REFUGEE RIGHTS v. STATE SECURITY: SOCIAL CONDITIONS OF REFUGEES AND THE LAW

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INTRODUCTION

International Refugee Law, although not a recent development, is one of the least evolved areas of International Law, owing in part to the hesitation by States to homogenize norms and restrictions in this respect. One of the most pressing concerns in the International sphere today is the need for protection of individuals fleeing from war, situations of internal conflict, or a regime that infringes their basic rights as citizens of the world. However, shockingly, most members of the International community have under the guise of protection of internal security, closed their doors to these individuals, an action which goes against the very spirit of international cooperation and the protection of human rights the world over. This article attempts to:

(i) Highlight the vulnerability of the present framework of refugee law in the face of restrictions imposed to preserve 'State security', and

(ii) It's inadequacy in providing adequate criterion for determination of refugee status, along with

(iii) The experimentation by various countries in their attempt to solve the latter issue.

This analysis is supplemented by a field study, conducted by the author as part of a research group, of a paradoxical situation dominating the world refugee concerns today- that of the Sudanese refugees in Israel.

REFUGEE LAW IN THE INTERNATIONAL SPHERE

Legislation in international law and the domestic law of states regarding refugees has been formulated recently due to the combined impact of the First and Second World Wars, which left many countries in a state of disarray. As was famously stated by the American diplomat William Smyser, "the second half of the twentieth century has witnessed an unprecedented explosion in the number and impact of refugees".

One of the first and still the most relied on source is the Convention Relating to the Status of Refugees, signed in 1951 in Geneva (also known as the Geneva Convention)[1], signed after the two World Wars and the Cold War. Although many

1. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150.

conventions and declarations signed subsequently have attempted to elaborate further on the topic, including the Universal Declaration of Human Rights[2] and the Cartagena Declaration on Refugees[3], the Geneva Convention continues to be of prime importance.

THE GENEVA CONVENTION AND THE CONCEPT OF ASYLUM

Article 1 of the Geneva Convention defines refugee as a person who,

"*as a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.*" [4]

The author, after doing a comparative analysis of the law regarding refugees in 7 European countries including Poland, Bulgaria, Romania, Czech Republic, Sweden, Germany, the United Kingdom, along with the United States of America, found that all these countries have almost replicated the Geneva Convention in their domestic laws. While this seems at the first glance desirable, it must be stressed that a law formulated in 1951, which was also affected by the then existing scenario after World War II, and the beginning of the Cold War, may not be applicable in the present scenario, when there have been such drastic changes in the economic and military dynamics of the world.

THE PRINCIPLE OF NON-REFOULEMENT: THE BACKBONE OF REFUGEE LAW

The main guiding principle in refugee law is the *principle of non-refoulement*[5]. Article 33 of the Geneva Convention states that no State shall expel or return (refouler) a refugee to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. However, this is not absolute as Art.33(2) allows the *forced return* of refugees concerning whom there is reasonable ground for regarding as a danger to the security of the country which they are in. Restrictions like this, imposing subjective requirements of 'security of the country' can be interpreted differently

2. Universal Declaration of Human Rights, 10 December 1948, GA Res. 217(III) U.N. GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).
3. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85).
4. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150, Art.1.
5. Goodwin-Gill, G., *The Refugee in International Law* (Oxford: Clarendon Press, 1998), 117.

depending on the attitude the host country wishes to adopt. Therefore, provisos like Art.33(2), purporting to supplement the main principle, can actually be used to override the norm as has been done in the case of the Sudanese refugees in Israel, who are branded 'enemy nationals' and imprisoned on arrival.

