

# THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW TO THE ISSUES FACED BY THE REFUGEES IN GENERAL AND AFGHANS IN PARTICULAR

Muhammad Zubair\*

*“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. Safeguarding human rights in countries of origin is therefore 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

## Abstract

*The article considers human rights application as an alternative to such situations where a nation-state is not a signatory to the international refugees’ law nor has any domestic arrangements for the refugees on their soil due to which they are living in a legal limbo. While the initial perception about human rights and refugee law was that both of these areas are divisions of public international law completely separate from one another, but now it is well established that the interaction between these is multifaceted as demonstrated at nation-state level and academic writings.*

*Whether refugees’ rights are human rights? A query like this may be a challenging task in contemporary environment, when there are frequent incidents of refugees’ mistreatments on the pretext of restrictive policies related to them. António Guterres, has observed that “the human rights agenda out of which United Nations High Commissioner for Refugees (UNHCR) was born, and on which we depend, is increasingly coming under strain. The international economic crisis brought with it a populist wave of*

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\* Associate Professor, Department of Law, Abdul Wali Khan University, Mardan & Ph.D. Research Scholar, Area Study Centre (Russia, China & Central Asia), University of Peshawar, Pakistan. Email: [mzubair@awkum.edu.pk](mailto:mzubair@awkum.edu.pk)

*anti-foreigner sentiment, albeit often couched in terms of national sovereignty and national security.”<sup>1</sup>*

*Against such an environment, reviewing the relationships in-between human rights and refugee laws is vital in-order to categorize the complete variety of nation-states’ duties and thus report their practices towards asylum seekers and refugees.*

**Keywords:** International Human Rights Law, UNCHR, Afghan Refugees, Pakistan

### **Introduction:**

More than fifty millions of refugees have been successfully returned to their homelands ever-since the ending of World War II, however almost an equivalent number of them are getting it difficult to recapture their essential human rights. At present, UNHCR’s office is helping about sixty five millions of refugees globally. Greater violations of human rights, internal conflicts, civil-wars, violence against minorities, forceful relocations apart from natural calamities are the causes which create refugees. Although respective regimes are accountable to their citizens to protect their fundamental human rights, while on the other hand refugees are facing protection issues from the host nations. Therefore, these displaced people need to be protected by the international community in-order to help these needy people especially as they have left their near and dear ones. By definition these people are the sufferers and there is need to provide them protection.

The jurisprudential foundation of refugee’s law is the notion of common humanity and the responsibility of the comity of nations to protect human lives, promotion of humanity’s well-being, to reduce sufferings of human-beings and to help states in the furtherance of these matters. Therefore, the main aim of the refugees’ law is to provide shelter during the period of sever threat, to make sure a dignified living for refugees until their voluntary and safe return. Hence, this branch of international law should be viewed from the perspective of human rights system which protects these vulnerable sections, to which the comity of nations have agreed to act as a surrogate guarantor of their dignity. Therefore, the notion of refugees’ protection in-itself can’t be separated from the concept of human rights. Accordingly the crux of the law of refugees is to define and protect the refugee’s rights.

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<sup>1</sup> A. Guterres, the United Nations High Commissioner for Refugees (UNHCR) remarks at the Opening of the Judicial Year of the European Court of Human Rights, Strasbourg, 28 January 2011.

In contemporary World, international human-rights law is the fastest growing area of international law. The only benchmark in 1951 during the drafting times of the Refugees' Convention for the protection of human rights at the global level<sup>2</sup> was the Universal Declaration of Human Rights (UDHR).<sup>3</sup> Today, in contrast, human rights at global level comprises not only the International Covenant on Civil and Political Rights (ICCPR)<sup>4</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>5</sup>, but also a range of dedicated global and regional pacts. As a result, the individual today is the holder of an impressive range of human rights.<sup>6</sup> Broadly speaking, refugees' law may be included in international human-rights law. The refugees' problem thus viewed from the human-rights viewpoint has become unprecedentedly important nowadays. Against this backdrop, the current article considers some of the human-rights which are vital for refugees and having great implications on their protection regime.

