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An Analysis Of The Legal Framework Of International Refugee Protection System

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Abstract *The article aims to investigate the legal framework of refugee protection system at regional and international level, which starts with the modern history of refugee system that when fleeing people from one region to another were considered as refugees. It further explores steps that were taken at the initial moment and how such system developed at the international level. The legal protection along with internationally accepted definition of refugees was achieved with the passage of time. The 1951 Refugee Convention is considered as the main foundation upon which the whole refugee system is based, was further augmented with the adoption of the 1967 Protocol, which removed the two main objections i.e. the temporal and geographical limitations from the Convention. The article explains the refugee definition, protections available under various instruments at regional and international level to refugees.*

Key Words: Refugee, Protection, Legal Framework, Persecution, Regional, International.

Introduction

States are responsible for the protection of their citizens. Whenever states are unable or lacking the will to protect their citizens, in such situations there is serious threats to individuals in terms of violations of their fundamental rights due to which they are forced to leave their near and dears along with their country in search of finding safe havens in other countries. Since the native nations are no longer in a position to protect their own nationals, then in such situations, the world community steps in to fill the gap by providing those fundamental rights to these refugees. The United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR) in the aftermath of the World War II. The task assigned to this agency is to protect along with durable solutions for these displaced people. UNHCR's activities rest upon the international law's framework and the benchmark set by the Universal Declaration of Human Rights (1948), the four Geneva Conventions on international humanitarian law (1949) along with various regional and international treaties and declarations, both obligatory and non-obligatory which particularly addresses the refugees needs. The international refugee protection regime's contemporary legal frame-work has evolved from the broader international framework particularly a historic environment which has assisted in the understandings of contemporary discourses and discussions on the possibility and sustenance of the present policies at national, regional and international level related to refugees.

At its initial stage, the global mechanism installed for the protection of refugees faced too many hardships in the form of discretionary nature of grant of asylum to those fleeing their native land due to

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persecution, non-refoulement obligations and non-discriminations. This creates technical as well as practical dilemmas. As a result of this, nations around the globe frequently fall short to fulfil their commitments, which they have made in the form of protecting these vulnerable groups of people, who are seeking sanctuary in their soils.

The subject-matter of the above mentioned issue can be considered from various angles, which includes the state, individual, society and a variety of international organizations and bodies. Hence, it is due to these multiple factors that one is unable to talk about a universally accepted mechanism for the protection of refugees or a single model to prevent the abuse of refugees or a mechanism for the achievement of a standard form of international protection regime. For understanding that what is involved in the protection of refugees, first it is essential to know that refugees' law fall under the greater banner of international protection regime, in which various types of obligations at international level related to the protection of these vulnerable people come. Apart from the traditional understanding of refugees' protection under the relevant international documents such as the 1951 Convention and its protocol of 1967, protection under the international human rights is also available to those whose rights are threatened but who don't meet the narrow criteria under the refugees' related international documents.

While discussing the larger notion of protection of civilians available in and during armed conflicts around the world, the refugees' protection performs a vital role in terms of rights during critical situations along with its exclusions available in the 1951 Convention. Likewise, differences in-between regional and global laws and practices is a harsh reality. Quite often, there are significant variations in the legal norms developed for refugees at regional levels and with those developed at the global level, which shows the sensitivity and complexity of the refugees matter and their protection.

This chapter of the research, against this background, presents an overview of the legal framework of refugee protection regime at international level. Under international law, the legal status of a person seeking a sanctuary in another country shifts on arrival at their border to the non-refoulement obligation, even in such cases where they are still waiting to be formally allowed in their territory. According to Benhabib, "The prerogative of democratic sovereigns to define criteria of political inclusion is not an unconditional right."

While protecting the refugees, two objectives need simultaneous consideration: one is the protection of refugees in law and the other one is the protection of refugees in practice. In the absence of law, they are lacking the legal status, which leads to the absence of fundamental human rights due to which refugees face exploitation from various quarters. This exploitation may be in the form of trafficking, arbitrary arrests, and detentions by the state authorities, which further force them into poverty and homelessness along the label of illegal migrants. There is no way-out in the absence of law, which will leave the refugees in limbo for indefinite period, and will force them to rely on donations, re-traumatized and distressed, and ultimately forceful return to conditions of violence, sufferings, and possible end of life. Keeping these realities in mind, we should make efforts for the adoption of a broad and meaningful legal framework at national level, which is in line with the standards at international level and make sure actual protection of refugees.

