is conclusive warrant the exclusion. The opinion upheld by the Government after consultation with the AAB. The Board highlighted to the Government to consider two issues which are at the stake that is the obligation to give protection to the Applicant and the security of the State.

Consequently, the application rejected, and Mr Agiza deported. Upon follow up by the Swedish Ambassador to Egypt and the complainant's family at the prison in Egypt, it discovered that the applicant was subject to the torture(electric shocks) upon his arrest by the Swedish authorities. Moreover, the applicant told the Swedish diplomats that he had been subjected to torture from Egypt authority although Sweden had received diplomatic assurances on that the applicant would not face torture-punishment from Egypt Authority.

The substantive assessment of the Committee was under Article 3 which posed a question, if the removal of the applicant violates the embodied under the provision that due to the substantial prevailing grounds of believing there is a danger of being subjected to torture, the state is obliged not to expel or return person; the Committee finds that there was violation of Article 3 of the Convention: In it analysis, the committee considered the information that was known, or ought to have been identified, to the State party's authorities at the time of the removal; the later events were relevant to review the knowledge, actual or imputed at the time of deportation.[67] Through, its confirmed numerous sources that are reports published concerning the Committee own work, the State were aware of the risk and also the State knew through its private security intelligence services considered the applicant to be involved in terrorist activities and thus posing a threat to Sweden's national security.

In its conclusion, the committee view that the applicant was at real risk of torture in Egypt in the event of expulsion; subsequently the complainant was subjected to treatment amounting to

[67]I. Järvergen, "The Principle of Non-Refoulment in Sweden Migration Law" Master Thesis, (Published 2011),39

torture or cruel, inhuman or degrading treatment or punishment: The committee also remarked that the diplomatic assurances, did not guarantee the enforcement mechanism and that it was not sufficient for protection against manifested risk.

Another communication against Sweden was about the Iranian nation[68] as the above cases, the claim based on the risk of being tortured upon expelled to Iran, which would trigger a violation of Article 3 of CAT. The Applicant was a widow who belongs to secular-minded families who are against the religious regime of the Iranian Government. After the death of her husband, the Iranian Government declared the applicant's husband a martyr; the applicant and her two sons were then required to adhere to strict religious rules. She re-marries to an Iranian spiritual Leader by force for sexual services. Later she started having a fair with a Christian man; the couple arrested by Iranian authority and applicant sentenced to stoning until death on her confession for adultery under torture — the extortion of confession surrounded with severely beaten by her late husband and questioned during detention. The was supposed to leave he matrimonial home with her younger son and subsequently applied for asylum in Sweden. The SMB rejected it, and the AAB dismissed their appeal. Her claim at the Committee based on her sentence to death by stoning for adultery before moving to Sweden which manifests the risk she might face upon her return.

The Swedish Government although was aware of the widespread violations of human rights in Iran nevertheless contended that the complainant was not politically active in Iran; the credibility as to her later marriage and subsequently relationship with another man was vetoed out due to lack of information to corroborate it. In it's finding the Committee analysis the report adduced by the applicants and find that the information was sufficient enough to shift the burden to Swedish Government; however the Government was not adequately investigated in the allegation to determine if there would be a substantial grounds to establish the risk which the applicant might face, and based on report on violence against women Moreover, the Committee notes reports that confirm widespread violations of human rights in Iran, including the fact that married women in recent times have been sentenced to death by stoning for adultery. In conclusion, the Committee finds that the deportation would comprise a violation of Article 3 of CAT if the applicant returned to Iran.

[68]A.S. v. Sweden CAT/C/25/D/149/1999, UN Committee Against Torture (CAT), 15 February 2001

The court and committee position is different from the interpretation of the exclusion clause by Sweden. Although the Convention is silent on what types of crimes but decided cases have revealed that Sweden is strict on the application and interpretation of the exclusion clause, they support the idea that the obligation to exclude an individual from refugee status and quickly return the individual stated in the convention. The first cases in Sweden that discussed an application of the exclusion clause in refugee status determination and expulsion was *Alzery v. Sweden* which decided that there was an obligation to the state to refrain from returning an individual excluded from refugee status. The extent of responsibility further developed in *Agiza v. Sweden,*(Supra) was an "expressly obligation" of refrain from expulsion arising out of convention or human right is attached to the state even in the context of national security. Furthermore, this position also stated in the decision of the Court of Appeal in the leading case of *U.K v Othman*(Supra) in which the court noted that the expulsion should keep concerning the context of the human right standard and other information produced during the process.

Also, the absence of a monitoring body for the operation of the 1951 UN Convention, CAT have a vital role in protecting the rights of refugee.[69] In the case of *Paez v. Sweden*[70] the applicant as the person not deserving a refugee and refused asylum in Sweden because the case felt within Article 1F of the Geneva Convention; the Committee held that Sweden had an obligation to refrain from expelling complainant to other countries where he faces a real risk of being deported or returned or being subjected to torture. The Committee is the last resort institution, and thus the complainant must establish that all available domestics avenue for remedies has used for seeking redress.

2.6.2. The International Covenant on Civil and Political Rights 1966.

The ICCPR offers that no one who is legitimately inside the territory of a state should expel from that state without due process.[71] The status of ICCPR in safeguarding the respect of refugee rights, including non-refoulement is in two way: First, it specifies what action must be done before anyone can forcibly expel. Second, it has a monitoring body called the HRC, where

[69]Article 17 The United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984
[70]CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April 1997
[71]Article 13 of the ICCPR was adopted by UNGA resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976

victims may direct incidents of refoulement.[72] The two blocks give refugees a chance to seek remedies in case of threats to refoulement.

Both two function of the HRC has illustrated in the case of *Danyal Shafiq v. Australia*[73]the case involves an application for protection of visa (refugee status), by the applicant which was then denied on 21 June 2000. The form was review to the Administrative Appeals Tribunal (AAT) and rejected on the ground that there were "serious reasons for considering that the applicant had committed a serious non-political crime outside Australia before his admission to Australia, within the meaning of Article 1F(b) of the Refugees Convention" The conclusion was then the Convention did not apply to him and that Australia had no obligation under the Convention to protect him. The author seeks for legal review before the Federal Court without succeeding. He then applied for consideration on compassionate grounds as per section 417 of the Migration Act 1958, which empower the Minister for Immigration, Multiculturalism and Indigenous Affairs to exercise discretion and grant a protection visa on humanitarian grounds; the decision was not in favour of the author and eventually the deportation followed.

When the case brought before HRC the decision was based on Article 5(4) of the Optional Protocol, and the committee found that there was a violation of Article 9(1) and (4), of the International Covenant on Civil and Political Rights; in their analysis the committee remark that:

> " The minister was bound to consider the circumstances that may bring Australia's obligations as a signatory to the International Covenant on Civil and Political Rights into consideration. For example: A non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty"[74]

[72]States that have become a party to the First Optional Protocol to the ICCPR recognise the competence of the Committee

[73]CCPR/C/88/D/1324/2004, UN Human Rights Committee (HRC), 13 November 2006

[74]University of Minnesota Human Rights Library. http://hrlibrary.umn.edu/undocs/1324-2004.html accessed 21st July 2019.

2.6.3. The European Convention on Human Rights and Its protocol.

The UNHCR is a primary overseer of the way states authorities implement and comply with the obligation under the Refugee Convention; the institution has lacked a systematic global supervisory jurisdiction to review the procedure process and the righteousness of state decisions to grant, or withhold the refugee status: Individual cannot petition to the judicial body as it is under Articles 34 and 35 of the ECHR. This task was done by a development body which specialised in a case-law interpretation and application in relation to the state courts; the result was not uniform in term of refugee status determination, this leads to the member states to address the issue by transforming it to the law which governs all EU member state: The content of the definition and meaning does not necessarily reflect the views of UNHCR.

The ECHR has no clause which associated with asylum issues; and for that matter, it is even seemed to initiate the case regarding those seeking asylum: However, the jurisprudence developed by the court has now set the standard for the right of asylum seeker across Europe.

In the several occasions the court has affirmed that the right of asylum is unguaranteed in the Convention and its Protocol; nonetheless, the protection those who owe a fear of persecution are under the UN Geneva Convention and the international human rights treaty ; It was then on view of the court that such interpretation would not be compatible with the common heritage of members of state which reflected on the preamble of the Convention: The court considered that the supervisory character of the ECHR prohibits extradition, expulsion, or deportation to a country where an individual is likely to be subjected to the treatment which is contrary to Article 3.[75]

It follows that, the Geneva Convention on refugee Status and other international human right treaty and the ECHR serve the same objective when addressing the question of expulsion of an individuals and exposed them to a prohibited treatment; the former covenants do not limit the application of the ECHR, and thus the EU member states are responsible under Article 3 for all foreseeable impact of deportation which individual encounter outside their jurisdiction: The Court observed;

[75]The European Convention on Human Rights 1950.

