

**INTERNATIONAL JOURNAL OF LAW  
MANAGEMENT & HUMANITIES**  
**[ISSN 2581-5369]**

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**Volume 3 | Issue 6**

**2020**

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# The Rights of Refugees: Protection under International Law

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## ABSTRACT

*Although people's transboundary movement began a long time ago, it took the dawn of the 21st century to have definitive legal and political consequences. International migration should reasonably be regarded as historical. People have migrated since the days of the nation-states. Over the years, the reasons for migration have undoubtedly changed, but the phenomenon is still alive. Thus, it may be said that cross-border human movement is part of the collective, universal human experience. In line with this sentiment, the human rights approach is also appropriately fitting to deal with such human experience. Although human rights concern in the past have effectively been denied access to a global dialogue on refugees on the mistaken premise that the refugee problem is very distinct from a human rights problem, today the trend is to integrate Human Rights Law and International Humanitarian Law into Refugee Legislation. The burgeoning awareness of the number, size, and nature of the refugee crisis has led the policymakers to shift their focus from the erstwhile policies on safety and welfare of refugees, which were developed after the Second World War, towards a more contemporary solution-based approach to the Refugee Problem. Refugee legislation is one of the institutional structures that can be applied concurrently in the context of armed conflict. Refugee rights are part and parcel of human rights.*

## I. INTRODUCTION

*"Human rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safety and voluntary return home. Therefore, safeguarding human rights in countries of origin is critical both for the prevention and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of Asylum."*

**United Nations High Commissioner for Refugees**

According to statistical data obtained by the United Nations High Commissioner for

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Refugees (UNHCR), around 70.8 million people worldwide were pushed out of their homes; of those, about 25.9 million are refugee's half are under 18. The UNHCR protects about 41.3 million internally displaced people and about 3.5 million asylum seekers within its ambit. Additionally, there are now 3.9 million stateless persons denied access to necessary guarantees such as education, health care, employment, freedom of movement, and personal liberty. These estimates are not all-inclusive, and there may be millions more who are not covered under the UNHCR mandate, including that of the 5.5 million Palestinian Refugees who are covered under the United Nations Relief and Works Agency (UNRWA) mandate.<sup>2</sup>

The use of a human-rights lens to assist refugees is a new issue that has arisen since the Second World War experiences. State actors initially applied International Humanitarian Law to tackle the issue in a bid to mitigate the problem. Yet after the carnage of the Second World War, it was clear that imposing the obligation to administer refugee security and welfare on the same State actors responsible for persecuting them made little to no sense. Also, the Second World War showed that if refugees lose the immunity, they were granted from their origin states and no other states were obligated to defend them, "it became almost impossible to protect their human rights."<sup>3</sup> Consequently, it is essential not only to avoid but also to address challenges faced by refugees to safeguard human rights in their countries of origin. Suppose circumstances have changed dramatically in the state of origin. In that case, refugees can regain their former position in their motherland and their fundamental human rights to be enjoyed, facilitating their safe, voluntary return. Respect for fundamental human rights and the "dignity of the individual," which is at the heart of all instruments on human rights, is essential in destination or host countries, where refugees are temporarily or permanently rehabilitated.

It has ignited universal moral unity amongst all nations, whether or not responsible for the refugee crisis, in protecting those who had to flee across international borders from covering their countries of origin. It has been further reinforced through numerous international instruments to this effect, including the landmark 1951 Convention on the Status of Refugees and its facilitating Optional Protocol of 1967. This structural transition has ushered in a new era in expanding the application of International Human Rights Law to refugees and keeping the international community responsible as a whole and not limited to its own country's internal borders.

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<sup>2</sup> UNHCR, *Statistical Yearbooks* (2019), available at <<https://www.unhcr.org/figures-at-a-glance.html>> (last visited on 17 October 2020).

<sup>3</sup> Parekh, Serena: 'Moral Obligations to Refugees: Theory, Practice & Aspiration' *The Critique*, 6 Jan 2016.

The only form of International law applicable during armed conflicts is not limited to International Humanitarian Law. Refugee legislation is one of the institutional structures that can be applied concurrently in the context of armed conflict. Refugee rights are part and parcel of human rights. The International Framework for Human Rights Law can compensate for the loopholes which are not addressed under the scope of International Refugee Law. The expected recipients are accorded full legal recognition under International human rights law, not unlike international law on refugees. The changing dynamic of the global refugee crisis has, however, led to international refugee law lagging, making it difficult to provide every refugee with sufficient security. International human rights legislation comes into play in instances like this. It seeks to tackle the current protection disparity and strengthen and underscore relevant pre-existing domestic laws or other specific laws concerning refugees. It can thus be said that International Human Rights law and International Refugee law are both distinct and complementary branches of International law.