This principle is also embodied in the Convention Against Torture, 1984, which states in Art.3 that no State party shall return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture[6]. In the context of 'protection of asylum-seekers in situations of large-scale influx' the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) adopted Conclusion No.22 in 1981 which states that in all instances of asylum-seekers,, the "fundamental principle of non-refoulement – including non-rejection at the frontier-must be scrupulously observed." Customary international law also extends the principle of non-refoulement to include displaced persons who do not enjoy the protection of the government of the country of origin.[7]

ASYLUM AND STATE SECURITY

The concept of asylum has been in existence in the form of religious beliefs of many countries since the ancient times.[8] However, the present concept of asylum has limited itself to the definitions laid out in the 1951 Convention, which clearly is unable to ensure a common standard of protection. One of the most significant horrors stories occupying the attention of the world today is that of the genocide in Darfur in Sudan. This genocide is carried on by the Arab militia (one of them being the Janjaweed) against the Sudanese of Negroid descent with the silent aid of the Sudanese government.[9]

In this instance, the Arab has become the "white man" and the story of racist colonization repeats itself as entire villages of Sudanese, both Muslim and Christian, are burnt down and thousands of families are wiped out. One of the most common escape routes for the survivors of such tragedies is Darfur-Khartoum-Egypt-Israel. Here however, lies the real irony. The Sudanese refugees come to Israel with the hope of asylum, and within half an hour of crossing the border, they are arrested by the border police, transferred to army bases and then the prisons and kept in the cells especially reserved for *enemy nationals*. A group of people, escaping from a

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6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987.
7. Goodwin-Gill, G., "Non-refoulement and the New Asylum Seekers", in Martin, D. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinses Nijhoff Publishers, 1988), 103.
8. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 82.
9. The information regarding this example has been gathered from an interview conducted of Sudanese refugees in an Israeli prison by the author as part of a research group.

ruthless government targeting them for the colour of their skin, are then punished by other countries for being representatives of the same government.

Egypt did not prove an adequate shelter due to ineffectiveness of the status granted to the asylum seekers which is dealt with in the next part of the article, and eventually, unable to remain in a place where they spent most of their time in jail and the rest living on the streets, they paid the Bedouin to help them cross the Israel-Egypt border. After crossing, most of them turned themselves in to get assistance from the authorities, only to get the brand "enemy national prisoner". The disappointment was evident in every answer. None had spoken to family in Sudan, most doubted if they had any family left in Sudan. They had been in Israeli jails for time spans of between four months to 1 year, with nothing other than the routine tribunal hearing. In such a situation, following from the principles of State Liability[10] and from the very wording of the Geneva Convention, these are bona fide refugees eligible for asylum. While they did not complain of any ill treatment in prison, in such a situation to punish them for the acts committed by the perpetrators of the violence against them, is in clear contravention of any humanitarian or human rights norm.

Article 31 of the Geneva Convention expressly states that a State shall not impose penalties on account of their illegal entry or presence, on refugees coming directly from territory where their life or freedom was threatened according to Article 1, if they can show good cause for such illegal entry or presence.[11]

Therefore, the imprisonment of these refugees as a result of a perceived threat to security is in gross violation of their human rights and every international norm relating to refugees. Examples like this serve to highlight how perceptions of State security have overshadowed the ideals of the Geneva Convention, an obstacle that the existing framework of the Convention seems to provide no resistance to. The concept of 'enemy national' has not been specifically dealt with in the definition of 'refugee'- whether it was because such instances were not contemplated, or whether protection was meant to be granted irrespective of origin of the refugee. Whichever the reason, the indisputable reality is that lacunae such as this one are being used by States to interpret the law in ways that defeat its very purpose.

The treatment of the Sudanese refugees is a clear violation of the theory propounded recently by scholars concerning the 'right to be granted asylum'.[12] Interestingly, this right is almost opposite to the right attributed to sovereign states- the 'right to grant

10. The emerging concept of State Liability in Refugee Law has been dealt with in the last section- A Move for Change.
11. Convention Relating to the Status of Refugees (1951), 189 U.N.T.S. 150, Art.31.
12. Kennedy, D., "International Refugee Protection" (1986) 8 Hum. Rts. Q. 1, 57.

asylum'.[13] In a case before the Supreme Court of the United States- *Chris Sale, Acting Commissioner, Immigration and Naturalisation Service, et al. v. Haitian Centers Council Inc., et al.*[14], it was held that the President had the power to establish a naval blockade that would prevent illegal Haitian migrants from reaching American soil, even though it posed a greater risk of harm to the Haitians who would face a long and dangerous return voyage. The Court felt that since neither the Convention nor any statute prevented such action, this was within the limits of the authority of the President. This is another example of how Art.33(2) can be misused and the exception is allowed to defeat the norm