> "The fact that a specialised treaty should spell out a specific obligation attaching to a prohibition on torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3".[76]

The ECHR object and purpose is the protection of individual human beings in which the interpretation of the provisions and its application are practically active and safeguarding; such construction extends to the cases of individual excluded for the refugee status is situation which they would expose to inhuman or degrading treatment prohibited by Article 3 of ECHR: The article reflect the inherent obligation to all member state of EU. The direct consequences which result from the measure taken by state trigger the application of ECHR. Therefore, in any case the expulsion of an individual who is not protected under the refugee convention give arise to issue under Article 3, and eventually engage the responsibility of that state under the ECHR, where there are a substantial grounds that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country of deportation.[77]

The decided case from ECtHR evidenced the position of ECHR in protection against refoulment. In the case of *Bader and Kanbor v. Sweden,*[78] the applicants claimed that their deportation to Syria would face a risk, particularly Mr Bader who, together with his brother, had planned the murder of their brother-in-law since they thought that he had ill-treated their sister. They Applied to the SMB for asylum and then appeal to the AAB, but the application was not successful because they had failed to show that they faced persecution if deportation upheld. The family lodged a new request for the same and applied for a stay of execution of the deportation order as well; the latter substantiated by the alleged impediment for enforcement of a judgement delivered by a Syrian Court, which Mr Bader had been convicted, in absentia, of complicity in murder and sentenced to death. The Swedish Embassy in Syria validate it assisted by a domestic lawyer; The local lawyer supposedly to claim that the case might be re-opened upon accused had been located, nevertheless, affirm that the Syrian judicial system was unfair. The crime linked to Syria tradition of Honour related killing, which set as a mitigating factor and the convict is likely to have a lighter sentence. At the time of conviction, the death penalty

[76]Vadslava Staynova, Protection under Article 3 of the European Convention on Human Rights, http://www.jur.lu.se, accessed 17th June 2019

[77] Handbook on European law relating to asylum, borders and. https://studylib.es/doc/5723294/handbook-on-european-law-relating-to-asylum--borders-and

[78]*Bader and Kanbor v. Sweden* 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005

execution was to be approved by the President, and it was unlikely to be imposed in Syrian Courts. The application rejected due to the opinion of the local lawyer.

The ECtHR Court based its analysis on the principle established in the case of *Öcalan v. Turkey* which suggests that "the significant degree of human anguish and fear owing to sentencing a person to death after an unfair trial, in circumstances where there is existing a real possibility that the sentence enforced, would bring the treatment within the scope of Article 3."[79] The court finds that the deportation would give rise to the violation of the Convention. The Court considers the risk which emanated from the existence of the death sentence; The Court's assess the judgement provided and went on remarked that the fact that the decision confirmed by state embassy in receiving state (Syria) and its possibility of enforcement through Syrian Authority which eventually would make applicant detained and probably tortured and lastly, the Court disagrees with statements that the embassy report as it was equivocal.

On its analysis, the Court notes that even though Sweden assured by the Syrian authority that the case against Mr Bader's reassessed and the possible procedure and conviction will not amount to the violation of his right, yet the State overlooks the fact that the defence lawyer of applicant was supposed to provide opinion on the issue. Nevertheless, also, the circumstance which the execution would implement bring considerable fear and anguish to the applicant and the family would be in the unbearable situation of not knowing the way the punishment enforced as it carried without any accountability. Hence, as the State overlooks the opinion of the defence lawyer, the court found that the deportation would expose the applicant to risk and deny him the fair trial, which amounts to the violation of Convention. From this case reflect the duty to the state to investigate, and it is indeed there is a problem as to the extent on which the country should go for the investigation to fully assure that the person would not be subjected to risk.

2.7. THE EU LAW AND THE OPERATION OF EXCLUSION CLAUSE IN EUROPE.

The rule of law is a fundamental principle in EU;[80] it means that any action taken by member states of the EU derived its legitimacy from the treaties and that the implementation is

[79]*Öcalan v. Turkey* (App no 46221/99) ECHR 12 May 2005 as cited by I. Järvergen, "The Principle of Non-Refoulment in Sweden Migration Law" Master Thesis, (Published 2011)
[80]Rule of Law and Democracy: Addressing the Gap Between https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices accessed on the 15th May 2019.

voluntarily and democratically approved by all states party to the EU.[81] The agreement is binding among the members' state since it set out the objectives of the EU, rules governing EU institutions, the decision-making process and the relationship between member state and EU.[82] The legal basis of an obligation of EU members to accord protection to refuges found in Article 78 of the TFEU which state as follows:-

> "1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection to offer appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement
>
> 2. For paragraph 1, the European Parliament and the Council, acting by the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, require international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) Partnership and cooperation with third countries to manage inflows of people applying for asylum or subsidiary or temporary protection.
>
> 3. In the event of one or more Member States confronted by an emergency characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

[81] https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en
[82] *Idem*

This legal obligation of EU member states to protect the refugee reflected in the refugee protection regime itself, human rights as well and humanitarian law.[83] The UN Geneva Convention on Refugee Status provides for international legal framework on the protection of refugee on a broader sense as it embodied the meaning and give the rights at the international level.[84] The CEAS established per the treaty, and it sets to work as a double-edged sword of the Convention and its protocol as well as other relevant agreements.[85]

Although the EU Member States have their way of protecting refugee, still they have an obligation under the human right Convention when they failed to honour and protect the right protected under the 195I Geneva Convention, and they are responsible in case of violation.[86] Therefore, the EU legislation cannot supersede the supremacy of international law and the members' states commitment to international obligation; and the rule and regulations made by the EU institutions provide the guidance to the member state and contribute to sharpening the international obligation regime.[87]

The application of exclusion clause found in article 12 of the recast QD, which reflects the pre-requisite for exclusion as provided in the 1951 Geneva Convention on the Status of the refugee. The QD is codifying several aspects of an international agreement signed by the members of the EU.[88] During the deliberation of the QD the draft article 14 now is Article 12, the European Commission advocates that the wording of the piece reflect the same conditions prevailing on the exclusion clause under the refugee Convention: But also article 21 of the QD reflect the

[83] S. Velluti, *Reforming the Common European Asylum System-Legislative Development and Judicial Activism of the European Court*, Springer Publisher, U.K 2014,10

[84]*Idem* "Convention constitutes the centrepiece of international refugee protection by providing a definition of refugee and the most comprehensive codification of refugees' rights at international level. The Convention is both a status and rights-based instrument and is underpinned by several fundamental principles, such as non-discrimination (Article 3) and non-refoulement (Article 33). Further, it lays down basic minimum standards for the treatment of refugees, without prejudice to states granting more favourable treatment." (Samantha: 2014) http://www.springer.com/series/10164

[85]*Ibid*, 11"Under this provision, International treaties are those that are binding upon all Member States, unless they qualify wholly or in part as customary international law binding upon Member States irrespective of a ratification of the treaty." (Samantha: 2014) http://www.springer.com/series/10164

[86]*Ibid,12*"The principle of good faith as the thumb rule of interpreting the treaties together with the rule of pacta sunt servanda which requires the state to abide the international agreements which are part to. Much as there CEAS still it does do away the obligation towards 1951Geneva Convention on Refugee Status." (Samantha: 2014)

[87]*Idem* "The EU is obliged not to impede Member States' obligations under international law. Compliance with EU law, therefore, may be said to be secondary to the fulfilment of international obligations. Consequently, the EU and its Member States remain legally bound to comply with the Refugee Convention, as well as the other international human rights treaties to which they are party, prior to any other instrument which is to be applied at EU level."(Samantha: 2014)

[88]"The QD (recast) has the effect of codifying aspects of this international treaty, which has been signed, inter alia, by all EU Member States within the corpus of EU asylum law, notwithstanding the fact that the European Union as an international entity with its own legal personality has not itself signed the refugee Convention

obligation to respect non-refoulment, the wording of the article moulded the same as those in Refugee Convention.[89] Besides the CJEU in several occasions has remarked and emphasised that the provisions of the directives are used to guide the competent institution of asylum in the Member States for commonality on CEAS.[90] Viewed in that way, it is; therefore, the overall European legal framework for the protection of the refugee must abide by the Refugee Convention and its protocol. In the sense that the primary obligation derived from the International law (Refugee Convention in this case), however since the later give a legal framework on fundamental protection of refugee rights which State should basically implement, The EU or community law is more sharpen meaning in a specific way protect what ought to be included in protection under international refugee law. Since it is a secondary obligation, it set more vigorous protection against violation of refugee rights, particularly, the non-refoulment.

