

Origin and Development of International Refugee Law – A Retrospection

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Abstract : The concept of a 'refugee' has expanded over the years as a result of the progressive growth of International Refugee Law. From a narrow and straight jacketed section of Public International Law, International Refugee Law in the present day is warranted to cater to a plethora of problems relating to refugees all over the world. This paper traces the origin and development of the International Refugee Law Jurisprudence and contemplates upon the same.

IndexTerms -International, Refugee, Law, Jurisprudence, UNHCR

I. PRIOR TO THE 1950s

*“During a period of more than four centuries prior to 1920, there was little concern to delimit the scope of the refugee definition. Groups of refugees tended to be relatively small and many of them chose to migrate to the Americas and the newly-discovered lands. Moreover, the reign of liberalism with its individualistic orientation and respect for self-determination led most European powers to permit essentially uncontrolled and unrestricted immigration.”*¹

Immigration was in reality considered by the receiving States as a means for furthering the State's own interest. The immigrating people were seen as a tangible source of labour and contributors to wealth and were permitted into the receiving States on the apparent concern to give them protection.

During the period between 1920 till 1935, generally, only those persons were treated as refugees who because of their membership in a group of persons were effectively deprived of the formal protection of their country of origin.² The refugee definition of 1920 and 1935 addressed the rights of persons who desired freedom of international movement but had been in an anomalous situation because they had not been receiving the protection of any state.³

The concept of refugee was thus, extended to include people who had been made subject to denaturalization in their country of origin, those whose nationality had been involuntarily withdrawn and also those of them who could not obtain valid passports in order to avail of international protection. These mainly comprised the Russian Refugees who were emigrating from their country post the First World War.⁴ Huge masses of Armenians too were fleeing their countries and were entering countries like Greece, Bulgaria, Syria, Constantinople, etc. between 1921 and 1922. It was estimated by the High Commissioner for Refugees, Dr. Fridtjof Nansen that by June 1924 there were around 320000 Armenians who were in need of identity certificates. As a result, the League of Nations Council adopted a resolution whereby it agreed to provide emergency certificates to the Armenian Refugees, much like those that had been given to the Russian Refugees.⁵

During the period between 1935 and 1939, the jurisprudence of 'refugee hood' was expanded to cater to the social upheavals faced by some. These persons had been the helpless casualties of social and political occurrences which had segregated them from their home and society. Thus, extension of help was now made not only to those who had de jure loss of State protection but also to those who had lost their state protection de facto. These agreements had been mostly sought to cater to the needs of the Germans who were dislocated and were aggrieved because of the National Socialist Regime⁶ in Germany.⁷

The period between 1938 to 1950, on the other hand, witnessed further expansion of the concept of Refugee where the sole criteria of group determination of refugee status was extended and refugee status was accorded also by individualist standards based on the merits of each applicant's status.

Many an International Organization was also established in the years preceding the 1950s.

- The Office of the International Commissioner of Refugees was created with the prime responsibility of monitoring relief operations.
- The same was replaced by the International Nansen Office for Refugees in 1929, which operated under the directions of the League of Nations.
- In 1933, a High Commissioner of Refugees coming from Germany was established. Both of these were taken up by the High Commission for Refugees, established within the League of Nations in 1938.⁸
- Following the Evian Conference of 1938, an Inter-Governmental Committee on Refugees was set up. This Committee consisted of 27 states and was created by the initiative of the United States.
- During the time of World War II, refugee relief was managed under the auspices of the High Commission for Refugees and Intergovernmental Committee on Refugees, which was headed by the High Commissioner. International co-operation in this field was pursued by the allied States through the United Nations Relief and Rehabilitation Administration (UNRAA) which was established in 1943.
- By 1947, responsibility of around 633000 refugees was transferred to a new institution – the International Refugee Organization (IRO).⁹

II. THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES -1950

The Office of the United Nations High Commissioner for Refugees¹⁰ (UNHCR) was established in 1950 by the General Assembly as a subsidiary organ for a period of three years under Article 22 of the United Nations Charter. Subsequent to that its mandate was extended every five years until 2004, when the time limit was removed.

The UNHCR Statute recognizes as a refugee:

“any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;”

and

“any person who, 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 or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, 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, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.”¹¹

III. THE GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES, 1951 AND THE 1967 PROTOCOL

The primary standard of refugee status is based on the 1951 Geneva Convention relating to the Status of Refugees. It is

“the key legal document in defining who is a refugee, their rights and the legal obligations of states.”¹²

Grounded on Article 14 of the Universal Declaration of Human Rights 1948, which recognizes the right of persons to seek asylum from persecution in other countries, the United Nations Convention relating to the Status of Refugees¹³, adopted in 1951, is the centrepiece of international refugee protection today.