### **Human Rights of Refugees:**

The problems faced by refugees have become a global issue. The situation of insecurity and uncertainty faced by refugees under customary law led to such a position where it became necessary to take steps which would ensure to provide them their fundamental rights to whom they are entitled to as human-beings.<sup>7</sup> One of such challenges faced by this vulnerable section of the comity of nations is to respect their human rights. Various human rights instruments at the global, regional and domestic level are there for the enhancement of the refugees' protection, which has greatly contributed in this direction. This is a recently developed idea for the protection of refugees through the establishment of a mechanism of human rights law and it has been developed by no one else than the United Nations. The charter of the UN states as one of the objectives and principles of it is "promoting and encouraging respect for human rights and for fundamental freedoms for all

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<sup>2</sup> B.S. Chimni (ed.), *International Refugee Law: A Reader*, Sage Publications (New Delhi, 2000), p. 165.

<sup>3</sup> UN Doc. A/RES/217A (III) (10 December 1948).

<sup>4</sup> UNTS, Vol. 999, p. 171 (No. 14668), adopted on 16 December 1966 and entered into force on 23 March 1976.

<sup>5</sup> UNTS, Vol. 993, p. 3 (No. 14531), adopted on 16 December 1966 and entered into force on 3 January 1976.

<sup>6</sup> James C. Hathaway & John A. Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press (Toronto, 1995), reprinted in B.S. Chimni (ed.), p. 202.

<sup>7</sup> Harpal Kaur Khera, "The Legal Status of Refugees—Their Rights in the country of Asylum", *Civil and Military Law Journal*, Vol. 26. No. 1, 1990, p. 57.

without distinction as to race, sex, language or religion.”<sup>8</sup> Irrespective of the status of a human-being in a specific state, the application of human rights to everyone is due to the dignity inherent in them. Therefore on the basis of this principle, all human beings whether they are refugees such as the Afghans in Pakistan or not are entitled to the same level of treatment in terms of rights and freedoms, which have been mentioned under the international human-rights instruments. Here one thing is of great importance to them as a refugee that in majority of the civil rights, the nationality requirement is of no value as mentioned in the ICCPR that the protection under it is extended to everybody or all individuals regardless of their status.<sup>9</sup> Even immigrants illegally present in a country can take the benefits of this by virtue of being human-beings.<sup>10</sup>

Distinguishing a refugee from an economic migrant is always a difficult task. Here one can argue that if a person’s life and freedom is under threat, then it is irrelevant whether that threat is coming to him/her from starvation or arbitrary execution due to his/her belief. Then under such a situation, being a human regardless of the status, such an individual is entitled to minimum level of human rights and treatments.<sup>11</sup> There are different stages during which a refugee’s human rights are violated which include violations at home, at escape stage and during the refugee-hood or on return.<sup>12</sup> Debate on forced migration is inextricably linked to various human rights issues. Various human rights having universal recognition are directly invoked to having application to refugees and other asylum-seekers. Such rights include right to life, right to protect from torture and ill treatment, a person should not be made stateless, freedom of movement, having a right to leave any state, even their own one, and have a right to come back to their own, and the right not to be returned forcefully.<sup>13</sup>

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<sup>8</sup> Brain Gorlick, "Human Rights and Refugees: enhancing protection through international Human Rights Law", Working Paper No. 30 (Oct. 2000), p. 11, <http://www.unhcr.org/ch> accessed on 27/02/2019.

<sup>9</sup> James C. Hathaway & John A. Dent, *Refugee Rights: Report on a Comparative Survey*, York Lanes Press (Toronto, 1995), reprinted in B.S. Chimni (ed.), p. 202-203.

<sup>10</sup> Guy S. Goodwin-Gill, *The Refugee in International Law* (2nd ed.), Oxford University Press (1996), p. 232.