2.8. CONCLUSION.

According to the right of non-refoulement, a refugee must not return to a state where there is a danger of persecution. This right applies even where the state has not determined the refugee status of a person or where it rejects an asylum seeker. As highlighted above, the discussion on both norms that is exclusion and non-refoulment. The two regimes of law, notably international law and EU legislation both provide for the operation of the exclusion clause and the consideration of non-refoulment while human rights instrument stress on the non-refoulment. Both international law, human right law and EU law imposed binding obligation towards Sweden. Sweden implement the recast QD at the same time provides for the shield to refugees' right of non-refoulement even the status has not determined, but it is no doubt that the essential tool for the countries to protect refugee rights is to uphold the right of non-refoulement. Decided the case has shown how the State could sometime diverge from the obligation imposed on and

[89]https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN "It means that as the Article 1D, 1E and 1F provide the principle of exclusion from the protection an individual who recognized as a refugee. "The QD (recast) in its fourth recital, notes that the 'Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'. recital 23 stipulates one of the keys aims of the Directive, namely that 'Standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention'. in addition, the necessity to 'introduce common criteria for recognizing applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention' is recognized in recital"

[90]Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU): A Judicial Analysis, European Asylum Office 2016. http://europa.eu (pdf)"The Court of Justice of the European Union (CJEU) has made reference to the QD (recast) on a number of occasions and, in particular, to the recitals just mentioned, with a view to emphasizing that the refugee Convention: 'constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria'."

fail to offer protection against refoulment. Indeed, this defeats the refugee system of protection as it observed in words of the Canadian delegate who had prompted other representatives during the discussion of Plenipotentiaries that the makers of the rules of the 1951 UN Convention had regarded the rights of non-refoulment as fundamental importance to the Convention as a whole. He categorically said that 'in drafting it, members of that Committee had kept their eyes on the stars but their feet on the ground.'[91]

[91]Chambo, *Supra*, note 35, 20

CHAPTER THREE.

3. THE PROSECUTION REFLECTION AFTER THE PROTECTION AGAINST REFOULMENT.

3.1. INTRODUCTION.

Sweden as the country which providing international protection to refugees bear a great responsibility because it must protect the rights of refugees in one hand and again discharge its general obligation towards its citizens.[92]The principle of non-refoulment (often referred to as customary principle in protection of refugee) has used as measures taken by the European community to protect the refugees. As part of their obligation, the European community has been condemning countries which violate this principle by nexus with human dignity. During the European refugee crisis, for example, countries like Greece, Italy, Germany, Netherlands, Belgium and Denmark, were held responsible for the violation of international obligation.[93] *De facto*, those days of refugee protection have described as the 'tap on' period with the European community generously contributing financial aid to discharge their international responsibility.[94]

Nevertheless, the growing consideration fatigue of the European community towards the refugee crisis in Sweden, responsibility-sharing has hugely reduced. From the preceding chapter showed the basis of the application of the exclusion clause and principle of refoulement derived from different international legal instruments. One of the instruments is the European Union Law. Swedish officials claim that the European union community asylum policy has left the whole refugee responsibility to Sweden and until such policy come to effect the state intends to limit the basis for an asylum seeker.[95]This chapter intends to give the theoretical relationship and impact existed between the implementation of the exclusion clause to the person not deserving international protection and right of non-refoulement.

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[92]Common European Asylum System https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en accessed on 12nd July 2019
[93]*Idem*
[94] Refugee Crisis: European Commission takes decisive action - Questions and answers https://europa.eu/rapid/press-release_MEMO-15-5597_en.htm accessed on 20th August 2019
[95]Sweden: By Turns Welcoming and Restrictive in its Immigration Policy https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy

3.2. THE CRIME COVERED UNDER ARTICLE 1F(b) FOR EXCLUSION.

By article 14(2)[96] the right to asylum may not be granted to a relatively group of individuals who prosecuted from the non-political crimes/acts or even those whom there is serious reason to considered so; nonetheless, the provision under the UNGCRS does not expressly provide the crimes covered under the provision: As long as there is a reason for considering that an individual has seriously committed a non-political crime to suffice for the exclusion.[97] The liberty has remained to the states to decide if the crime is severe and do not fall within the political crimes to warrant exclusion. The practise shows that there is somewhat variable in the concept of severe crime and some states have narrow it while other broader to include an economic crime; as to the political crimes the state usually takes a leaf from the extradition law.[98] However, to some of the state, the analysis of the application is somewhat taken into consideration the international criminal law document such as ICC statute[99]; such occasions implies the UNGCRS is a living instrument and its interpretation should involve another international law instruments.

Since the provision is silent as to the crime covered, the prevailing presumption is the serious crime may be raised in the absence of any political factors as UNHCR suggested; as Goodwill put it such evidence of homicide crimes, a crime against human, arson, drugs trafficking and armed robbery may constitute serious offences.[100] The provision has a relatively broad group of serious crimes; it is not only dealing with non- political crimes but also for crimes which are more likely to be considered as political crimes such as terrorism.

3.3. PROSECUTION OF A PERSON NOT DESERVING REFUGEE STATUS.

As it has discussed above that the individual who excluded from a refugee status; return or extradition of that cannot come into effect because the removal cannot justify under human rights law. Nevertheless, does this mean that the person is free from prosecution, or what then the state should do with that person? The questions have somehow been trigger the issue of duty to state to extradite or prosecute such person; this is in realm of two regimes of protecting the security of the state and fulfilling international obligation of protection guarantee in the international instrument: The seminal working paper issued by the European Commission has

[96]The Universal Declaration of Human Right of 1948
[97]Hathaway & M. Foster, *Supra*, note 22, 529.
[98]J. Rikhof, *The Relationship between Refugee Exclusion Law and International Law: Convergence or Divergence?* Irish Center of Human Right, 2011, 229
[99]*Ibid*, 143
[100]G. Goodwin-Gill& J McAdam, *The Refugee in International Law*, Oxford University Press 2007, 107

tried to provide the guideline which addresses the issues, and the Commission was of view that;

> " The extradition or prosecution principle provides a solution of the inherent contradiction between the State's need, and indeed the obligation, to combat acts such as terrorism, and the individual's entitlement to protection against refoulement."[101]

In the light of the above view of the Commission and take into consideration the rationale of the provision of exclusion clause, such principle affirms the integrity of the institution of asylum and prevent impunity from justice to those people not deserving refugee status; it follows that in the event when a person does not accord a refugee status then state is expected either to prosecute in its jurisdiction or alternatively extradite the person for prosecution to another state; Logically, it fits in the question of moral and cover the loophole which sought to be used by the fugitives: However, the doubt remains as the legal basis and how credible the principle and as Gilbert puts it the current state of development of the principle provides an inadequate response, apart from its a limited number of situations, to ensure that those excluded but who are unreturnable do not escape punishment.[102] It seems to be correct as it poses a question that if the state has such an obligation under the international law regime?

3.4. PROSECUTION UNDER THE UN CONVENTION ON THE REFUGEE STATUS.

The interpretation of the UNGCRS depending on teleological approach, meaning that it is in good faith and accordance with the ordinary meaning accompany to the terms of the treaty in their context and the light of its object and purpose[103]; it noted that the central core objectives of the Convention were to safeguard the integrity of it and the prevention of impunity: For that reason does the current prevail circumstance triggers any legal obligation from the Convention in light of its interpretation? Methodologically, if the plain meaning of the treaty is far away from the precise result, then the object and purpose of the convention would be helpful as some of the scholars observed.[104] Nevertheless, there are no such provisions which establish the legal basis for the prosecution of those individuals excluded from status as criminals; follows that

[101]European Commission Guideline 2001
[102]G. Gilbert, "Undesirable but Unreturnable: Extradition and Other Forms of Rendition" JICL15(2017), 73
[103] Article 31 Vienna Convention on the Law of the Treaties 1969, General Principles of International Law - Judicial Monitor. http://www.judicialmonitor.org/archive_0906/generalprinciples.html accessed on 10th June 2019.
[104]"Linderfalk has established a hierarchical methodology answering this question; only if the ordinary meaning of the treaty does not provide a clear result should recourse be taken to the "object and purpose" as quoted by Lasreus, *Supra*, note 40, 10

even the object and purpose would be defeated as there is no justification to argue on such prosecution: The Convention should expressly state the how state should, soon after excluding an individual on the basis of crime, treaty a person in accordance with either national or international courts. Therefore, the Convention does not cover the prosecution issue, although one would argue that it implied the spirit of fighting against impunity; yet, the matter left within the jurisdiction of the hosting state.

3.5. PROSECUTION UNDER INTERNATIONAL CRIMINAL LAW.

The UNGCRS does neither provide for the crime covered under the provision nor provide for the obligation to prosecute those individuals excluded from refugee status under the common crimes. However, the Convention is the living document, and its application is not out-dated; thus, its interpretation should be in line with other international law convention concerning crimes of an international element. Since states have no obligation to prosecute specifically under the common crimes which are not common among states; it appears that it is even hard to take an upshot from international criminal law regime. Indeed, there are some international crimes attracted international attention, which push states to comply to the obligation prosecute; yet, there are reasonably several works of literature dealing with the issue of common crimes which highlighted the variation on the issues

Nevertheless, by comparison to refugee law and practice, international criminal law has not advanced from a solid foundation of international criminal law documents until 2002.[105] It gives a complicated situation as most of the common crimes could overlap in the sense that other crimes could not be prosecuted under the international criminal court or domestic court. Such circumstance seems that the state is not in any compulsory duty to prosecute the crime, which shared under the UNGCRS.[106] Therefore, international criminal law only prosecutes those covered under the statute.[107] The prosecution question might be solved between states with the assist of three relative developed concept universal jurisdiction, extradition and diplomatic assurance. From that proposition, the attempt is now shifted to those mention concept to give analysis on the prosecution of a person not deserving protection under common crimes.

