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RIGHT TO ASYLUM AND THE STATE SOVEREIGNTY TO DECIDE: THE CONFLICT IN REFUGEE CRISIS*

INTRODUCTION:

With the current crisis of Syrian refugees and the response of the European Union, the question of who is a refugee, and what is the protection accorded to him under international law comes into question. The conflict is between the right to asylum as stipulated under international law, and the sovereignty of a particular State to decide whether or not to grant asylum to a person. The question arises, whether it is a legal duty or a moral choice of a State to grant asylum.

For this, it is necessary to define and demarcate clearly the persons who are protected by the laws and international Conventions, and to determine the rights given to them and balance these rights with the sovereignty of each State. A refugee is a*"person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him— or herself of the protection of that country, or to return there, for fear of persecution".*[1]

In 1994, the UNDP analysed the concept of 'security' as being too narrowly construed as a security of territory from external aggression, as protection of national interest in foreign policy, or as global security from the threat of a nuclear holocaust[2]. Subsequently, an all-encompassing concept of human security was derived, aiming to protect people from critical and pervasive threats and situations, building on their strengths and aspirations, offering the general strategies of protection and empowerment[3]. This new framework considers the safety and security of individuals, irrespective of their attachment to, or status within a State.

STATE RESPONSIBILITY: A DUTY OR CHOICE

This part of the paper purports to analyse current and existing legal provisions relating to refugees and asylum. The paper proceeds by citing the existing international Conventions and legislations on the matter, and identifying the gaps therein. The various International documents relating to international laws with respect to refugees, and the corresponding provisions incorporated to protect refugees are scrutinised in the light of the question whether these provisions induce a duty on the State to ensure effective application of the rights granted, or whether in the absence of such provision, the right there under is restricted to mere existence in principle.

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[1] Art. 1A (2), 1951 Refugee Convention

[2] UNDP, Human Development Report: New Dimensions of Human Security, 1994, ch.2, 22

[3] UN Commission on Human security, Human Security Now, New York, 2003, available at: www.humansecurity-chs.org/finalreport/English/FinalReport.pdf

INTERNATIONAL LAWS AND STATE'S DUTY THEREUNDER

Any right granted to a person or a group of persons calls for a corresponding duty on another person or group of persons (sometimes the State) to do or refrain from doing an act. In the absence of such a specification, the right becomes difficult or even impossible to be realised. The 1948 Universal Declaration of Human Rights provides that "everyone has the right to seek and enjoy in other countries asylum from persecution"[4], but the same is no incorporated in any legally binding agreement. There is no mention of this right in the 1951 Refugee Convention, indicating the reluctance of the States to make themselves bound by any substantive legal content in this regard. The right to asylum is included in the EU Charter of Fundamental Rights which is part of the Treaty establishing a Constitution for Europe[5], but is guaranteed only in accordance with the 1951 Convention and its Protocol, and the Constitution itself. The 1951 Refugee Convention does not make any mention of a duty on the part of any State to grant asylum. Attempts to introduce any reference to asylum and admission were vigorously opposed during the negotiations leading to the adoption of the Convention[6].The provisions of international law, in element, are to the effect that States possess a "right" and not a "duty" to grant asylum[7]. Several international attempts were made to formulate clear legal provisions in respect to territorial asylum, which, however, mostly failed to materialize. The UN Declaration on Territorial Asylum in 1967[8]made such an attempt, following which the first draft Convention on Territorial Asylum of 1972[9] was submitted, leading to the United Nations Conference on Territorial Asylum in Geneva in 1977. The texts discussed there under yet again only spoke about adopting "best endeavours" to grant asylum, and not to the effect of casting a duty. However, the 1977 Conference failed to adopt the draft Convention, and no further attempt has since been made to develop a right of territorial asylum[10]. The existing laws are, thus, incapable of guaranteeing the intended protection to refugees, though the principle has been included in various texts.