<sup>11</sup> United Nations High Commissioner for Human Rights (UNHCHR or OHCHR), *Human Rights and Refugees*, Centre for Human Rights, UN Office at Geneva (1993), p.17 <<http://www.unhcr.ch/html/menu6/2/fs20.htm>>.

<sup>12</sup> Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, Transnational Publishers (2002), p. .1

<sup>13</sup> United Nations High Commissioner for Human Rights (UNHCHR or OHCHR), *Human Rights and Refugees*, Centre for Human Rights, UN Office at Geneva (1993), pp.14-15. <<http://www.unhcr.ch/html/menu6/2/fs20.htm>>.

Implementation of international human rights is made through a method which is significantly different from international refugee law. There is no tribunal at international level for the enforcement of refugees' rights, if there are claims that their rights have been violated as mentioned in the international refugees related instruments and in such a situation they are depended upon the national arrangements in their hosting states, while on the other hand there are various setups at global and regional level for the human-rights enforcement, if ones human-rights having been violated.<sup>14</sup>

Therefore, the human rights impact on the definition of refugees is basically grounded in the following core features:

- 1: Just like any other conventional rule, Geneva Convention's article 1 should be interpreted as well as applied inside the normative framework existing at its interpretation's time, which includes the treaties related to human rights adopted since its existence.<sup>15</sup> Interpretation like this has proven its worth to be necessary for the adaption of Geneva Convention to continuously shifting realities of forced migrations.
- 2: The standards provided by the human rights have uniformity at the global level, which can help in the harmonization of the frequently unilateral and divergent interpretations by the state parties.
- 3: Provided the inherent subjectivity in various main concepts of the refugee's definition, human-rights values provide a more objective and predictable normative structure in the determination of a genuine refugee.

The foundation upon which the definition of refugee's is based, especially the concept of persecution obviously demonstrates the penetration of human-rights into refugee's law. Earlier in 1953, Jacques Vernant "equates 'persecution' with severe measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of

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<sup>14</sup> Joan Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, Transnational Publishers (2002), p. 4.

<sup>15</sup> '[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16, at 31. Furthermore, human rights treaties constitute 'any relevant rules of international law applicable in the relations between the parties' under Art. 31(1)(c) of the Vienna Convention on the Law of Treaties.

Human Rights”.<sup>16</sup> Even though at that time these understandings were not generally shared,<sup>17</sup> gradual recognition came with the passage of time during the 1960 and 1970s with the exceptional growth of human rights. The notion of persecution was framed by Goodwin-Gill in his pioneer studies which published during 1983 against the human rights’ background.<sup>18</sup> The work was further standardized in his influential book “*The Law of Refugee Status*”, by Hathaway which published during 1991. The definition of persecution according to him is as, “sustained or systemic violation of basic human-rights demonstrative of a failure of state protection”.<sup>19</sup> Having a definition of persecution, while referring to human rights has developed into conventional perception in legal doctrine.<sup>20</sup> Further interesting development is the acknowledgement on the part of states in their subsequent practices to the Geneva Convention. Numerous jurisdictions<sup>21</sup> at national level, administrative authorities<sup>22</sup> along with European Union Qualification Directive<sup>23</sup> have restated it.

Human rights application isn’t restricted to the concept of persecution rather they have also shaped several additional distinct characteristics of refugees’ definition. Already recognized by numerous national jurisdictions, the word refugee has to be considered being written against the backdrop of international human rights law, comprising as revealed or articulated in the UDHR...and the ICCPR’.<sup>24</sup>

Persecution’s foundation provides one of the most noticeable examples of the human-rights ideas: religious and political opinions obviously stand on

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<sup>16</sup> J. Vernant, *The Refugee in the Post-War World* (1953), p. 8

<sup>17</sup> Grahl-Madsen (n 32) at 193–4.

