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SPS Policy Brief

Contemporary Challenges for International Refugee Law

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Introduction

The world has been morphing, transforming and transiting in desire and discourse, grace and guidance, purpose and practicality, pace and propensity and terrorism and transcendentalism. But this transformation does not address the biggest contemporary challenges posed to international refugee law (IRL) in its present posturing. The national governments across the globe have given the cold shoulder to refugees in their itinerary of international obligations and duties as enunciated in the UN Charter and Universal Declaration of Human Rights (UDHR) along with the vast pool of human rights instruments. However, international community has been performing its refugee mandate in an ostensible manner that is insufficient and contemptuous to their basic rights and dignity. Today, refugees have been grappling with scorn, suspicion and skepticism of national governments in their quest for durable solutions to human displacement and migration. But, unfortunately, refugees are being squeezed in the state practices which are reflected in their autonomy of sovereignty, foreign policy preferences, international relation controls and geo-strategic choices that undermined the dignity, equality and liberty of the refugees.

Consequently, these dichotomies created a cartel of care based on caste, colour, ethnicity, race, region, political opinion, social origin and statelessness for humanitarian aid and assistance in a given situation that require a collective and uniform international action. Therefore, in the backdrop of this sordid scenario, an attempt has been made in this paper to understand the contours of national, regional and international responses by the governments to refugee crises, to identify the contemporary challenges for IRL and to present a cornucopia of recommendations for national governments of the South and South-East Asian region to have national laws better than IRL as IRL makes a case for normative and substantive refugee protection framework that warrants an improvement upon in municipal jurisdictions.

Nature of the Problem

Today, the situation of refugee population is mindboggling that poses unprecedented challenges before the international community. How to mitigate outrages to the substantive human rights claims of refugees as enunciated in the 1951 UN Convention Relating to the Status of Refugees and its 1967 Addition Protocol is the most fundamental question. Refugees flee persecution emanating from grave and massive violations of human rights in their country of origin and seek asylum in other countries. There are around 45 million refugees including asylum seekers, people of concern and internally displaced persons (IDPs) who seek refugee status as per the latest estimates of the United Nations High Commissioner for Refugees (UNHCR) report of 2014. The Republic of South Africa, US, France and Sudan hosted largest refugee populations whereas Federal Republic of Germany was the only country in the Global North to have become major refugee-hosting country in the recent past. However, heavy combating in Unity and Upper Nile states of South Sudan for the last two months has caused displacement of more than 100,000 people and blocked humanitarian aid deliveries for some 650,000 people as aid organizations have been compelled to withdraw as reported by the UNHCR representative on June 02, 2015.

In the contemporary scenario, human flight is a disturbing global reality for refugee law decision makers and judges who are encountered with a range of challenges in international refugee law and legal problems in asylum law at national, regional and international level irrespective of their jurisdictions. “Securitization” of the institution of asylum by the developed countries in the wake of 9/11 elevated to the unprecedented levels whereas border controls, restrictive measures and detention policies of the western countries further aggravated refugee crisis that has immensely deprived the refugees’ accessibility to asylum. These strategies has adversely affected the interpretative equilibrium of important provisions of 1951 UN Convention Relating to the Status of Refugees like Article 1F, exclusion clauses, inclusion clauses and cessation clauses that deals with the institution of refugee-hood. Although, there have been certain positive developments in international law which have made possible to prosecute persons who claim refugee-hood after committing international crimes. But it has also created overlapping and competing international protection to refugees fleeing serious human rights abuses that further posed many challenges as state parties infused “convention refugee status” with “complementary” or “subsidiary” forms of international protection in the absence of evidentiary burdens and standards of proof to determine refugee status.

Refugee flows are largely the consequence of pejorative, pernicious and deteriorating social, political and economic conditions among many countries in the First, Second and Third Worlds, in the former Soviet Union, and among states that were within the Soviet, Europe, African and Indian Sub-Continental orbit. Every nation-state at a certain stage of its evolution and history has grappled with the problem of human influx and exodus in one way or the other but no plausible, pragmatic and permanent or durable solutions have been rummaged by the stakeholders.