The main reason for doing this isn't because this is the correct thing but it has other advantages in the shape of efficiency, cheapness, and most efficient as compared with what are the current practices we are doing. Processes based on law can lead to fair and timely verdicts; through which legal, economic and social rights of the refugees can be protected, furthermore the adoption of such process will prevent the exploitation and hardships faced by the refugees. Such process will not only bring efficiency in the governmental affairs but will also lower the financial and human costs of the governments incurred due to the disregard of the problem in the shape of prolong detention of immigrants, protracted displacements in camps, or expenses incurred on medical and social welfare of the refugees (Refugee Studies, 2016).

As Hathaway reminds us that the law related to refugees is a mechanism for the protection of human rights and therefore it is basically erroneous to associate policies of asylum and immigration (Hathaway, 2007). The laws related to asylum and refugees are complex and intricate, juxtapose to immigration control, human rights law and national and international laws, with substantial repercussions for welfare and security

related policies. Likewise, refugees sit outside the notion of contemporary citizens, which focus on the partisanship of a bounded territorial community (Soguk, 1999).

Refugees and the laws related to them are portrayed as against to the interests of the nations. There are frequent reminders from the national press to the citizens that it is not in the national interest of the nation to pursue liberal asylum policies. The problem associated with refugees is that they are lacking the state's effective representation along with protection; she is uprooted, dislocated and displaced (Haddad, 2002).

International law ensures the protection of all persons in a dignified manner irrespective of their citizenship, focussing on the human instead of national with respect to the protection of rights (Lauterpacht, 1950). Yet human rights are not hermetically sealed from the politics of border control, which seeks to define and exclude those who have no clear right of entry (Kesby, 2012).

The History of Refugees

"The term 'refugee' has originated from the French word 'refugie', which was used for the first time during 1685. The Refugee Convention of 1951 explains a refugee in a very clear way that somebody who is in a state of fear of persecution, due to racial, religious hatred, membership of a nation and other social and demographic or political reason flee from his native country, because he is unable to protect himself in his country of the said fears whatever they may be (UNHCR, 1951). Similarly, a refugee may be described as an individual who being in danger of his/her sustenance, escapes to another country. It is duty of the other state and right of the refugee to be protected by the state where he takes refuge (Rashid, 2000).

Generally speaking, the term refugee may be defined as an individual who has been compelled to depart from their home country in-order to flee from persecution, natural disaster or war.

According to the definition provided by the international refugee law, a refugee may be distinguished by the following three features;

- Someone who is moving-out of the state of origin or crossing the borders of the nation of habitual residence.
- Such people are not in a position/unwilling to get the protection in that country due to fear of persecution.
- The fear of persecution should be supported by one of five following grounds:

That racial based, based on religious grounds, nationality, due to association with a community or socially associated with a group, or political views." (Academy, 2001).

Refugees have a very long history of miseries. Prior to the Christian era, the story of persecution of Prophet Abraham/Ibrahim (SM) around 2200 BC and his flight from the place of birth near Euphrates in Iraq to Syria was an instance of a refugee situation. Euripides and Sophocles had mentioned the notion of refuge or asylum seekers in their writings during BC period in Greece (Rashid, 2000). Roman emperors at the initial period of Christianity persecuted many Christians due to their beliefs and many of them were compelled to take refuge in the underground chambers, which were converted later on for the burial purpose of the dead.

If the 1951 Convention had retrospective application, then the definition of refugee would be applicable to all those who meet the criteria mentioned in it for the refugees. In such a list there are so many candidates, for instance, the Huguenots of France, who were forced to leave to England, the Netherlands, Germany, Prussia, Switzerland and South Africa due the Edict of Fontainebleau in 1685 which banned Protestantism in France. Another example is the mass emigration of Jews in the 19th and 20th centuries due to the repeated waves of pogroms which swept the Eastern parts of Europe. In the same fashion, Muslims were forced to migrate to Turkey at the start of the 19th century from Europe (McCarthy, 1995).