INADEQUACY OF TEMPORARY PROTECTION AS A SOLUTION

There was an attempt to create a solution to the problem of refugee rights versus state security through an emergence of the term of *'Temporary Protection'*. This was initially conceived in the context of refugees fleeing the conflict in Yugoslavia, so the host country did not have to grant permanent asylum to them and burden their resources.[15] There are three main characteristics of temporary protection: *firstly*, even those refugees who fall within the definition of the 1951 Convention may be given only temporary protection; *secondly*, the arms-length measures deliberately make the industrialized countries less accessible as even asylum-seekers facing imminent danger on return can be given only temporary protection; and *thirdly*, the granting of temporary protection is based on a premise of return, regardless of what the wishes of the refugee are to that effect.[16] If the host State considers it safe for the asylum-seeker to return after a certain amount of time, the person concerned has no say in the matter. While this does have certain merits regarding the providing of immediate security (as states are less hesitant to grant temporary status), recognizing protection needs and ultimately facilitating repatriation, the question remains- *how temporary is temporary?*, and what is the way to guarantee a safe return to the country of origin-and most importantly, how can the root cause in such country be dealt with.[17] Therefore, the concept of temporary protection, while an easy way out for countries determined to close their borders to any kind of a perceived racial or economic threat, is risking lives of asylum-seekers who are eventually forced to return to the places they have escaped from. To add to this, temporary protection is hardly given much importance by local authorities of different countries, and essentially the asylum-seeker is powerless against any kind of aggression shown by

13. *Ibid.*
14. 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).
15. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 89.
16. *Ibid.*
17. United Nations High Commissioner for Refugees, *The State of the World's Refugees- In Search of Solutions* (Oxford: Oxford University Press, 1995), 85.

them. The Sudanese refugees are a clear example of this. These were young men, from the age of 17-31, who had managed to flee while their families were burnt down, had been arrested and tortured by the police in Khartoum, escaped, and finally managed to get entry into Egypt. After reaching Egypt, they all applied to the UNHCR. Out of all of them, one was given asylum, one temporary protection, the other was rejected, one had his interview rescheduled three times, and the rest never even heard from the office again. Irrespective of qualification (one of them was a qualified engineer who had done his education in Khartoum) they were all street vendors while in Egypt. The Egyptian police would repeatedly arrest them *in spite of their having being granted temporary protection by the UNHCR* and then release them in return for payment of some money, and if there was no money, they could be kept in jail for over 1 month. They also faced severe discrimination from the Egyptian people who felt they were "bad people because they had black skin"[18].

As a result of instances like this, many believe that refugees should not be made guinea pigs in the experiment to address the root cause of States' unwillingness to open their borders. Unless there is a dependable response to the risk of human rights abuse, the autonomous right to seek protection outside the frontiers of one's own state should not be compromised through measures such as temporary protection.[19]

A MOVE FOR CHANGE

The criteria laid down in the Geneva Convention are not only open to various interpretations, they have also clearly been proved to be insufficient. The latter problem, however, is now slowly being addressed by countries individually. Most legislations, drawing from the Convention, adhered to the requirement of a "well founded fear of persecution" for the granting of refugee status, requiring at least some threat of death, either in the form of a death penalty or as part of indiscriminate killing in the country of nationality. It has been recognized that asylum-seekers escaping from conditions due to natural disaster, civil war, etc., are not covered by the existing definition.

