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Burden Sharing in 1951 Refugee Convention

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ABSTRACT

The world is swamped with the growing number refugees who have fled their countries of origin or habitual residence seeking international protection. The 1951 Refugee Convention relating to the status of refugees and the Protocol of 1967 are the core regime of the refugee protections.

The problem in the current regime is that the legal and political arrangements were made to manage the refugee problems in Europe post the World War II. The refugee distribution throughout the world is very uneven. Most of the refugee problems today occur in Africa, Middle East and South Asia and the impact of the burden of the refugees has to be borne mostly by the neighboring countries who themselves are struggling to manage their resources. One systematic failure in the convention is the root to all the other existing problems in the convention i.e. the failure of the states to follow the principle of burden sharing

Although most of the nations are ought to bear the burden of the first asylum states, yet in practice only few actually do. The states with the least capacity bear the impact of the disproportionate distribution like the African States. There is no stringent law regarding the burden sharing in the current refugee regime or the international law. Till today the inclusion of burden sharing has not been done in the operative and binding part of the treaty. The 1951 Convention did not address the issue of admission to the country and the right to seek asylum. It failed to properly apportion the burden and responsibility sharing between the states.

I. INTRODUCTION

The world is swamped with the growing number refugees with a recent estimate of more than 17 million individuals who have fled their countries of origin or habitual residence seeking international protection. Their fundamental rights are abused as they seek protection in the country of refuge. They are forced to leave their territory owing to their vulnerability. The fear of persecution on various grounds such as religion, sex, race, ethnicity etc, forces them to leave their territory and cross the borders of the other countries.² Historically looking, the problem

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² Alice Edwards, *Temporary Protection, Derogation And The 1951 Refugee Convention*, Mjil (2011)

of refugee arises when the government of that country is incapable of providing any security to the persons facing the danger. It is the reason why people choose to leave their country and seek protection abroad in the international community.

The 1951 Refugee Convention relating to the status of refugees and the Protocol of 1967 are the core regime of the refugee protections. Along with this the regional conventions and declarations also provide for tackling the refugee problems such as the Africa, Latin America and Regional Conventions. The refugee regimes are in consonance with the Universal Declarations of Human Rights, 1948. The international regime also supports and cooperates with the Office of United Nations High Commissioner of Refugees (UNHCR).

The problem of refugees is not just a human right issue but it is more than that. This refugee problem is the one of the inherent parts of the international politics. The issues related to the refugee crisis such as the consequences and the responses by the international community depend largely on the world politics.³ The core issue of the influx of refugee movements is caused by the inequality in the world economy and the government failure to curb the issue. Issues such as security, terrorism, culture conflicts and transnationalism arise out of the refugee crisis. These are the reasons why tackling the refugee problem is still a big very challenge faced by the world today, because doing justice with the refugees along with managing their own national resources is a challenging task. Hence international cooperation plays a very important role. The forced migration which is one of the major causes for the refugee problem is related to broader global political trends.⁴

The causes of the forced migration are closely related with the international system, geopolitics and global political economy. All the discussions and the policies of the refugee law focus on the vulnerability of the persons who are facing the threat. Solutions to alleviate their pain and sufferings are sought by the policy makers.

The problem in the current regime is that the legal and political arrangements were made to manage the refugee problems in Europe post the World War II. However with time the locus shifted from Europe to the Asian countries, Africa and the Middle East. Europe now seems immune to the threat of the Refugee Problem. The outlook of Europe and United States has changed to consider the problem of refugees as a third world problem.

³ Michael W Doyle, *Responsibility Sharing: From Principle to Policy*, IJRL, Volume 30, Issue 4, December 2018, Pages 618–622, <https://doi.org/10.1093/ijrl/eey046>

⁴Ibid.