<sup>18</sup> G. S. Goodwin-Gill, *The Refugee in International Law* (1983), 38–46. See also E. Lapenna, ‘Le réfugié et l’émigrant dans le cadre des droits et libertés fondamentaux’, 22 *AWR Bulletin* (1984) 50; G. Melander, *The Two Refugee Definitions* (1987).

<sup>19</sup> J. C. Hathaway, *The Rights of Refugees under International Law* (2005), esp. at 104–105.

<sup>20</sup> C. J. Harvey, ‘Refugee Law, the Judges and a “New” Human Rights Culture’, 14 *Immigration and Nationality Law and Practice* (2000) 5.

<sup>21</sup> *Canada v. Ward* [1993] 103 DLR 4th 1; *Horvath v. Secretary of State for the Home Department* (n 26); *K. v. Refugee Status Appeals Authority* [2005] NZAR 441 (2004)

<sup>22</sup> *INS Basic Law Manual*, quoted in D. Anker, *Law of Asylum in the United States* (1999) 174; UK Asylum Policy Instructions, *Considering the Protection (Asylum) Claim and Assessing Credibility* (2010) 22–3.

<sup>23</sup> Art. 9 of Council Directive 2004/83/EC, OJ 2004 L 304/12, 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

<sup>24</sup> *Applicant A v. Minister for Immigration and Multicultural Affairs* [1997] 190 CLR 225, 296–7 (Kirby J)

the ideas of freedom of thoughts<sup>25</sup> and of opinions and expressions,<sup>26</sup> while the rest of the grounds that is, nationality, race, and membership of a particular social group, comes within the principles of non-discriminations.<sup>27</sup>

Even though there is no clear mentioning of gender as one of the persecution's ground, however, human rights has played a major role in the further development of it through the adoption of gender sensitive approach which shows its evolution. Gender-sensitivity has become forerunner approach of the human rights of the refugee's definition.<sup>28</sup> Therefore, claims on the basis of gender along with those of sexual orientations, now-a-days are usually deemed as being categorized to fall within the broader areas of membership of a specific social group.

The non-refoulement's principle is generally considered as the foundation upon which the international refugee law is based.<sup>29</sup> Its history can be traced back to the treaties of extradition which concluded at some point in the 19<sup>th</sup> century, but for the first time its approval were clearly given in the Convention related to the international status of refugees in 1933. Under existing law related to refugees, Article 33 (1) of the Geneva's Convention is its basic source.

The significance of this fundamental principle is further certified by Article 42, which bars reservations to Article 33. Hence this basic principle of law related to refugees having been reaffirmed in nearly all instruments<sup>30</sup> in-between states, to such a level that it has adopted the shape of customary international law.<sup>31</sup>

International human rights development significantly altered the normative contents of refugee's status. While comparing with the refugee's law, human rights represent two basic features; its inclusiveness as well as universal. This distinguishing characteristic stands upon the idea that by definition human rights are inherent in the quality of human beings. As a result of this,

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<sup>25</sup> Arts 18 of the UDHR and ICCPR

<sup>26</sup> Arts 19 of the UDHR and ICCPR

<sup>27</sup> Arts 2 of the UDHR and ICCPR

<sup>28</sup> D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm', 15 *Harv. Hum. Rts. L.J.* (2002) 133, at 138–9.

<sup>29</sup> G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007) 201–84; Hathaway, *The Rights of Refugees under International Law* at 278–369.

<sup>30</sup> Agreement relating to Refugee Seamen, 23 November 1957, completed by the Protocol to the Agreement relating to Refugee Seamen of 12 June 1973, Art. 10; Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, Art.II(3).

<sup>31</sup> Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees, UN Doc HCR/MMSP/2001/09 (2002), para. 4.

the enjoyment of rights under the Covenant is not restricted only to the state's citizens (Pakistan's national) but rather available to all those present in that particular state irrespective of their status including refugees such as Afghan in Pakistan etc..<sup>32</sup> The extra significance of human rights is clear with respect to the refugees as well as asylum-seekers that have been denied the benefits under majority of the provisions of the Geneva's Convention by means of disputable and restrictive interpretations. But human rights leave far more impact on the refugees and are not limited to their legal status. It also maintains its central role for the assertion of refugees rights which have due recognition under the Geneva's Convention also.

