



UNDERSTANDING THE LEGAL RIGHTS OF REFUGEE, MIGRANTS AND ASYLUM SEEKERS UNDER INTERNATIONAL LAW

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ABSTRACT

Indeed, the cardinal principles of human rights as first set out in the Universal Declaration of Human Rights (UDHR), such as universality, interdependence and indivisibility, equality and non-discrimination, and that human rights simultaneously entail both rights and obligations from duty bearers and rights owners, have been reiterated in numerous international human rights conventions, declarations, and resolutions. Today, all United Nations member States have ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Refugee, migrants and asylum seekers are human beings and ultimately fall within the confines of the Universal Declaration of Human Rights. This article therefore examine in details for better understanding, the nature, categories, legal rights of refugee, migrant and asylum seekers under International Law.

Keyword: Refugee, Migrants, Asylum, International Law

Introduction

The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. Adopted in 1948, the UDHR has inspired a rich body of legally binding international human rights treaties. It continues to be an inspiration to us all whether in addressing injustices, in times of conflicts, in societies suffering repression, and in our efforts towards achieving universal enjoyment of human rights.¹

It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Whatever our nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status, the international community on December 10 1948 made a commitment to upholding dignity and justice for all of us.²

¹Daniel Warner, "Migration and Refugees: a challenge for the 21st century", in Jean-Yves Carlier, Dirk Vanheule, Europe and Refugees: a challenge?, Kluwer Law International, The Hague, 1997, p. 58.

² Ibid at P.59

Over the years, the commitment has been translated into law, whether in the forms of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights.³

Building on the achievements of the UDHR, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights entered into force in 1976. The two Covenants have developed most of the rights already enshrined in the UDHR, making them effectively binding on States that have ratified them. They set forth everyday rights such as the right to life, equality before the law, freedom of expression, the rights to work, social security and education. Together with the UDHR, the Covenants comprise the International Bill of Human Rights.

Over time, international human rights treaties have become more focused and specialized regarding both the issue addressed and the social groups identified as requiring protection. The body of international human rights law continues to grow, evolve, and further elaborate the fundamental rights and freedoms contained in the International Bill of Human Rights, addressing concerns such as racial discrimination, torture, enforced disappearances, disabilities, and the rights of women, children, migrants, minorities, and indigenous peoples.

Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.⁴

The differences between refugee, migrant and asylum seeker

What is the difference between a refugee, an asylum seeker and a migrant? Does it really matter to understand their definition? Yes, absolutely.

It's crucial today to understand what an asylum seeker or a refugee is because of all the misconceptions and misunderstandings around those terms.

Al Jazeera announced recently that it wasn't going to refer anymore to the Mediterranean "migrant crisis", instead it would call it a "refugee crisis". More than 72,000 have now signed a petition on Change.org urging the BBC to use the term "refugee crisis" instead of "migrant crisis". The terms have distinct meanings, and despite some grey area, confusing them completely leads to problems for those respective populations.⁵

Who is a refugee?

Refugees are people fleeing armed conflicts or persecution. There were 19.5 million of them worldwide at the end of 2014 according to UNHCR. Their situation is so perilous that they cross national borders

³Chapter 1, part 1 of the Statute of the Office of the United Nations High Commissioner for Refugees. [15 Sept. 2020].

⁴ UNHCR, 2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, Division of Programme Support and Management, 15 June 2010, p.2.

⁵News-bbc-report-on-refugees-and-migrants.info.[accessed on 20 Sept. 2020].

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to seek safety in nearby countries and become recognised as refugees with access to assistance from states and aid organisations.⁶

An important piece of this is that refugees are protected by international law, specifically the 1951 Refugee Convention. But even the terms refugee and asylum seeker are often confused.

Who is an asylum seeker?

An asylum seeker is someone who claims to be a refugee but whose claim hasn't been evaluated. This person would have applied for asylum on the grounds that returning to his or her country would lead to persecution on account of race, religion, nationality or political beliefs.

Someone is an asylum seeker for so long as their application is pending. So not every asylum seeker will be recognised as a refugee, but every refugee is initially an asylum seeker.