The concerns posed in this article are the protection of the fundamental rights of refugees under International Law and the Right of Refugees to the customary principle of non-refoulement. The combined application of International Human Rights Law, International Humanitarian Law, and International Refugee Law is another underlying theme.

## **II. RIGHTS OF REFUGEES UNDER INTERNATIONAL LEGAL FRAMEWORK**

### **A. INSTRUMENTS FOR SAFEGUARDING THE RIGHTS OF REFUGEES**

Since the current refugee issue is global and covers populations concerning their ties with different nations and the ties of other countries with one another, we need legislation that protects not only refugees' legal status but also the whole issue of refugees. This law focuses on the solution and imposes on States and non-State actors, in accordance with the applicable international agreements, contractual obligations based on a range of domestic substantive and legislative enactments.

While the International Refugee framework deals with providing material assistance like food, shelter, medical, and healthcare to refugees, its primary focus is on providing legal assistance to refugees. This is achieved through the medium of various Legal Instruments, national and international, which aim to ensure that the rights enumerated under its provisions are extended to every refugee and similarly places an obligation on the part of the state to see that these rights are enforced effectively.

The International Convention relating to the Status of Refugees and its 1967 Optional Protocol relating to the Status of Refugees is the principle of refugee law and policy. The Refugee Convention, ratified by 145 state parties, established a refugee's definition and laid down the principle of non-refoulement.

Article 1(2) of the 1951 Convention on the Status of Refugees defines a "refugee" as "someone who is owing to a 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 state 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."<sup>4</sup>

Scholars have criticized the definition of refugee provided under *Article 1 (a) (2)* of the Refugee Convention for its inconsistency and the inability to include new players such as climate refugee groups and IDPs in the refugee definition.

The UNHCR acts as the guardian of the Convention of 1951 and its 1967 Protocol. UNHCR aims to ensure that, following the core values of these enactments, refugees' rights are protected and guarded by the States Parties.

The former United Nations High Commissioner for Refugees, António Guterres, observes that *'the human rights' agenda out of which UNHCR was born, and on which we depend, is increasingly coming under strain. The global economic crisis brought with it a populist wave of anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security'*.<sup>5</sup>

In light of this statement, the author emphasizes that economic exigencies in a host nation must not result in the cutting down of refugee protection endowments at the cost of refugees' access to fundamental human rights. To this end, the host nations' various obligations have to be recognized, and legislative measures concerning refugees and asylum seekers brought up to date to obtain a balance between the law on refugees and the law on human rights.

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<sup>4</sup> U.N. G.A Res.2198 (XXI), U.N Doc. A/RES/21/2198, (16 December 1966).

<sup>5</sup> Guterres, A.: 'Remarks at the Opening of the Judicial Year of the European Court of Human Rights' UNHCR: Strasbourg, 28 January 2011.

Some significant International and Regional Refugee legislations include the Universal Declaration of Human Rights (Article 14); the European Convention on Human Rights (Articles 2, 3, and 5); the African Charter on Human and Peoples' Rights (Article 12); the Arab Charter on Human Rights (Article 28); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3); Convention on the Rights of the Child (Article 22); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; the OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa; the Guiding Principles on Internal Displacement; and, the New York Declaration for Refugees and Migrants.

The Global Compact for Safe, Orderly, and Regular Migration is the first-ever intergovernmental agreement under the United Nations' auspices towards a common approach to all the aspects of international migration. It was adopted through the New York Declaration for Refugees and Migrants in 2018.

The various Rights of Refugees enumerated under these International and Regional Instruments and Customary Principles of International Law include:

- i. Right to Protection Against Refoulement;
- ii. Right to Freedom of Movement;
- iii. Right to Equality and Non-Discrimination;
- iv. Right to Seek Asylum;
- v. Right to Liberty and Security of the Person.

