

1951 REFUGEE CONVENTION AND ITS PROTOCOL: IMPERATIVES TO INDIAN PERSPECTIVE

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ABSTRACT

Being not a signatory to the notable International legal provisions passed for the betterment of refugees such as the United Nations Convention (1951) and protocol (1967), the Indian approach towards the refugees is worthy to do researches. It is for this reason that India responds sympathetically towards its refugee population following the principles of humanitarian considerations. Further, it is interesting to see that the Indian constitution is assuring some definite fundamental freedom to all without discriminating citizens and non-citizens. In order to preserve the fundamental freedoms of the foreigners and of course refugees (non-citizens), the Indian government had given them judicial backup too. This paper is an attempt to look at the importance of the International refugee conventions for the holistic betterment of the global refugee population. Further, the paper outlines the Indian perspectives on the global refugee laws and conventions. It also emphasizes that the Indian constitution and judiciary plays an important role in accommodating refugees, in relation to its political others, as well as ethnic affinities.

KEYWORDS: *Refugees, International Law, India, Humanitarian Considerations, Supreme Court, Indian Constitution, Foreigners Act*

INTRODUCTION

The number of the refugee¹ population is increasing year by year from the final decades of the 20th century. That is why from the second half of the 20th-century refugee studies have got a prominent academic seat due to its relatedness with the foreign policy designs of the global countries (Black, 2001). In 2017, the rate of global forced displacement marks record than the past years. The global trends report of the United Nations High Commissioner for Refugees (UNHCR) puts forward that 68.5 million people were expelled from their country of origin due to persecution, disputes, and disagreements by the end of 2017. In 2017, the number of newly displaced persons was recorded as 16.2 million. On the other side, about 44,400 people enforced to leave back their country of origin in the very same year. Further, the trend of the year shows that another 3.1 million were waiting for asylum. Another notable fact of the year is that an average of 85 percent of the global refugee population is hosted by the developing regions under the mandate of UNHCR (UNHCR, Global Trends, 2017). In this context, it is essential to the various UN organs to put forth concrete laws and legislation in order to control/stop the actual reasons behind the mass refugee outflows (Newman and Selm, 2003). The complete control or eradication of the global refugee population cannot be fulfilled by the UNHCR or any other UN mechanisms in this era of overwhelming ethnic disparities, conflicts, civil wars, natural hazards etc. However, the unified leadership of the UNHCR and the collective responsibility of all nations can contribute together to control or manage the actual cause behind the increasing amount of the global displacement year by year.

Present days refugees have become a global challenge affecting state, society, and individual, especially to the host countries. The influx of refugees inflicts a number of socio-economic and political burdens on the host countries in response to accommodate them through the measures of resettlement and rehabilitation. It is essential to look at the other dimension too; by resettling and rehabilitating the refugees; countries of refuge are getting much economic assistance and grants from the various International bodies and other NGOs (Jacobsen, 2002). Further, within the global political scenario the debates on the resettlement, rehabilitation, repatriation and socio-economic development of refugees play a major role in dictating the foreign policy equations of the states; especially

¹Article 1 A (2) of the 1951 Convention relating to the status of refugees defines the term '*Refugee*' as:

A. For the purpose of the present Convention, the term 'refugee' shall apply to any person who:

A (2) 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national (See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. Pp. 289, 290).

when it comes under the purview of border sharing countries and it is most relevant in the case of South Asian Region.

The other challenge is, of course, affects the refugees themselves, especially in concern of their life/lifelessness, socio-political mobilization, attributes of citizenship as a human being and other probable tensions if repatriation requires by the country of refuge. Being non-citizens of countries of refuge, most of the present refugees across the world face a number of socio-economic and political challenges with respect to their life/lifelessness. In other words, only the status of citizenship provides a person to engage in all socio-cultural and political activities without any discrimination against the fellow citizens (Bellamy, 2008). Practically, in most of the states from Asia, Latin America, Africa and the Caribbean; non-nationals-particularly refugees cannot entertain the citizenship rights (Kibreab, 2003). In the words of Grahl Madson, the major problem of a refugee is statelessness (Nathwani, 2003) similarly, it is evident that the livelihood of the refugee population in any country of asylum is not fully satisfactory, as they enjoyed earlier in their country of origin or residence. In addition, the problem of 'repatriation' hangs as the sword of Damocles above the heads of refugees and it becomes problematic to them when it happens involuntarily or without giving much time to precede the process. For a successful movement of repatriation, it is inevitable to be based on the voluntary nature (Dasgupta, 2003). In order to concern with the all above-mentioned issues of refugees, the 1951 Convention relating to the status of refugees and its 1967 Protocol were framed subsequently.