Legal Challenge

There is an umbrella of refugee rights ---such as right to health, education, profession to eke out a dignified livelihood and to live in a clean environment---which are impregnated with economic, social and cultural dimensions that raised critical and complex challenges and legal issues in claiming international protection for national jurisdictions. There are as many as ten major challenges that include (a) re-construction of the “convention refugee definition”, (b) role of municipal legal systems in applying and interpreting 1951 UN Convention Relating to the Status of Refugees and its 1967 Addition Protocol, (c) the standard of proof in the cases of complementary protection, (d) implementation of Article 1F and Article 33 (Non-refoulement) in the post 9/11 geo-strategic scenario, (e) national judicial responses in refugee cases, (f) treatment of refugees under international human rights treaty bodies, (g) feasibility of economic harm as a basis of refugee protection, (h) incorporation of climate change human displacement in the existing refugee law, (i) developing substantive national refugee law and (j) evolving consistency in national and international refugee law adjudication. India must seriously consider these challenges in its legislative vision on refugees or whenever India amends its Foreigners Act, 1947 that is immensely insufficient to deal with problem of refugees.

It has become imperative on international community to address these challenges with a cosmopolitan perspective above any divide of occidental and oriental ideologies. One of the most crucial challenges happens to be climate change that has affected the all-natural resources required for human sustainability. The climate change has created extreme weather conditions like desertification, global warming, global glacier loss, loss of

lives, and precarious rise of sea level where-under human migration and displacement have become the order of the day. Consequently, climate change has created a new category of refugees called “climate refugees” but they are not addressed by the international refugee protection framework. Thus, climate refugees development have initiated a new debate on an important paradigm “right to development” v. “right not to be displaced” in the contemporary international refugee law.

Case of the Rohingyas

In the first half of the 2015, thousands of boatloads of hungry men, women and children from Bangladesh and protractedly persecuted Rohingya Muslims from Myanmar have been abandoned at sea having been denied refuge by the two Southeast Asian nations. Majority of the Rohingyas are asylum seekers as they are fleeing persecution and inhuman conditions in Myanmar. In the past three years, hundreds of Rohingyas have been killed and thousands have been forced to live in camps in refugee like situation in their country of origin. Rohingyas are effectively stateless as they are divested of fundamental human rights and freedoms under the municipal laws of Myanmar like rights to education and health care and freedom of movement is severely restricted and they have also been deprived of citizenship. In another instance, Indonesia compelled a boat full of hundreds of Rohingya and Bangladeshis to go to their original destination that is Malaysia.

Moreover, Bangladesh has also categorized Rohingyas as illegal immigrants on its territory who cannot be accepted all the time. Regional human trafficking syndicates and religion-driven discrimination are responsible for their flight as these syndicates locked horns with the government. UN appealed countries in the region--- Malaysia and Indonesia---to open their borders and help the stranded people but its appeals were met with cynicism and discard. Consequently, South-East region has witnessed the biggest exoduses of boat people since June 2012 in search of better lives elsewhere after Vietnam War according to the UNHCR. Thus, UN branded Rohingyas one of most persecuted minorities of the world for decades with the Buddhist majority state’s culpability.

Presently, South-East Asia is in the quagmire of soaring humanitarian calamity where about 1,600 refugees arriving on the shores of Malaysia and Indonesia who have initially been most compassionate towards Rohingya refugees as it has signed Protocol against the Smuggling of Migrants by Land, Sea and Air where-under humanitarian premise of refugee treatment has been made an indispensable prerequisite to be observed. Even International Organization for Migration (IOM) has applauded the role of Indonesia for its treatment of asylum-seekers in alleviating their sufferings. Yet, refugee exoduses and human sufferings have been used as human cargo industry for generating ransom by the smugglers and human traffickers. Primarily, Indonesian asylum policy is based on its commitments to international treaty obligations since Indonesia has ratified two Protocols to UN Convention against Transnational Organized Crimes and Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime whereas Indonesia claims that it has limits to its generosity towards refugees. However, Indonesia is not a party to 1951 UN Refugee Convention but it should open its border more generously to asylum-seekers in the South-East Asia as Australia has been following the “All White Australia” policy towards asylum seekers and does not allow them at its shores. Although, US is willing to be the part of any collective international humanitarian action to deal with the stranded boat people of South-East Asia under UNHCR initiative as per international law. Recently, US have positively responded to consider the requests of IOM and UNHCR to provide aid and assistance to South-East Asian governments to