THE PRINCIPLE OF NON-REFOULEMENT

"Non-refoulement"[11] is a major concept of international law which deals with the protection of asylum-seekers, which lays down that asylum seekers or refugees must not be returned to a place where their life or liberty would be at risk; they should not be prevented from seeking safety in a country, if there is a chance of them being returned to a country where their life or liberty would be at risk, even if they are being smuggled or trafficked: they should not be denied access to territory of the State where they have sought asylum. This principle is now generally considered to be part of customary international law[12], making it binding on all States irrespective of their membership in any Treaty or Convention. While it is doubtless that provision applies to all refugees on the territory, the disagreement of the international community in the application of the principle arises on the question whether it applies also to

[4] Art.14, Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948
[5] Article II-78, Treaty establishing The Constitution of Europe
[6] G. Goodwin-Gill, The refugee in international law (Oxford: Oxford University Press, 1996, 2nd ed.), 175.
[7]See R. Sexton, "Political refugees, non-refoulement and state practice: a comparative study" (1985) 18 Vanderbilt Journal of Transnational Law, 731, at 737-738.
[8]GA Res.1400 (XIV), 21 September 1959
[9] A. Grahl-Madsen, Territorial asylum (Stockholm: Almqvist&Wiksell International, 1980), 174-176
[10]Goodwin-Gill, The refugee in international law, 181-182.
[11] Art.33, Refugee Convention, 1951
[12]Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: opinion", in E. Feller, V. Trk and F. Nicholson (eds.), Refugee protection in international law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 87-177, at 149.

those who arrive at the border of the State, seeking asylum. On one hand, while no obligation lies on States to grant asylum, by virtue of any international law, another argument states that rejection at the frontier does amount to refoulement[13]. The interpretation supporting this view takes into account the title of Art.33, "Prohibition of expulsion or return", and hence that expulsion or return from the border would also constitute violation of the provision. While some support this view, some states do not agree with this interpretation of the principle of non-refoulement[14], and the US Supreme Court in 1993 declared that the principle applies only to refugees within state territory[15], thus limiting the scope of its application. Since refoulement is technically said to occur when the person is forced to return to the country where he fears persecution, the rejection at a border where the person need not necessarily have to return to such a country, would not be "refoulement" in that sense. This calls for a case-by-case analysis where refoulement may be said to have happened when the person seeking asylum was at the border of his country of origin and is rejected by the neighbouring country, forcing him to obviously return to his country of origin where he fears persecution.

In the absence of a legal provision compulsorily enforcing asylum to refugees, this principle is the only legally binding doctrine that might come to the aid of refugees and asylum seekers. The provision is with regard to grant of asylum as long as the "fear of persecution" continues, which in turn grants the State in question the discretion whether or not to continue the asylum once the fear has ceased to exist. If the person is no longer a refugee, the state is no longer bound by the provisions of the Convention, and in that essence, refugee protection is temporary[16]. The Convention itself stipulates provision to the effect[17]. The costs of reassessment of refugee status to determine whether or not to let them remain in the territory of the State of asylum, has discouraged many States from taking the pain of periodical reassessments, thus in effect providing permanent asylum to the refugees in question. However, since this not a legally binding practice, or part of customary law, or even in the absence of *opinion juris* to this effect, this only remains the discretion made by certain (mostly Western) States, to choose between the financial burden of maintaining the refugees and a periodical reassessment to determine the refugee status. Thus, several States, mostly owing to the unpredictability of refugee movements and numbers, have chosen not to grant permanent or indefinite asylum to refugees.

Analysing the existing laws and State practices in this regard, it becomes evident that the absence of internationally recognized and observed legal principles create an ambiguous situation, governed by the extension of the non-refoulement principle and following upon the actual practices adopted by States, which still fail to render to the principle any status of customary international law.

