

RESPONSIBILITY OF THE STATE FOR PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW

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Abstract

This paper explores the responsibilities of states for the protection of refugees under international law, emphasizing the delicate balance between state sovereignty and humanitarian obligations. The status of refugees is primarily governed by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which provide a legal framework for defining who qualifies as a refugee and outline the responsibilities of states towards them. Key obligations include non-refoulement, non-discrimination, the provision of identity papers and travel documents, and ensuring freedom of movement and employment opportunities for refugees. Despite these frameworks, gaps remain, particularly regarding the causes of refugee flows and the right to asylum, which is recognized in the Universal Declaration of Human Rights (UDHR) but not explicitly enforced under the 1951 Convention. The paper also delves into the role of the United Nations High Commissioner for Refugees (UNHCR) in safeguarding refugees, highlighting its evolution from its predecessor, the International Refugee Organization (IRO), and its current responsibilities in coordinating international efforts for refugee protection. The process of determining refugee status is analyzed, emphasizing the importance of fear of persecution and the interpretation of what constitutes persecution. The paper further discusses the challenges faced by refugees and the international community in providing adequate protection, including the complex legal and institutional issues raised by internal displacement, humanitarian emergencies, and the broader responsibility to protect. In conclusion, while the 1951 Convention has significantly contributed to defining state responsibilities towards refugees, the paper underscores the need for a more comprehensive approach that addresses the evolving nature of forced migration and ensures better protection for refugees worldwide.

Keywords: Refugee Protection, Non-Refoulement, State Responsibility, UNHCR, International Refugee Law.

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Introduction

Refugees occupy a unique and challenging space in international law, where the complex interplay of state sovereignty, territorial supremacy, and humanitarian principles often leads to tensions and difficulties in adequately addressing their needs. The fundamental aim of refugee law is to offer protection to individuals fleeing persecution and serious harm; however, it is widely recognized that this legal regime remains incomplete and, at times, insufficient in fully responding to the multifaceted challenges faced by refugees.¹

¹ **State Sovereignty:** International Court of Justice, *Case Concerning the Right of Passage over Indian Territory (Portugal v. India)*, Judgment, 12 April 1960, ICJ Reports 1960, p. 6.

State sovereignty, a bedrock principle of international law, refers to the authority of a state to govern itself and make decisions within its territory without external interference.² This principle often comes into conflict with humanitarian obligations when it comes to refugees. States have the sovereign right to control their borders and decide who may enter or remain within their territory. However, this right is not absolute, especially when it intersects with the international legal obligation to protect refugees.³

One of the core principles of refugee law is non-refoulement, which prohibits states from returning refugees to a country where they would face threats to their life or freedom on account of their race, religion, nationality, membership in a particular social group, or political opinion. This principle is enshrined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, which together form the cornerstone of the international refugee protection regime.⁴ The principle of non-refoulement is not only a treaty obligation but has also attained the status of customary international law, meaning that it applies universally, regardless of whether a state is a party to the Refugee Convention.⁵

Despite the legal obligations associated with non-refoulement, the practical application of this principle is fraught with challenges. States often face difficult decisions when balancing their national security interests and domestic political pressures against their international obligations to protect refugees.⁶ In some cases, states may seek to circumvent these obligations by employing legal and administrative measures that effectively limit access to asylum, such as through restrictive border controls, externalization of asylum procedures, or the designation of third countries as "safe" for the return of asylum seekers.⁷

The international community, primarily through the United Nations High Commissioner for Refugees (UNHCR), plays a vital role in supporting and monitoring the protection of refugees. The UNHCR is tasked with ensuring that the rights of refugees are respected and that they receive the protection and assistance they need. The organization provides critical support to states in fulfilling their obligations under international law, including through the provision of guidance, technical assistance, and advocacy. However, the effectiveness of the UNHCR is often limited by the political will of states, as well as the availability of resources and access to populations in need. Evolving nature of global challenges has further complicated the refugee protection regime. Issues such as internal displacement, climate-induced migration, and complex humanitarian emergencies present new legal and institutional questions that the current framework struggles to address. Internal displacement, for instance, involves individuals who are forced to flee their homes but

² **Principle of Non-Refoulement:** United Nations High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, available at UNHCR.

³ **Customary International Law:** International Court of Justice, *Case Concerning the Certain Expenses of the United Nations (Advisory Opinion)*, ICJ Reports 1962, p. 151.

