

A CRITICAL ANALYSIS OF HUMAN RIGHTS OF REFUGEES IN A GLOBALIZED WORLD

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Abstract

A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.¹

The refugees in international law occupies a legal space characterised, on the one hand by the principle of State Sovereignty and the related principles of territorial supremacy and self-preservation; on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations)² and from treaty. Refugee laws remains an incomplete legal regime of protection, as the global society is in dilemma by the continuous conflicts between human rights and state interest. The refugee policies are changing from been primarily rooted in humanitarian considerations to becoming more focused on state interests.

The purpose of this article is to examine the impact of such conflict on refugee policies as well as on human rights law.

¹ <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>

² The Refugee in International Law By Guy S. Goodwin-Gill, Jane McAdam p.1

Introduction

"Human rights concerns go to the essence of the cause of refugee movements, as well as to the precepts of refugee protection and the solution of refugee problem"- Ms. Ogata

The global world today is noticing a dichotomy between a human right and state interest perspective on refugee protection. The refugees policies have changed from being primarily rooted in humanitarian considerations to becoming more focused on state interests. The standard interpretation of human rights obligations, state bears the primary responsibility for protecting the human rights of their own members. This state centric interpretation leaves a gap with respect to any responsibility that states might have in their treatment of those who are outside their jurisdiction. This can be explained by the illustration of the morally unacceptable consequences caused by the former President Clinton's recent apology, while he was for pushing for dramatic tariff cuts on US rice imports to Haiti at the expense of Haitian farmers. The apology came in the light of the humanitarian catastrophe following the collapse of rice production in Haiti, he came to recognize his direct responsibility in hampering the human right to food of Haitian citizens, while he was trying to discharge his obligation to protect and promote the rights of citizens in his own country.³

With his apology, Clinton is clearly suggesting that he did something wrong and that he is the one responsible for it, but neither of these claims make sense within the standard state-centric ascription of responsibilities for human rights protection currently recognized by the international community. This interpretation makes it clear that an alternative to the state-centric ascription of human rights obligations is urgently needed to move the human rights project forward in a globalized world.

We are now witnessing a conflict between refugee policies and human rights law, as authors have debated between the traditional vs practical approach towards human rights. Where the former is concerned with the core philosophical questions regarding the nature, grounds and substantive content of the concept of human rights. The weakness of this approach has been highlighted by many authors as this approach tends to work in disconnect from actual human rights. While the

³ Human Rights, Human Dignity, and Cosmopolitan Ideals; Ch-3 Global Governance and Human Rights; p.45

latter approach starts from the opposite side. It takes contemporary human rights practice as a guide in order to figure out what human rights actually are. This orientation toward contemporary practice makes the practical approach seem more promising in terms of its ability to offer fruitful answers to the difficult questions that arise within that practice. The weakness of this approach is that it takes current practice as a guide and tends to take the state-centric conception of human rights obligation for granted, as this view pervades current practice.

The Rawls's Law of Peoples, which is generally identified as the first account of human rights that follows the practical rather than the traditional approach. According to Rawls, the main goal of human rights practice is to determine the limits of toleration between peoples. In light of this goal, the distinctive function of human rights is to "specify limits to a regime's internal autonomy". It is not coincidental that an interpretation of the functions of human rights as trigger for coercive intervention against states yields a notoriously truncated list of rights that bears little resemblance to the list of rights actually contained in the major human rights conventions and treaties, which have been signed by a majority of states. Rawl's list of human rights proper is limited to the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).⁴

Since Rawls's approach refers to "peoples" rather than "states", his own wording is slightly different. His own description of the functions of human rights is to "specify limits to a regime's internal autonomy."

Insisting on this distinction is important for the prospects of defending the practical approach against critics who hold, that the state-centric claim is false.

Subsequently, the study of international relations has moved from a state-centric phase to a post-realist, post-positivist phase. This involves a shift from inquiring into the role of the state as an agent of preserving its autonomy in an anarchic world to an understanding into the role of the marginal and the excluded. Many scholars have tended to accept the position that the state could

⁴ J. Rawls, *The Law of Peoples* (Cambridge, 1999), p.65.

no longer be the basic unit of analysis in international relations and seek to emphasize the role of marginal human beings, both 'subject' and 'object' of international politics.

The UN Charter laid down the principles of universal respect for the human rights of all persons and of international cooperation to protect and promote human rights. Shortly after the approval of the charter in 1945, a UN committee was charged with writing an international bill of rights. The Preamble of the Universal Declaration of Human Rights (UDHR) states that

The General Assembly proclaims this Universal Declaration of Human Rights.....to the end that every individual and every organ of society .. shall strive .. to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.