REJECTION AT THE BORDER

The absence of clear-cut provisions would enable countries to reject the refugees at the border and he would face similar rejection at other borders, a phenomenon called "refugee in orbit". This calls for a broader interpretation of the non-refoulement principle, however, still not giving a conclusive principle on the matter. One of the principal concepts of Treaty international law is that treaty obligations must be performed by state parties in good

[13] Ibid, 113-115

[14]See for instance DIMIA, Interpreting the Refugees Convention - an Australian contribution (2002), 46, http://www.immi.gov.au/refugee/publications/convention2002/

[15]Sale, Acting Commissioner, INS v Haitian Centers Council (1993) 113 S.Ct 2549

[16]J. Fitzpatrick and R. Bonoan, "Cessation of refugee protection", in E. Feller, V. Trk and F. Nicholson (eds.), Refugee protection in international law: UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 491-544

[17] Article 1(c) of the 1951 Refugee Convention

faith[18].Under this interpretation, the obligation under Art. 33 would require State parties to grant temporary admission to refugees in order to determine whether they are indeed refugees and deserving of the protection. In the absence of such compliance, it will become impractical to abide by the obligation not to reject refugees at the border. Thus it is considered that the pre-emptory norm of non-refoulement principle is admission. Owing to the UNHCR obligations, a State presented with an asylum request, at its borders or on its territory, assumes immediate refugee protection responsibilities relating to admission, and to the provision of basic reception conditions and includes access to fair and efficient asylum procedures[19]. Though formal compliance is not recognized in law by the countries, in practice many States are found to have recognised some linkages between non-refoulement and admission. Some refugees are granted temporary admission into the territory in order to lodge an asylum application, and States are seen to have generally admitted persons who arrive at their borders claiming protection[20].When an asylum-seeker lodges an application to a State, whether at the border or within the territory, the state in question takes up the responsibility to examine the request. If the application is granted and the person is recognized as a refugee, the State grants him permanent asylum, to remain in the territory indefinitely. This is not a legally binding obligation, but the general practice of States in the matter has been in conformity with the practice. However, in the absence of *opinion juris*in this regard, the general practice in itself does not become customary international law, and binding to all States. This norm could be brought about as an extension of the non-refoulement principle, and applied in ensuring the safety and security of refugees, since no legally binding provisions in the form of Conventions or Treaties exist currently. In view of the contemporary international and socio-political scenarios existent in the world, especially considering the Syrian refugee crisis, it calls for the creation and implementation of an effective legal system to determine refugee rights conclusively and precisely, and to draw up corresponding duties to States.

PRINCIPLES OF "SAFE THIRD COUNTRY" & "FIRST COUNTRY OF ASYLUM", AND IMPLEMENTATION OF REFUGEE LAWS

Two of the principles most often used by States to deny asylum are the principles of *"safe third country"* &*"first country of asylum"*. The inception of deviation from the trend of granting asylum began in the early 1990s, with an increasing number of states transferring the responsibility to examine some asylum applications to "safe third countries"[21].This points to the shift in the international attitude towards refugees and asylum, from the voluntary granting of asylum, to the conferring of the responsibility upon other States. The scheme of "temporary protection" also founded at this juncture implied towards the reluctance of States to grant permanent protection to refugees[22]. The principles stipulated above, in practice, do not violate the concept of non-refoulement, as the refugees will not be forced to move to the countries where they fear persecution; however, the refugee will be redirected to another country instead of being admitted at the border, which may in turn lead to a set of chain deportations and render him a refugee in orbit. The refugee here will have no guarantee of access to protection in a safe country. For instance, the Dublin Convention lays down that any Member State shall retain the right to send an asylum seeker to a third country, in accordance with its national