Becoming a refugee

A vital part of being recognised as a refugee is Refugee Status Determination (RSD), a legal process that governments or UNHCR use to determine whether a person seeking international protection is considered a refugee under international, national or regional law.⁷

The process can be lengthy, complicated and is certainly imperfect. There is still no single uniting model for RSD. States do have the primary responsibility for determining the status of asylum seekers but UNHCR will step in where states are unable or unwilling.

Who is a migrant?

Migrants choose to move not because of a direct threat or persecution but mainly to improve their lives:

- Finding work
- Seeking better education
- Reuniting with family

Unlike refugees who cannot safely return home, migrants can return home if they wish. This distinction is important for governments, since countries handle migrants under their own immigration laws and processes.⁸

The difference between migrants and refugees

The grey area is that one person's motives may change in nature and in importance during their journey. So categorising individuals as "economic migrants" or "asylum seekers" can't always reflect that complex reality of people's experience of migration and the situation they had to suffer at home (e.g. droughts). Giving away all your life savings for a chance to cross a few borders is a huge leap to take.

Back to Europe and the large numbers of people arriving by boat in Greece, Italy and elsewhere. Are they refugees or are they migrants?

The truth is they're a mix of both. "Refugees and migrants" is probably the best way to refer to movements of people by sea or in other circumstances where both groups may be present.⁹ As other

⁶UNHCR, 2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons, Division of Programme Support and Management, 15 June 2010, p.20.

⁷ Sadako Ogata, "Refugees in the 1990s: Changing Reality, Changing Response", lecture at Georgetown University on 25 June 1991, in Eduardo Arboleda, Ian Hoy, "The Convention Refugee Definition in the West: Disharmony of Interpretation and Application", in Selina Goulbourne, Law and Migration, Edward Elgar Publishing, Cheltenham, 1998, p. 77.

⁸ UNHCR, 2009 Global Trends, p.6.

⁹ Article 1 A (2) of the 1951 Refugee Convention

reports point out, some migrants face extreme conditions at home, such as natural disasters that have coerced them to leave. The grey area then expands when it comes to determining the difference between coerced (for certain migrants) and forced (for refugees).¹⁰

What rights do migrants have?

According to international human rights norms, which are based upon the inherent dignity of every person, migrants enjoy the fundamental rights afforded to all persons regardless of their legal status in a State. See Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A (III) (UDHR), art. 1. See also Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, UN Doc. HRI/GEN/1/REV.9(VOL.I), 11 April 1986; Amnesty International, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest* (2012), 13. The Human Rights Committee has explicitly stated that, with the exception of Article 25 of the ICCPR, which pertains to political participation, all the rights guaranteed in the ICCPR apply to migrants. *General Comment No. 15: The position of aliens under the Covenant*, 11 April 1986.

Right of asylum

The right of asylum falls into three basic categories: territorial, extraterritorial, and neutral. Territorial asylum is granted within the territorial bounds of the state offering asylum and is an exception to the practice of extradition.¹¹ It is designed and employed primarily for the protection of persons accused of political offenses such as treason, desertion, sedition, and espionage.¹² It has become a widespread practice, however, to exclude from this category persons accused of the murder of a head of state, certain terrorist acts, collaboration with the enemy in time of war, crimes against peace and against humanity, and war crimes. Extraterritorial asylum refers to asylum granted in embassies, legations, consulates, warships, and merchant vessels in foreign territory and is thus granted within the territory of the state from which protection is sought.¹³ Cases of extraterritorial asylum granted in embassies, legations, or consulates (generally known as diplomatic asylum) are often occasions for dispute. For example, after an unsuccessful uprising against the communist government of Hungary in 1956, the United States controversially granted diplomatic asylum to dissident Hungarian Roman Catholic József Cardinal Mindszenty, who was given refuge in the U.S. embassy and remained there for 15 years. Neutral asylum is employed by states exercising neutrality during a war to offer asylum within its territory to troops of belligerent states, provided that the troops submit to internment for the duration of the war.¹⁴