1951 REFUGEE CONVENTION AND ITS 1967 PROTOCOL: AN OUTLINE

'International refugee law' is or can be used as a blueprint or model in order to address the problems of refugees and other migratory flows. However, it is not itself a 'resolution' to all of the aforementioned issues, because without the determined will of states, the effective process of the same cannot fulfill (Goodwin-gill, 2017, P. 10). The fundamental regulations and orders of the International refugee law and its applicability depend on the act of action and reaction. On the other side, many of the transnational and regional instruments are willingly misused or utilized due to the present forms of regime gaps and ill governing mechanisms. To surpass these problems of manifestation there is a requisite of proper leadership, bold thinking, and systematic change. The office of UNHCR has to shoulder the responsibility in order to fulfill the above-mentioned prerequisites for the successive manifestation of a refugee policy (ibid, P. 14).

The paramount foundation to the International refugee protection is constituted by the combination of 1951 convention and its protocol of 1967 protocol along with a number of other regional instruments (Hyndman, 2000, P. 38). The Convention of 1951 has its own noteworthiness in the fields of legal, political and ethical applications. When its legal realm is concerned; it dispenses the elementary qualities on which righteous activities can be based. The political speciality of the convention indicates on a comprehensive structure with which the states can collaborate to share the responsibility of the burden of forced displacement. Its ethical presentation is signified by the large ratification of a large number of states in order to protect the world's endangered and disregarded displaced people (Feller, 2001, p. 582). In fact, the reach of the 1951 convention was confined to the incidents happening in Europe and before the deadline of January 1, 1951 (Weis, 1995, p.5). However, these geographic and time shortcomings were removed by the introduction of the Protocol Relating to the Status of Refugees in 1967 (UNTS, 1967, p. 267).

REFUGEE RIGHTS IN THE CONVENTION AND ITS PROTOCOL

Refugees had provided many of basic rights in the real sense in the political boundaries of the countries of refuge. International refugee law along with global human rights instruments and international humanitarian law impart a huge number of rights and provisions to the refugees in terms of their rehabilitation, resettlement, and repatriation. To understand the actual conditions and poignant realities of the displaced persons and refugees it is very much essential to understand and analyze the practical applicability of those legal documents and their provisional manifestations. To achieve this goal, it is inevitable to check and analyze the delivery and allocation of the rights to 'seek asylum and leave behind the country of origin'; without which other detail explanation of the refugee rights cannot be discussed.

Various rights of the refugees have explicitly discussed in the original text of the 1951 convention. Article 3 of the convention sees the global refugees through a single mirror without having any discrimination on the basis of religion, country of origin or race². Article 20 speaks about the rationing system should be distributed to the refugees as same as the nationals³. Article 21 is about the housing, to the refugees staying in the territory of the contracting states, as a favorable and possible treatment⁴. Public education of the refugees settled in the contracting states has mentioned in Article 22 of the convention⁵. Furthermore, Article 23 of the convention is all about the overall public relief should be extended to the refugees which stay lawfully within the territory of the contracting states⁶. Article 26, 27 and 28 deal with the refugee's freedom of movement, identity papers and their travel documents respectively⁷.

Article 31 of the convention is not to follow punitive actions with response to the illegal arrival or existence of the refugees within the boundary of the contracting states⁸. Article 32 and 33 refuses expulsion of refugees unlawfully and their refoulment and repatriation respectively⁹. A refugee settled in any one of the contracting states of the convention can approach the courts, when he/she refuses or denies the rights depicted in the convention. Article 16 of the convention gives this right to refugees¹⁰.

In Other Words, the 1951 Convention Covers a Wide Range of Measures to Protect the Rights of Refugees, as Feller Notes:

- Refugees should not be returned to persecution or the threat of persecution (the principle of *non-refoulement*);
- Protection must be extended to all refugees without discrimination;

² See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 291)

³ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 294).

⁴ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 295).

⁵ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 295).

⁶ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 295).

⁷ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 296).

⁸ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 297).

⁹ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 297, 298).