[105]"The process rather appears to have taken place episodically, sprung from specific circumstance such as the Nuremberg tribunals, the terrorism wave in the 70s, and then establishment of the international ad hoc criminal tribunals" Lasreus, *Supra*, note 40, 11

[106] Article 1F(b) of the United Nation Geneva Convention on the Status of Refugee of 1951

[107] The Rome Statute of the International Criminal Court

3.5.1. The Concept of Universal Jurisdiction.

This part is trying to link the concept of universal jurisdiction and the obligation of the state to prosecute. As the general rule stands the concept requires that the state would prosecute a person only if the crime were committed in a territory of the state or the suspect is a national of that state but this is not the case the concept has not accepted in the international law; and it is even painful to merge with the crime committed by a person not deserving a refugee protection: One because the person is a not a nation of the host state and the crime committed was not within the territory of the hosting state.[108] But also the crime committed may have been lawful in the state where it was committed[109];however, the case would be different if the individual has continued to commit the crime which is unlawful in both states and whilst the person is in the territory of the hosting state, and this could even lead to her expulsion.[110]

That being the case, the concept could, therefore, applied to those crimes which regarded as crimes of international concern thought those crimes now, they are limited due to the practice among states and as explained above there is a variation between the states.[111] The consensus is, however, the most severe crime should trigger the concept of universal jurisdiction, but the doubt persists as to them what sort of crime could regard as the most serious one. The development of the International Criminal Law set the most serious crime, which obliged a state to prosecute universal.[112]

It follows that the concept of universal jurisdiction could partially be used in some case which the individual excluded from refugee protection has committed a crime within the jurisdiction of the State[113] , but the issues still existed if the states want to use their right to proceed with proceeding for the crime committed. It is relatively accurate for this study; such a concept does accommodate somehow the distinctions necessary for the analysis in this chapter and will then be used to a limited extent. Although the concept of universal jurisdiction requires the basis for jurisdiction to prosecute a person not deserving protection, the obligation to prosecute or extradite is increasingly demanded and incorporate in international treaties: Consequently, this

[108]Article the United Nation Geneva Convention on the Status of Refugee of 1951
[109]The crime such as FGM or Domestic violence, Unnatural offences, adultery may not fit on the double criminality principle.
[110]Article 33(2) of the United Nation Geneva Convention on the Status of Refugee of 1951
[111] Rikhof, *Supra*, note 59, 21 "The exact list of crimes varies both among scholars and states and ranges from a small number of "core crimes" to a rather extensive list.
[112]The case of Heichman Case in International Criminal Law
[113]Denmark and the issue of unwanted migrant who committed crime within its territory and serve the punishment after prosecuted in Denmark

portrait a picture that there is a need to differentiate the two terms in which the latter requires the state explicitly to proceed with the proceeding of the crime committed by a person not deserving protection; and whom the crime sought to committed was before entering the hosting state.

3.5.2. The Extradition Law.

The extradition law was among the minor issue debated in the formulation of the exclusion clause in the UNGCRS; this related to the UNHCR statute which articulates the exclusion of the person commits an extraditable crime: The views remain the extradition however in the exclusion context cannot be justified with the international obligation.[114]The extradition law under article 1F(b) has two main points which are the crime committed at the country of origin must be a crime in the country of refugee; the interpretation has been that the element of the crime must indeed be the same, this accomplished through the subjective abstract approach. Since the crime must be of the same element in both states, the approach has also been to consider the penalty set for extradition crime. As the provision of the UNGCRS requires that the crime to be dangerous; then punishment is used to determine a basis for interpreting how serious the crime is.

The controversial is however on the element that the crime should be not a political crime; extradition law requires that an individual would only be subjected to extradition if the crime committed is the conventional crime with no element of political crime: There are many theories regarding the element of political purpose.[115] Purely and relative political offences are the most common underlying theory which tries to explain the element; the former is stressed on the attack within the territorial integrity of the nation, whereas the latter concern on crimes which are motivated politically to force changes within the nations: A compound political offence can also be formed with inclusion of both theory, as a link of common offence and then political offence.[116] It is the most common type of crime at the national level, which requires the predominance and proportionality test.[117]

[114] Rikhof, *Supra*, note 59,187
[115]*Idem.*
[116] *Ibid*,188
[117]*Ibid*,189 "The second type of offences has been the subject of extensive national jurisprudence and from this jurisprudence the most satisfactory approach has come out of the Swiss judiciary, which developed the predominance and proportionality test"

Predominantly, the motivation behind the commission of crime directly connected to the political goal and the circumstances which the crime is committed; It usually rests upon the situation prevailing within the state: Proportionally, the impact of the crime committed has also to be weighed vis a vis the purpose sought to achieve; the test is not corresponding to the requirement, if the result is uncertain as to the predictable amount of damage not connected to the object of the attack.[118] Practically, the justification as a political offender to exempt an individual from being extradited has been clarified and narrowed over the years through international treaties which governed a state obligation to a specific criminal behaviour particularly, terrorism.

With an exception to the right of non-refoulment, a person not deserving protection can be deported to their country of nationality. Usually, the arrangement is in the form of an order from the requested state seek that person extradition for the prosecution of the crime committed. This order has its foundation on extradition treaty whether bilateral or multi-lateral; in whatever case, the state is duty-bound to extradite such person unless in exceptional circumstance mainly if there is a concern on the human right issue.[119] The arrangement should, therefore, be in line with the procedure provided under the extradition treaty; this is relatively observed, and in most case, the extradition is disguised which often bring the doubt if the accused will face a fair trial.[120] Therefore, as it explained, the extradition law does not set how prosecution in hosting state should be done but rather the extradition arrangement subject to the requirement provided under the treaty. It is therefore hard to see the answer to the prosecution of the person excluded from protection.

3.5.3. Diplomatic Assurance.

The diplomatic assurances frequently happened in extradition cases, and it is a chance for a state to get rid and protecting itself from the criminals, during the exclusion of a person not deserving protection.[121] The UNHRC and Human rights treaty bodies do not agree with this kind of arrangement in relation to the receiving state where it manifestly found that the state has in endemic situation of ill-treatment and the use of torture; nevertheless, diplomatic assurances are neither provided under international refugee law nor international human rights

[118] *Idem*
[119] D. Winther, "Extradition, Asylum and Mutual Trust in the European Union One man's terrorist is another man's freedom fighter, yet another man's asylum seeker, yet another man's fugitive" Master Thesis (Published 2018)
[120] Gilbert, *Supra*, note 99,65
[121] *Ibid*, 71

treaties: Yet invoke the arrangement to justify their compliance of the obligation under the refugee law.

The diplomatic assurance set to justify the prosecution and eventually fair trial to a person not deserving protection in a hosting state. It does not give the assurance of the prosecution of the same person in the hosting. Nonetheless, there is no formal regulation of deportation with assurances exists today; cases which arise in this situation are likely to be treated differently according to their circumstances; the jurisprudence of the ECtHR does on giver a bottom line for assessing the reliability of a state which admitting the person for prosecution.[122] This idea of diplomatic assurance has been facing obstacles particularly from various international human rights organizations and scholars, as it is not enough to be reliable on the foreseen risk to a satisfactory, especially when monitoring mechanism is ineffective, the assurance given is general and when the assurance substance is reinforced only by the ratification of the leading international human rights instruments by the readmitting country.[123]

Practically, the issue is the extent in which assurance could be relied upon and effectively eliminate the risk to the individual excluded at the time of removal, as Geoff remark that " it is constrained and cannot treat it as the default by states trying to counter impunity while upholding human rights.[124] Therefore, it is established now the prosecution of person not deserving protection cannot be done by the hosting state; on contrary state get rid of the person whilst justify its action as a compliance of the obligation under international law which there is a possibility such person to face a real risk which violates his or her right.

3.6. CONCLUSION.

In a nutshell, the chapter highlight that there is no any provision which provides for prosecution under the international law and the state is not obliged to prosecute individual excluded from refugee status instead they can send them back upon assurance which its practise is not much developed as to the extent of implementation. Besides, the state is only supposed to expel the person not deserving international protection under the ambit of Article 33(2) of the refugee Convention. Under no circumstances should factors such as the common crimes undermine the

[122]The Landmark case of Case Omar Othman a. k. a Abu Qatada v. Secretary of State for the Home Department [2013] EWCA Civ 277 (27 March 2013)
[123]Gilbert, *Supra*, note 99, 71
[124]*Idem*

State's responsibility to protect those refugees excluded from status. Government authorities' actions are contrary to international human right standards.