### **B. Customary International Law and Rights of Refugees**

A vast majority of the current number of refugees, who are seeking Asylum from situations of general armed conflict or climate disasters, are vulnerable under Codified International Instruments. It has led to academicians and International agencies coming up with new designs and propositions to provide legal assistance to these refugees. The non-refoulement principle is a recent import, which was recommended to alleviate the void in current International Instruments. The obligation of non-refoulement has emerged as a rule of Customary International law and is often considered a peremptory norm of jus cogens. However, the authentication or the dimensions of such annotation remains vastly uncharted.

Art 38(1) (b) of the International Court of Justice statute provides for custom as a valid

source of International Law.<sup>6</sup> A valid Custom is characterized by the persistent and straightforward practice of carrying out such acts that have grown up under the auspices of the belief that, under international law, such actions are mandatory or correct.<sup>7</sup> It is evident from the terms of Art 38(1) (b) that to establish a good custom, two essential elements need to exist, namely State Practice and *Opinio Juris*.<sup>8</sup>

State practice corresponds to a common way under the law of Nations. Uniformity and continuity of practice are necessary to establish State Practice. While full uniformity of practice is not mandatory, considerable uniformity is required.<sup>9</sup> The generality of practice must also be demonstrated, thus requiring many states to observe the same pattern. Concurrently, the subjective element of *Opinio Juris* has to be established. *Opinio Juris sive necessitatis* refers to a moral obligation on the part of the state that makes it think that it is bound to the law in question. In the case of *S.S. Lotus*<sup>10</sup>, the ICJ held that State procedures had to be focused on understanding having an international responsibility. Therefore, the state's abstract action will not suffice; this would have to be accompanied by the proof of a conviction that the action is made mandatory by the presence of the rule of law requiring it.<sup>11</sup>

The principle of Non-Refoulement, although having found mention in various International Instruments, has emerged as a customary principle of International Law over the years. The expression 'non-refoulement' originated from the French word 'refouler,' which means 'to drive back or repel.' non-refoulement is a concept that prevents a State from returning a refugee or asylum seeker to a territory where there is a risk that their very life or freedom might be threatened because of race, ethnicity, nationality or membership in a particular social group or political view. The Principle of Non-refoulement was designed to ensure that persecutors are not restored to persons who avoid persecution. Because the principle of non-refoulement has developed into a rule of customary international law, States are bound by it, whether or not they are party to the Refugee Convention of 1951 or its 1967 Protocol. Non-refoulement has also been widely recognized under International human rights law and incorporated into various International Human rights instruments. The Principle of Non-refoulement also often comes as part of a prohibition on torture or cruel, inhuman, or degrading treatment or punishment as has been enshrined under the provisions of Article 7 of

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<sup>6</sup> United Nations, Statute of the International Court of Justice, 18 April 1946, art 38(1) (b), 1 U.N.T.S. 993.

<sup>7</sup> Jennings, Robert and Arthur Watts: *Oppenheim's International Law* 27 (9th ed. 2008).

<sup>8</sup> Jenks, C Wilfred: *The Prospects of International Adjudication* 225 (1st ed. 1964).

<sup>9</sup> Crawford, James: *Brownlie's Principles of International Law* 24 (8th ed. 2012).

<sup>10</sup> *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>11</sup> *Nicaragua v. United States of America*, International Court of Justice (ICJ), 27 June 1986, p 14.

the International Covenant on Civil and Political Rights.<sup>12</sup>

The UN Human Rights Committee in its General Comment No. 20 (1992), has interpreted it to include the aspect of non-refoulement as, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."<sup>13</sup>

The purpose of the framers of the 1951 Refugee Convention and its 1967 Protocol, behind the creation of the 'non-refoulement' principle under the terms of Article 33, can undoubtedly be sketched back to the time when the Convention was being drafted. Following the current scenario, in the post-world war era, state parties to any convention were reluctant to include any article that signed them for refugees' unconditional admission. The principle of non-refoulement was introduced afterward. India has so far resisted ratification of the 1951 Refugee Convention, citing similar reasons. 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 the 1967 Protocol and any other person or entity acting on its behalf.<sup>14</sup>

The principle of non-refoulement imposes a negative duty on the states' instead of the far greater positive duty to grant the right of Asylum in that state. This principle application has been extended to all asylum seekers, regardless of their citizenship or immigration status, including those entering or trying to enter a state legally or unlawfully. States have been presented with the duty of considering in good conscience the merits of each case in compliance with the provisions of the Vienna Convention on the Law of Treaties before returning anyone.<sup>15</sup>

### III. CONCLUSION

*"If ever we needed reminding that we live in an interconnected world, the novel coronavirus has brought that home"*

**- Filippo Grandi, UN High Commissioner for Refugees**

The proliferation of Covid-19 worldwide has led to ongoing policy debates on the implications and legal ramifications of this unprecedented health sector crisis. Most countries

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<sup>12</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, art 7 , U.N. T.S. 999, p. 171.