help migrants and refugees who come to their shores. Since October 2014, US have re-settled more than 1,000 Rohingya refugees and accommodated almost 70,000 refugees in 2014 alone from every nook and corner of the world as reported by the UNHCR.

An eminent Oxford University refugee law scholar Prof. Guy Goodwin-Gill contended that there could only be one critical challenge in international refugee law and [that is “progressive development” of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Addition Protocol.] Prof. Guy Goodwin-Gill further opined that “international refugee regime is premised on individual state responsibility with the national courts serving on the front lines and playing an important formative role in the application and interpretation of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Addition Protocol”(sic). However, international refugee law rests on a humanitarian premise. It is a premise tragically inadequate for our time, but one, which remains a terra incognita despite the frequency and enormity of contemporary refugee crises.

The problem of the refugee is today profoundly different. The persecutors are not defeated and defunct regimes. Instead persecutors are existing governments, able to insist on the prerogatives of sovereignty while creating or helping to generate refugee crises. The present international refugee law poses more questions than offers answers. The absence of common standards sharing for assessing claims in refugee status determination procedures remains an obstacle in India and elsewhere whereas politico-religious exclusivism shaping treatment traditions and approaches created credibility crises for global governance institutions in the context of international human rights law. The guarantees regarding rights of refugees are insufficient when measured against the standards guaranteed by international refugee law and international human rights law instruments to which 153 national governments have acceded to.

Despite the fact of it's more than sixty years of existence it could not offer any durable or permanent solution to the problem of refugees such as Palestinian refugees and other intractable refugee questions across the globe. The biggest challenge before the contemporary international refugee law is of its survival as law and it must be attended in the right earnest while addressing the challenges raised here otherwise it may turn out be a positive morality of a vanishing vacuum of jurisprudence of international law.

Policy Recommendations

Therefore, the following points must be considered in any future administrative, executive and legislative exercise by the national governments in this part of the globe:

- Countries in North America and some in Europe and the Pacific have expanded the traditional reading of the refugee definition as contained in article 1A Para 2 of the 1951 Refugee Convention, to include persons fleeing persecution in situations where the country of origin is unable to provide effective protection or no longer exists that line should also be reflected in South and South-East municipal legal systems.
- The breakdown of public order, internal strife, civil war, ethnic cleansing and genocide are increasingly the cause of refugee movements in this part of the world, therefore, it should be legally addressed.

UNHCR sensitize religious heads, monks and spiritual leaders to understand that every religion respects democracy, human rights and multi-culturalism as an inalienable part of human existence.