The exchange of population in-between Turkey and Greece during the 1923, which suffered approximately two hundred thousand people from both sides, majority of them were repatriated forcibly

and were denaturalised from their homelands of millennia or centuries with the guaranteed nationalities of the destination nations by virtue of a treaty which was sponsored and administered by the international community under the Treaty of Lausanne (Convention Concerning the Exchange of Greek and Turkish Populations.).

Apart from other devastation, which resulted from the World War II, it also produced huge number of refugees. The United Nations Relief and Rehabilitation Administration (UNRRA) was created in 1943 by the Allies in-order to give support to those areas liberated from the Axis power. The number of refugees in March of 1939 only from Czechoslovakia stood at approximately one hundred and fifty thousands (Institute of Refugee Assistance). Approximately 200,000 Jews during the period from 1933 to 1939 fleeing due to Nazism sought refuge in France (Holocaust Encyclopedia). Some of the Jews numbering about 55,000 were compelled to seek refuge in Palestine (Gelber, 1993).

There is a slight confusion, which may appear about the differences between refugees, asylum seeker, internally displaced person (IDPS), migrated people. According to the 1951 Refugee Convention, an Asylum seeker may be defined as the one having fear of persecution on account of religious, racial discrimination, association with a specific social group, political ideology or nationality and having a pending application under the above mentioned convention for asylum, who if returned to his/her native land may face anyone of these threats. During the pendency of application, whether initially or appeal stage, the individual is considered as an asylum seeker (Migration Watch UK).

By the same token, migrant may be defined as an individual who is in search of better life and for that reason shifts somewhere else to another land with their own free will. Prior to shifting to his desired destination, the migrant is taking all sorts of data related to the language, environment, economy, employment opportunities, etc. A migrant is at liberty to make the arrangements in advance such as travelling, whether taking their belongings or not, and to meet their near and dears before going abroad. If everything is not according to his/her aspirations, then the migrant is at liberty to say again goodbye to the country or wants to meet their family and friends can come back without any fear to their ancestral home (Settlement Services International).

The main difference in-between internally displaced people (IDP) and refugees is that the IDPs are leaving their homes without crossing the national borders while on the other hand the refugees are those individuals having fear of persecution in their homeland and therefore crossing the international borders in search of safe Heavens.

Refugees around the World

In the twenty-first century, the refugee crises have crossed all the limits and records of the past. According to the UNHCR, by the end of 2004; there were estimated 2,748,500 refugees crossed the international border. In the start of the 2015, total refugee number in the Central Africa and Great Lake was 662,600. But in the mid of the 2015 the number increased to 878,800 people. On the East and Horn of Africa the number was 2,747,300 within the mid 2015. In the Southern Africa 179,800 people was forced to be refugees. And in the West Africa the number was 258,900. In the American Continent, there was 752,900 numbers of refugees by the middle of the 2015. The number was 3,785,000 in the Asia Pacific region. In the Europe the wave hurt so strongly that during the middle of 2015, the numbers of refugees were- 3,489,600. In the Middle East and Northern Africa; there are 3,005,300 people were forced to cross the border.

In the recent wave of refugees towards Europe showed the anarchy in the under-developing states. In the civil war affected areas like Sudan, Syria, Afghanistan, Iraq, Libya, and Yemen forced millions of people to cross their international borders and be refugees. Developed states like Germany, France etc are filled with refugees and this problem is growing each day. By using the water people from different parts of the world are heading towards Europe.

