

The Legalities of Accepting or Refusing Refugees and Asylum Seekers in International Law

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"No one leaves home unless home is the mouth of a shark."- Warsan Shire

Introduction

Our world is suffering from an ever-growing crisis as a result of the mass exodus of Syrian refugees. Whether or not to accept these refugees has been the subject of much debate in countries all over the world. However, it is crucial to consider the legalities of accepting or refusing refugees and asylum seekers in international law.

The United Nations Refugee Agency was established in 1950 to assist with displaced Europeans in the aftermaths of World War II. Called into emergency action, the agency dealt with Hungarian refugees as the Soviet Union caused havoc. From then on, this agency has been called on to intervene in many refugee crises such as, the decolonization of Africa in the '60s Balkan wars, and displacement in Latin America. Currently, the agency is intervening in the Syrian refugee crisis.¹

Before diving into the acceptance or refusal of refugees, it is essential to first distinguish who is a refugee and who is an asylum

¹ *History of UNHCR*. UNHCR, the United Nations Refugee Agency, <http://www.unhcr.org/cgi-bin/texis/vtx/home>. (Retrieved March 11, 2016.)

seeker. In this case, both groups are important when it comes to state responsibility under international law. The difference between the two is somewhat minimal.

The 1951 Refugee Convention identified the distinction between a refugee and an asylum seeker. ²This convention defined a refugee as, “[Any person] owing to well-founded fear of persecution 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”³

Refugees must be fleeing their home country due to a well-founded fear of persecution based on their religion, race, or political views. However, it is important to note that the court in the 1987 U.S. case, *INS v. Cardoza-Fonseca*,⁴ determined that a refugee or asylum seeker does not have to prove that they are “more likely than not” going to be persecuted. There is also an understanding that refugees will eventually return to their home country once the fear of persecution has passed. Asylum seekers can seek asylum for the previously mentioned reasons, as well as for economic reasons, such as an inability to find adequate employment to feed their family. A country is not required to

² 1951 Refugee Convention, United Nations Refugee Agency, <http://www.unhcr.org/pages/49da0e466.html>. (Retrieved March 11, 2016.)

³ *Article 1, 1951 Refugee Convention*, United Nations Refugee Agency, <http://www.unhcr.org/4ca34be29.pdf>. (Retrieved March 11, 2016.)

⁴ *INS v. Cardoza-Fonseca*, 480 U.S. 421, (1987).

grant asylum to asylum seekers and if asylum is granted, the asylum seeker is not expected to return to their home country. There are, of course, many obstacles to achieving refugee or asylum status in a foreign country.

State Responsibility

Once a refugee or asylum seeker has achieved protection in another state, the state is only held to a certain level of responsibility. This responsibility of the state changes depending on if such person is a refugee or asylum seeker. The discrepancy lies in the extent of protection given. According to the 2011 case, *M.S.S. v. Belgium and Greece*⁵, Article 3 of the 1951 Refugee Convention does not require a host country to provide financial assistance, or any assistance to maintain a certain standard of living to refugees and, “cannot be interpreted as obliging Contracting Parties to provide everyone within their jurisdiction with a home,” when referring to refugees. However, it is also stated that according to Directive 2003/9, the “Reception Directive,” under European Union Law “there is a positive obligation to provide accommodation and decent material conditions to impoverished asylum seekers.”⁶

⁵ *M.S.S.* refers to an Afghan citizen, Mr. M.S.S., see *M.S.S. v. Belgium and Greece*. The European Court of Human Rights, Application no. 30696/09, Strasbourg, Jan. 21, 2011, http://www.proasyl.de/fileadmin/fm-dam/NEWS/2011/Urteil_EGMR_MSS_gegen_Belgien_und_Griechenland.pdf. (Retrieved March 11, 2016.)

⁶ *M.S.S. v. Belgium and Greece*, Application No. 30696/09. “*European Database of Asylum Law*.” <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>. (Retrieved March 9, 2016.)