- UNHCR look beyond the trajectory of improvement of care and maintenance of refugee aid and assistance for Rohingyas and other refugees in the South and South-East Asia. UNHCR liaise with national governments in the region to find durable solutions to refugee plight and get them codified in the national laws.
- International humanitarian intervention must be free from any quid pro quo, lobbying, caucus calculation and national policy paradigms etc. There must be equality in redressing and mitigating human suffering rather than geo-strategic importance of a particular refugee producing region or country to be the criteria to warrant solution of the refugee problem.
- International community must calibrate and craft a credible and pragmatic International Pressure Mechanism (IPM) to the refugee problem backed by sanctions against the refugee producing countries. Moreover, Human rights bodies have had to assume a role they were not initially meant to play, as they are now dealing more frequently with cases relating to asylum.
- No country of refuge is capable of facing great difficulties in handling refugee influxes at its own so that principles of burden sharing is there which implies that the international community will help to relieve the burden placed on the country of reception.
- The stratification of refugees on economic, climate, humanitarian and political grounds must be incorporated in the scheme of existing refugee definition whenever it is re-formulated. Definition must also be grounded on natural and non-natural foundations of persecution and displacement.
- Refugees are being regarded as subjects of international law; therefore states should not perceive refugee flows, exodus, influxes, migration and transmigration as a threat to the sovereignty, integrity and national security of the host country.
- Theories of push back and imposed repatriation must at all levels be eschewed rather principles of non-refoulement and institution of asylum must be promoted and preserved as required under Article 14 of Universal Declaration of Human Rights and same must be the part of national laws.
- The fate and future of refugees are not the sole responsibility of UNHCR alone rather it is an enterprise of humanitarian character and philanthropic engagement involving partnership all national governments, development advocates, humanitarian actors, non-state actors, all organizations like IOM and NGOs with UNHCR. Therefore, National legislations in every geo-political entity must underline the fact that there is an unqualified universal mandate to protect refugees of all castes, colours, genders, opinions, races and religions who are fleeing well-founded persecution.

Thus, it can aptly be put across the negotiating table that the countries in South and South-East Asia including India have to renounce their trepidation and chauvinistic tendencies while dissipating the sense of precarity among the refugees. India's response to asylum-seekers and refugees is sandwiched between law and policy as there is no law on refugees and policy on refugees is volatile and vulnerable to the whims and megrims of every national government. It is an unwritten and silently operated policy of ethno-religious-cultural driven response administered by the ad hoc arrangements of the government that is reflected in the procedure for determination of refugee status. Policy is an amorphous proposition whereas law is a determinate premise impregnated with harmonious certainty and equilibrium of interpretation at the judicial anvil. Predominantly, religion is considered to be the main criteria to extend any relief to asylum seekers, refugees and migrants from South Asian countries---Afghanistan, Pakistan, Bangladesh, Sri Lanka---including Myanmar and Tibet as it is evident that only Hindus, Sikhs and Buddhists have been given preference and primacy in their re-settlement, re-integration and citizenship attainability in India. On the other hand, non-Hindu Afghan refugees are provided temporary stay in India with a modicum of support from the regional delegation of UNHCR in New Delhi for South Asia.

Conclusion

Therefore, India's treatment of asylum-seekers and refugees immensely incompatible with global standards as it does not have *lex lata* on refugees and it is not inclined to have any *lex ferenda* in this regard. India deals with asylum-seekers and refugees under the Foreigners Act, 1947 which does not have even the most minimum content of the definition clause of 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol where under "well-founded fear of persecution" is the litmus test for refugee status and protection. But the Foreigners Act, 1947 simply prosecutes and treats aliens and migrants as only foreigners. The Foreigners Act, 1947 of India is brutally inadequate, flagrantly inhumane and gives unfettered powers and executive discretion of deporting migrants and refugees to the national government. It is now high time for India to demonstrate the political chutzpah of enacting law on refugees at national and regional levels. In South and South-East Asia and elsewhere states can legislate national laws consistent with their needs of dealing with migrants and refugees while meeting the requirements to the norms of customary international law, international human rights law and fundamental rights guaranteed under the national constitutions even without specifically acceding to 1951 UN Convention on Refugees.

The challenges and recommendations identified hereinabove must form the inalienable basis of future codification and legislation for refugee protection in the countries of this part of the world. Protection of refugees cannot be left alone on judicial responses and norms of customary international law as national legislation is the only strongest guarantee that ensures institutional accountability and state responsibility to protect refugees, migrants and immigrants. The region must also accede to the minimalist international protection available to the refugees under 1951 UN Convention Relating to the Status of Refugees with its 1967 Additional Protocol by transforming its international commitments into reality.

Disclaimer:

Views are personal.

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