[18]*PactaSuntServanda;* Article 26 of the 1969 Vienna Convention on the Law of Treaties, 1155 ILM 331
[19] Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers, FORUM/CG/SM/03, 11 March 2004, 7
[20]T.J. Farer, "How the international system copes with involuntary migration: norms, institutions and state practice" (1995) 17 Human Rights Quarterly 72, at 79
[21] R. Byrne and A. Shacknove, "The safe country notion in European asylum law" (1996) 9 Harvard Human Rights Journal 185
[22]J. van Selm-Thorburn, Refugee protection in Europe: lessons from the Yugoslav crisis (The Hague: MartinusNijhoff Publishers, 1998)

laws, provided that it is in compliance with the provisions of the Geneva Convention[23].One of the issues with regard to the varying interpretations accorded to the term "refugee" and the related legal provisions is that a person might be considered refugee in one State, while not so in another State[24]. The holistic idea of "safety" of the refugee is a crucial element in determining the fairness of the attitude adopted by the State in directing the asylum seeker to approach another state. The States tend to accept an asylum seeker in case he establishes a familial or transit link with the state in question. Transfers of responsibility to examine asylum applications have so far been found to take place between States with equivalent refugee protection systems[25]. While some States have taken to the system of setting up systems to process applications in transit processing centres, the resettlement and safety from persecution is thereby guaranteed to the refugee; however leading also to prolonged detention of the asylum seekers[26]. In relation with fixing a State's responsibility in processing an application of asylum may also be based on the broader principle of *non-refoulement.* The good-faith theory here purports the States to examine the applications themselves, rather than transferring it to another third State.

The obligation of States towards refugees also vary depending on their status, being there a distinction between the way the provisions of the Convention apply to all refugees, while some only to those "lawfully in", others to refugees "lawfully staying"[27]. In case refugee law is regarded as a part of human rights instruments, consequentially the provisions there under will become applicable irrespective of the number or nature of refugees, and the duty to grant protection will become more or less absolute. Several attempts have been made at different points to consider the Refugee Convention as a human rights treaty[28], which would render it with wider powers of implementation.

While the rights of refugees are crucial in the context of human rights considerations on an international basis, the economic, political and financial burden imposed on the receiving state are also to be considered at par, as the resources thereby consumed will render an impact on the resource availability to, and the quality of life of, the native people. In such consideration, the number of refugees seeking asylum matters in determining the socio-legal situation. In situations of mass influx or large-scale influx, large groups of refugees who together enter a State are often denied their rights under the Refugee Convention, or where the States do admit large numbers of refugees, they demand in exchange a "de facto suspension of all but the most immediate and compelling protections provided by the Convention"[29].

SHARING THE RESPONSIBILITY

It is not the sole individual burden on any particular State, but a collective and mutually inclusive responsibility of all States to accord and ensure protection and safety to refugees, though no such provision has been enshrined in the Refugee Convention. The only reference in this regard is made in the preamble of the Convention, calling for "international cooperation"

[23] Art. 3(3)
[24] R. v. Secretary of State for the Home Department, ex parte Adan, R. v. Secretary of State for the Home Department, ex parte Aitseguer [2001] 1 All E.R. 593
[25] Council Regulation No.343/2003 of 18 February 2003 establishing the criteria and mechanism determining the Member State responsible for examining an asylum application lodged in one of the Member State by a third country national, OJ 2003 L 50/1
[26]G. Noll, 'Visions of the exceptional: legal and theoretical issues raised by transit processing centers and protection zones' (2003) 5 European Journal of Migration and Law 303.
[27]Goodwin-Gill, The refugee in international law, 307-31
[28] T. Clark in cooperation with F. Crépeau, "Mainstreaming refugee rights. The 1951 Refugee Convention and international human rights law" (1999) 17 Netherlands Quarterly of Human Rights 389.
[29]J-F. Durieux and J. McAdam, "Non-refoulement through time: the case for a derogation clause to the Refugee Convention in mass influx emergencies" (2004) 16 International Journal of Refugee Law 4, at 13