The enduring application of human rights has been helpful in guarantying an extra set of important rights. A variety of human rights which supplements the Geneva's Convention is both extensive as well as significant. A greater opportunity in-order to further the protection of refugees lies through the application of human rights rests on the non-discrimination's principle. Furthermore, Art. 26 of the ICCPR make sure that all are getting equal treatment before the law and protects them from discrimination and is not restricted to the rights given in the ICCPR.<sup>33</sup> Similarly, references to 'national origins' as well as 'other status' amongst the non exhaustive category of banned bias ground apparently include both discriminations in-between refugees and other biased treatment between citizens and refugees.

### **Conclusion:**

It may be summarized from the above discussions that human rights have assumed the shape of ultimate standard in the determination of who the refugee is. The infusion of human rights into the sphere of refugees' matters has demonstrated to be more instrumental in shaping universal and vibrant understandings of the definition of refugees, which will be more helpful in the international law's evolution in future. Thus it therefore helps in the prevention of Geneva's Convention from becoming an ineffective instrument by adjusting it to the ever shifting realities of future related to forced migration. The main reason behind this infusion of the two different areas of international law can be traced back to the existence of treaty bodies of human rights. They are instrumental in shaping a vital role in the proliferation of human rights into the refugee's law. Clearly it doesn't suggest any kind of hierarchical relationship in-between these branches of international law, since both of these regimes retain their conventional autonomies. These bodies have repeatedly cleared their intensions that they

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<sup>32</sup>*The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 at 18 (1986) para. 2

<sup>33</sup>HRCtee, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6, at 146 (1989), para. 12.



have nothing to do with the examination of claims made by asylum-seekers or the monitoring of contracting nations' performance with respect to the observances of their responsibilities under the Refugees' Convention.<sup>34</sup> Nevertheless, from the content's perspectives of the particular norms, the boundaries in-between both the regimes have been consistently blurred. There is an extremely close relationship in-between both of these two areas of the international law due to which they are so much interdependent on one another that it is almost not possible to split one area from the other one.

The combine applicability of both these areas of international law has further strengthened the protection regime of refugees' law through a mutually supporting process. This merger in-between the two has reached to such a level that now it is virtually impossible to dissociate one from the other or even it can be argued to such an extent that human rights law has absorbed the refugees' law.

Whereas the Refugee's Convention has maintained symbolic relevance to some extent, the difference in-between the aliens and citizens which condition the very substance of refugee's status has been marginalized to large extent and superseded generally by the application of human rights to non-nationals.<sup>35</sup>

It is high time for the development of progressive approach to the problems faced by the refugees at global level, such an approach should be based on the fundamental human rights of the refugees as well as the asylum countries interests and international comity of nations, to secure cooperation from all these stake holders to find durable solutions of their problems. Provided the close connection in-between these two areas, international human rights values are great tools for the enhancement and complementation of the present international refugees' protection regime by giving it proper direction and orientation.

The contemporary legal framework at global level recognized on refugees a range of fundamental human rights which shows the contribution of a number of instruments and treaties. It can be safely stated that the existing law related to refugees has evolved out of the human rights law and an inseparable part of it. Human rights therefore, with the passage of time have become an integral part of the customary international law and on the basis of this, it is the need of the hour that all states of the world whether signatory

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<sup>34</sup>*T.I. v. The United Kingdom*, ECHR (2000) Reports 2000-III; *M.S.S. v. Belgium and Greece* para. 342.

<sup>35</sup><http://www.oxfordscholarship.com/view/10.1093/acprof: accessed on 20/2/2019>

to the international refugee instruments or not such as Pakistan should recognize the human rights of the refugees including Afghans living in Pakistan.

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