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Principle of Non-refoulement & responsibility of States

Simranjeet Kaur

ABSTRACT

The objective of this paper is to show the importance of the State's responsibility towards Refugees. How far the refugee law is applicable on the States. The author seeks to draw attention towards the Principle of Non-Refoulement, enshrined in the refugee convention, 1951 and other treaties such as International Covenant on Civil and Political Rights, Convention Against Torture and under International humanitarian law at a glance. Furthermore, the paper discusses the grounds on which states shrug their responsibility to entertain refugees and abide by the principle of non-refoulement. And lastly the paper gives a brief account about how India used certain exceptions to forbid the entry of Rohingya refugees.

Keywords: Refugees, Non-Refoulement, Customary Law, 1951 Refugee Convention, Rohingya refugees.

INTRODUCTION

The forced migration of people across borders or oceans in search of protection of foreign states is a recurrent event from time immemorial. What could be more unfortunate than to have been driven out of one's homeland? The place where one was born. Refugees are no one but ordinary people like us, who have lost everything. Leaving their life behind, leaving with nothing but a few bare minimum belongings, they can cling to. Just because one day someone bombed their houses out of political oppression or out of their belongingness to different ethnicity. We who are so privileged cannot even imagine how it feels to yearn for basic amenities like food and shelter. Many of them continue to live their lives after abysmally losing a member of their family in the war or ethnic conflict. Some of them live the rest of their life with a disturbing memory of their close ones getting brutally killed in front of their eyes. Having misanthropic actions of others become a vital ingredient affecting the mental health. It is beyond imagination how traumatized a life of a refugee can be.

All they seek for is protection, for themselves, for their kids, for their families. They too deserve better lives with dignity just like the rest of us. They also deserve equal number of opportunities just like other people, better education, quality food to devour, and every single basic thing that each human on this planet needs to function, because they are no different from us. No distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty,¹ such as:

- Right to life, liberty and security of person.
- No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- Everyone has the right to recognition everywhere as a person before the law.
- All are equal before the law and are entitled without any discrimination to equal protection of the law, etc.

¹ Article 2 -7, 1948 Universal Declaration of Human Rights.

States are responsible to provide all the basic amenities to citizens and protect their rights. When a state becomes unable or unwilling to protect the rights of its citizens, they are left with no other option than to leave their country to seek protection somewhere else.

It seems like migrant crisis tends to happen periodically in Europe. The 700,000 asylum seekers that Europe had to deal with after the fall of the Iron Curtain.² Before that, 60 million refugees during and after the WWII.³ Very recently, following the emergence of war initiated by the Russian-backed separatists, 2.6 million of Ukrainian residents were forced to leave their homes in Eastern Ukraine.⁴

This is where another country has to walk in to ensure the rights of those people and this is known as, 'International Protection'. So, the international refugee law should be understood as a system of human rights protection, by which the international community agrees to act as surrogate guarantor of the dignity of persons compelled to leave their own country.⁵ Hence, the concept of refugee law is nothing but protection of human rights, perhaps based on the principle put forward in the preamble of the Charter of the United Nations, which states, "faith in fundamental human right, in the dignity and worth of the human person, to promote social progress and better standards of life in larger freedom".

APPLICABILITY OF REFUGEE LAW

The global community has shown due concern for the refugee's rights which is evident from the fact that refugee law encompasses customary law, peremptory norms, international legal instruments and regional legal instruments.⁶ Many countries are parties to these international legal instruments, and are bound to the provisions. However, since the legal instruments of refugee laws mostly consists of customary law, even if a state is not a party to the convention, an obligation still arises under the International law. Protection under refugee law is ordinarily available to those who have left their countries of origin.

Everyone has the right to seek and to enjoy in other country's asylum from persecution.⁷ Any person who is outside his or her country of nationality or habitual residence, unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality,

² Connor, 2016.

³ Rothman & Ronk, 2015

⁴ Gienger, 2015.

⁵ Prof. James Hathaway, "Crisis in International Refugee Law", in "New Delhi Workshop on International Refugee Law, 20-21 February, 1998, *Indian Journal of International Law*, Vol. 39, No. 1 1999, p. 5.

