

The Contemporary Refugee Crisis: Finding a Solution

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Abstract

“Safety is something you can’t touch, but you will feel it when they take it away from you”
Home is a safe place, where everything is warm and innocent. Where the people are familiar and the roads are known. The laughter of the children fills your ears, and the sight of them studying makes you dream of a positive future. But this place that we call home is a luxury that the refugees being persecuted in their own nations are unable to enjoy. The photograph of a toddler dead on a Turkish beach sent goosebumps down our spine and yet the situation has aggravated since that picture with no relief in sights. This paper examines the age old laws regarding asylum seekers and refugees, and attempts to apply them in the present situation across the world. It also tries to draw conjectures from the past, to realize how the laws have failed the refugees and IDPs, in such group situations and especially in the non-international armed conflicts. Lastly, the paper sights the responsibility to protect (that is being shirked off), as an essential rule of humanitarian assistance, and how it can be honored, to bargain a solution to the present situation.

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Introduction

In times that globalization and privatization has taken over the world, and the lines of sovereignty seemed faded by a global market, the world sees redrawing of borders and fences. Goods are allowed, but not so much humans.

Wars have been a common phenomenon for humans since the disputes over property began. The nation states have times immemorial attempted to acquire more land into their own territory. This quest for expanding territory has infused anger and hostility between nations, and thus enunciated wars. The most common drawback inter alia was initial loss to human life and property. However, wars were fought in battlefields and the impact did not reach the civilian population until the war ended and the territory was annexed. In most international armed conflicts the same situation prevails even presently. After the two consecutive World Wars the art of warfare has substantially evolved, and the attacks are not aimed at warring parties but also against protected persons which includes civilians.

Another transformation in warfare is not just in means and method of warfare, but between the disputing parties. The parties to a conflict till the World Wars were primarily two separate nations. However, another aspect of war that evolved during the phase was the Non-International Armed Conflict or civil war. The conflict became an omnipresent part of the warring world, which was hard to ignore any longer. These wars are not fought in battlefields; there seems to be no distinction between normal combat zones and normal zones.

The most essential consequence of any war has always been – Displacement. Civilians being displaced from their homes as a result of destroyed houses or the fear of destruction. The people have been fleeing persecution and conflict, seeking asylum in foreign nations since the advance of war. The most potent example of the same is Syria, wherein the hostilities began in 2011, and the never ending surge of fire and attack between the multi-party war initiated the biggest exodus that the world has seen since the Second World War.

The present research paper focuses on the conceptual understanding is groundwork for the formation of laws with respect to refugees. The research ultimately attempts to synchronise the two, and conceptualizes certain suggestion which provide effective solutions in the situations of mass influx like Syria

Evolving a Refugee Law

Individual rights have recently become the focus of the international paradigm, after the humanity faced the scourge of two world wars. The loss of life, and property led to the realization that if peace is to be achieved, then individuals need to form an essential part of

the new International Law regime, as the receiver of the rights or as patron of duties and obligations. The inclusion of individuals under the international law was claimed as the 'fundamental axiom' of the international legal order.

Thus, International law has evolved through the ages, as the 'law of nations', and the initial understanding of the same did not include individuals as its subjects, but merely objects upon whom the orders shall be applicable. The states remain the supreme guiding force behind the rights to the individuals. The concept of social contract and evolution of state came into being to provide individual with certain basic securities, so as to protect individual rights. What if the state is the transgressor of the same rights, do individuals have any rights in the cosmopolitan paradigm that the world elucidates off in this century.

The present law with regard to refugees can be categorized into 3 parts –

Right of Asylum given under the Universal Declaration of Human Rights (UDHR)

In 1948, UDHR was the first document to recognize human rights at the international level, and the right to asylum was a part of the declaration. Article 14 pans out a "...right to seek and enjoy in other countries, asylum from persecution".

International Humanitarian Law

International Humanitarian Law does not directly talk about refugees, except in Geneva Convention IV. Article 44 provides for the protection of refugees to not be treated as enemy aliens, thus putting it in the sphere of international armed conflict.

In case of non-international conflict, Article 3 common to all Geneva Conventions applies, which provides for the humane treatment of persons not a part of hostilities. It provides specific prohibitions so that the rights of persons are not violated. It appeals to the parties to conflict to adhere to the Principle of Distinction, and prohibits any direct attack upon the civilian population, or civilian objects.

Conventions and commissions for the protection of Refugees

The most sought after alternative amongst the three has been the Refugee Convention of 1951, because of its universal adoption. The convention was formed to secure certain inevitable rights to refugees, and to expand the scope of those rights which have been already provided;² while cataloguing the same in a single document for the first time. It provides rights such non-discrimination, non-refoulement, and other socio-economic rights essential for survival of the refugees in host nations.