II. THE CURRENT REGIME FOR PROTECTING REFUGEES

The current regime is universally criticized because of it being western centric in approach and also because it proves to be insufficient for many reasons. The criticisms is mostly by the people and organizations focused on human rights goals and also by the government which is most affected by the irregular system.⁵ The most basic definition of refugee has a number of uncertainties and is quite restrictive in approach when applied to certain cases. The refugee protections are provided less on the basis of legal and humanitarian approach and more on the political influences of the states.⁶

The refugee distribution throughout the world is very uneven. Most of the refugee problems today occur in Africa, Middle East and South Asia and the impact of the burden of the refugees has to be borne mostly by the neighboring countries who themselves are struggling to manage their resources. One systematic failure in the convention is the root to all the other existing problems in the convention i.e. the failure of the states to follow the principle of burden sharing. Although most of the nations are ought to bear the burden of the first asylum states, yet in practice only few actually do. The states with the least capacity bear the impact of the disproportionate distribution like the African States. There is no stringent law regarding the burden sharing in the current refugee regime or the international law. All the efforts to recognize the burden sharing are in the form of a moral urge and hence do not have a substantive legal force. Till today the inclusion of burden sharing has not been done in the operative and binding part of the treaty. The 1951 Convention did not address the issue of admission to the country and the right to seek asylum. It failed to properly apportion the burden and responsibility sharing between the states. It also failed to establish the quotas for the admission of refugees thus leaving the first asylum countries to deal with the mass influx.⁷

III. PROBLEMS IN THE 1951 CONVENTION (FOCUS ON BURDEN SHARING)

The refugee crisis starts with the following:

1. Persecution in the country of origin⁸, nationality or habitual residence which drives the refugees out of their territories either individually or in small groups.

⁵Dana Schmalz, “*The principle of responsibility-sharing in refugee protection – an emerging norm of customary international law*”, Völkerrechtsblog, 6 March 2019, doi: 10.17176/20190306-132332-0.

⁶ Peter Hilpod, *Quotas as an Instrument of Burden-Sharing in International Refugee Law The Many Facets of an Instrument Still in the Making*, SSRN Electronic Journal, (2017)

⁷ Burden and responsibility sharing and international cooperation, available at <http://www.refugeelawreader.org/en/ii-international-framework-for-refugee-protection/ii-1-universal-principles-and-concepts-of-refugee-protection/ii-1-6-burden-sharing-and-international-cooperation.html> (last visited 23rd March, 2020)

⁸ It is commonly understood that three types of states are involved in refugee crisis situations. “Countries of

2. Situations of mass influx that arises due to conflicts or civil disturbances which compels them to move out to a safer place
3. Transnational displacement due to natural or man- made disasters.
4. Mixed flow of persons who may not be in danger but often become a part of the migration movement.

The 1951 Convention is outdated when it comes to tackling of the current refugee problem. It was drafted in 1951 when the problems that the world is facing now did not exist then.⁹ The Convention is still relevant but the problem lies in its implementation since it is a soft law and does not have the authority of the hard laws in force. It was drafted keeping in consideration the vulnerability of the persons who were put in that situation against their will and giving protection to them.

The weakened support and the will to committedly implement the Convention lie in the fear of the government against acts of terrorism and other transnational crimes. Providing asylum comes with a cost of social and economic tensions when the other countries are unwilling to share the burden. There is no consistent way to separate out the illegal migrants along with the refugees. Other problems also include the text of the Convention like the limited scope of the definition of refugee, the grounds of persecution etc. that gives the ground to the receiving countries to not apply the Convention.¹⁰

Even though several steps have been taken to leniently interpret the Convention and as far as possible apply it to the important areas such as women and children protection, family reunification etc. Strategic tools and solutions are now being put forward to tackle the problem more efficiently however the problem still lies in the lack of firm commitment to make the asylum available for however long it is required. The right of the refugees to be granted the asylum had been dropped to be included in the Convention.

The protection given to the refugees are not permanent in nature and a solution needs to be worked out once they have been given a temporary refuge. The problem of burden sharing needs to be worked out in this case so that the state of first asylum does not face unnecessary burdens. The lack of imposing a legal duty on States is the cause of the problems faced by the

origin” are the states from which refugees flee from the fear. “Countries of first asylum” are the countries to which refugees immediately flee which is often the neighbouring countries.

⁹ 2013. Global Report 2012. Geneva, Switzerland: UNHCR.