⁶ Human Rights Machinery has been established on a regional basis in Europe, Africa and Americas.

⁷ Universal Declaration of Human Rights, 1948.

political opinion, or membership in a particular social group has the right to protection against refoulement.⁸ It has to be noted that the principle is not limited to those formally recognized as refugees,⁹ but also to those who have not had their status formally declared.¹⁰

STATE'S RESPONSIBILITY TOWARDS THE REFUGEES

Responsibility-sharing is a core tenet of international response to refugee crises. The 1948 Universal Declaration of Human Rights broadly gives that “everybody has the privilege to look for and appreciate in different nation’s haven from mistreatment”.¹¹ However, this entitlement is not induced into any mandatory instrument. This shows the hesitant nature of the states to provide a shelter to the victims of mistreatment in their own state. Although there is no legitimate restricting instrument which allows shelter to outcasts, states are yet bound to the principle of non-refoulement laid under article 33 of the 1951 Convention. This principle provides that no outcast will be returned back to any nation ‘where his life or opportunity would be undermined because of his race, religion, nationality, involvement in a specific social gathering or political feeling.’

It is seen that in some instances states have been successful to put responsibility-sharing in practice in the refugee context. The Comprehensive Plan of Action for Indochinese Refugees (CPA)¹² being one great example of it. The CPA was adopted at an international conference in 1989 to provide temporary refuge to the continuing outflow of refugees from Vietnam and the Lao People’s Democratic Republic.

THE PRINCIPLE OF NON-REFOULEMENT

NON- REFOULEMENT OBLIGATIONS UNDER INTERNATIONAL LAW

(i) The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol

⁸ Art. 33, Convention relating to the Status of Refugees, Adopted on 28 July 1951; GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 117 (1996); Elihu Lauterpacht & Daniel Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 89 (Erika Feller et al. eds., 2003).

⁹ Catherine Phuong, *Identifying States’ Responsibilities towards Refugees and Asylum Seekers*.

¹⁰ UNHCR Conclusion No. (XXVIII) “Non-refoulement” (1977).

¹¹ UDHR, Art.14.

¹² See UNHCR, The state of the world’s refugees 2000 – fifty years of humanitarian action (Geneva: UNHCR, 2000), 84-85.

“We reaffirm that the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol are the core international refugee law instruments and that they remain crucial for the protection of refugees. We recognize the importance of their full and effective application by States parties and the values they embody.”¹³ The principle of non-refoulement is an important part of International refugee protection. “We reaffirm respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law.”¹⁴

It is laid down under Article 33 of the 1951 Convention, and states that, “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.*” Which means a State cannot interdict refugees from its territory. As it would constitute to violation of obligation under International law.

The principle applies to any person who fulfils the requirement of being a refugee enshrined under the Article 1A(2) of the 1951 Convention, which provides, “*Any person 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.*”

Refugee status is declaratory in nature, a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.¹⁵ Moreover, the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared.¹⁶ The principle applies to a wide range of people, including those seeking asylum as well as those already granted asylum, regardless of whether the individual entered the host state legally. It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to

¹³ IPU, Statement on parliamentary action in support of UNHCR and refugee protection, IPU Governing Council, 188th session, Panama, 2011.

¹⁴ *Ibid.*

¹⁵ UNHCR, Handbook on procedures and criteria for determining refugee status, 1979, Reedited Geneva 1992, para 28.

¹⁶ This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) “*Non-refoulement*” (1977), para. (c).

fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.¹⁷

The non-refoulement obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol¹⁸ as well as any other person or entity acting on its behalf.¹⁹

But in some instances States have terribly failed to comply by the principle. One classic example would be the European migrant crisis, also known as the refugee crisis,²⁰ a period characterized by high numbers of people arriving in the European Union (EU) overseas from across the Mediterranean Sea or overland through Southeast Europe. In the particular exodus where Europe had failed to respond to influx in a coordinated fashion. A vast majority arrived by sea and other migrants made their way over land, principally via Turkey and Albania. The reason behind this major exodus was the conflict in Syria as well as the ongoing violence in Afghanistan and Iraq, abuses in Eritrea, and on top of all of it poverty in Kosovo, led people to look for new lives elsewhere. According to the International Organization for Migration (IOM), more than 3,770 migrants were reported to have died trying to cross the Mediterranean in 2015. Where boat carrying about 800 people capsized in the sea off Libya. Overcrowding is thought to have been one of the reasons for the disaster. Most died on the crossing from north Africa to Italy, and more than 800 died in the Aegean crossing from Turkey to Greece. In 2015, EU countries offered asylum to 292,540 refugees. Although huge numbers have been applying for asylum, the number of people being given asylum is far lower.