It is the right of a state to grant asylum to an individual, but it is not the right of an individual to be granted asylum by a state. This perspective is reflected in the Universal Declaration of Human Rights (UDHR), which, though recognizing (article 14) the right “to seek and to enjoy in other countries asylum from persecution,” does not explicitly provide a right of asylum. The original draft of that article, which referred to the individual’s right “to seek and to be granted asylum from persecution,” would have afforded more protection to asylum seekers. Similarly recognizing that “the grant of asylum may place unduly heavy burdens on certain countries,” the Convention relating to the Status of Refugees, which was adopted by the United Nations (UN) Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in 1951, did not create a right of asylum for those seeking it, and the impressive array of rights it enumerates pertains only to those refugees “lawfully in” or “lawfully staying in” the sheltering state.¹⁵ Subsequent unsuccessful efforts to articulate an individual’s right of

¹⁰UNHCR, 2009 Global Trends, p.9.

¹¹ Article 2 (c) of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, O.J. L31, 6 February 2003, pp.18-25 (hereinafter Council Directive 2003/9/EC).

¹² Liza Schuster, *The use and abuse of political asylum in Britain and Germany*, Frank Cass Publishers, London, 2003, Pp.3,5,6.

¹³ See Article 97 of the Immigration and Refugee Protection Act (2001, c.27).

¹⁴ United Nations General Assembly, *The right to food – note by the Secretary General*, A/62/289, 22 August 2007, p.20,

¹⁵ Volker Türk, *The Common European Asylum System – a vision for the future*, Conference on “The Common European Asylum System: Future Challenges and Opportunities”, Stockholm, 3 November 2009, available at < <http://www.unhcr.org/refworld/docid/4af15b672.html> > [accessed on 20 Sept. 2020].

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asylum included: (1) the UN General Assembly Declaration on Territorial Asylum (1967), which contained substantive exceptions to its non-refoulement (non-return) provision (pertaining to national security and to the safeguarding of its national population), and (2) a proposed Convention on Territorial Asylum, which never materialized.

In ancient times asylum designated a place of sanctuary or protection from which a person could not be removed forcibly without sacrilege. Later it came to signify an institution for the protection or relief of some class of destitute or otherwise unfortunate persons; its most common uses in this sense were in *orphan asylum* and *insane asylum*.¹⁶

Legal rights of refugee, migrant and asylum seeker

In accordance with the laid down principles of human rights protection as provided under the Universal Declaration of Human Rights (UDHR), both refugee, migrant and asylum seeker are entitled to be accorded with the following rights irrespective of the legal system of the particular state or nation concerned. Those rights include:

- Free exercise of religion and religious education
- Free access to the courts, including legal assistance
- Access to elementary education
- Access to public relief and assistance
- Protection provided by social security
- Protection of intellectual property, such as inventions and trade names
- Protection of literary, artistic and scientific work
- Equal treatment by taxing authorities
- The right to belong to trade unions
- The right to belong to other non-political nonprofit organizations
- The right to engage in wage-earning employment
- The right to own property
- The right to practice a profession
- The right to self-employment
- Access to housing
- Access to higher education
- The right to choose their place of residence
- The right to move freely within the country
- Free exercise of religion and religious education
- Free access to the courts, including legal assistance
- Access to elementary education
- Access to public relief and assistance
- Protection provided by social security
- Protection of intellectual property,

¹⁶ Maria-Teresa Gil-Bazo, "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law", in *Refugee Survey Quarterly*, vol.27, issue 3, 2008, pp.33-52.