CHAPTER FOUR.

4. THE PROTECTION OF PERSON DENIED REFUGEE STATUS IN SWEDEN.

4.1. INTRODUCTION

The International refugee instrument predicted an average number of refugees who fear persecution in the country of their nationality. It noted that these instruments provide liberty to states to decide the number of refugees who are permitted to enter the territory of the host state. For that reason, a hosting state usually, using its sovereign discretion to refuse or return a refugee including those not protected under the Convention. As it discussed in Chapter two Sweden's Aliens Act regulates asylum; before November 24, 2015, Sweden recognised three types of asylum status which are refugee, persons supposed in need of subsidiary protection, and persons in need of other protection:[125] On that date, the Swedish exercised its sovereign discretion and government announced that its asylum policy aligned to that of EU including a limitation on the number of grounds by eliminating the third status type that is person in need of other protection.[126]

The right of non-refoulement which obligates states to ensure that a refugee protection to a place where there is a risk of persecution; the government through Prime Minister announced stringent measures to discourage asylum seekers in a sharp reversal of its open-door policy towards people fleeing war and persecution: Sweden's prime minister, Stefan Löfven, said "The country's generous asylum regime would revert to the "EU minimum", revealing that most refugees would receive only temporary residence permits from April."[127] Mostly, Sweden has been respecting and continue to respect the principle of non-refoulement; the state has permitted a large number of refugee access to their territory and privilege to continue in their countries pending solutions to their problem: Apparently, it is among the country in EU which has the most massive refugee operation.[128]

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[125]Å. Wettergren & H. Wikström, Who Is a Refugee? Political Subjectivity and the Categorisation of Somali Asylum Seekers in Sweden, Journal of Migration Studies http://www.tandfonline.com/loi/cjms20

[126]https://www.loc.gov/law/help/refugee-law/sweden.php#_ftn12 accesed on 23 July 2019

[127]https://www.theguardian.com/world/2015/nov/24/sweden-asylum-seekers-refugees-policy-reversal accessed on 27th May 2019

[128]Sweden: By Turns Welcoming and Restrictive in its Immigration Policy

This chapter is not going to debate the history of the refugee operation in Sweden; it merely set to look and discussed on how a country with such development has responded to the encounters of refugee protection and support in past few years, focusing on the treatment of individuals excluded from a refugee protection in the context of respect principle of non-refoulement.

4.2. AN OVERALL INSIGHT ON REFUGEE OPERATION ON SWEDEN.

Sweden is home to refugees since 18th up to 20th C[129]; the period of which can be classified it in two regimes the 'open-door' policy regime and 'semi open-door' policy regime: The categorisation based on the way refugees viewed and treated.[130] In the 1900s, refugees were a product of war, so states opened doors to the migrants (merchants and soldiers) to on the course of the conflict to strengths the state in time of war[131]; seeing that the policy works excellent, the state then emerging to be one among the European nation superpower and the need for dynamic migration policy[132]: However, following the time of disaster which made it to become country of emigration.[133] After the Alien Act come into force in 1927, the state becomes reasonably count of immigration; nevertheless, the act restrictively aimed at protecting the domestic labour force through discrimination attitude,[134]which was then later changed.

Following, the economic expansion in mid-1900 the state demand more labour force which in turn the vast majority of migrants move to Sweden as workers; this facilitated by implementation and the formation of the Common Nordic Labour Market in 1954 following with the abolition of border controls within the Nordic area in 1957: The situation continues which led other workers recruitment from other European countries.[135] The workers were seen as temporary migrants and later only they would then returned to their country of a nation; the

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https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy,5th April 2019

[129]https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy 5th April 2019

[130]*Idem*

[131]"Swedish kings during the Middle Ages and the early modern period expanded their administrative and territorial power by bringing in administrators, merchants, and soldiers from today's northern Germany." Sweden: By Turns Welcoming and Restrictive in its Immigration Policy# https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy,5th April 2019

[132] *Idem*

[133]*Idem*

[134] *Idem*

[135]It was only when the labor demand of an expanding heavy industry outpaced the available Nordic immigrant supply in the 1950s and the 1960s that tens of thousands of guest workers were recruited from countries such as Yugoslavia, Greece, Turkey, Hungary, Austria, and Italy. Sweden: By Turns Welcoming and Restrictive in its ImmigrationPolicyhttps://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy5th April 2019

view could not work as the state had vague immigration policy; as a result, the Swedish Immigration Board (renamed the Swedish Migration Agency in 2000) formed in 1969.[136] Following the economic crisis in the early 1970s the labour immigration stop; the workers were then not needed, and the government actively encourage those already present to leave the country; however, the action failed, and those remains and stay began to apply to the state to let their loved ones to join them.[137]

In a nutshell, the part of speech of the Prime Minister Löven can express how the refugees and asylum seekers are viewed. He remarked that:

> "We are adapting Swedish legislation temporarily so that more people choose to seek asylum in other countries ... We need respite…It pains me that Sweden is no longer capable of receiving asylum seekers at the high level we do today. We cannot do any more."[138]

This sort of remark shows how the current refugees' situation in Sweden. I do not want to replicate the whole history of refugee operation in Sweden in this part: since I believe there are many pieces of literature which discussed the same.

However, to get a picture of what Sweden has shouldered in the past few years, the following detailed account of refugee's movement into Sweden will highlight a situation. It started with the aftermath of the mess in the European refugee crisis. In 2015 Sweden received 160,000 asylum application which is twice comparing 2014; the applicant's origins are from Syria, Afghanistan, Iraq, Eritrea, and Somalia: The unaccompanied children application was 35000, and most of them were boys led by Afghans nationals.[139] For two years consecutively, 2016 and 2017, Sweden hosted refugees respectively. However, due to the incoming of a massive

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[136] *Idem*

[137] The state's assumption that the guest workers would return home proved false. Not only did most stay on, but they also became citizens and began to apply for family reunification visas. Ironically, the restrictive 1967 law opened a new path to immigration in the form of family reunification, which meant that large numbers of people continued immigrating to Sweden. Sweden: By Turns Welcoming and Restrictive in its Immigration Policy https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy accessed on the 5th April 2019

[138] Sweden slams shut its open-door policy towards refugees https://www.theguardian.com/world/2015/nov/24/sweden-asylum-seekers-refugees-policy-reversal accessed on the 15th June 2019.

[139] "Approximately 66% of all unaccompanied children in 2015 were Afghans. Although there was an increase from 2014 to 2015 in asylum seekers from all countries, the steepest increase in asylum seekers was among those from Afghanistan, from 3,104 in 2014 to 41,564 in 2015, a 1,298% increase, compared with an increase of 30,583 to 51,338, a 68% increase, in application.
http://www.asylumineurope.org/reports/country/sweden/statistics accessed on 10th March 2019

number of refugee severe logistical and environment challenges faced Sweden; the administration could not accommodate all the refugee. The situation is yet to get better. Statistically, the total number of 5,990 refugees hosted in Sweden in 2018 of whom 1,420 were from Afghanistan, followed by 735 from Iran, then 710 from Eritrea, 660 from Iraq, Somalia 425, and Syria and stateless person were 345 and 305 respectively; among those hosted as refugee 665 of person where excluded and granted humanitarian protection.[140]

In a nutshell, the above refugee movement affects not only the host countries but also, everyone involved in the process of seeking solutions for the refugee problem. It affects UNHCR, the international and regional community (CEAS) and Sweden as host state in the following ways. This active border movement of refugees is not viewed positively by Sweden due to security concern such as the possibility of arms proliferation, and a protracted refugee situation is reviewed burdensome to the member state of EU especially when other refugee emerging situations elsewhere in another state also demands due attention.