In addition to continuing protection to all persons who had been considered as refugees according to already existing instruments, the 1951 Convention also includes persons who were under the fear of being persecuted for reasons of *“membership of a particular social group.”*¹⁴ The Convention also deals in *‘multiple’* or *‘dual’* nationality and also provides for circumstances when a person may *‘cease’* to be a refugee or be *‘excluded’* from the benefits of being a refugee.

THE 1967 PROTOCOL- The 1967 Protocol removed the geographic and temporal limits of the 1951 Convention. The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention a universal coverage.¹⁵ It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.¹⁶ The 1967 Protocol achieved the formal universalization of the Refugee status. The requirement in the 1951 definition that the claim relate to a pre-1951 event in Europe was removed. However, the substantive content of the definition was not subjected to any form of review. As a result, Third World Refugees whose emigration is caused by varied factors like natural disaster, war, or political or economic turmoil were not included.)

It should be kept in mind, that the 1967 Protocol is an independent legal instrument even though it is very much related to the 1951 Convention.¹⁷ By 1999, 134 states had acceded to the Protocol and all but five states¹⁸ which had acceded to the 1951 Convention had acceded to the 1967 Protocol by then.¹⁹

The present day refugee laws have developed through the amalgamating efforts of United Nations High Commissioner for Refugees, the attempt to prepare a United Nation Convention on territorial asylum, setting of refugee protection arrangements and through national legislations.

The practice of granting asylum has an ancient tradition.²⁰ The concept of asylum and the principle of non-refoulement are pivotal to International Refugee Law. The question of Asylum was submitted to the International Law Commission in 1959.²¹ It was later transferred to the UN Commission on Human Rights which led to the adoption of the 1967 UN Declaration on Territorial Asylum by the General Assembly. The last attempt at regulating asylum under international law was made in 1977 by convening a Conference to discuss the adoption of a Convention on Territorial Asylum.²²

IV. THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) AND EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME (EXCOM)

–their pivotal role in the development of International Refugee Law

UNHCR was created as a subsidiary organ of the General Assembly in 1950 through the adoption of UNHCR's Statute and was assigned the primary function of ensuring international protection to refugees. UNHCR's responsibilities with respect to the development of international refugee law form a key component of this international protection function and UNHCR remains the only international organization explicitly assigned such responsibilities by the General Assembly. States' recognition of UNHCR's role relating to the development of international refugee law, as well as their obligation to co-operate with UNHCR in its performance of such role is derived from Article 35 of the 1951 Convention relating to the Status of Refugees.²³

UNHCR is required to play a pivotal role in International Refugee Law. Paragraph 8 of the Statute of the United Nations High Commissioner for Refugees²⁴ states that:

“The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;

(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;

(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;

- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
- (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions;
- (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees."

UNHCR is also required to promote:

"through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection".²⁵

Two important examples of UNHCR's contribution in its early years in the development of International Refugee Law are the 1957 Agreement on Refugee Seamen and the 1967 Protocol relating to the Status of Refugees.²⁶

A study conducted by the Government of the Netherlands undertaken at the request of UNHCR in October 1953, revealed that around 25 per cent of the refugee seamen over there did not possess any travel document and that the position of another 25 per cent seemed precarious too. Subsequent to this, UNHCR sent a memorandum to the International Labour Organization suggesting its governing body to consider the problem. When the Netherlands later initiated a conference of eight Western European maritime nations, UNHCR was present as an observer and participated in the negotiations of the Hague Agreement on Refugee Seamen. The 1967 Protocol gave the 1951 Convention a universal ambit by removing the geographical and temporal limitations related to the definition of a refugee contained therein.²⁷

The Executive Committee of the High Commissioner's Programme²⁸ was created in 1958 by ECOSOC²⁹ at the request of the General Assembly. EXCOM has guided UNHCR in the performance of its activities through its conclusions. Though from the legal perspective, it is not clear whether EXCOM's Conclusions are legally binding on UNHCR without endorsement from the General Assembly, however, in practicality, UNHCR consistently follows the advice provided by EXCOM in its conclusions thus giving the EXCOM Conclusions a binding status. Over the years, the General Assembly and EXCOM have been encouraging UNHCR to:

"explore the development of guiding principles in order to ensure international protection to all who need it."