Legal Status of Refugees

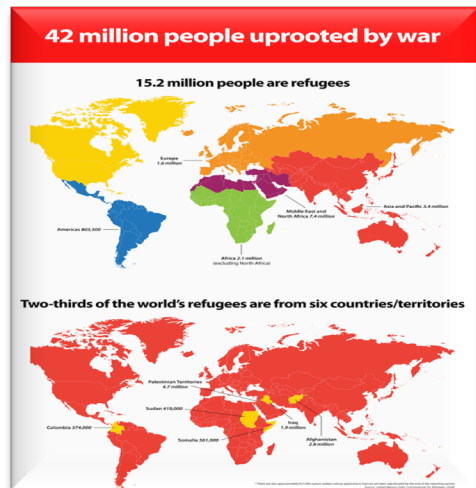
Though refugees are coming from an uncomfortable situation, they still have to follow some important and vital rules. Because of their status, refugees have to be bound in some legal norms. The main purposes of bringing such laws are creating a uniformed base for the refugees and a better treatment by all states. The refugees shouldn't be treated inhumanly and they shouldn't be sent back to the state they came from. These laws will provide the refugees their rights and obligations to the receiving state.

According to James Hathaway, the contemporary law related to refugees may be considered as a give-and-take in-between the sovereign prerogatives for the control of immigration by the states. The main function of the law is not to cater for the needs of the refugees themselves but instead to regulate the disrupted international immigrations according to the wishes of the states (Hathaway, *The Law of Refugee Status*, 1991).

In the Post WWI era, an international conference was convened on July 6, 1936 in Evian (France) to set up an Inter-Government Committee on Refugees as to how the international community should respond to the flight of the Jewish refugees from Nazi Germany to other West European states. Soon after the WWII, the UN Charter was adopted in June 1945 and came into force on 24 October 1945. The Charter affirmed international co-operation in solving international problems of humanitarian character and in promoting and encouraging respect for human rights and for freedoms of fundamental rights for all persons without any distinction as to race, gender, language or religion (Article 1.3 of the Charter). In 1948 the General Assembly adopted Universal Declaration of Human Rights, which is arguably the main moral document for all the people of all times. This includes some of the rights of refugees and asylum seekers. In the article 14.1 states that every can ask for and obtain asylum from persecution in any other countries. On December 1950, the Statute of the Office of the United Nations High Commissioner for Refugees was adopted by the General Assembly of the UN. To deal with displaced people, a conference was held in Geneva to formulate legal provisions principally for the refugees from the Eastern European communist states. It was attended by 26 states. The conference adopted the convention relating to the status of refugees on 28th July 1951. The convention came into force on 22nd April 1954. This convention was significant because of its three important explanations about i) the definition of the refugees, ii) the conditions which a refugee will lose his/her status and iii) indicating the circumstances where persons can't claim the status of refugee.

The convention had so many limitations because it stated that the refugees, who acquired such status before January 1951, will be covered under this convention. This limitation was removed by the protocol of 1967. By now it has been ratified by 145 states and 146 states have ratified the protocol. Different organisations at regional level are in favour of measurements at regional level having applicability to those states having membership of the concerned organisations. These measurements comprised of:

- The Bangkok Principles on the Status and Treatment of the Refugees adopted in 1966 at the Asian-African Legal Consultative Committee .
- The Organization of African Union's Convention of 1969 (OAU) governs the Specific Aspects of Refugee Problems in Africa.
- The Cartagena Declaration on Refugees of 1984 for Latin America.
- The Council of Europe's Recommendation 773 (1976) on the Situation of the de-facto Refugees.



(<https://www.pinterest.com/pin/217440106738229571>, 2018)

- According the directives of European Union directive back in 2004, about the minimum standards of third world country nationals and eligibility of getting the status of refugee for international protection.

Instruments Governing Refugees at International Level

The 1951 Convention on the Status of Refugees

Though, we know that the convention of 1951 has a positive impact on the refugee crisis, but critics shown so many weaknesses of this convention. Because of the Euro-centric policy towards crisis management, it is not so much helpful for the other signatories of this convention. The contemporary context of refugee crisis is not similar with the previous problems. In this convention, the states have no strict obligations to co-operate with UNHCR unless it is incorporated in the convention. On the other side, this convention puts emphasis on protection and resettlement of the refugees and doesn't refer to their voluntary repatriation. In the contemporary crisis, there are so many cases that refugees have not satisfied the criteria that are described in the Convention. According to this dilemma, they are not Convention's Refugees. Many of the people fled because of civil wars, ethnic, tribal and religious conflict in the country.