4.3. SWEDEN MIGRATION LAW AND ASYLUM POLICY.

States must protect refugees from actions, which violates their rights. These actions may arise straight from acts or omissions of its government officials and agents, or indirectly where the domestic legal and managerial systems fail to enforce or assurance the compliance of international standards. To fulfil its obligations under the 1951 UNGCRS, EU Law and 1950 ECHR, Sweden enacted the Swedish Alien Act of 2005[141] and has also implemented a Swedish Migration Policy. While the 1951 UNGCRS and ECHR Conventions advocate for the right of non-refoulement of refugees; the Alien Act does provide for a right of non-refoulement.[142] The principle of non-refoulment is to reflect in Chapter 2 particularly in sections 1 and 2; both provisions reflects the obligation under international and community law in the sense that the former enshrine the UNCAT and ECHR while the latter articulates the obligation under UNGCRS.[143]

The SAA is clear that an individual who is not qualified for a refugee status or a refugee who is dangerous to the society and security of the state shall be sent out from Sweden only in the exceptional circumstance; the wording of the provision does not refer to the term ‘return ‘in the

[140] http://www.asylumineurope.org/reports/country/sweden/statistics accessed on 10th March 2019
[141]Utlänningslag [Aliens Act] (Svensk Författningssamling (SFS)2005:716),http://www.notisum.se/rnp/sls/lag/20050716.HTM , archived at https://perma.cc/9UPC-U699/
[142] Järvergen, *Supra*, note 67, 19
[143] *Ibid*, 20

Alien Act but instead 'expulsion' and 'refusal of entry' is used.[144] In practice, state has return refugees under the justification of 'the failure of EU asylum common policy during the refugee crisis' or 'a threat to national security';[145] such action is not friendly with the refugees right to seek refuge under the international refugee and human rights law, even in Alien Act which the right of non-refoulment is absolute to the individual not deserving refugee protection: The government officials for asylum services shall ensure that no asylum seeker is removed from the territory of Sweden until the claim has determined.[146]

At the same time, the sending back of a person not deserving international protection is somehow delusion since a person is recognised, as a refugee and it cannot be claimed that the presence of the person is a threat to the nation; or justifying the action through community law asylum policy.[147] The current Swedish Asylum Policy has tried to depart from the Swedish Alien Act and possibly not regarding the principle of non-refoulement; it provides the limits to the grounds for asylum by only considering the refugee and person in need of subsidiary protection and excluding the person in need of other protection.[148] It probably falls short of the standards set up in the 1951 UN and ECHR Conventions. If compared to the previous practices, Sweden consistently has relatively respected to the principle of non-refoulement, the current practices of the government action on limiting asylum seeker might affect such as returning the persons not meriting international protection to their country of origin hence exposing them to danger and even death.[149] It is a clear abuse of a refugee's fundamental right and should be questioned.

4.4. LEGAL PRACTISE TOWARDS THE PERSON NOT DESERVING REFUGEE STATUS

As it elaborated in chapter two, the SAA is the law that governs the refugee operation in Sweden. The meaning of a refugee reflects both the 1951 UN and 1969 AU Conventions. Nevertheless, its non-refoulement provision is not explicit as to the extent which refuge is

[144]*Ibid, 21*
[145] Sweden: By Turns Welcoming and Restrictive in its Immigration Policy https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy accessed 5th April 2019
[146]Järvergen, Supra, note 67,22
[147]*Idem*
[148]Law on temporary limitations to the possibility of being granted a residence permit in Sweden, 2016:752 https://bit.ly/2jMHsV9
[149]Once the person is excluded the State provide for the resident permit for 13months under humanitarian grounds. Upon the expire of time. If State satisfied the person, no risk still exist in the country of origin the deportation process will be initiated.

supposed to establish her case in terms of evidentiary assessment; of course the implementation of this domestic law focus on the protection against persecution and torture, when it comes to the issue of right of non-refoulement, and it might indicate that the state's compliance with international obligations.[150]It noted that right of non-refoulement differ in different international law document and International Human Right law document, and it can be said it is not totally coherent or even usurps ; the Refugee Convention driven by the notion of persecution while CAT and ECHR cemented on the idea of torture; the former expressly provide for the prohibition of expulsion while the latter such explicit prohibition interpretation as part in the prohibition of torture. However, the doubt remains on the burden of proof, because in the course of the assessment of fact of the refugee situation, the individual is initially required to provide necessary proof of his/her story in line with the international and domestic law requirement, if succeeded then it is duty of state to establish no persecution or risk faced upon return.[151]

The UNGCRS does not expressly provide for a state standard of proof, what it provides is the assumption of giving the benefit of the doubt to an applicant in case the person has suspected or commit a crime.[152] In such circumstance evidence is required to establish the crime committed as Hathway, put it "the approach to "serious reasons for considering" proposed here moves away from merely excluding insufficient evidence. Instead, it both sets an affirmative evidentiary standard ("clear and convincing") and, most important, requires congruence between the facts found and the substantive legal requirements of the form of liability said to justify exclusion."[153]

However, it is unclear between the Swedish domestic law and international law concerning in the level of the standard of proof, in the sense that the quality of evidence required from the person not deserving protection as against to right of non-refoulement; on the contrary, based on the ECtHR and the CAT for the right not to returned; the required burden of proof is a "substantial grounds": The Swedish domestic law, standard of proof based on credible and probable of the refugee story and country of origin situation.[154] It shows that the exclusion is warranted if the story and evidence together suffice to prove the application of the exclusion

[150]Järvergen, Supra, note 67, 23
[151] *Idem*
[152] "Serious reason for considering" Article 1F(b) of the UNGCRS
[153] Hathaway & M. Foster, *Supra*, note 22,537
[154] Järvergen, Supra, note 67,49

clause, and there is probable exposure to the risk of persecution or torture. Noticeably, this suggests inconsistency when it comes to the standard of evidence required.

The practice can be demonstrated in a recent case at the Supreme Court of Sweden the case of Qiao Jianjun[155], an official from the Chinese state grain administration who has lived mainly in the United States since 2011, he is accused of committed an economic crime according to documents of charges against him from Chinese authorities provided to Sweden. The accused detained. He was formerly chairman of a local department of the Communist Party and member of the People's Congress in China. He had then joined the Chinese Democratic Party (China Democracy Party) and appointed as local chairman of the party in Singapore and the Dominican Republic as well as in the Nordic countries. After realising that the Chinese government strongly dislike members of that party, he decided not to move out of China with his family to the United States and settled there. He then moved to Austria, and in the end, he moved to Sweden in 2014 with his new wife, a citizen of Austria. In March 2019, he applied for asylum in Sweden. The SMB has not yet taken any decision based on his application. The applicant claimed that his participation in the Chinese Democratic Movement is the basis of the wrong accusation of a crime by the Chines Government; he was dismissed from his employment on October 9, 2011, after the Chinese authority come to the knowledge that he was a member of the Chinese Democratic Party. Shortly after that, he was charged with the crime. The Swedish authorities argued that there should not be any obstacles under the European Convention against extraditing the applicant to China, provided that the Chinese authorities provide acceptable guarantees to the Swedish government. According to the to them, these guarantees should mean - that the applicant will not be punished to death, the expression was validated by the Chinese Supreme Court which decided that the applicant would not be sentenced to the death penalty; that he will be assured of a fair trial with the right to a valid defence, - that he is protected against torture and other inhuman treatment (with access to adequate medical care in the institution), and on top of that the Swedish authorities will have the opportunity to check his circumstances in the future. The applicant has opposed extradition. He has argued in the Supreme Court that there are barriers to extradition according to Sections 7 and 9 and, in respect of the alleged act under point 2 (e), section 10, second paragraph, of the Extradition Act; he also claims that extradition would be contrary to the European Convention.

[155] http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2019/2019-07-09%20%C3%96%202479-19%20Beslut.pdf

In its analysis the, SSC assessed the crime and its extradition status, the individual situation of the applicant; and the current prevailing human right situation in China and the assurance made as well, the Court through the statement of Justice Petter Asp held that "The Supreme Court makes the assessment that there is a risk that he will be subjected to persecution because of his political activity and that he will be subjected to treatment in violation of the European Convention on Human Rights."[156] The SSC disagree with the assurances by Chinese authorities as it was not watertight to justify extradition.

In summary, the above cases are significantly like both touches to the asylum seeker or refugee who are excluded from refugee status. The central issue was the assessment of a general and personal risk of exposure to torture. It appeared that individual excluded from a refugee status are in a situation of being deported or expelled regardless they are in risk of being exposed to torture. It is because the only justification Sweden provide for not send back the person was because the receiving state did not take the matter of diplomatic assurance solemn as modality was through electronic communication; this far differs from the case of *Othman* which the modality set for diplomatic assurance was in written form. On the other hand, the state is not putting all effort into investigating the substantial ground of the risk of being exposed to torture or persecution. The next sub-part discusses the motive or disagreement which the government would rely upon to justify their action to the person not deserving protection.

4.5. MOTIVE BEHIND CHANGE OF LAW, POLICY AND PRACTISE INDIVIDUAL NOT DESERVING REFUGEE STATUS

As the implementation of amendment become strictly, so the use of exclusion clause has also become increasingly applied; as a result, the refoulment of refugee is so rampant in the past few years throughout the European Union; for instance, in 2015 alone, some of the states in collective basis expelled refugees from their countries.[157] The discussion above establish that in Sweden related refoulement incidents of the person not deserving protection have become common in the last few years; this could be driven by the state argument which might shed some lights on this change of attitude towards refugees.

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[156] *Idem*

[157] "FRA reported an increase in cases of persons allegedly being pushed back at the EU's external border, particularly in Bulgaria, Greece and Spain. In 2015, this extended to Hungary. Conduct raising questions regarding the prohibition of refoulement and collective expulsion became more frequent", https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf accessed on 7th July 2019

4.5.1. Change on ideology on the democratic process.

During the period of 'open-door' policy, Sweden was following a social-democratic ideology under many party systems; which the ruling party stay on the Government for a long time without much criticism on the immigrant's issue. Following the migration and refugee crisis in 2015/16 Swedish Politics was brought to attention on the issue which is until today has left a scar particularly on political process; thus democratic process no is considered with other political parties, which they are critical to immigration and refugees: Immigration issues advocated by Sweden Democrats party scored as one of the top issues in the 2014 and 2018 Swedish elections.[158] This made a change in politics in Swedish Parliament as the part co-existed with the ruling party; moreover the party has already pushed the major parties to adopt its left-manifesto concerning asylum seekers with regard to a national-security threats, terrorism, and crime; this has impact the government to further tighten border controls and increase Sweden's ability to detain and deport asylum seekers.[159] The action had regularised the manifesto on migration and refugee regime, including the amendment which restricts and eventually undermine the right of individual exclude from protection.