To combat this issue, the concept of granting '***Humanitarian Status***' was created. The dislocation of large number of people could not be handled by the traditional solutions of resettlement or temporary asylum, and called for something more effective-the acknowledgment of the root causes of their problems, and subsequent action by the International community. While the earlier concept of strictly defining refugees allowed greater scope for discretion by the State in which asylum was

18. As mentioned during the interview by one of the refugees.
19. Hathway, J., ed., *Reconceiving International Refugee Law* (London: Martinses Nijhoff Publishers 1997) xxiii.

sought, there has been a growing awareness that a 50 year old definition is no longer adequate. The United Nations High Commissioner for Refugees, while addressing the Economic and Social Council, referred to situations of international conflict, civil war, general political and social instability, etc., and stated that if persons were obliged to leave their country of nationality as a result of such events, they would not be refugees according to the statutory definition, but would be in a situation *analogous* to refugees.[20] The General Assembly, in its Resolution A/RES/49/169 of 20 December 1994, called upon States to take all measures necessary to ensure respect for the principles of refugee protection and the humane treatment of asylum-seekers in accordance with internationally recognized human rights norms. Many countries, including the seven mentioned earlier, have started developing separate criteria for granting of humanitarian status. These include civil war, natural disasters, etc. Sweden also provides for the granting of humanitarian status to homosexuals fleeing from countries like India where homosexuality is a crime.

However, despite UNHCR's repeated recommendations that such asylum-seekers should be protected against refoulement and be permitted to remain in the territory of refuge until a permanent solution can be found for them, there is no customary international law protecting humanitarian refugees.[21] It remains dependant on the individual initiative of each State.

Recently, there have been efforts to evolve a theory of State Liability which centers on the principle that every State must be held responsible for the performance of its international obligations under the rules of international law, whether derived from custom, treaty, or any other source of international law.[22] Therefore, failure to perform such obligations would amount to an international wrong.

There has also been discussion concerning the existence of the "Right to Remain" which can draw inference from the principle of non-refoulement, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the 1973 Convention on Suppression of Crime of Apartheid.[23]

In such a scenario, keeping in mind the provisions of the Universal Declaration of Human Rights and the Convention Against Torture, to turn away asylum-seekers

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20. Jackson, I., *The Refugee Concept in Group Situations* (London: Martinses Nijhoff Publishers, 1999), 421.
21. Hailbronner, K., "Non-refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?", in Martin, D. (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht: Martinses Nijhoff Publishers, 1988), 128.
22. Beyani, C., "State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law", (1995) Int'l J. Refugee L. *(Special Issue)*131.
23. Gowland-Debas, V., (ed.), *The Problem of Refugees in the Light of Contemporary International Law issues*, (The Hague: Martinses Nijhoff Publishers, 1994), 102-105.

from the border or to return them when it is felt that their persecution is not severe enough, is a gross violation of International Law- a violation that nearly every State is guilty of.

All these principles have been evolved with the aim of being able to provide better protection to asylum-seekers, where the host country is obliged to look beyond its security concerns and address the humanitarian issues involved. Initially, laws relating to refugees were made keeping in mind the country's foreign policy, relations with neighbours, level of technological development, etc. Now, however, there is a slow change towards the other direction, where the human rights of the refugees are considered paramount irrespective of where they are from, or what the economic policies of the host country are. Unfortunately, this has not been implemented in many countries yet, but with the initiative of the UNHCR and human rights organizations like hotlines for migrant workers, there is a gradual shift towards this thought process.

CONCLUSION

The concept of granting refugee status emerged from the whole idea of burden-sharing amongst the international community regarding problems faced by large numbers of people, as is evidenced from the emphasis on principles such as non-refoulement. However, unfortunately, this has now turned into the phenomenon of burden-shifting[24] as states anxious to close their borders to what they assume are security threats, now begin to find reasons to avoid granting refugee status. This attitude has resulted in situations like that of the Sudanese refugees where ironically, a problem which is known by all to stem from mass violations of human rights, culminates in a repeat performance of this violation by other countries who are turned to for assistance.

There is also not enough acknowledgment of the fact that the existing definition framed in 1951 does not cover a whole range of people in need of asylum, and it cannot be left to individual States to be pro-active. There is necessity for improvement to be made on an international scale, wherein either the definition itself is amended or international regulations governing the granting of humanitarian status as a parallel to refugee status are created. In the present scenario where individualistic concerns of States dominate even the human rights sphere, it is only the force of collective recognition that will succeed in ensuring refugees their rights.

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24. Chimni, B., (ed.), *International Refugee Law* (New Delhi: Sage Publications, 2000), 90.