In the name of Sovereignty, the westerns are playing ping-pong with the refugees. We have seen the condition of Aylan Kurdi, a five years old Syrian refugee who died in the most gruesome way because his family didn't get the shelter from the host states. All the states have refused to take such poor refugees. After the despicable attack in the Paris, the world leaders were agreed to restrict the number of refugees in their states. Some states like Austria, Hungary didn't take any of the refugees till then. The right to life is A fundamental right and it is clearly violated in the Convention. The definition by the Convention doesn't include many scenarios like foreign aggression, armed conflict or civil wars.

Another important problem about the convention is, it doesn't include the refugees who are forced by the environment. The rise of the sea level hampered many of the low-lying states. Maldives is one of the effected states. Green house effect hampered life-styles and it even forced many people to be displaced. Most of the refugees from the developing states are being considered by the Western states as 'economic migrants'. This means that they fled the state not because of any threat but because of the availability of economic opportunities in the host state.

International refugee law is based upon the Convention of 1951 Relating to the Status of Refugees. The term refugee has been defined by the 1951 Convention (as explained above), and this instrument provides the benchmark that who is qualified as a refugee and who is not eligible under this document. As this Convention was drafted at the end of the World War II, therefore, the refugee's definition is focused on individuals, who has left their homelands as a result of the devastation in Europe or elsewhere and are refugees before the first January 1951. Again during the late 1950s and early 1960s, the refugee crises appeared; therefore at that time it was the need of the hour to expand both the limitations of the Convention, that is, the temporal and geographical. Hence, a Protocol to the above mentioned Convention was drafted and adopted in 1967.

While a Cold War creation, the noble aims and some principles of the Convention are still as relevant as it were at that time. However arcane disputes to fit contemporary challenges about how words in a treaty can be reinterpreted miss the vital point. The 21st century world must fulfil the necessities of the refugees, which can be achieved only by rising to the present challenges and not by pious adherence to the dictums of the past. The way forward is not to reinterpret past wording, but to build a new system that works.

Who are Refugees?

A refugee may be defined as an individual who is leaving his motherland or country of habitual residence as he/she is unable to get the protection of his home country, because he/she is facing the fear of persecution

due to religious hatred, racial discrimination, association with a specific social or demographic group, ideology or nationality (1951 Convention).

The Convention of the Organisation of African Unity (OAU) which governs the specific aspects of refugee's problems in the African continent, adopted this regional instrument in 1969, which further added to the 1951 Convention's definition by including a consideration which was objectively incorporated as is;"

"Any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality."

At round table discussions of the representatives of the governments of Latin Americans along with the prominent jurist in 1984 adopted the Declaration of Cartagena. In the same fashion as the OAU did, this Declaration also added a further objectively based consideration, to the refugee definition already adopted in the 1951 Convention. By virtue of this Declaration those individuals who are leaving their motherlands due to threats to their life, freedom or security as a result of generalised violence, assault from a foreign country, civil conflicts, violations of human rights on massive scale, or other such conditions which have suffered the public order to a great extent.

Refugees – as refugees – need and should be entitled to expect three things: rescue, autonomy, and an eventual route out of limbo. Currently, the majority of refugees are not getting any of them.

The 1967 Protocol to the 1951 Convention Relating to the Status of Refugees

Although the Protocol of 1967 is distinctive but closely connected with the 1951 Convention related to the status of refugees. By virtue of this instrument, the two limitations that is, the temporal and geographical, found in the 1951 Convention were removed. Both these documents deal with three key areas:

The fundamental definition of a refugee, beside the conditions for termination of, and to exclude from refugee status; the refugee's legal position in the asylum seeking nation, their duties and rights, consisting of the right to be provided protection against the forced return or refoulement, to such a land where he/she is fearing persecution. States responsibilities comprises of cooperation with UNHCR during the implementation of its duties and facilitation, while performing the duty of supervision for the Convention's application.

While signing the Protocol of 1967, there is an agreement from the states that they will apply majority of the Refugee's Convention articles (Art. 2 to 34) to all those individuals covered by the definition of the Protocol. So far a large number of states have acceded both these documents. It shows the states determination that both the treaties are vital for the international refugee protection regime. The message from the Conference to all the governments and their parliaments is that they should be aware of their responsibilities in terms of protection of refugees and to give shelter to the sufferers from political persecution as mentioned in the Convention of 1951 related to refugees.