4.5.2. Economic Burden and Security.

A recent report shows that security has become a critical problem in Sweden, and somehow, refugees are linked to it.[160]In 2018, Sweden's security service (Säpo) reported that the Government had "valid security concerns" but this does not mean that the rights of individuals excluded from refugee status violation; although the report citing the security threat is from extremist group there is however no a conclusive proof that most of refugee or asylum seeker constitute the group.[161] Thornberg stated that "the growth of extremist environments is 'a reason

[158]The Sweden Democrats, who first joined Parliament in 2010, received more than 13 percent of the national vote in 2014, making it the third-largest political party. It improved on that performance in 2018, its 17.6 percent national share exceeded in some counties and municipalities. It has become impossible for either of the two traditional blocs to form majority governments, since neither bloc wants to govern with the support of the Sweden Democrats. This new situation may prompt a structural change to Swedish parliamentarianism. Sweden: By Turns Welcoming and Restrictive in its Immigration Policy https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy accessed 5th April 2019

[159]*Idem*

[160]https://www.sakerhetspolisen.se/en/swedish-security-service/about-us/press-room/current-events/news/2019-03-14-facing-a-wider-range-of-threats-in-2018.html accessed 1st August 2019

[161] Countries such as Greece, Italy, Poland, and Hungary blatantly disregarded EU treaties and regulations. This meant that a few countries—Germany, Sweden, and Austria—found themselves taking in most of the more than 1 million asylum seekers who made their way to Europe in 2015. In response this latter group of countries closed their borders and introduced restrictive legislation. Sweden: By Turns Welcoming and Restrictive in its Immigration Policy

for concern': Our country is facing a 'new normal'; in just a few years, the number of individuals belonging to violent extremist circles has increased from hundreds to thousands."[162] Such extremist activities members attributed to involving in serious violent crime, and yet the authority still believes there might be emerged some of the group which could also grow stronger; this opinion connected to the number of the attacks which some of the member states to the EU faced.[163] Thus a person not deserving protection is viewed as a problem rather than people who need the human right protection. They considered as a source of insecurity and economic burden for Sweden. Even so, this does not justify not to give them protection, although the criminally which is underserving traits to the person, and the legal lacuna on the status could also link to the state which usually left this person with no access to the social activities pushing them to illegal activities.

4.5.3. Lack of equitable responsibility-sharing.

Lack of continued assistance from the European union community is one among the factors, which led to not only to introduce an amendment and restriction of the border but also the violation refoulement of refugees from Sweden. By being a part of the EU, Sweden is the party of CEAS in which the EU asylum policy arguably failed after the aftermath of the 2015-16 refugee crisis. The implementation of the policy was about equitable distribution of asylum seekers among the Member States; however, the policy could not work because the member states put in front the national interest as the result none of the treaties and regulation set for asylum situation not consistently applied.[164] For that reason, Sweden had to amend its current legislation arguing that member state should uphold a working standard EU asylum policy in a place; yet the reform is still in progress, and it is not sure when will be completed: This left a prevailing conflict situation between the Southern, Eastern and Northern as many asylum seekers and refugee entering the Southern and go to Northern State whilst the Eastern close their borders.[165]However, this argument is not justifiable on the action taken by the

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https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy accessed 5th April 2019

[162]https://www.sakerhetspolisen.se/en/swedish-security-service/about-us/press-room/current-events/news/2019-03-14-facing-a-wider-range-of-threats-in-2018.html accessed 1st August 2019

[163]"The 'new normal' is something Sweden shares with the rest of Europe. The attacks in Manchester, London, Barcelona and Turku have all shown that we must work together to counter the threat posed by terrorism." https://www.thelocal.se/20180222/the-threats-to-sweden-are-greater-than-in-a-long-time accessed 29th May 2019

[164]Sweden: By Turns Welcoming and Restrictive in its Immigration Policy https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy accessed 5th April 2019

[165]*Idem*

Government, which is likely to violate obligation under international law and Human right. As the general rule members to the international treaties are legal bound to the treaties which they sign and ratify. The state cannot justify the action taken by the domestic law, and merely the domestic law cannot supersede the international obligation. Therefore, the lack of solidarity among EU members in asylum system does not warranty the action likely to violation of fundamental rights.

4.5.4. Recently protracted refugee situation.

Sweden has been hosting refugees and asylum seekers for a long time. It has been home to several refugees for decades. However, the more the asylum seekers and refugees particularly those not deserving protection continuous to stay in a host country could result to a risk of spreading conflict to either neighbouring states or the country of origin of refugees.[166] Therefore, a state could justify its, measures such as refoulement as a conflict prevention strategy.[167] For instance the Swedes ISIS fighters could establish that the present restrictive refugee regime in Sweden, which I would say refoulement is only one dimension, is inspired more by the longing to fight against terrorism by `contain´ those refugee who were once fighters within countries of origin, solely by the conventional purposes of such restrictions: View it in government perception, in this case the solution could only be in the countries of origin rather than in countries hosting refugees as the Swedish government struggle to implement legislation which would prevent it.[168] However, in the legal point of view, the argument cannot stand as it established that the international legal obligation could not rip off for political justification. Much as the person not denied refugees status was a fight or just common criminal once seek protection the state is legal bound to offer the protection to that person.

4.5.5. Nature of the Refugee population.

The refugee in the past few years come from the independent state, which is more like to be in civil war or domestic conflict (jihad, extremist). As a result, today's refugees or asylum seekers could carry with them weapons, which do not only threaten Sweden' security but also government in countries of their origins; this could lead to souring the relationship of state of

[166] https://www.vice.com/en_uk/article/3k9j8b/how-sweden-deals-with-returning-isis-fighters accessed 22nd July 2019
[167] *Idem*
[168] *Idem*

affairs between the host government and the country of origin, which in turn could tighten the border security between them.[169] For instance, One may argue or even accursing the involvement of Swedes ISIS fighting in Syria indicates that the Government of Sweden is of harbouring terrorist: This might affect the relationship between the state with another state and with other surrounding states as well not to mention the possibility of conflict. Of course, the board control and security guard in asylum procedure they perform their duty include ensuring searching of the people in a move but relatively it is not conclusive that the searching would assure all weapons could seize at the border. Nevertheless, the state should put the resource and mechanism to counter such leak and avoiding putting action which would then violate their international legal obligation.

4.6. THE IMPACT OF AMENDMENT OF ASYLUM LAW TO A PERSON NOT DESERVING REFUGEE STATUS.

The high magnitude practises and commotion in the Sweden refugee operation might go together with a refoulement incident on the person not deserving protection. Some of these incidents have been discussed in some cases above as well as the motive which the Government had to implement those restriction measures. Nonetheless, the Swedish Asylum system categorised the cases falling under the Article 1F(b)as security case; their refoulment incident can be somewhat noticed and documented and even publicly non-protested or otherwise, the applicant might have been already suffering from the violation of his or her right. Although once the SAS offered them protection on the humanitarian ground is only for the 13months, then the state will look if a person would be deported, but only after there is no risk of persecution.[170] Besides, the question will remain to what extent humanitarian protection offered to a person denied refugee status and in what categories. Statistically, since the refugee crisis began 2015 the detention and expulsions of the had increased; a sum of 3,959 persons was detained in 2015 while in 2017, the detention raised to 4,379: Nevertheless, the number of deportation of rejected asylum seekers was 2, 448 for the first eight months of 2018.[171] In respect to that, the implementation on the amendment could make the exclusion clause be interpreted merely as an extension to reserve the treatment of person not deserving protection as the matter of the security of the state as the result its scope of application could be unjustified.

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[169] *Idem*

[170] http://www.asylumineurope.org/reports/country/sweden/content-international-protection/status-and-residence/residence-permit 10th March 2019

[171] In January 2016, Interior Minister Anders Ygeman called for the deportation of 80,000 rejected asylum seekers.