¹⁰ See Brownlie, & Goodwin-Gill, (Eds.). (2007). *Basic documents on human rights*. Oxford University Press. P. 297, 293).

- The problem of refugees is social and humanitarian in nature and, therefore, should not become a cause of tension between States;
- Since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution to the problem of refugees can be achieved only through international cooperation;
- Persons escaping persecution cannot be expected always to leave their country and enter another country in a regular manner and, accordingly, should not be penalized for having entered into or being illegally in the country where they seek asylum;
- Given the very serious consequences that the expulsion of refugees may have, this should only be resorted to in exceptional circumstances to protect national security or public order; and
- Cooperation by States with the High Commissioner for Refugees is essential if the effective coordination of measures taken to deal with the problem of refugees is to be ensured (Feller, 2001, PP. 582, 583).

On the other side, the 1967 Protocol relating to the status of refugees is not dealing directly with the personal rights or basic needs of refugees. However, it speaks of the overall responsibilities of the countries with respect to the refugee protection (UNTS, 1967, P.267)

REFUGEES IN INDIA

As one of the most notable refugee-receiving states of the world, India is having a large number of a refugee population that has entered from Sri Lanka, Tibet, China, Burma, Bhutan, Afghanistan, Nepal, Bangladesh and from other countries too (Benoit, 2004 and Bhattacharya, 2008). However, the Indian approach towards the refugees comes from various countries were/is not always the same (UNHCR, 2011). More often, political and other socio-cultural motives had played/ are playing as the pushing factors that decide the status of different refugee groups in India (HRLN, 2007).

Being not a signatory to the notable International legal provisions passed for the betterment of refugees such as the United Nations Convention (1951) and protocol (1967), India wants to resolve the refugee issues of the South Asian region following its own resettlement mechanisms (Dasgupta, 2003). On the other side, India is a signatory a number of global human rights mechanisms. It denotes the safety and protection of the refugee population within the country in a practical level (Bhattacharjee, 2008). In this background, India has to frame a national legal framework on the refugee concern along with taking initiatives to establish a South Asian regional refugee convention/law; as successfully made in the regions of Africa and Latin America.

INDIA AND THE GLOBAL REFUGEE REGIME

India is not a signatory to the major global refugee regulations of 1951 convention relating to the status of refugees and its 1967 protocol. However, India serves as the executive committee member of the UNHCR. As Prasad mentioned in his thesis, India does follow and bring in practice certain articles of the convention of 1951. This includes:

Article 7; India provides refugees with the same treatment as all aliens,

Article 3; India fully applies a policy of non-discrimination,

Article 3A; No penalty is imposed on illegal entry,

Article 4; Religious freedom is guaranteed,

Article 16; Free access to courts is provided,

Articles 17 and 18; it provides wage-earning rights and as work permits have no meaning and refugees do work, this article is complied with,

Article 21; Freedom of housing allowed and refugees need to stay in camps. Freedom of movement as guaranteed to aliens except in certain areas where special permits are required not only for aliens but also all Indians,

Article 27 and 28; the issuing of identity and travel cards (Prasad, 2010: 23).

On the other side, it is interesting to note that India follows major human rights conventions such as ICCPR, the ICESCR, and the CRC and CAT in its state practice (Sanderson, 2015). So, it can be evaluated that the Indian treatment with its various refugee population is based on the above mentioned human rights conventions following the principle of 'human consideration' without being differentiating the citizens or non-citizens.

TREATMENT OF REFUGEES IN INDIA

The entry, treatment, and security of the various refugee's population in India follow the norms and regulations depicted in the 1946 Foreigners Act. The Act interprets the term 'foreigners' to all, they are not citizens' of the country (Sanderson, 2015). Further, in practical terms, the absence of a specific refugee law in India has been steadily a co-product of its security concerns and other political urges (Sanderson, 2015). It is also noted here that the Indian approach varies with the different refugee population in the country in terms of its actual political and administrative treatments (Prasad, 2010). So, India has to develop some basic legal and legislative framework to address invariably with the various refugee groups hosted in the country (Bhattacharjee, 2008, Chimni, 1994, Chimni, 2003, Gorlick, 1998, Khan, 1997, Oberoi, 2006 and Verma, 1997, Singh, 2010). As for the Indian domestic law is concerned; it is not having provision to protect displaced persons from the notion of 'refoulement' (Sanderson, 2015).