The confirmation by the Executive Committee of the legitimacy of the 1951 Convention and 1967's Protocol on the Status of Refugees provides the ground for the foundation of International Refugee law.

State Parties' responsibilities towards the Convention on Refugees

By virtues of a universal principle of International law, all the parties to a treaty are bound to enforce and implement it in good faith. Those countries who have given ratification to the 1951 Convention are bound to provide protection to refugees on their soil according to the letter and spirit of the instrument. The terms and conditions of the Convention, which the states are bound for their application, are as under:

States Cooperation with UNHCR

States are bound to co-operate with the UNHCR by virtue of Art.35 of the 1951 Convention as well as under Art.II of the 1967 Protocol, while performing its duties and particularly required to help the UNHCR

while supervising various provisions' implementation found in the above mentioned treaties.

Information on National Legislation

The information on national legislations has to be sent to the United Nations Secretary General by the State parties, which they have adopted for the insurance of Convention's application.

Exemption from Reciprocity

A right's granting on the basis of reciprocity to an alien by a country and then demanding the same treatment from that individual's country is not allowed and the refugees are exempted from such conditions. The idea of reciprocity is not applicable to the refugees since they are lacking the home country's protection.

Parties (States) to the International Instruments related to the Refugees

At international level, states along with UNHCR also gets encouragement from the Executive Committee to further promote the protection of refugees along with durable solutions at regional levels, where possible but to make it sure that these measures are fully in-line with the standards at the international level by focussing on specific regional demands.

The Legal Framework for Refugees at Regional Level

Efforts at the regional level for the protection of refugees have a long history. Some of the most important organisations at regional level are as under

The Convention of the Organisation of African Union 1969 (OAU) Governing the Specific Aspects of Refugee's Problems

When the colonial powers left the African continent, it led to never ending conflicts due to which it saw a massive movement of refugees across the continent. The sufferings due to these displacements of large scale populations compelled not only the leaders at African continent but also around the globe, which not only resulted in the form of 1967 Protocol for refugees but also in the shape of a 1969 Convention of OAU For the refugee of African continent. Declaring the Refugee's Convention of 1951 on the one hand as the fundamental universal document, but on the other hand the 1969 Convention of OAU is till date as the only binding legal document at the regional level.

The definition of refugee given in the Convention of OAU is perhaps the most significant area, which needs attention. It follows the definition of a refugee given in the 1951 Convention but further incorporates a consideration that any individual forced to leave their homeland due to the external aggression, foreign occupation, domination or any such event which seriously disturb the public order in any part or the whole nation of the individual. By virtue of this definition, all those individuals who are leaving their homelands due to civil conflicts, violence, and wars are eligible to claim the refugee status in the states that are signatories to this document irrespective of the condition of well-founded fear of persecution. Nearly all the countries (approximately 45) of the African continent are the members of this document and is the only regional instrument which is of binding nature across the continent of Africa.

The Declaration of Cartagena on Refugees

A summit of a large number of delegates representing different governments and prominent jurist across the Latin America was held in 1984 at Cartagena, Columbia. The purpose of the summit was to discuss the refugees' protection across the region. As a result of these discussions, the members adopted various recommendations, which are known as the Cartagena Declaration.

The Cartagena Declaration also extended the refugees protection to all those leaving their homelands due to generalised violence and many countries in the region incorporated this expanded definition into their municipal laws.

Conclusion

Having discussed all the above analysis we can say that Refugee is a fleeing person from his own state to another due to a well- founded fear of persecution on the basis of race, political opinion, religion, nationality and being a member of a particular social group. The legal framework for a Refugee in shape of Refugee Convention 1951 and 1967 Protocol gives protection to such person. Without this legal protection a refugee could face many hardships and exploitations at the hands of state authorities. However the current legal regime does not cover the situation where a person has left his own country due to economic crisis. It also does not protect a person who flees due to environmental crisis. There is a need now to bring the International refugee Protection regime under the umbrella of International Human Rights Protection law so that it covers all aspects of humanity.

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