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“Dharma is to protect the Needy”

Article on

Ramifications of Non-refoulement in the South-Asian Countries

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Abstract

The paper's core objective is to understand the unwelcome consequence of the principle of non-refoulement through the South Asian perspective. To intensify the premise, the paper will first try to trace the reasons for the displacement of population and how being a migrant is different from becoming a refugee. The paper will then explain the origin, meaning, and international framework of the principle of Non-Refoulement, followed by the central question of whether Non-Refoulement is a customary international law? Further, whether South Asian Countries are bound to abide by this principle? In this paper, the author will compare the findings among the South Asian nations. After that, the paper will highlight the core concerns and problems faced by developing countries to accommodate the refugees and abide by non-refoulement.

The paper will then introduce the precautionary principle as a mechanism to deal with future problems of refugees and some suggestions to deal with this issue in a better fashion by incorporating groups like ASIAN and BRICS.

Keywords: *non-refoulement; refugee rights; customary international law and precautionary principle.*

Introduction

The condition of statelessness is one of the worst experiences that any human can encounter. It is even more unfortunate when the person is mercilessly tortured, becomes a victim of persecution and is forced to settle in a different part of the world leaving his own home, family and nation behind. Moreover, hosting these displaced people is another major issue for the countries. In this paper, the author will address how South Asian countries are home to over 2.5 million refugees. While on one hand, these nations¹ are themselves struggling to provide primary needs to their own citizens, on the other hand, the international community forces them to accept millions of people. These obligations are just adding further to the miseries of the host states².

The refugee crisis is addressed as a global problem. Statistics reveal that the global South countries have provided shelter to over 80 percent of the world's refugees³. We also need to consider that this region is ill-equipped to deal with the contemporary refugee crises and fails miserably in accommodating the displaced population. Refugees choose to settle in the South Asian region due to liberal migration laws and easy access due to porous borders and principles like non-refoulement⁴. This article attempts to find the answers to some complex questions involved particularly concerning the principle of non-refoulement; *the position of South Asian countries concerning refugees; reasons for migration; non-refoulement as a Customary International Law; whether the principle of non-refoulement binds any country at all.*⁵

¹Matter of O-F-A-S-, Respondent, 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N (December 6, 2019) <<https://www.justice.gov/eoir/page/file/1224026/download>> accessed 22 January 2021

² Moving Targets An Analysis of Global Forced Migration, 33 (September 2017) <https://belonging.berkeley.edu/sites/default/files/haasinstiute_moving_targets_globalmigrationreport_publish_web.pdf> accessed 22 January 2021

³UNHCR Note on the Principle of Non-Refoulement, UNHCR, (November 1997) <<https://www.refworld.org/docid/438c6d972.html>> accessed 22 January 2021

⁴Nafees Ahmad, 'Options for Protecting Refugees in South Asia' (2019) <<https://harvardilj.org/2019/09/options-for-protecting-refugees-in-south-asia/#:~:text=South%20Asia%20is%20home%20to,with%20the%20contemporary%20refugee%20crisis>> accessed 22 January 2021

⁵ Aman Kumar, 'India's relationship with the Principle of Non-Refoulement' (2020) <<https://allaboutil.wordpress.com/2018/05/19/indias-relationship-with-the-principle-of-non-refoulement/>> accessed 22 January 2021

The catastrophe of displacement

There can be numerous motives for a person to migrate from their country and relocate to another country, but the element of will or consent is present in such a case. However, in refugees' case, they do not choose this position but are forced for this⁶. Whether it is a civil war or external aggression or prolonged conflict situations of any other kind, it result in generations born and bred in refugee conditions⁷.

Any human becomes a refugee only when there is a feeling of being unprotected, fear of persecution for political, religious, ethnic beliefs or membership of a particular social group pushes people to resettle in different parts of the world. Other reasons for the frequent displacement of the population can be *natural disasters*, which transpire increasingly due to climate change⁸. Post relocation these people have to encounter numerous problems such as finding a new place to settle, food to eat and clothes to wear, but they also have to incessantly deal with xenophobia just as frequently; this dislodged population becomes the victims of sexual and gender-based violence, especially women and children⁹.

Fortifying the refugee rights

The principle of *non-refoulement* serves as the kernel of international refugee protection laws¹⁰. The origin of the principle of non-refoulement can be traced during the two world wars, and a tacit recognition was granted when it was codified in *Article 33 of the Refugee Convention of 1951*¹¹. Principle of non-refoulement is an indispensable international norm, and is related to *Responsibility to Protect (R2P)* commitment by United Nations member states¹².