Lacunae in the Refugee Protection Regime

²G.A. Res. 428(V) (Dec. 14, 1950).

Refugees have recently received a huge international attention, while the numbers have gone over 21 million, it still isn't enough. The refugee convention and other mechanisms (elaborated in the last chapter) have been in place for the better part of the century, and yet the crisis at present is beyond the control of all the organizations put together. The 1951 Convention, even when it provides a comprehensive protection to refugees after receiving the status, has historically been challenged for various reasons, mostly concerning the definition of refugees. The convention was an important move in the direction of refugee protection regime. However it was laden with gaps, which have still not been filled after over 50 years of the convention.

Definition of Refugees

The UNHCR and General Assembly drafted the 1951 convention,³ which includes within the scope of refugees, all persons who had been given the status by the commission on Refugees under the League of Nations, thus validating Nansen Passports in the Refugee Convention of 1951. However, the said definition was restricted only to –

- a) events occurring prior to 1st January, 1951; and
- b) events occurring in Europe or elsewhere.

However, the article was amended further by the 1967 protocol. Article 1 provides that –
“...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...”

The ingredients of the definition can be elaborated further for the sake of convenience -

1. Well-founded Fear of Persecution

The asylum seekers have to establish a well-founded fear of persecution. The fear must be based on reasonable grounds of either certain past persecution or other reasons. The fear should be well founded in an objective risk. The convention nowhere defines persecution, leaving a wide scope open for the nations to define it in the manner that they deem possible.

Such as in United States the immigration department dealing with the refugees, is based on the *Mogharrabi* Test,⁴ which provides certain elements to establish persecution – a) Possession of protected characteristics; b) Awareness; c) Capability; and d) inclination.

A similar approach has been taken in other countries also. Such as in Canada, it is not essential to establish a series of past persecutions, but a well-founded fear of future persecution must be established.⁵

³G.A. Res. 429 (V) (Dec. 14, 1950).

⁴ Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987). Also see INS v. Cardoza-Fonseca, 480 U.S. 421, 431(1987).

2. Indirect Targets and Fear of Persecution

Unlike primitive times, the wars are not fought on battlefields but on and amongst the people and their property.⁶ Thus, to establish a fear of persecution is not possible in a war scenario, and yet there is fear from continuous hostility.⁷ Such as in Syria, there are attacks happening almost every day and there is fear for loss of life. However, the attacks are not directly upon the people, but on the opposition groups.

3. Grounds of Persecution

Handbook And Guidelines on Procedures and Criteria for Determining Refugee Status under The 1951 Convention and The 1967 Protocol Relating to The Status Of Refugees Reissued provides that the refugees situations can be due to drastic climatic changes or natural disasters and wars also, and the definition under the convention does not take into consideration either of these.

The fear of persecution has been based on five elements – race, religion, nationality, particular social group or political opinion.

Attempts towards a Solution

The element has been evolved in certain regional conventions, where even war and climate change refugees have been encompassed. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, under Article 1(2) – the term refugee shall “also apply to every person who, 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”

A similar definition was adopted by the Cartagena Declaration under Para 3 of the conclusion, to be applicable upon Latin American nations. Even though these changes have been made as late as 1984, there has been no amendment in the 1951 convention subsequently, to incorporate a wider ambit of refugees within its ambit.

Other Lacunas

1. Discrimination Clause (Article 3)

The essence of all the rights granted to refugees are in a single clause i.e. Article 3 – non-discrimination. The clause renders the nations to not discriminate amongst refugees with

⁵*Natynczyk v. Canada (Minister of Employment and Immigration)*, O’Keefe, (F.C., no. IMM-2025-03), June 25, 2004.

⁶ EMMA HADDAD, *THE REFUGEE IN INTERNATIONAL SOCIETY: BETWEEN SOVEREIGNS* 32 (2008).

⁷*Ibid.*

regard to the application of the clauses of the present Convention, however with respect to other matters the nations are not obliged by the convention.

Further, this clause restricts the discrimination to merely race, religion and place of origin – and does not include the discrimination faced by the refugees on account of ‘being refugees’. Such as in Lebanon, the expansiveness of xenophobia is expanded to the idea that the nation’s resources and infrastructure is restricted for the beneficial use by the citizens only. Also, the discrimination clause leaves out sex based discrimination – the women at risk of persecution on grounds of their gender.

2. Principle of Non-refoulement

The principle of non-refoulement is one of the strongest right that the refugee protection documents claim to hand out. However, Article 33 of the convention does not claim to cover a wide ambit of refugees, and thus is laden with a few weaknesses. Firstly, mass influx has been considered as an exception to the rule, as the term ‘return’ and ‘expel’, both require the person to enter the territory first, and in case of individual complaints, the persons can be given access and scrutinized by the state, while in case of mass influx it isn’t possible.