The UDHR lays down two key human rights standards in respect of refugee protection which is the right to seek and enjoy asylum and the non-discrimination principles as embodied in Article 26 of the International Covenant on Civil and Political Rights, the Convention on the Elimination of All forms of Racial Discrimination and the 1951 Refugee Convention. Whereas the right to seek asylum grants the possibility to access another territory and thereby, in principle, offers a safe haven from prosecutors, the prohibition against discrimination constitutes an important precondition of real protection in the country of refuge.⁵

Refugee studies reflect the tendency to take issues with the classical principle of state sovereignty and argue for new norms of political community, which would be less exclusionary towards so-called 'non-nationals', and probably be more sensitive to the needs and interests of the 'outsiders'.

Human Rights and Refugees

The definition of refugee which is given in certain variations in relevant international instruments is that of any person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, owing to well founded fear of being persecuted by reasons of his race, religion, nationality or political opinion, and is unable, or due to fear, is unwilling to avail himself, of the protection of the country of his nationality, or if he

⁵ Refugee Protection between State Interests and Human Rights: Where Is Europe Heading?
Author(s): Morten Kjærum

has no nationality, to return to the country of his former habitual residence. Refugees may be stateless or not. It is not there nationality status but the absence of protection by a state which is determining element of their refugee character.⁶

There is a casual link between the violation of human rights and the phenomean of refugee movements. Political refugees leave their countries because of the breach of their civil and political rights. Other displaced persons are uprooetd because of natural disasters or wars, which create situations in which human rights cannot be fully exercised. From one prespective, there are inherent human rights links that accompany the refugee anywhere he goes, since a host country must respect the human rights of all persons within its territory, including aliens and refugees. Indeed the protection of the human rights of the refugees belong to the emerging human rights culture.⁷

The history of refugees can be traced back to the immediate aftermath of the First World War, when the League of Nations created the office of the High Commissioner for Refugees which was responsible for defining the status of refugees and providing them with assistance. However it was after the aftermath of the Second World War that the international community came together to create a permanent and compherensive legal regime for the protection of refugees.

The United Nations General Assembly by the Resolution 428 (V) created the office of the High Commissioner for Refugees (UNHCR) , the year 1951 saw the drafting of of the convention relating to the status of refugees. Latter, a protocol to amend certain provisions of the 1951 Convention enetred into force on 4 October 1967.

While the above international instrumnts remain the cornerstone of international protection for refugees and are the strongest expression of international concern for the plight of refugees, it has become increasingly evident that they are not sufficient to deal with the magnitute and complexity of today's refugee problems. It is now said that international refugee law is at a crossroad. Clearly, new realities demand the creation of new principles and new approaches. But

⁶ Human Rights and Refugees : Paul Weis, 4 Jan 1972

⁷ Alfred de Zayas, *Human Rights and Refugees*, 61 Nordic J. Int'l L. 253, 258 (1992-1993)

we must be careful not to sacrifice the existing principles of refugee law, which are already been undermined in the contemporary global landscape.⁸

Growth in Refugee Population

There are factors which are presently challenging the orthodox approaches to refugee protection as embodied in the 1951 Convention and the 1967 protocol. One of such is what is perceived as 'refugee problem' which is the scale and spread, at the earliest the refugee population was just one million, which now stands at more than 28 million refugees. The causes of refugee flows have undergone extensive transformations that have served to highlight the shortcomings of the present international regime for refugee protection. The 1960s and 1980s witness massive refugee movements due to the proliferation of national liberation struggles, the decolonization of The Third World War and the proxy wars of the Cold War in Indo-China, Central America, Afghanistan and Southern Africa.

The New World Order, so anticipated after the end of the Cold War, has not created space for a New Humanitarian Order. Rather, it has witnessed the explosions of new ethnic conflicts within states in which human displacement is not just an 'unfortunate' by-product, but frequently, the very objective of the conflict. The modern nation-state is currently experiencing an acute crisis. Apparently unable to come to grips with the aspirations and expectations of its diverse population groups, many nation states have descended into ethnic conflict, forcing millions of people to flee their homes in countries such as Rwanda, Sri Lanka and Somalia.

Another factor that has challenged the traditional approaches to the refugee problem is the growing complexity of the movement of people across the globe. International migration has become a multidimensional and interrelated process, generated by wars, including civil wars, human rights, deprivations, natural calamities and poverty. Because of the complex interaction of political, economic, environmental and human rights factors, it is becoming increasingly difficult to make a clear distinction between 'voluntary' and 'involuntary' population movements, between people who are fleeing from threats to their life and those wanting to escape poverty and social injustice.

⁸ The inadequacies of international regime for the protection of refugees : by J.M. Catro-Magluff

*"not even the most prescient of the drafters of the 1951 Convention [could have] anticipated the magnitude of today's refugee problem."*⁹

The above observation point out that the 1951 Convention was simply not designed to provide answers to today's refugee problem and thus not be expected to resolve problems which it was never intended to deal with.