⁴ Challenges in Applying Non-Refoulement: Human Rights Watch, *World Report 2023: Events of 2022*, available at HRW.

⁵ **Role of UNHCR:** UNHCR, *UNHCR's Role in Protecting Refugees*, available at UNHCR.

⁶ Internal Displacement: Internal Displacement Monitoring Centre (IDMC), *Global Report on Internal Displacement 2023*, available at IDMC.

⁷ Complex Humanitarian Emergencies: UN Office for the Coordination of Humanitarian Affairs (OCHA), *Global Humanitarian Overview 2023*, available at OCHA.

remain within their country's borders. Unlike refugees, these individuals do not cross international boundaries and are therefore not protected under the Refugee Convention. This gap in protection highlights the need for a more comprehensive approach to displacement that goes beyond the traditional refugee framework.

Moreover, the rise in complex humanitarian emergencies, often characterized by a combination of armed conflict, natural disasters, and state fragility, has led to situations where the distinction between refugees and other displaced persons becomes blurred.⁸ These scenarios challenge the existing legal definitions and protection mechanisms, necessitating innovative responses and greater international cooperation.

In conclusion, while the principle of non-refoulement and the efforts of the UNHCR represent critical components of the international refugee protection regime, they are not sufficient on their own to fully address the needs of refugees in today's world. The international community must continue to adapt and strengthen its legal and institutional frameworks to respond to the evolving challenges of refugee protection, ensuring that the balance between state sovereignty and humanitarian principles is maintained in a manner that upholds the dignity and rights of those fleeing persecution and conflict.

Determination of Refugee Status

Refugee status is a pivotal concept in international law, serving as the foundation for the legal protection and rights afforded to individuals who flee their countries due to persecution, conflict, or violence.⁹ The process of determining refugee status is governed by a combination of international treaties, regional agreements, and national legislations, each contributing to the intricate legal framework that defines who qualifies as a refugee.¹⁰ This process is essential not only for the protection of refugees but also for the effective implementation of international refugee law, which seeks to balance humanitarian principles with state sovereignty and territorial supremacy.¹¹

The factors leading to an individual's condition as a refugee are multifaceted, often involving forced expatriation and the severing of ties with their state of nationality.¹² These factors are critical in determining their refugee status, as they highlight the individual's need for international

⁸ Inadequacies in International Law: Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, 2007), p. 220

⁹ Refugee Status and International Law: United Nations High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, available at UNHCR.

¹⁰ International Treaties and Regional Agreements: United Nations, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137; United Nations, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations Treaty Series, vol. 606, p. 267.

¹¹ National Legislation: For example, the *Refugee Act of 1980* (U.S.) and the *Immigration and Refugee Protection Act* (Canada). See: U.S. Congress, *Refugee Act of 1980*, Public Law 96-212; Government of Canada, *Immigration and Refugee Protection Act*, SC 2001, c 27

¹² Balancing Humanitarian Principles and State Sovereignty: James Hathaway, *The Law of Refugee Status* (Cambridge University Press, 2005), p. 134.

protection.¹³ However, despite the existence of international frameworks, the determination of refugee status remains a complex and often contentious process, reflecting the inherent inadequacies of international law in fully integrating refugee protection into conventional legal frameworks.¹⁴

Definition of the Term 'Refugee'

The term 'refugee' is not universally defined under customary international law, which underscores the complexity of the refugee protection regime. Instead, the definition of a refugee is primarily the subject of treaties and international agreements, each tailored to address specific historical, geographical, and legal contexts. The most widely recognized definition of a refugee is enshrined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. According to the 1951 Convention, a refugee is defined as a person who:

"...owing to a 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 his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country..."

This definition sets a legal standard for refugee status, focusing on the well-founded fear of persecution as the core criterion. The 1967 Protocol expanded the temporal and geographical scope of this definition, allowing for its application to refugees worldwide, regardless of when the persecution occurred.

However, the 1951 Convention's definition is not exhaustive. Other international and regional legal instruments offer varying definitions of a refugee, tailored to their specific purposes. For example, the Organization of African Unity's (OAU) 1969 Refugee Convention and the Cartagena Declaration on Refugees in Latin America broaden the definition of a refugee to include individuals fleeing generalized violence, external aggression, or events seriously disturbing public order.