(ii) International Covenant on Civil and Political Rights, 1976 (ICCPR)

It protects refugees against being returned to a risk of persecution. Additionally, international human rights law has made non-refoulement a fundamental element of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, enshrined under Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The United Nations (UN) Human Rights Committee (HRC), which monitors the implementation of the ICCPR, has interpreted

¹⁷ UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr. Paul Weis, Cambridge University Press, Cambridge (1995), at p. 341.

¹⁸ Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

¹⁹ UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

²⁰ "European Refugee Crisis 2015: Why So Many People Are Fleeing The Middle East And North Africa". *International Business Times*. 3 September 2015.

Article 7 – and to some extent, Article 6 on protecting the right to life – as implying that return to torture and other forms of ill-treatment is also prohibited. According to the UNHRC,

“States Parties must not expose individuals to the danger of torture or cruel or inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.

(iii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (CAT).

Apart from the 1951 Refugee Convention, the principle of non-refoulement finds expression under Article 3 of the UN Convention Against Torture, which provide, *“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”* The prohibition on torture is absolute and non-derogable, as is the principle of non-refoulement of those at risk of torture.²¹ And it is further validated in under General comment 4 on the implementation of Article 3, that each State party must apply the principle of non-refoulement not only to any territory in its jurisdiction, but also to any area under its control or authority, including on board a ship or aircraft registered to the State party.

(iv) International humanitarian law

The principle of non-refoulement is also reflected in Article 45(4) of the Fourth Geneva Convention, which provides that, *“In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”* While the term ‘persecution’ is not defined in humanitarian law, it refers, as a minimum, to serious violations of human rights (right to life, freedom, security) on such grounds as ethnicity, nationality, religion or political opinion.

II. NON- REFOULEMENT UNDER CUSTOMARY INTERNATIONAL LAW

Due to the wide acceptance of the principle of non-refoulement, it is UNHCR's considered view, supported by jurisprudence and the work of jurists, that the principle of *non-refoulement* has become a norm of customary international law.²² This is concluded since the principle is widespread repeated by states of similar international acts over time (state practice); and as it fulfils

²¹ See General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018, paras. 8-9.

²² UN docs. A/AC.96/694 para 21.; A/AC.96/660 para. 17; A/AC.96/643 para. 15; A/AC.96/609/Rev.1 para. 5.

the requirement that the acts must occur out of a sense of obligation (*opinio juris*). This view is based on a consistent state practice combined with a recognition on the part of states that the principle has a normative character. Non-refoulement is a principle of customary international law and applies to all states. Domestic and regional courts with developed human rights jurisprudence have also recognized the general applicability of non-refoulement and its fundamental, non-derogable role in the protection of basic human rights. It is argued that since the prohibition of torture is a part of customary international law, having a status of a peremptory norm of international law, or *jus cogens*. The refoulement of a person to a State where he fears persecution or a risk of torture would create a violation of a *jus cogens* norm of prohibition of torture. Hence, creating an absolute ban on any form of forcible return of a person to a place where there is danger of torture.

Therefore, even if a particular State has not signed and ratified the above-mentioned conventions, the principle of Non-Refoulement binds all States, regardless of whether they are parties to these international conventions.

EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT

Since life is a cause and effect, for all rules there must be a violation. Henceforth, there is no law without reasonable restrictions. Exceptions to the principle of non-refoulement under the 1951 Convention are allowed only in the conditions laid down under Article 33(2), which states that:

“The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”²³

Although this international principle creates an obligation to protect human rights, it also creates tension with a state’s sovereignty because it disregards a state’s monopoly over the authority of its population and territory. The concept of state sovereignty was introduced in the Treaty of Westphalia in 1648 and emphasizes the role of a state to make decisions based on national security. The State Centric theory is a great way to understand how the role of sovereignty impacts the principle of non-refoulement. This theory creates a dilemma between State sovereignty and the protection of human rights, it is presumed that states will choose to maintain their sovereignty, instead of protecting the human rights. This approach to global governance has caused the principle of non-refoulement to be disregarded by its signatories and for the decrease of its

²³ Art. 33(2), Refugee Convention, 1951.

effectiveness. Due to increasing number of people seeking refuge, states have started arguing upon on the non-intervention principle within Article 2(4) of the UN Charter of 1945 which provides “*the prohibition of the threat or use of force against the territorial integrity or political independence of any state*”. In stating that the UN is not authorized to intervene in matters of domestic control, this principle furthers the state’s ability to take a state-centric approach to disregard non-refoulement. With an objective to sustain national security and public order, states have begun citing the non-intervention principle which again decreases the effectiveness of non-refoulement. This has become a classic example of neglecting and disregarding human rights. States permitted refoulement on the grounds of past criminal records, or many a times on religious identities. Since the principle of non-refoulement is simply a moral obligation with signatories, states use the argument of sovereignty and the UN non-intervention principle as a defensive mechanism to legally occlude their borders to those seeking refuge under the a fundamental principle of non-refoulement.

INDIA TOWARDS ROHINGYA REFUGEES

The Rohingya people are a highly persecuted Muslim minority in the state of Rakhine in Northern Myanmar, and the international community recognizes attack on Rohingya as a crime against humanity, validating these atrocities as genocide and ethnic cleansing. The matter of refugee refoulement is notably observable in India, where refoulement of Rohingya refugees is perpetuated due to the weakly enforced international norms of non-refoulement and India’s concern for national security.

Although during independence and partition in 1947, India faced a refugee crisis, yet the country does not have a legitimate legislative structure for the protection of refugees. India is not a party to the 1951 Refugee Convention, however non-refoulement is a principle of customary international law and applies to all states, as already discussed above. India’s obligations to the international community also extends to the international human rights law treaties that it has signed and/or ratified. The principle of non-refoulement finds expression in the UN Convention Against Torture (Article 3). India has not ratified the convention – though it is still obliged to act in line with its object and purpose as it has signed it. India justifies non admission of Rohingyas on three major contentions. First, India asserts that refugee conventions are Euro-centric and force developing countries to carry the burden of refugees while they struggle to meet the needs of their own citizens. Second, India has taken a State-centric approach to justify non-refoulement by arguing that it compromises state sovereignty. India has taken Article 33(2) of the Refugee Convention as its defense to justify their claim that Rohingya refugees represent a threat to national

security. Third, India claims that refugee inflows deprive Indian citizens of their basic citizenship rights and strain national resources. Nonetheless, the lack of refugee laws has allowed India to pursue a selective ad hoc approach to non-refoulement.

However, it seems that the recent Citizenship (Amendment) Act, 2019, is a step to admit migrants from India's neighboring countries. But it is again debatable that the act discriminates on the basis of religion since Muslims are not included in the act.

CONCLUSION

Therefore, it is to be concluded that state's responsibility certainly includes but is not limited to responsibility for internationally wrongful act. It has a broader scope that involves responsibility for the people who had to flee from their origin State due to a fear of persecution. The state of destination of all the refugees must give them equal and fundamental protection as mentioned in the universal declaration of human rights with applying the humanitarian intervention, abiding by its duty under 1951 Refugee Convention, the principle of Non-Refoulement (article 33) and the duty to grant refugees a range of legal rights (articles 2 to 32). As the convention does not mandate principle of non-refoulement, states are seen running away from their moral obligation to provide shelter to those in dire need.

Moreover, there is no clarification about which state has to protect, at which stage, which refugee. Issues of state responsibility for protecting refugees go well beyond the granting of asylum/admission. Even though a refugee has found physical safety in one state, other states are not exonerated from their responsibility to contribute to his legal and material security in the country of first asylum and to find durable solutions.