4.6.1. Manifestly unfounded claims and accelerated procedures.

Following the declaratory nature of the refugee definition, the UNHCR has often found a need to stress that the protection of non-refoulement applies from the instance a person fulfils the criteria of 1A.[172]The examination of cases, which could trigger exclusion from refugee status, often requires a high degree of expertise and specialised knowledge. There are therefore good reasons for being cautious with the various kinds of unique or expedient procedures that commonly discussed concerning asylum claims. As such, special procedures are not inherently detrimental to a fair and full procedure.[173]

Indeed, in a paper addressing the security concerns in connection with refugees, UNHCR suggests the establishment of select "exclusion units" which should consist of experts in relevant legal areas as well as security experts. A similar system was established in Canada in 1999, apparently with excellent results.[174]Most discussions on proper procedures, however, seem to focus on expediency rather than expertise. In Swedish law, manifestly unfounded asylum-claims are subject to an accelerated procedure setting the Government as the first and final decision to expel the applicant without the opportunity of appeal. It is because the people fall under the exclusion attract public attention because of the criminality element. Once it established, the asylum application treatment becomes different from other applications as Järgern put it goes to the Police Authority and then the Government takes over.

4.6.2. Exclusion before inclusion.

On a procedural level, the incorporation of the exclusion clause does not prevent the administration nor the courts, from determining refugee claims on the sole basis of the exclusion clause, without ever considering the issue of persecution.[175] The implementation of the new law indicates that the legislator did not want an investigation on the inclusion grounds to be carried out: The issue is problematic. UNHCR has, on several occasions, stressed the need for a holistic approach to the refugee status determination and that the exclusion clause only used "after the judge is satisfied that the person fulfils the criteria for refugee status".[176] Generally, the call for "inclusion before exclusion" is founded on good arguments. Following the "exceptional nature" of the exclusion clause it has often been concluded that Article 1F(b) cannot consistently be

[172]The UNGCRS 1951
[173] Lasreus, *Supra*, note 40,45
[174] *Idem*
[175] *Idem*
[176] UNCHR, Guidelines on the Application of the Exclusion Clauses, December 1996

used as a general screening device to shorten the determination procedure; such a procedure would also impair the prospects for a fair and full examination of the circumstances in each case: On a more practical level, the Lawyers Committee for Human Rights reports that, especially in situations of mass influx, it has proven hard to find the necessary co-operation of individuals if the investigation appears to be made with the primary intention of exclusion (rather than identifying protection needs).[177] As Article 1F(b) does not make explicit referrals to a particular process or order of the determination, states sometimes claim that the issue has left to the discretion of the sovereign state. In support of the exclusion before inclusion track, references often made to the mandatory phrasing of Article 1F. While states are, in the end, obliged to deny refugee status to excludable individuals, article 1F may seem time and cost-saving admissibility test: Recently, James Hathaway has supported this approach.[178] This line of argumentation, of course, is subject to the same criticism as mentioned above. Nevertheless, UNHCR commentaries are just as non-binding as those of the Lawyers Committee for Human Rights and given the diverging state practice the "inclusion before exclusion" would be an accepted principle of law is not entirely convincing.[179] Hence, the legal, as well as practical arguments, strongly advise that inclusion determined before exclusion.

4.6.3. The likelihood of the right of non-refoulement to be infringed.

When it comes to exclusion, according to Article 1F(b), the situation is very different. The provision does not affect refugees and, more interestingly in this context, Article 1F(b) is unconditional: If a person meets the criteria of the provision, it is immaterial whether he or she may endanger national security or is entirely harmless. The primary purpose of the article is not primarily to protect a state but to exclude individuals unworthy of enjoying the protection as a refugee; therefore, the criteria for exclusion and expulsion differ. Concerning exclusion, a state needs only to establish "serious reasons for considering" that a person has committed a particular crime, while the expulsion of a refugee demands that that person "ha[s] been convicted by a final judgement" and "constitutes a danger to the community.[180] Thus person deportation then is the judgment enforcement.

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[177] Lawyers committee for Human Rights 'Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective

[178] Lasreus, Supra, note 40

[179] Chapter IV of the Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees Reissued Geneva, February 2019

[180] *Idem*

On the other hand, the exclusion clause is applicable only about specific types of crimes or acts while a decision of expulsion based on any "serious crime" committed in the territory of the host state. Hence, if expulsion is possible not only on the grounds of 33(2) but also on the grounds of Article 1F, this is no longer a matter of legal technicalities. It effectively widens the scope of application and extends the exception to the protection against refoulement beyond what was foreseen by the UNGCSR51 and beyond what is permitted. The different objectives of Article 1F and 33(2) reflect on the requirements of the respective provisions. Individuals with permanent status as a refugee have endowed with particularly strong protection against expulsion. Only where a refugee is a "danger to the security of the country" or "constitutes a danger to the community" can he or she lose the protection against refoulement. However, since the aim, as well as the focus of Article 33(2), is to protect the security of the state, even a conviction for a particularly grave crime should not lead to refoulement if, for some reason, that person does not, or no longer, pose a security threat to the country. Consequently, expulsion, according to Article 33(2) always requires that an analysis is carried out establishing a current or future danger to the country or community.[181]

[181] Background note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05, 4 September 2003).

4.7. CONCLUSION.

This chapter finalised that there is no management between law enforcement agencies in Sweden in addressing refugee issues. Besides the public opinion on government policies has an impact on refugee practice. However, under no circumstances should factor, such as lack of adequate international community and fatigue undermine Sweden's responsibility to protect refugees, particularly those excluded from refugee status. State migration officials' actions are likely to contravene the international standards and human right law. The strategy of the government to implement an amendment of its law and migration policy as the limit factor for countries that produce refugees to find a solution to the crisis is unacceptable. Sweden, therefore, has relatively failed to discharge its obligation to protect refugees against defilements. The failure attributed to a direct act of government and partial failure of the standard asylum system and domestic legal and administrative systems to guarantee the respect of international standards makes Sweden directly accountable for the refoulement practices of the person not deserving protection.

CHAPTER FIVE.

5. CONCLUSION.

This study commenced because of the absence of adequately documented research on the protection against refoulment in the context of exclusion in Sweden. The argument advanced was that the policy and legal practise towards the individual excluded from the protection as a refugee was due to the failure in the CEAS and The failure, in its itself, has manifested in the strict application of the exclusion clause which conflicts with the principle of non-refoulment as articulated in international, regional and human rights treaties that the CEAS is bound to uphold. The previous chapters discussed to show the incidents that once exclusion upheld the return of an individual is likely to happen. The Cases discussed demonstrated such situation.

However, also, we have seen the reflection when the right of non-refoulment is upholding the question of prosecution arises which it is not clear as to what degree such prosecution enforced to that individual who is protected by the principle of refoulment, but they are supposed to prosecute. The task of which can only be done through extradition or diplomatic assurance which the development of the two blocks is not well enough to answer the protection of non-refoulment under the amendment of the new law which limits the migration movement.

Primarily, in few years, Sweden's approaches to refugee protection have changed strict and limited respect for refugee rights. The latter motivated by economic and security burden, ideology change, lack of responsibility sharing, the nature of refugee, the massive inflow of refugee. This push the government to take measures which limit such movement. Nevertheless, such a measure had an impact on the obligation toward international and human rights law. It should not allow continuing because the refugee rights are at stake. Collective action through the EU is required to address this problem. The Member state should corroborate address problems of equitable distribution and rethink about CEAS and how would it benefit the community mutual.

Sweden should cease its stringent decision and practices, which is likely to violate not only the fundamental right of non-refoulement but also other rights such as the right to seek asylum. It should also resort to requesting effective and enough EU community support and to further the equitable and fair responsibility to incorporated into the broader EU domestic and foreign policy agenda. As a member of the EU and European Commission, Sweden should take the

opportunity and cease it to appeal for equitable responsibility-sharing. This promising situation facilitates the effective use of existing mechanisms as well as ensures proper protection of refugees. The Government of Sweden has appealed to the European community to respond on responsibility-sharing, through relocation refugees. The practical implementation of this action would ease the heavy burden of the refugees to Sweden, and if it does work it could do away the harsh measures on refugees and eventually provide protection especially to those face unacceptable refoulement practise

Also, the EU Council has set a means to provide financial and material assistance for the implementation of programmes which will benefit both refugees and host states. These programmes initiated to target the restoration of the effect accompanied by protracted refugee situation. Besides it addresses the syndrome of viewing refugees as an economic burden and thus guarantees respect for their protection against refoulment and other rights.

Concerning the prosecution, serious crimes are not a new phenomenon, although, for the past few years, the crimes have reached fascinating attention so as the implementation of exclusion clause. This paper partly discussed the consequence of the implementation particularly to person allegedly to commit the crime of prevalent. The examination revealed that although there is not an obligation to prosecute those persons fall within the alleged crime as an obligation to prosecute could only relatively fit on the crimes of international elements. State practice shows that the state often relies upon extradition and diplomatic assurances to do away with the person not deserving protection; these findings are exciting and call for further attention on the context of non- refoulment. The extent as to the duty to investigate and the extent on the mechanism set for assurance remains on the grey area which warranty the refoulment practise on the ground of prosecution.

In general, there is no excuse to smash away the fundamental right of a refugee not deserving protection. Sweden and European Community at large, their obligation is crystal clear that to safeguard the protection and not to endangers the fundamental rights of individuals excluded from protection as a refugee.

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