Secondly, Article 33(2) provides that the benefits of the provision are not available to a refugee who there are ‘reasonable grounds of believing to be a danger to the national security’; yet it is denied on the facade of a threat to national security, due to large influx into the territory.

3. IDPs

The 1951 convention gives a narrow conception of refugees who have also been displaced involuntarily, but unlike IDPs is beyond national borders. Other factors remaining same, crossing of internationally recognized state borders is the only distinction between a refugee and an IDP. Thus, every refugee at one point before crossing borders can be placed in this category. Also, the refugees who have been returned from their country of asylum, and are unable to return to their former homes, are also within this category.

4. Burden sharing

The EXCOM Conclusion 22 observed that in situation of mass influx, the first asylum nations should admit them on temporary basis, if it is unable to provide for durable solutions, as the fundamental principle of non-refoulement includes non-rejection at the frontier. Further it also recommends the international community to conform to the principles of international solidarity and burden-sharing.

The successive articles of the convention, however, have failed to provide a solution to the nations incapable of accommodating the influx of refugees. The convention places the

Human Rights vis-a-vis Justice System in Present Era : A Publication of Jus Dicere

refugees in the same category as the citizens of the host country, by placing a similar obligation upon the state to provide for their survival, basic needs, and social securities. There is a major need for responsibility or burden sharing by the developed nations, for the benefit of these developing nations, so that they don't crumple under the pressure.

Such as in Lebanon, and Turkey – Initially the nations were not financed by any international organization or national agencies to share the responsibility upon them due to topographical reasons. The economies of the nations were completely crashed and the nationals soon develop a xenophobic attitude towards the refugees, leading to a difficulty in getting legal jobs, and housing for them.

Conclusion

While explaining the situation at a meeting in Brussels, UN Secretary General, Ban Ki Moon exclaimed that -

“The situation is complex, yet simple in its fundamentals: We need to help human beings caught up in horrendous circumstances, which they had no role in creating and have no power to change. With the world now richer than ever and more knowledgeable than ever, we should be able to cope better than ever”.

The refugee convention and mechanism has clearly been incapable of dealing with the present crisis across the world. The inevitable consequence of the incapacity of the world at large is being dealt by over 5million refugees. The dangerous life in the hostile nation and the skimpy condition of refugee camps has put a whole generation in the hands of peril. Certain suggestions and conclusions that may be provided for the same –

Enlisting Refugees

The refugees are not catalogued in any list. Thus the boat people who die while crossing borders are only a part of estimations on the basis of survivors (if any) or bodies. The procedure of crossing borders should be made easier and more secure. The persons crossing borders anonymously also fall prey to traffickers and smugglers.

Burden Sharing

The term burden sharing is a misnomer. Till the time refugees are considered a burden upon the nation, and its economy, politics, and society – they shall always be seen as a liability. The correct term must be ‘responsibility sharing’. The people are world citizens and are a responsibility rather than an obligation upon any other nation. The responsibility sharing in certain cases can be similar to that of monetary help to the United Nations and to the nations proving actual refuge, in setting up camps and providing basic facilities. Thus the shift is

required in reality from the fear of refugees to acceptance towards them. This can only be done by the change in governmental policies towards refugees.

Humanitarian Intervention to Humanitarian Aid

The focus should shift from the wastage of money of building stronger borders and security forces, to the protection and resettlement of refugees. While people are dying, the government spends billions on border control. The money can further be invested into collaborative action against the government in Syria. The divided interest merely fuels the hostilities in the nation and would ultimately have regard for no population, which would be the ultimate sufferer in the internationalized civil war.

The nations need to understand humanitarian intervention beyond 'war' and should provide 'humanitarian aid' to the refugees. Money and infrastructure should be spent for their reestablishment and rehabilitation. Refugees are a vulnerable group, which is capable of being exploited immensely. The major aid should be in the field of providing them with education and employment.

Another major focus of the refugee mechanism must be upon resettlement and Repatriation. The 2030 agenda for Sustainable Development has been agreed by 193 nations, which includes strong focus on justice, institutions and peaceful societies. The purpose of having such declarations and developments is primarily to access the overall development of world, with each nation in focus.

Unorganized Group

Refugees are a group which did not get time to plan their escape. The groups are unorganized and unplanned in terms of growth and settlement. Certain refugees have shifted to rural and sub-urban areas, while the rest of them are still residing within the camps. The organizational leadership with refugee groups is necessary not merely for shifting and crossing borders but also for retaliating against the government or the group that is causing hostilities in the nation.

The refugees are a sect that has been bestowed with the tag of vulnerability. They are enormous in number and the crowd shall only have the capacity to retaliate when they organize into a group. As distinct entities they portray vulnerability, but as cumulative group, they signify immense power. This power can set them free.