<sup>13</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

<sup>14</sup> 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' UNHCR Geneva, 26 January 2007.

<sup>15</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), United Nations, Treaty Series, vol. 1155, p. 331.



have locked down non-essential human activities, demanding full compliance with the same, and have also implemented strict travel bans both in and out of the country. The economic moratorium consequences have left daily wage workers unemployed, many of whom have been forced to migrate internally, by bus or foot to their hometowns. The travel ban has not dissuaded domestic migration across several states in India. While the human cost of Covid-19 is unrivaled, the economic downside of this health exigency has been detrimental towards vulnerable, poor communities who have no recurring income or savings to bank upon. In turn, it has forced these communities to ignore the lockdown restrictions to earn their daily keep. They assert that before surrendering their lives to Covid-19, they would perish due to hunger.

Covid-19 has hindered international humanitarian operations and also led to the forced repatriation of many refugee communities to their countries of origin, wherein they are likely to be persecuted for the same reasons that had led to their migration in the first place. During the global fight against Covid-19, refugees are emerging as the most vulnerable people. They often live in crowded makeshift camps and do not have proper access to sanitary facilities and necessary items required to provide safe sanitation such as soap, masks, and so on. A single outbreak can claim many lives in such situations. Access constraints on humanitarian organizations due to domestic lock-ups in host countries also have limited refugees' access to essential needs such as food, water, and medical facilities. Similarly, while financial aid for humanitarian action has always been riddled with red tapes and bureaucratic restrictions, it is even more harrowing during this global pandemic.

In light of these extraordinary circumstances, the author stresses that host nations are obliged to uphold their obligations of non-refoulement towards refugees and guarantee their rights to life as enshrined in Article 6 of the ICCPR. Various preventive steps undertaken by the International Committee of the Red Cross in this situation has been illustrated in the figure below (See Figure 1.1).

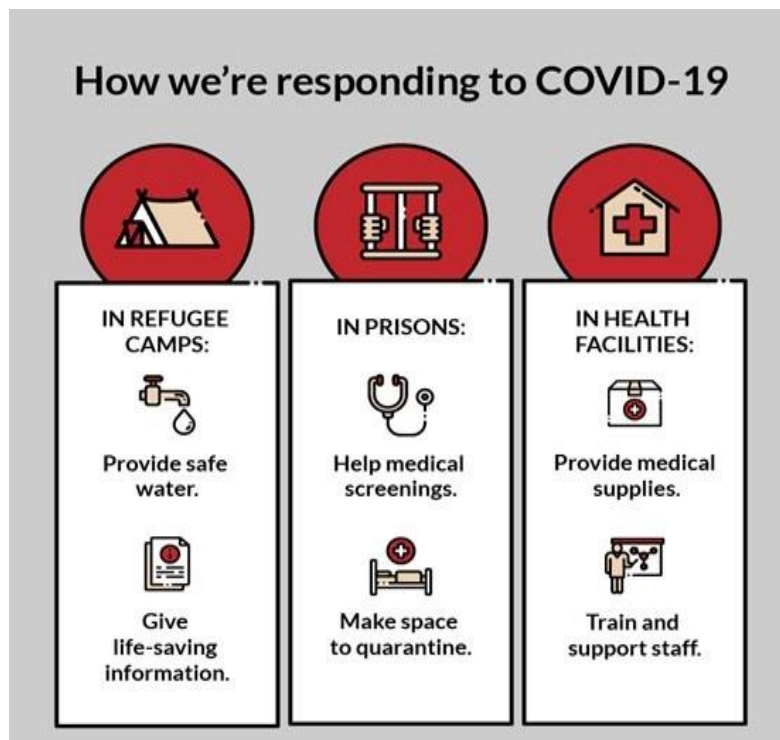


Figure 1.1: I.C.R.C and Refugee Protection during COVID-19 (Source: ICRC)<sup>16</sup>

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<sup>16</sup> Figure 1.1: International Committee of the Red Cross, Coronavirus: COVID-19 Pandemic. < I.C.R.C and Refugee Protection during COVID-19 (Source: ICRC)> (last visited on 17 October 2020).