¹⁰ 1951 Refugee Convention, Grounds of persecution provided: (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.....return to it.

states of first asylum.¹¹

The problem of large scale of mass influx of refugees

The absence of burden sharing in the operative part of the Convention is a clear problem when it comes to the mass influx of refugees. A report 'World Development Report' released by the World Bank in 2011 estimates that about 75% of the refugees are found in the country which are neighboring to the refugee's country of origin. They are at a disadvantage as compared to the other since they are left with no choice but to admit the refugees. They are often low income countries and have fragile border regions. The economic, social, political and the environmental impacts are the highest hit on these countries. few countries are not only dealing with the mass influx problems but also have the sub national conflicts of their own. The government and the legal of structure of these countries often find it difficult to adjust with the added responsibility. The local citizens get in competition with them due to scarcity of food, shelter and employment. Adding to this is the responsibility of providing education, sanitation and health services to the refugees which often comes at a cost of their citizens. Since there is no permanent solution to it, the longer the refugees stay in the country the probability of these issues arising is more. The burden sharing and the responsibility sharing are not at all distributed properly. The absence of clear provisions is a serious loophole in the Convention.

A failure to fulfill the burden sharing requirement

There have been several cases where the crisis of the international refugee protection regime is evident. The protections that are provided in the language of the regime are more western centric. While most of the refugees receiving countries are not a part of the west and there is a prominent huge gap in every aspect between the western and the eastern countries, the problem seems a natural outcome of the irregularity in the convention. The restrictive policies adopted by the Western and the powerful states have confined the movement of the refugees to the third world countries or the least developed countries. With the state practice the limitations of the 1951 Convention worsened. The purpose of the convention has shifted its focus from humanitarian purpose to political interests.

Over the last few years the refugee¹² problem has changed drastically. The numbers of people displaced are overwhelming. The UNHCR has provided protection to over thirteen million people and just over ten years later the number increased to twenty three million. It is important

¹¹ Supra, Note 16.

¹² The word "refugees," has several meanings. It is generally used in widest connotation to encompass as many people as possible. However, it still lacks the coverage and fall short of covering every kind of refugee.

to note that this figure does not cover the internally displaced people or people who do not qualify as refugees under the 1951 Convention and there are many of that who are excluded from the definition of refugees. If included it would 50 million people around the globe.

In the current scenarios the refugees who are a victim of the persecution have reduced considerably over the years while on the other hands persons coming under the UNHCR Mandate refugees, other than coming under the definition of 'well-founded fear' has considerably increased, like people under the threat of genocide, rape or ethnicity. The distribution trend of the refugee globally is very upsetting. More than 70% of the total refugee problem is in Asia or Africa. The countries here are the ones which have the least ability to sustain themselves let alone tackling with the large number of refugees. These allocations are not unintended. It is result of the current refugee regime and the restrictive domestic policies.

The number of refugee a country hosts depends of the definition of refugee it applies and how liberally it is interpreted. More the number of grounds more would be the refugees seeking asylum. For example the Cartagena Declaration adopted by the American States has a broader definition of refugees as compared to the 1951 Convention. It includes the grounds such as generalized violence, internal conflicts etc. The different definitions that are applied in identifying refugees help in explaining the uneven distribution of the refugees throughout the world.

Thailand has hosted many refugees from the countries like Cambodia, Vietnam, Myanmar and Lao. It has emerged as one of the leading nations to host a large number of refugees in the recent times.¹³

The 1951 Convention is more Europe and Western centric this leaving a huge number of refugees as a burden on least developed nations or developing nations like India, Pakistan, Tibet etc.¹⁴

The most blatant flaw in the 1951 Convention is that the countries are given the discretion to interpret the Convention as per their political and self-interest. Often the humanitarian grounds are disregarded in many cases and it's on the second priority. For example, the requirement given in the Preamble of the Convention is not been followed. It is provided that the articles 15 and 16 of the Universal Declaration of the Human Rights have to be followed while interpreting the Convention. However there has been a complete failure to interpret and apply