- such as inventions and trade names
- Protection of literary, artistic and scientific work
- Equal treatment by taxing authorities

Legal protections of refugee, migrant and asylum seeker

The following provisions prohibit discrimination or any inhuman treatment against refugee, migrant and asylum seeker either on the basis of national origin, race, religion or whatever reason. They are:

- African Charter on Human and Peoples' Rights (arts. 2, 12)
- African Charter on the Rights and Welfare of the Child (arts. 3, 23)
- African Union Convention Governing Specific Aspects of Refugee Problems in Africa
- American Convention on Human Rights (arts. 1, 20, 22)
- American Declaration of the Rights and Duties of Man (art. XIX)
- Arab Charter on Human Rights (arts. 3, 34(5))
- Asian Declaration on the Protection and Promotion of the Rights of Migrant Workers
- Cartagena Declaration on Refugees
- Convention against Torture (arts. 3, 6(3))
- Council of Europe Convention on Action against Trafficking in Human Beings
- European Convention on Human Rights (art. 14), and Protocol No. 4 and Protocol No. 7
- European Convention on Nationality, 1997
- European Convention on the Legal Status of Migrant Workers
- European Social Charter (Revised) (Part I(18) and (19), art. 19)
- Convention on the Elimination of All Forms of Discrimination against Women (art. 9(1))
- International Convention on the Elimination of All Forms of Racial Discrimination (arts. 1(1) and (2), 5)
- International Convention on the Protection of the Rights of Migrant Workers and Members of their Families
- International Covenant on Civil and Political Rights (arts. 2(1), 13)
- International Covenant on Economic, Social and Cultural Rights (arts. 2(2), 2(3))
- International Labour Organization Migration for Employment Convention (Revised), 1949 (No. 97)
- International Labour Organization Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- International Labour Organization Domestic Workers Convention, 2011 (No. 189) (arts. 8, 15)
- Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (General Provision; Principle II)
- Protocol of 2014 to the Forced Labour Convention, 1930 (art. 2(d))
- UN Convention on the Law of the Sea (art. 98)
- UN Convention on the Reduction of Statelessness, 1961
- UN Convention relating to the Status of Refugees, 1951, and 1967 Protocol
- UN Convention relating to the Status of Stateless Persons, 1954
- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
- UN Protocol against the Smuggling of Migrants by Land, Sea and Air
- United Nations Standard Minimum Rules for the Treatment of Prisoners (arts. 6(1), 38), as revised by the Mandela Rules
- Universal Declaration of Human Rights (arts. 2, 15)
- Vienna Convention on Consular Relations

Conclusion

The year 2001 marks the 50th Anniversary of the United Nations Convention relating to the Status of Refugees. The Convention was a landmark in the setting of standards for the treatment of refugees. It incorporated the fundamental concepts of the refugee protection regime and has continued to remain

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the cornerstone of that regime to the present day. On 28 July 1951, when the Convention was originally adopted, it was to deal with the aftermath of World War II in Europe even as the Cold War set in. The inspiration for the Convention was the strong global commitment to ensuring that the displacement and trauma caused by the persecution and destruction of the war years would not be repeated. But during the decades that followed, it globalised, and the 1967 Protocol expanded the scope of the Convention as the problem of displacement spread around the world. In these origins lies the Convention's avowedly humanitarian character which ensures that its fundamental concepts remain intrinsically sound.¹⁷

The majority of new asylum-seekers are Syrian, with Serbia receiving by far the largest percentage of those seeking international protection in the sub region. However, many asylum-seekers and refugees move on before their international protection needs have been assessed. Such movements are prompted in part by: difficulties in applying for asylum, for example at borders; inadequate or insufficient reception conditions; low recognition rates; or a lack of local integration prospects..."

Therefore, in my humble opinion, parliamentarians can play a crucial role in protecting rights of refugees, migrants and asylum seekers and in finding solutions to their problems. As opinion-leaders and decision-makers, parliamentarians can promote respect for refugees, migrants and asylum seekers among their constituents and encourage informed debate on their protection issues. As overseers of national budget appropriations, parliamentarians can ensure that adequate and cost-effective funding is provided both to their national refugee and migrant protection systems and to UNHCR, the only international agency mandated to protect refugees, migrants and asylum seekers and promote durable solutions to their problems.¹⁸

¹⁷ See Chapter III, "Obligations of the Member States towards persons enjoying temporary protection" of the Council Directive 2001/55/EC.

¹⁸ Sir Elihu Lauterpacht, Daniel Bethlehem, "The scope and content of the principle of non-refoulement: Opinion" in Erika Feller, Volker Türk, Frances Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p.118