V. THE INTERNATIONAL REFUGEE LAW IN THE 1990S

UNHCR on the advice of EXCOM has worked towards the development of the *"basic standards for the treatment of refugees"* through the maintenance of constant dialogues with Governments, NGOs³⁰, academic institutions and scholars. UNHCR considers their advice to form its own view on such issues.

EXCOM Conclusion 81 (p) (XLVIII) 1997,³¹ inter alia:

"encourages UNHCR to continue to organize informal consultations, with a view to making further progress in this area, including through exploring the development of guiding principles."

The International Association of Refugee Law Judges (IARLJ) was established at Warsaw in 1997. It aims at facilitating communication and dialog between refugee law judges around the world in an attempt to develop *"consistent and coherent refugee jurisprudence."*³²

UNHCR created the Global Consultation process in December, 2000 to directly address the problem of refugees. It aimed at *"both reflection and action to revitalize the international refugee protection regime."*³³ The result of these Global Consultations was the establishment of the *"Agenda for Protection."* The same was drafted by UNHCR and was approved by the EXCOM Conclusion 92 (a) (LIII) 2002. It states that:

"the Agenda for Protection is a statement of goals and objectives and an important inventory of recommended actions to reinforce the international protection of refugees, and is intended to guide action by States and UNHCR, together with other United Nations organizations, and other inter-governmental as well as non-governmental organizations."

Convention Plus started as an *ad hoc* response to the Agenda for Protection. It aimed at creating a normative framework for burden-sharing at the global level. As an interstate process, Convention Plus involved creating structures to facilitate dialog between countries.³⁴ It was an international effort initiated and coordinated by the Office of the UNHCR. Its aim was to improve refugee protection worldwide and to facilitate the resolution of refugee problems through multilateral special agreements.³⁵

Some important EXCOM Conclusions³⁶ significant for the international protection of refugees are listed below:

- EXCOM Conclusion No. 64 (XLI) 1990- Refugee Women and International Protection.
- EXCOM Conclusion No. 67 (XLII) 1991- Resettlement as an Instrument of Protection.
- EXCOM Conclusion No. 72 (XLIV) 1993- Refugee Protection and Sexual Violence.
- EXCOM Conclusion No. 73 (XLIV) 1993- Conclusion on Refugee Children and Adolescents.
- EXCOM Conclusion No. 88 (L) 1999- Conclusion on the Protection of the Refugee's Family.
- EXCOM Conclusion No. 104 (LVI) 2005 – Conclusion on Local Integration.
- EXCOM Conclusion No. 105 (LVII) 2006 – Conclusion on Women and Girls at Risk.
- EXCOM Conclusion No. 106 (LVIII) 2007 – Conclusion on Children at Risk.

One of the most influential means for UNHCR to further the development of refugee law principles and standards is through its formulation of Guidelines. Pursuant to the Agenda for Protection drafted by UNHCR as the outcome of the Global Consultations Process, UNHCR has drafted a flurry of Guidelines on topics which complement the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol.

These Guidelines address a number of current issues relating to the interpretation and application of the refugee definition in the 1951 Convention and 1967 Protocol, namely:

- gender-related persecution
- membership of a particular social group
- cessation of refugee status
- internal flight or relocation alternative
- application of the exclusion clauses and
- refugee claims based on religion.

The UNHCR Guidelines further help to fill in the gaps in the International Refugee Law by laying down various refugee standards. These Guidelines also influence the conduct of various States.

VI. RETROSPECTION OF THE EVOLVING INTERNATIONAL REFUGEE LAW JURISPRUDENCE

The concept of a 'refugee' has expanded over the years as a result of the progressive growth of International Refugee Law. From a narrow and straight jacketed section of Public International Law, International Refugee Law in the present day is warranted to cater to a plethora of problems relating to refugees all over the world.

The pre 1920s era did not recognize immigration as a problem. However, after the First World War the concept of refugees as an issue of concern started to evolve and at the time of the Second World War the International Refugee Law Jurisprudence had developed to a certain extent. The establishment of UNHCR, followed by the 1951 Convention and the 1967 Protocol had a pivotal role in developing the refugee law. Lately, EXCOM Conclusions and UNHCR Guidelines have helped UNHCR to fill many a leeway in the International Refugee Law and thus, cater to the evolving refugee issues of the day.

The International Refugee Law is thus an evolving field of Jurisprudence which has grown over the years to fulfil the needs of the refugees of the respective times.

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