¹³ Available at, https://ec.europa.eu/echo/files/aid/countries/factsheets/thematic/refugees_thailand_en.pdf (last visited 27th March, 2020)

¹⁴ The New Humanitarian News, available at <https://www.thenewhumanitarian.org/news/2019/09/11/Thailand-refugee-policies-asylum-seekers-immigration-detention>

the Convention with the other human rights instruments.¹⁵

Recently in Europe and United States recent legislations have now put forward new procedural barriers to the refugees applying for asylum applications. Measures such as extend and continuous detention of the asylum seekers, denial of access in appeal against the rejection of the refugee claim, restrictions on getting authorization at work, restrictions on the necessary assistance to survive in a new territory etc. has contributed to the uneven distribution. There has been polarization of the rich and the poor countries, the developing and the developed nations.

The burden sharing regime seems to only exist in the text as is evident by the current scenario where the burden is placed most the countries that have the least ability to deal with it.

IV. ROLE OF UNHCR

Since the inception of the UNHCR the concept of the burden sharing has been a core issue addressed by it. The concept of the burden sharing has been present in the recital 4 of the Preamble of 1951 Refugee Convention.

The suggested parameters of UNHCR are as follows:

- 1) Multilateral or bilateral actions, regional or universal cooperation with the UNHCR.
- 2) Such actions should be applied to a particular situation and then focus on strengthening the host states capacity so that it can effectively provide the asylum.
- 3) The existing mechanism should also be strengthened and new arrangements should also be made for the necessary funds and other assistance.
- 4) Government should ensure that the reasons for causing mass influx should be reduced if not completely removed.

There can be various forms of burden sharing depending on the problems: from physical relocation to agency programmes for bilateral assistance, assistance in the form of human resources, financial assistance etc.¹⁶

UNHCR has provided the following recommendation regarding the burden sharing:

- 1) International solidarity and burden sharing should not be a pre requisite for adhering to the principle of non refoulement and asylum.
- 2) Burden sharing should be followed in all the national, international and regional

¹⁵Ibid.

¹⁶ Steven R Roper, Burden Sharing in the funding of UNHCR, *Journal of conflict resolution*, Vol 54, (2010)

perspective aspect. They should be complementary and supplementary to each other.

- 3) People trafficking/people smuggling should be recognized as an emerging issue in the concept of burden sharing.
- 4) Temporary evacuation or permanent settlement can be a positive element in the strategy of burden sharing.¹⁷

V. CONCLUSION

The 1951 Refugee Convention and the 1967 Protocol stand inadequate with the text of time. Since the 1951 Convention was drafted keeping in consideration the then situations when the Soviet Union was disintegrated and a large number of refugees emerged that time in Europe. It does not stand true with the test of time as the focus of the influx of refugees shifted from Europe to South Asian and African Countries and it has failed to cover the new problems of refugees that has appeared with time.

There persist the numerous distinct models and proposals which could prove to be helpful for adequately sharing the responsibility and burden among the countries, whether developed or developing. As the century-old refugee and human rights convention have failed to tackle such issues appropriately, there is a need for reformation and bringing in new protocols specifically for the purpose of responsibility sharing as of, for now, there is not even a clear definition provided under any of the conventions concerning this issue. Hence new innovative ideas could be carved out, which would help parties involved in the long run to unanimously adapt and understand the importance of burden-sharing in present times where the inflow of refugees is increasing day by day. The inclusion of new proposals and doctrines like Common but Differentiated responsibilities could be reconciled with the refugee law as no law on an individual basis could tackle the issue diligently. Hence there is a need to adopt doctrines and principles from other subjects of law that could successfully be infused or amalgamated with the refugee laws for effective and efficient protection of refugees along with their due resettlement and rehabilitation in the receiving states. Another solution or mechanism which could be adopted by states involves the concept of mini-multilateralism which involves unanimous efforts by the group of states who strives hard to achieve common goals or objective and is able to solve issues and problems by entering into agreements of international nature. These types of arrangements or agreements further the principle of good practices globally.

¹⁷ Solidarity and Burden-Sharing, available at <https://www.unhcr.org/525fe3e59.pdf>