The allegations of Eurocentrism, particularly in the view of the fact that 26 states which participated in the drafting of the Convention, 17 were from Europe and 4 from a North American persuasion. It is often marked by the criticism that the Third World did not participated in the drafting of the Convention is a part of broader concern that non-European countries have not enjoyed the same access to international law making process.

The UNCHR has acknowledged the limitations in the refugee definition :

*"In many parts of the world refugees are victim of civil war and political conflict rather than the persecution. Africa, burdened with its colonial past, provides many grim examples of ethnic tensions, exacerbated by poverty population explosion and environmental degradation, leading to repression and violence Communal strife and civil war intensify famine and food shortages, forcing people to move in search of safety and survival"*¹⁰

Many authors have pointed out that the problem is not so much of conceptual weakness of the Convention, but of proliferation of restrictive measures which "test the minimum threshold of protection from a forcible return to a country where they face persecution."

Global Apartheid

With the end of the Cold War, the main political and ideological motivation for accepting refugees, namely to embrace and discredit communist regimes, has disappeared. The 'open door' period or 'golden age of asylum' of the 1960s and 1970s in which African countries accepted hundreds of thousands of asylum seekers fleeing from armed struggles against colonialism, racial domination and apartheid has come to an end.

⁹ Jens Vedsted Hansen, 'Europe's response to the Arrival of Asylum Seekers: Refugee Protection and Immigration Control', New Issues in Refugee Research (Working Paper No.6, May 1992), p.2.

¹⁰ Cited in Arboloda and Hoy, op.cit., p.72

The contemporary unwillingness of states to accept and protect refugees is motivated by a number of factors: concern over dilution of national sovereignty, spread of international terrorism, rise of illegal immigration, and changes to the ethnic and religious composition of society. To alleviate their fears, many states have undertaken radical changes through legislative and interstate arrangements, which have had the effect of blocking access to refugee status determination procedures and restricting the rights of refugees once they have arrived. For Richmond, this is indicative of what he terms *"the creation of system of global apartheid based on the discrimination against migrants and refugees from poorer developed countries."*¹¹

Sovereignty

The modern manifestation of the classical dichotomy between states' claim to sovereignty and their participation in the international society. The international instruments providing for the protection of refugees are seen as restraining states' jurisdiction to control the admission of foreign nationals onto their territory. The imperatives of immigration control got to the very core of a states' symbolic function and are motivated by a number of factors, namely,

- the maintenance of law and order
- the prevention of crime
- the protection of national security, particularly in the context of international terrorism,
- the protection of national markets, labour and housing, and
- the safeguarding of social benefits for genuine community members.¹²

The growing preoccupation with state sovereignty, particularly in the area of immigration, must be analyzed in conjunction with the growing trend toward globalization and integration. At a time of significant and widespread deterritorialization and erosion of state authority and legitimacy, immigration control is often viewed as one of the last remaining symbols of national security.

"it is likely that migration control is and will continue to be used by the governments to express and assert their positive sovereignty is in serious doubt in so many other areas, and demonstrate representative democracy when the whole basis of democracy appears in dire trouble in many crucial policy areas. This largely explains the tendency of immigration and asylum issues to

¹¹ Richmond, op.cit

¹² The inadequacies of international regime for the protection of refugees : by J.M. Catro-Magluff

dominate national political agendas in Western Europe around election time.”- Sarah Collision¹³

Neo-Liberal Approach

The neo-liberals tend to emphasize three dimensions of international relations: First on the economy front, they emphasize worldwide acceptance of market economy as a panacea for elimination of all evils and argue that free market will bring about progress, peace and development. Secondly, on the political front, they put emphasis on increasing democratization of the world as they tend to believe that democracies do rarely fight among themselves, and argued that human rights will be observed, protected and respected only in a bilateral-democratic society. Finally, in order to bring about ‘perpetual peace’, these scholars recommend the formation of international regimes which will seek to develop norms, rules, decision-making procedures as well as multilateral agreements among states to regulate state behaviour in several ‘issue areas’.¹⁴

The main feature of neo-liberal is to admit that solution of refugee problems would necessitate the formation of refugee regime at the international level. The study formed by Thomas Risse, Stephen Ropp and Kathryn Sikkink on human rights, offers a tentative framework of a refugee regime. At the very outset, one admit that refugee norms have three distinct dimensions: first, they challenge state rule over society and national sovereignty; secondly, they are not yet well institutionalized; and, finally, these norms are still contested and compete with other principled ideas. The principle developed by the Thomas Risse and Kathryn Sikkink, emphasize that “the establishment and sustainability of networks among domestic and transnational advocacy networks” would have the following purposes: identification of norm violating states; and, challenging norm violating states by pressurizing both ‘from above’ (i.e., through international organizations, non-governmental organizations.) and from ‘below’ (i.e., social movements). Such process of internationalization as well as implementation have been described as a process of socialization.¹⁵