⁶Sikanyiso Masuku and Size Nkala Source, 'Patterns of the refugee cycle in Africa' (2018), Vol. 7, No. 3, Journal of African Union Studies <<https://www.jstor.org/stable/10.2307/26890366>> accessed 22 January 2021

⁷ Refugees, Oxfam Australia <<https://www.oxfam.org.au/what-we-do/emergencies/refugees/#:~:text=People%20become%20refugees%20or%20displaced,as%20a%20result%20of%20war>> accessed 22 January 2021

⁸Comments on the Draft 5th Immigration Control Basic Plan, UNHCR (2015) <https://www.unhcr.org/jp/wp-content/uploads/sites/34/protect/Final_UNHCR_Comments_ENG.pdf> accessed 22 January 2021

⁹Ibid 6.

¹⁰Sonia Bucan, Nikolas Dolmat, Sarah Hajjaji, Lucy Keller, Ali-Mikael Sanji, 'Non-Refoulement and the Case of the Rohingya' (2020)

<<https://crgreview.com/non-refoulement-and-the-case-of-the-rohingya/>> accessed 22 January 2021

¹¹Ibid 5.

¹²Ibid 10.

In simplistic terms, this principle means that "*a person cannot be compelled to return to their home state if they continue to have a well-founded fear of persecution in their home state*"¹³. It prohibits States from "*transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations in their home state*"¹⁴.

However, non-refoulement demonstrates an inextricable clash with state sovereignty. It is very well understood that the sovereign state has complete authority over its borders and gets to regulate the movement between the borders. However, the principle of non-refoulement threatens this notion of sovereignty¹⁵.

Abiding by the Non-refoulement principle: A customary law principle

First, we need to discern which kind of practice becomes law as part of customary international law. Customary international law results from a general, and consistent practice of states followed by them from a sense of legal obligation¹⁶. Custom in its legal sense means something *more than mere habit or usage*¹⁷; it is a usage felt by those who follow it to be an obligatory one¹⁸. Article 38(1) of the ICJ Statute lays down two criteria for proving the existence of custom in international law:-(a) *general practice* and (b) *the acceptance of this practice as law*.

Non-refoulement fulfils both the conditions mentioned above and hence qualifies to be customary international law, and all the member states need to abide by this principle¹⁹.

One major problem arises here because, except Afghanistan, none of the South Asian Countries is a party to the Refugee Convention of 1951, which is the primary document in which the

¹³SanyaSamtani, 'Deporting Rohingya Refugees: Indian Supreme Court Violates Principle of Non-refoulement' (OxHRH Blog, 18 October 2018), <<http://ohrh.law.ox.ac.uk/deporting-rohingya-refugees-indian-supreme-court-violates-principle-of-non-refoulement>>accessed 22 January 2021

¹⁴ The principle of non-refoulement under international human rights law, OHCHR <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed 22 January 2021

¹⁵Ibid 10.

¹⁶ Abbas, Ademola, *Complete International Law: Text, Cases, and Materials*, (New York: Oxford University Press, 2012) 83

¹⁷ Colombia v. Peru (1950) ICJ REP 266

¹⁸ Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands (1969) ICJ REP 3

¹⁹Ibid 16.

principle of non-refoulement is embedded. It will be legally challenging for the international communities to compel the South Asian countries to abide by the principle²⁰. Non-compliance of this principle demonstrates that the governance of non-refoulement as an international norm is not very effective, despite claims that the principle of non-refoulement has acquired *jus cogens' status*²¹.

However, to counter the above notion²² it can be argued that the principle of non-refoulement falls under various other international conventions as well to which these South Asian countries are signatories. Hence they are obligated to the principle of non-refoulement in those other international conventions²³.

Significance and application of Non-refoulement in the South-Asian countries

The nations always face a dilemma between "*morality versus reality*" while dealing with refugees' problem²⁴. On the one side of the pedestal, there is the moral obligation of protecting refugees, asylum seekers or the stateless person. Furthermore, on the other side, there is a rational perspective to protect national interests, security and sovereignty, which always receives precedence over morality.

Similar is the situation while obeying the principle of non-refoulement. Countries are obligated to any international law extend to the international convention or treaty signed and ratified by those nations²⁵. When it comes to international refugee laws, the South Asian countries have a very dubious stand. India, Pakistan, Bangladesh, Sri Lanka and Nepal are not parties to the 1951 Refugee Convention²⁶. Therefore *prima facie* they are not bound by the restrictions and rules of this convention. It can be further implied that these nations do not have to adhere to the principle of non-refoulement as well, which is given in *Article 33* of the 1951 Refugee Convention²⁷.

²⁰Ibid 5.

²¹Ibid 10.

²²Ibid 5.

²³Abdul Gaffer, 'Approaching The Rohingya Crisis' (2018), *World Affairs: The Journal of International Issues* , Vol. 22, No. 1, <<https://www.jstor.org/stable/10.2307/48520051>> accessed 22 January 2021

²⁴Ibid 23.

²⁵Ibid 13.

²⁶Ibid 13.

²⁷Ibid 10.