As noted by legal scholars such as Professor Goedhart, the legal definition of a refugee often differs significantly from a sociological or humanitarian perspective. Humanitarian organizations may adopt broader definitions to provide assistance to a larger group of displaced persons, including those not covered by the legal criteria of the 1951 Convention. This discrepancy between legal and humanitarian definitions highlights the challenges in applying a one-size-fits-all approach to refugee protection, given the diverse circumstances that lead to displacement.

International and Regional Instruments

International and regional instruments play a crucial role in shaping the determination of refugee status. The 1951 Convention and its 1967 Protocol are the cornerstone of the international refugee protection regime, setting the legal standards for who qualifies as a refugee and the rights and obligations of both refugees and host states. These instruments emphasize the principle of non-refoulement, which prohibits the return of refugees to territories where their lives or freedom may be threatened.

¹³ Inadequacies in International Law: Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford University Press, 2007), p. 220

¹⁴ Complexity in Determining Refugee Status: UNHCR, *Global Trends: Forced Displacement in 2022*, available at UNHCR.

Regional instruments, such as the OAU's 1969 Refugee Convention and the Cartagena Declaration, reflect the specific needs and challenges of refugee protection in different parts of the world. These instruments often adopt broader definitions of a refugee, recognizing the unique circumstances that may force individuals to flee their homes, such as civil wars, internal conflicts, and natural disasters.

National legislations also play a significant role in the determination of refugee status. Countries that are signatories to the 1951 Convention and its 1967 Protocol are required to incorporate these international standards into their domestic laws. However, the application of these standards can vary widely from country to country, depending on national interests, security concerns, and the capacity of the state to absorb and integrate refugees.

Challenges in Determining Refugee Status

Despite the existence of a robust international legal framework, the determination of refugee status remains fraught with challenges. One of the primary issues is the discretionary power of states in interpreting and applying the definition of a refugee. This can lead to inconsistencies in the recognition of refugee status, with some individuals being granted asylum while others in similar circumstances are denied protection.

Moreover, the process of determining refugee status can be lengthy and complex, often involving multiple stages of assessment, interviews, and appeals. This can result in prolonged uncertainty for asylum seekers, who may be left in legal limbo for extended periods. The lack of a universal definition of a refugee further complicates this process, as different countries and organizations may apply different criteria in their assessments.

Another significant challenge is the issue of mixed migration flows, where refugees and economic migrants travel together. This makes it difficult to distinguish between those who are fleeing persecution and those who are seeking better economic opportunities, potentially leading to the wrongful denial of refugee status to individuals who are genuinely in need of protection.

The determination of refugee status is a critical aspect of international refugee law, as it directly impacts the rights and protections afforded to individuals who have been forced to flee their countries. While the 1951 Convention and its 1967 Protocol provide a legal framework for defining who qualifies as a refugee, the process remains complex and subject to interpretation. The involvement of various international, regional, and national instruments adds layers of complexity to the determination process, reflecting the diverse and evolving nature of refugee movements. Despite these challenges, the international community must continue to strive for a fair and consistent approach to the determination of refugee status, ensuring that those in need of protection receive the support they deserve.

State Responsibility towards Refugees Under International Law

Refugees occupy a precarious and challenging position within the international legal framework. The legal obligations of states towards refugees are enshrined in various international treaties and conventions, with the 1951 Convention Relating to the Status of Refugees being the cornerstone of modern refugee law. The Convention, along with its 1967 Protocol, outlines the responsibilities of states in protecting individuals who flee persecution, emphasizing both humanitarian principles and the respect for state sovereignty. This section will explore the key responsibilities of states under the 1951 Convention, the role of the United Nations High Commissioner for Refugees (UNHCR), and the criteria for determining refugee status.

Responsibility under the 1951 Convention

The 1951 Convention Relating to the Status of Refugees provides a comprehensive definition of a refugee, which has become the foundation for refugee protection globally. According to the Convention, a refugee is someone who: Has a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Is outside their country of nationality and is unable or unwilling to avail themselves of the protection of that country.

This definition is crucial as it sets the parameters for who qualifies for refugee status and, therefore, who is entitled to the rights and protections under the Convention. However, the responsibilities of states towards refugees extend beyond mere recognition of their status; they encompass a range of obligations aimed at ensuring refugees' safety, dignity, and well-being.