¹³ Sarah Collision, ‘Globalisation and the Dynamics of International Migration: Implications for the Refugee Regime’, *New issues in Refugees Research*, p.32

¹⁴ *Refugee studies and international relations theory* by Gautam Kumar Basu. P.399

¹⁵ *Ibid*, p.402

A look at the proposed refugee regime, based on neo-liberal prescription, reveal some of its weaknesses. The model of refugee regime developed by Risse and Sikkink in the field of human rights, these scholars have made an effort to examine how international relation norma can lead to cahnge in state behaviours. The problem lies in the fact that violation of human rights of a citizen by a state and violation of human rights, which a refugee is legally entitled to by the same state, may evoke different responses in a given society. *'A citizen is an insider' while a refugee is an 'outside, refugees are simply 'stateless' persons 'who have to escape from their own country at a short notice and with nothing but clothes on their back'.*¹⁶

The point is mobilization of domestic opposition would be comparatively difficult indeveloping a pro-refugee regime- mentally than in the sphere of human rights.

Secondly, linkage between transnational advocacy networks and domestic support groups may not always produce the desired outcomes. One of the normative assumption of the regime theory is that "the formation of international regimes is supposed to be rationally indicated in sistuations where mutual gains can be optimized, and losses minimized through coordination and cooperation", and such regime formation would 'bring about peace and stability among the states within its domain'.¹⁷ Given the fact that half of the flow of refugees is within Third World countries, and also that corruption is highly prevalent in these countries, domestic groups supposedly working for the refugees may 'manufacture' data, 'produce' information and distort facts in such a way that coordination and cooperation required for international regime may lead to hostility, indiffernce, and mutual suspicion among the states.

Refugee protection and human rights

Human rights have moved from being highly political instruments during the cold war period to becoming an integral part of the legal instruments applied by domestic and international legal bodies as well as different parts of the state administration. This is particularly true in relation to issues related to refugees and immigrants. Thus, human rights law, as illustrated above, has challenged restrictive legislation and practices. There are current trends which could be interpreted in a way which indicates a move towards clipping the wings of human rights law¹⁸.

¹⁶ UNHCR, op.cit., p.853

¹⁷ Refugee studies and international relations theory by Gautam Kumar Basu. P.402

¹⁸ Refugee Protection between State Interests and Human Rights: Where Is Europe Heading?

An obvious target would be the international and regional control mechanism. With regard to the UN treaty bodies in general terms it is noteworthy that during a period such as the last decade with a lot of focus on human rights implementation, the most prominent international monitoring mechanisms are still dramatically underfunded. The underfunding is so severe that meetings are canceled due to the inability to fund travel costs for members of the committees. At the domestic level there is a growing resistance against compliance with international human rights law as interpreted by treaty bodies. Furthermore, mainstream politicians and commentators in many countries are questioning whether national parliaments can decide their own policies or whether they should be subjugated to what they call the "human rights tyranny".

A conflict is developing between attempting to create a higher human rights profile at the global level and other intergovernmental fora and at the same time moving towards clipping the wings of human rights as has been done with refugee law. A way forward from avoiding yet another clipping is to consider more clearly the different groups of people arriving as refugees and the different set of legal regulations. Furthermore, it is important that human rights law and refugee law become more integrated so that refugee protection is perceived as being part of human rights protection. However, the two branches of law should not merge completely, but continue to be separate bodies.

Conclusion

It is clear that there is a casual link between the violation of human rights and the phenomenon of refugee movements, the international regime for protection of refugees is presently facing a number of challenges. As been discussed in the paper the increasing numbers of refugees have made many governments reluctant to grant asylum. There are concerns that framework of the Convention and the Protocol may be inadequate to deal with the growing scale and complexity of the problem.

The 1951 Convention and the 1967 Protocol remain the strongest expressions of international concern and solidarity for persecuted people. Given the reluctance of states to implement the present provisions of the Convention, the establishment of a new international framework that is more generous to the needs of refugees is not a feasible option. Instead, the nations must apply

the Convention as liberally as possible, respecting its original spirit and aspirations. State must learn to balance their national interests with their internationally recognized obligations to protect and assist refugees.

Further it can be argued that refugees problems are not confined within the boundaries of nation states and their solutions require transnational cooperation. This involves not only prevalence of certain international institutions, but also requires regime formation in the refugee issue area. Such regime may function as global institution of governance with elements at the local, regional and international levels.

In particular, the growth of must encourage societies that respect minority rights and political, social, economic and environmental justice.

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