must be achieved to prevent situation where "the grant of asylum may place unduly heavy burdens on certain countries". The legal barrier on effective application of such sharing is that the principle of responsibility-sharing has a weak legal basis, not on a provision of the Convention, but merely the preamble; and a State violating this cannot be held liable for contravention of any provision thereof, but may only be criticised on having violated the spirit of the Convention. Though not legally stipulated, ad hoc arrangements to share the responsibility to protect a particular caseload of refugees have been made in various situations, the most famous of such arrangements being the Comprehensive Plan of Action (CPA) for Indo-Chinese refugees[30]. A formal system of allocation of responsibilities was set up in the European Union under the Dublin Convention, now been replaced by an EU Regulation[31]. Though many resources have been utilised to bring about the application of this provision, the setting up of a more comprehensive system of allocation of responsibilities between countries of first asylum and other countries further afield would be more useful[32].The general notion is that States assume responsibility for the refugees who reach their territory and make a claim for protection there. The principle of sharing of responsibilities is dependent on the intentions and movement of refugees themselves. The exceptions to such notion is resettlement of refugees by the transfer of responsibility to 'safe third countries'. Resettlement is the organised transfer of refugees in a country of first asylum to the resettlement country or a safe third country. The social, political and economic necessity of the implementation of burden-sharing and allocation of responsibilities between various States is that, in the absence of these provisions, the countries in regions of origin would have to bear the overwhelming responsibility to protect the majority of the world's refugees who themselves may not be willing to seek asylum elsewhere, and wish to avail protection in the first possible and nearest option available. The view that the overall primary responsibility must be assigned to the first country of refuge was found to derogate the willingness of States to accept a large number of refugees into their territory, and declining to allow refugees to regularize their status or otherwise remain within their borders. A provision of sharing of responsibilities will effectively reduce such burden, and help to bring about a better protection to refugees without reluctance on the part of States where the first asylum is sought, merely owing to the comprehension of economic, social and political burdens that might otherwise overwhelm the States, in the lack of such responsibility sharing. Another major issue that jeopardizes the security of a refugee is that in the absence of a provision that induces his security as a collective responsibility of all States, the refusal of each individual State to accommodate him will constitute a denial of asylum and hamper his rights under international law. The fixing of the responsibility on a single State where the asylum is sought would render the refugee without cover in case of refusal to grant asylum, while a collective or shared responsibility will give him enough ground to exert his right on a number of States than on any single State. A properly laid down and implemented system of allocation of responsibilities would protect the interests of both the States and the refugees. On the one hand, it would ensure that the international response to refugees is more positive. Countries which are situated in regions of conflict and origin of refugees will be more open to receiving refugees if they comprehend other states to come forward to share the responsibility to protect these people. The benefit conferred on other States is that the guarantee of safety internationally will reduce the tendency of refugees to other States located farther away, and the random movements will be avoided. Furthermore, a systematic basis to control and determine the admission and transfer of refugees would make the crisis easier to handle and control, with the State's first action being the admission at the border, and the next being a proper analysis of the question whether to grant permanent asylum and let him reside in the

[30] UNHCR, The state of the world's refugees 2000 – fifty years of humanitarian action (Geneva: UNHCR, 2000), 84-85

[31] C. Faria, (ed.), The Dublin Convention on asylum: between reality and aspirations (Maastricht: EIPA, 2001)

[32] Goodwin-Gill, The refugee in international law, 204

territory, or to transfer him to a third State which is ready and willing to share responsibility under the system.