But as already explained above, Non-refoulement is customary international law and nations must obey this principle.

In order to counter the whole narrative of customary international law obligation, the states put forward this argument of *prioritisation of state/national security* and to substantiate the same, states highlight the *Article 33(2)* of the 1951 Refugee Convention which justifies that, any threat national security²⁸ is an exemption in order to escape the obligation of non-refoulement.

Another moral claim these countries usually put forward is that- the refugee inflows deprive the citizens of their fundamental citizenship rights, strain national resources, and create equal employment opportunities. However, these moral arguments do not have a legal backup. At last, this is to summarize that the countries are not exempted from this principle's obligation. The principle of non-refoulement binds states as it is a part of customary international law.

The principle of non-refoulement is rooted in other international conventions as well. For example, India is not a party to 1951 convention but a signatory to the *2016 New York Declaration for Refugee and Migrants*²⁹, thereby giving tacit recognition to the principle of non-refoulement as *Paragraph 24* of the New York Declaration mentions this principle. Other international conventions which indirectly encapsulates the principle of Non-refoulement are- *Article 3 of the Convention³⁰ against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*; *Article 6 & 7 of International Covenant on Civil and Political Rights, 1966*; *Article 16 of International Convention for the Protection of All Persons from Enforced Disappearance, 2006*; *Article 22 of Convention³¹ on Rights of Child, 1989*³².

All the South Asian countries are indirectly accountable with the principle, as these countries are party to some or all the conventions mentioned above³³ and also a signatory to the *International Covenant on Civil and Political Rights, 1966*, whose *Article 7* imposes obligations on the state parties to not subject anyone "to torture or cruel, inhumane or degrading treatment or

²⁸Ibid 5.

²⁹Ibid 6.

³⁰*Article 3- No state party shall expel, return ("refouler") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture*

³¹*Article 22- State parties shall take appropriate measures to ensure that a child who is seeking refugee status ... receives appropriate protection and humanitarian assistance*

³²Ibid 5.

³³Srihari Gopal, 'Rohingyan Repatriation and the Principle of Non-Refoulement' (OxHRH Blog, 18 August 2018) <<http://ohrh.law.ox.ac.uk/rohingyan-repatriation-and-the-principle-of-non-refoulement>> accessed on 22 January 2021

"punishment" and the UN human rights committee interpreted this article to include the principle of non-refoulement in it³⁴.

Raising security concerns as an exceptions to Non-refoulement

Countries such as India and Bangladesh have often claimed that the refugees pose a *national threat or security concern to their state*, and have started this as an essential consideration in repatriating the *Rohingyas*³⁵.

In order to address the claim in a better fashion, we need to revisit that national security is a valid exception to non-refoulement under *Article 33(2)* of the 1951 Refugee Convention. Even during the Refugee Convention's drafting, states were reluctant to include any exception to the principle of non-refoulement. However, national security is mentioned as one of the exemptions, keeping in mind that any country's sovereignty is supreme. Nevertheless, the point needs to be seen here is that the national security exception has not attained the status of a principle of customary international law, which is the source of obligation of non-refoulement for all the member states, because most of the international treaties enshrining the principle of non-refoulement do not create a national security exemption. Therefore, those states that have raised *security concerns* as a ground for repatriating refugees to the country of origin do not apply to the customary international law that imposes non-refoulement obligations³⁶.

One of the alternative solutions to this situation can be, since the law provides that the Host country (taking India as example) can not send the refugees (considering rohingyan refugees) to the country of origin (Myanmar) because there is a threat of persecution, but can send these migrants to other refugees camps (as there are 6,55,000 people in Bangladesh camps). If the host country's government deport these migrants to a third country where there is no threat of persecution, that will not be a violation of the principle of non-refoulement. And the host nation can reduce the burden of its own state.

³⁴Ibid 5.

³⁵ Abhishek Bhatia, Ayesha Mahmud, Arlan Fuller, Rebecca Shin, Azad Rahman, Tanvir Shatil, Mahmud Sultana, K. A. M Morphed, Jennifer Leaning and SatchitBalsari, 'The Rohingya in Cox's Bazar: When the Stateless Seek Refuge' (2018), *Health and Human Rights* , Vol. 20, No. 2, <<https://pubmed.ncbi.nlm.nih.gov/30568406/>>, accessed 22 January 2021

³⁶D Chigudu, 'International migration: The state-sovereignty-migration nexus' (2015), Department of Public Administration & Management, University of South Africa, *The Journal for Transdisciplinary Research in Southern Africa*

Applying the precautionary principle is the solution

The right to protection of one's sovereign border flows from the right as a sovereign state. The sovereign states have the liberty to decide, who shall and shall not enter inside the geographical boundaries. From the equality principle perspective, the state has to treat everyone equally, but that principle applies within its territorial boundaries and among its citizens. However, when a person is entering into another's country, prerogative in terms of sovereignty reigns supreme. Hence, it is crucial to apply the precautionary principle well in advance because once there will be a massive influx of migrants, it will be difficult to differentiate between an illegal migrant, a legal one and who can be a threat to the country.