While it is true that countries can refuse refugees as they please, the state still has a responsibility to any refugees and asylum seekers that they refuse. This responsibility is known as the Non-Refoulement Principle and was established in Article 33 of the 1954 Convention of Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.⁷ Non-Refoulement states that if a country refuses a refugee, they cannot send them back to the country that the refugee is seeking refuge from. According to Article 33, “No contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁸ Before the state can turn refugees or asylum seekers away, they must make arrangements for the refugee in another country. “International human rights law strengthens... the protection of norms... such as for instance, the *absolute* prohibition of *refoulement* to situations where there is a real risk of torture or inhuman or degrading treatment or punishment.”⁹ Failing to do so violates international law and can subject the country to legal action.

⁷ *United Nations Convention relating to the Status of Refugees, Article 33(1), 1954*, United Nations Educational, Scientific, and Cultural Organization, <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/refoulement/>. (Retrieved March 11, 2016.)

⁸ Atle Grahl-Madsen, *The Status of Refugees in International Law*, Publisher A.W. Sijthoff, 1966.

⁹ MariaTeresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship*, 34 *Refugee Survey Quarterly* 11–42, (2015).

Exclusions

Exclusions and exceptions follow the creation of laws. It is paradoxical that those who established and endorsed such laws would desire to limit their applicability and their responsibility under the law. It is necessary to secure state support for the Refugee Convention. A state's top priority is sustaining legitimacy with its citizens. Therefore, when new parties are introduced such as refugees and asylum seekers, states must ensure that they put their citizens' well-being at the forefront while also protecting and upholding international law. One main concern is national security. According to the non-refoulement principle in Article 33 of the 1954 Convention, states do not have to grant refugee status if there is reason to believe the contender is a threat to national security.

In the 2008 case, *Matter of S-K-*, S-K-, a Burmese national and Chin minor, donated to the Chin National Front (CNF).¹⁰ The CNF was an organization that the U.S. declared as a terrorist organization and that pushed for the freedom of the Chin ethnic group in Burma. When it was found by the Burma military that S-K- was a contributor, she was targeted by the Burmese. S-K fled to the U.S. seeking protection from military persecution. However, she was denied asylum on the basis of her association with the CNF. The immigration courts upheld the decision to deny asylum in 2006, however two years later the appeal was sustained and the defendant was granted asylum. As well as national security, any individual, according to 1981 case, Fedorenko v. United States, who “assisted the enemy in persecuting

¹⁰ *Matter of S-K-*, 24 I&N Dec. 475 (BIA 2008), <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>. (Retrieved March 11, 2016.)

civilians” or “voluntarily assisted enemy forces” is not eligible to seek refugee status or asylum in the United States.¹¹

Secondly, states are only held responsible to those seeking asylum or refugee status in their jurisdiction. They are not required to go beyond their territory to situate displaced persons. States can deny applications solely for jurisdiction discrepancies. However, the denial must be rightly applied. In the 1995 case, Sale v. Haitian Ctr Council, Inc., the U.S. denied the petition of those seeking asylum and returned them to Haiti, as they were not in the United States’ territorial water, insisting that the Non-Refoulement Principle did not apply.¹² The Inter-American Commission on Human Rights, who oversee cases in order to protect human rights in the Americas,¹³ declared the decision to be a violation of the petitioners’ human rights.

Finally, through the safe country principle, states are identified as either a safe country or an unsafe country. A safe country is a state where refugees can seek protection without fear of endangerment, whereas an unsafe country is one in which persecution is still feared. Under the safe country principle, those seeking asylum or refugee status must pursue protection in the first safe country they enter. This principle was established to assure that all safe countries would share the weight of protecting refugees and not let the burden fall on the more desirable countries such as the United States and the United Kingdom. If one arrives in a safe country and continues on their journey to reach a

¹¹ Fedorenko v. United States, 449 U.S. 490 (1981).

¹² Sale v. Haitian Ctr. Council, Inc., 509 U.S. 155 (1993).

¹³ *What Is the Inter-American Commission for Human Rights?*, Organization of American States, Jan.9, 2016. <http://www.oas.org/en/iachr/mandate/what.asp>. (Retrieved March 11, 2016.)

more suitable destination, he may be returned to the original safe destination as long as he obtains basic human rights, he is protected with the non-refoulement principle, and the fear of persecution is nonexistent¹⁴.

Issues

The battle between government resources and state responsibility under international law is often an unequal battlefield, frequently at the expense of the law. These battles intensify with the onset of a refugee emergency. The most obvious example of a contemporary refugee emergency would be the Syrian refugee crisis.