In order to preserve the fundamental freedoms of the foreigners and of course refugees (non-citizens), the Indian government had given them judicial backup too. For example, in a case held among the State of Arunachal Pradesh versus Khudiram Chakma, the state council was ordered by the court (on the basis of article 21st of the constitution-protection of life and liberty') not to compel any Chakma refugees to repatriate from the state (Bhattacharjee, 2008). This must be read with the Supreme Court declaration of 2006 that all the refugees settled in the country must be protected from the process of involuntary repatriation as mentioned in the constitutional provision 'the right to life and personal liberty' (Nayak, 2013). Chimni observes the Indian refugee-specific treatment:

India does not pass refugee-specific legislation to regulate the entry and status of refugees; rather it has handled the influx of refugees at the political and administrative levels. The result is that the refugees are treated under the law applicable to the aliens (Chimni 1994: 379)

The National Human Rights Commission (NHRC) is the major Indian official instrument with respect to the refugee treatment hosted in the country (Chimni, 2005). To preserve the political and administrative rights of the refugees, the Government of India follow certain safeguards. Prasad observes:

The Indian Government deals refugees with at both political and administrative level which is largely applicable to the aliens. In the case of refugees' protection, the constitution of India guarantees certain fundamental rights, which are applicable to non-citizen, namely the right to equality (Article 14), the right to life and personal liberty (Article 21) and the freedom to practice and propagate their own religion (Article 25). Any violation of these rights can be remedied through recourse to the judiciary as the Indian Supreme Court has held that refugees or asylum seeker cannot be discriminated against because of their non- citizen status (Prasad, 2010: 22)

NEED FOR SOUTH ASIAN REFUGEE REGIME

The birth of the new nation-states in the aftermath of the colonialism caused to make the complexity of refugee concerns within South Asia (Singh, 2010). International border sharing of the South Asian countries causes to the mass influx of refugees and other economic migrants. In a real sense, the south Asian cross-border population movements are the major threat to the internal security and political instability of the region (Weiner, 1993).

'Security' concerns are one of the vital regards of all the countries, as Barry Buzan rightly observed; like 'justice', 'security' is an inevitable concept within the stability of any state (Suhrke, 2003). The absence of a specified state policy to all countries of the region more often complicated/ been complicating to deal with the various refugee population of the region (Nair, 1997). To overcome this problem of security in terms of the refugee influx and other migratory movements within the South Asian region, every state of the region has to frame first at least their own specific refugee framework. Chimni opines that it is essential to all of the South Asian states to frame some domestic laws which cover the notion of all dimensions of the term 'rights', before signing to the 1951 Convention or 1967 Protocol (Chimni, 2000). The nation-states are the principal organs to evolve and enforce the laws and regulations in order to protect refugees (Hyndman, 2000). Shacknove rightly observes that the refugee treatment of any country is based on both the state interest and the feeling of human consideration (Steiner, 2000:7). So that the South Asian echoes of the refugee treatment is mainly dealing in bilateral level (Singh, 2010).

Many regional efforts have been made since 1979 in order to address and put forth durable solutions to the refugee problems, such as seen in Africa, Central America, South East Asia and Europe (Rogers, 1992). SAARC does not initiate any serious sitting over the concern of population movement of the region, foreseeing the possible distort of the Organization, once such discussion has happened (Weiner, 1993). Being the prominent political and diplomatic power of the South Asian region, India has to initiate to frame a refugee-centric regime within the region.

CONCLUSIONS

1951 convention relating to the status of refugees and its 1967 protocol are the major international framework in order to protect the rights of refugees spread along the globe. Besides these, there are many International human rights laws and regulations which speak eloquently for the fundamental and basic rights of the human being without having any discrimination between the citizens and non-citizens (which include refugees) of any state. India is not a signatory to the 1951 convention and 1967 protocol relating to the status of refugees, being it is one of the foremost refugee host countries of the South Asian region. However, India is a part to most of the International human rights laws which directly speak on the rights all global community without having any territorial and political distinctions between the states.

India hosts a huge number of refugee population from the South Asian region and outside too. Other than India, all prominent countries of the region are having a big number of the refugee population. Other than Afghanistan, none of the countries of the region ratified the 1951 convention and 1967 protocol. So, India must play a twin role both at the national and regional level in order to tackle the sorrows of the South Asian refugee population.

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