Non-Discrimination

One of the fundamental principles under the 1951 Convention is the prohibition of discrimination against refugees. States are required to treat refugees without discrimination based on race, religion, or country of origin. This principle is vital in ensuring that refugees are treated equitably and are not subject to prejudicial practices that could exacerbate their vulnerable status.

Wage-Earning Employment

The 1951 Convention also mandates that states grant refugees the right to engage in wage-earning employment. Refugees lawfully residing in a state should be allowed to work under conditions similar to those afforded to nationals of foreign countries in comparable situations. This provision is essential in promoting the self-reliance of refugees, enabling them to support themselves and their families while contributing to the host country's economy.

Freedom of Movement

Freedom of movement is another critical right under the Convention. Refugees must be allowed to choose their place of residence and move freely within the host country, subject to regulations applicable to aliens in similar circumstances. This freedom is crucial in allowing refugees to access resources, seek employment, and rebuild their lives in safety and dignity.

Identity Papers and Travel Documents

The 1951 Convention requires states to issue identity papers and travel documents to refugees lawfully residing in their territories. These documents are vital for refugees as they provide legal recognition, enable movement, and help in accessing essential services such as healthcare, education, and employment.

Prohibition of Expulsion or Return (Non-Refoulement)

Perhaps the most significant responsibility under the 1951 Convention is the principle of non-refoulement. This principle prohibits states from expelling or returning refugees to territories where their lives or freedom would be threatened based on race, religion, nationality, membership in a particular social group, or political opinion. Non-refoulement is a cornerstone of international refugee law, reflecting the commitment of the international community to protect those fleeing persecution.

Cooperation with the UNHCR

States are also obligated to cooperate with the UNHCR and other relevant United Nations agencies in the supervision and application of the Convention's provisions. This cooperation is crucial in

ensuring that refugees receive the protection and assistance they need and that their rights under international law are upheld.

Establishment of UNHCR and Its Functions

The United Nations High Commissioner for Refugees (UNHCR) plays a central role in the international protection of refugees. The UNHCR was initially established by the League of Nations in 1921, with a focus on defining the legal status of refugees, organizing their repatriation or resettlement, and providing relief work. However, the modern UNHCR, established after World War II, has a broader mandate that includes providing international protection to refugees and finding durable solutions to their plight.

Evaluation of Persecution

The process of determining refugee status involves evaluating the applicant's fear of persecution and interpreting what constitutes persecution. This evaluation is complex, as it requires a thorough understanding of the individual's circumstances, the conditions in their home country, and the legal standards set by the Convention.

State Responsibility in Determination

States party to the Convention are responsible for establishing procedures for determining refugee status. These procedures must be fair, efficient, and in line with international standards. While each state has the autonomy to determine refugee status, these determinations are not necessarily binding on other states, leading to variations in how refugee status is recognized and granted globally.

State responsibility towards refugees under international law is a multifaceted and evolving area. The 1951 Convention Relating to the Status of Refugees, along with the UNHCR, provides the primary framework for refugee protection. However, gaps remain, particularly in addressing the causes of refugee flows and the procedures for determining refugee status. As global challenges such as internal displacement and complex humanitarian emergencies continue to evolve, so too must the international community's approach to protecting refugees, ensuring that the principles of non-discrimination, non-refoulement, and international cooperation are upheld.

Responsibility of States under the Universal Declaration of Human Rights (UDHR)

The international community has a collective responsibility to find solutions and provide protection for refugees. This mandate, entrusted to the UNHCR, has played a significant role in shaping legal structures and developing the framework for refugee protection. However, challenges remain in ensuring that all refugees receive the protection they need, and the evolving nature of global crises continues to test the resilience and adequacy of existing legal frameworks.

Conclusion

State responsibility for the protection of refugees under international law is a complex and evolving area that requires a careful balance between humanitarian obligations and state sovereignty. The 1951 Convention Relating to the Status of Refugees, along with its 1967 Protocol, provides the foundational legal framework for this protection, outlining key obligations such as non-refoulement, non-discrimination, and the provision of essential rights and services to refugees. Despite the progress made in international refugee protection, significant challenges remain, including gaps in the legal framework, issues of enforcement, and the need for a more comprehensive approach to address the changing nature of forced migration. The role of the UNHCR is crucial in supporting states and ensuring that refugees receive the protection and

assistance they need. However, the international community must continue to adapt and strengthen its legal and institutional frameworks to ensure that the rights and dignity of refugees are upheld in an increasingly complex world.