Once the concept is internationally acknowledged and accepted by the States internationally, the next major determination is with regard to the mode of sharing responsibility. Delicate questions come up, regarding whether the States nearest to the region of origin have a responsibility to accommodate the maximum of refugees, only owing to the geographical closeness, irrespective of their ability to allocate resources to the increased population; or whether they must be distributed equally among States capable and willing to accommodate them; or whether a more equitable and comprehensive method must be developed thereof. The best interest of both States and refugees would require that the mode of allocation of responsibilities are such that it ensures effective protection to asylum seekers, coupled with decent resources to live upon, and at the same time protects the interests of the receiving sate by not pushing its resource availability. In this regard, a much acknowledged proposal was to set up refugee quotas for states according to their 'protection' capacities[33]. While this proposal calls for the physical transfer of refugees to different territories according to their capacity, a more acceptable and practical suggestion is that the primary responsibility to provide physical protection to refugees should remain with countries of first asylum, while industrialised countries that are capable of sharing the responsibility should assume the financial responsibility to support and improve protection capacities in the former countries[34]. The implementation of this scheme of responsibility sharing will be easier and more practical, as the physical transfer of refugees to distant places will thereby be avoided, and the financial burden on the first country of asylum will simultaneously be reduced, and the financially stronger States will be obliged to comply to the sharing of responsibility in terms of the resources they are capable of deploying for this purpose. State responsibility with respect to refugees is of various at each stage, namely, to receive and process asylum claims, to assess the merits of the claim, to provide protection pending durable solutions and to provide durable solutions[35].The earlier position where all these responsibilities were assumed by the same State has now changed, by the UNHCR mandates[36]. The State presented with the request is obliged to accept and examine the same, and it may decline to assume that responsibility where it is established that the refugee has already found 'effective protection' in the country of first asylum[37]. The responsibility can be transferred to a third state provided that there is no risk of persecution in that state, that the asylum-seeker has access to fair and efficient procedures there and that he is treated according to international human rights standards[38]. However, the responsibility to assess an asylum application cannot be transferred to any third state when there exists a connection between the asylum-seeker and the state assuming responsibility to assess his claim, e.g. lawful residence, family ties and so on. Pending durable solutions, the State assuming responsibility to process the claim is duty bound to protect the asylum seeker financially, politically and socially. Financial, human and technical support should be provided to the states assuming the responsibility to protect refugees at these two stages, by other States[39]. The responsibility to provide durable solutions should also be a shared responsibility and emphasis is placed on the role of resettlement[40].

[33]P.H. Schuck, 'Refugee burden-sharing: a modest proposal' (1997) 22 Yale Journal of International Law 243

[34]J.C. Hathaway and R.A. Neve, 'Making international refugee law relevant again: a proposal for collectivised and solution-oriented protection' (1997) 10 Harvard Human Rights Journal 117

[35]Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers, FORUM/CG/SM/03, 11 March 2004

[36] Ibid

[37]Summary Conclusions on the concept of "effective protection" in the context of secondary movements of refugees and asylum-seekers, Lisbon Expert Roundtable, 9 and 10 December 2002

[38] Convention Plus Issues Paper submitted by UNHCR on addressing irregular secondary movements of refugees and asylum-seekers, 8.

[39] Ibid

[40] Ibid

The basic idea behind the inception of the concept of shared responsibility is that it is unjust to expect the States in the region of origin to assume the entire responsibilities relating to refugees solely as their own. The availability of resources within these territories, the equitable distribution of the same, and even the ethnic and cultural composition of the receiving state will be altered by the influx of refugees, and the interests of the receiving state could also not be disregarded. Especially in case of mass influx, the increased competition for available resources will put extreme economic and political pressure on the State granting asylum. In the context of such interlinked economic, political, social, moral, and humanitarian principles, it becomes necessary to devise a thorough and proper international scheme to define the responsibility of each State, to make proper arrangements to share the aforesaid responsibility, and to ensure its application.

CONCLUSION

The study reveals that the primary problem with respect to the international refugee laws is the absence of clear cut definitions on responsibilities, lack of international agreements making it compulsory to abide by the rules, and lack of well devised system of sharing responsibilities. When individual political interests come in conflict with humanitarian concerns, there is a need for proper system of international law to be established, which tackles the lacunae. The current Syrian refugee crisis aptly underlines the urgency of the same.