The existing international law on migration does not dictate upon states how to control migration flows, nor does it impose on how to formulate migration rules and regulations. The law prescribes that states ought to develop migration laws that protect and manage both documented and undocumented migrants' fundamental human rights enshrined in the international law provided by various instruments³⁷. At the same time, it is indispensable to notice that refugee or migrations laws should also not compromise the hosting state's security and public order situation.

Challenges and obstacles in the refugee crises

The predicaments are infinite, and there is no definitive list of concerns the host countries need to handle³⁸. One of the significant issues is *identifying* an illegal immigrant, legal migrant, or a threat to the country. It will highly discriminatory to assume that everyone is a threat, judging everyone through one perspective is not acceptable, but accommodating everyone without proper security check is also not the safest route³⁹. But the core issue with the influx of refugees is that hundreds of thousands of people come together, some have their identification documents but many of them don't have any proof of identity. And it is next to impossible to run everyone through security check first and then allowing them to enter the borders.

Another major problem for South Asian states is that they have *limited resources* both in monetary and non-monetary terms. Furthermore, providing assistance, shelter, food and other necessities is a major challenge for these countries. Countries also need to prevent a situation like

³⁷Ibid 6.

³⁸Ibid 33.

³⁹Ibid 35.

mobilisation of these refugees in the *country's inner part; civil conflicts due to the high influx of immigrants and changing demographics*. Even after all the challenges, the host nation needs to ensure that refugees are not deprived of any human right.

The way forward

Before providing any solution, we need first to identify the major stakeholders in this problem, the refugee issue is a shared problem, and management framework must incorporate diverse actors at multiple levels⁴⁰. Most important actors in the refugee crisis are- the *country of origin of the conflict, the people affected by the crisis* and the *states hosting the refugees*. Another major actor is *UNHCR*, a specialised agency mandated to lead and coordinate international action to protect refugees and resolve refugee crises worldwide. It also coordinates with intergovernmental organisations, international organisations and other non-governmental organisations to provide humanitarian assistance including food and non-food aid. Regional organisations like *ASEAN* and *SAARC* also plays a significant role in resolving refugees' issues⁴¹ by determining the status of refugees, facilitating negotiations for repatriation or can share the burden of refugees among all the nations of the regional organisation. *Collaboration and cooperation* is the key to deal with the issue effectively⁴².

Displacement of populations is not one country's problem; if collective efforts are not taken soon, all the member nations will have to face the repercussion in one way or the other. The identification of actors leads to the development of networks and functional modalities for collaboration. Authority and responsibility should be based on expertise and skill among the broad range of actors. Collaboration, cooperation, and networking should be developed to resolve identified problematic areas and provide humanitarian assistance and service to refugee communities.

Also, *long term solutions and short-term management* must be two integral parts while dealing with the refugee issue. All active actors must address the root causes of the problem and take appropriate measures to address them⁴³. It is the responsibility of the host nation's authority to stipulate the difference between asylum seekers and economic migrants. Only then will the

⁴⁰Ibid 23.

⁴¹Ibid 6.

⁴²Ibid 23.

⁴³Ibid 23.

host country comply with UNHCR's recommendation of treating refugees as economic migrants where states need to fill a gap in the local labour force.

It is also crucial to conduct awareness campaigns to address the immediate fear and hostility among the host nation's local communities against refugees. Because there can be a scenario when this hostility might turn into retaliation and further lead to these refugees' oppression in the host state.

Conclusion

The problem does not lie in the fact that the refugees are coming, but since they are stretching into other states' sovereign territory, that creates a real humanitarian crisis and perhaps even a demographic crisis in the host nation itself. The world has already witnessed the major refugee crisis of *Syria, Afghanistan, South Sudan, Myanmar, and Somalia*; there might be even worse situations in the future. It is essential for the South Asian countries to collectively realise this concern's gravity and start formulating laws and policy to apply the principle of prevention in the refugee crisis context. The author also dealt in depth with the Principle of Non-refoulement; the bindingness of the principle as customary international law; the response of South Asian countries to this international obligation. As the principle of non-refoulement has become widely accepted as customary international law, South Asian countries cannot escape their responsibility of offering refuge to asylum seekers altogether. But the author tries to provide an alternative route to reduce the burden to an extent. Through this paper, the author urges the world community to support the South Asian countries to deal with the influx of millions of migrants and opt for a collaborative and cooperative approach. And do not shift the whole burden on a few states; it is not one country's problem, but this is the collective responsibility of all the member's states. Finally, the paper calls for support from other developed nations, the international community and regional bodies to deal with this issue.