The United Nations High Commissioner for Refugees defines the refugee emergency as “any situation in which the life or wellbeing of the refugees will be threatened unless immediate and appropriate action is taken, and which demands an extraordinary response and exceptional measures.”¹⁵ With such emergencies, states are not always equipped with the necessary resources to fulfill their duties outlined in the United Nations Declaration of Human Rights.

In the event of a refugee emergency, “The country of asylum may be under tremendous pressure and often under media scrutiny, and

¹⁴ *Background Note on the Safe Country Concept and Refugee Status*. UNHCR, United Nations Refugee Agency, Jan. 3, 2016.

<<http://www.unhcr.org/3ae68ccec.html>>. (Retrieved March 16, 2016.)

¹⁵ Kate Jastram & Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law*, Universal Declaration of Human Rights, 1–149, Inter-Parliamentary Union, 2001. http://www.ipu.org/pdf/publications/refugee_en.pdf. (Retrieved March 11, 2016.)

may not have had experience in handling the arrival of large numbers of hungry, sick, wounded or frightened people.”¹⁶ Not being prepared would likely result in a competition of resources between natives and refugees; thus, creating a ripple effect of struggles within safe countries both domestically and internationally. However, even though the new host country may be strapped for resources, they do have certain obligations and state responsibilities under international law. As such, even if a country is burdened by an influx of refugees, they must still find a method to meet the basic human needs of those refugees.

If a country is burdened extensively by the number of refugees, they do not have an option to simply send them to the home from which they have fled. The country is still obligated to follow the principle of non-refoulement, even if the state does not necessarily define those peoples as refugees anymore, those who flee from armed conflict are not always recognized as refugees in asylum countries that do not use the wider definition of refugee found in the Organization of African Unity (OAU) Convention and the Cartagena Declaration. Nevertheless, in practice it is recognized that people escaping from war cannot be returned to their home countries” ID. Thus, states are not absolved of their state responsibility due to lack of resources or lack of desire to provide those resources.¹⁷

Conclusion

Ultimately, when it comes to refugees and asylum seekers, the

¹⁶ Id.

¹⁷ J.O. Moses Okello, *The 1969 OAU Convention and the Continuing Challenge for the African Union*, Forced Immigration Review, <http://www.fmreview.org/faith/okello.html>. (Retrieved March 11, 2016.)

state has two choices: to accept or refuse them. At times, the wellbeing of the already vulnerable refugees and asylum seekers are sacrificed in favor of state agendas, many of them citing economic constraints and lack of resources for their decision to reject these people. However, regardless of the political, economic, or resource restraints a state may have, it has an obligation to persons fleeing from persecution. These obligations include meeting their basic human needs and abiding by international principles, such as non-refoulement. Through these legalities and exceptions, states can easily reject those seeking safety, causing the petitioners to be stuck in a permanent purgatory. If this revolving door of refugees continues to spin, a lost generation will come to fruition.

Looking Ahead

Everyday, people around the world are exposed to different political opinions in regards to refugees in mass media. The majority of politicians call for a restriction of movement of peoples based on their religion or country of origin. They also call for a reduction of refugee acceptance rates in their respective countries. Whatever their reasoning is behind these decisions - whether it is taking into account state resources, or if it is blatant racism and xenophobia - they seem to forget about potential ramifications under international law and legal precedent. Hopefully in the wake of the upcoming Presidential Election, the current stance on accepting refugees will change for the better.

The largest obstacles to progress for refugees are international legal institutions. Many international legal institutions such as the International Criminal Court, International Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights, and

the African Court on Human and Peoples' Rights are relatively weak. Out of those listed, the European Court of Human Rights is the most effective due to the fact that members of the European Union must accept the court's jurisdiction in order to keep their membership. Since the other courts do not require the acceptance of jurisdiction, it makes their rulings and recommendations essentially meaningless.

As such, while it is great to have international laws and principles such as non-refoulement, without accountability states can act as if there is no law at all. The best thing for the most vulnerable people in our world today, is for the cracks in international law to be filled. We must move to universal jurisdiction for the international courts to ensure the protection of human rights and hold states accountable for their actions. As Dr. Seuss said, "Unless someone like you cares a whole awful lot, nothing is going to get better. It's not."¹⁸

¹⁸ Dr. Seuss, *The Lorax*, 1971.