

The Burden of Refugees' Accommodation and the Right of Host Nation to Compensations

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Abstract: Flowing of refugees from their country of origin to a third country is a result of conflict, persecution, poverty and injustice. Unfortunately, response from the international community was considered slow and inadequate. As a result, the burden of caring for millions of refugees has been shouldered either by the refugees themselves, their countries of asylum, resettlement countries and donors or through international organizations such as UNHCR. Despite effort by international community to adequately address the issue, it was cleared that much needed to be done to provide sufficient assistance for human suffering. In 2015, over 60 million displaced people, refugees and migrants are accounted for, while the number has gradually increased to 92 million in January 2017. The burden has partially affected the social and economic day to day of number of host nations, while some nations felt uneasy to continuing bear the cost of the problem they never caused. There are numbers of unattempt questions such as the responsibilities of the countries of origin toward their own citizens that has turned refugees and toward the countries of asylum that shoulder the burden of caring for those refugees. Even though, certain attempts have been made toward legal claim for the effect of refugees, host nations are yet to institute a successful legal action with remedies. As a result, states need to back by clear legal provisions to file their litigations. This paper focuses on number of legal questions; whether host nations deserve certain compensations and to whom such can be claimed and the appropriate legal actions that are available to institute those claims. International law, treaties, conventions, various arising cases and expert opinions will be utilized throughout the investigation.

Key words: Conflict • Refugee • UNCHR • Compensation

INTRODUCTION

The term refugee is broad and covers a lot of grounds. As a result, politicians, aid workers, academics and the press often approach the word from different angles and with varying ideas of the rights, roles and responsibilities the term implies. Such divergent views fuel the global debate about how best to manage and protect refugees. There are two United Nations agencies, the United Nations High Commissioner for Refugees (UNHCR) and the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), are responsible for safeguarding the rights and well-being of the world's refugees. Currently, the UNHCR's major operations take place in Afghanistan, Colombia, Democratic Republic of the Congo, Mali, Pakistan, Syria, Jordan, Lebanon, Turkey and Iraq. In a statement

regarding the UNHCR's mid-year 2015 report, António Guterres, the UN High Commissioner for Refugees, said "Never has there been a greater need for tolerance, compassion and solidarity with people who have lost everything." It's predicted that forced displacements in 2015 exceeded all previous records, topping 60 million people. This means that one out of every 122 persons in the world was forced to flee their home [1].

The definition of a refugee is precisely contained in the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees, which define a refugee as an individual 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 unwilling to avail himself of the protection of

that country". The above definition did not cover situations of mass flight from war, regional bodies such as the Organization for African Unity developed agreements such as the OAU Convention of 1969. It expanded the definition of refugees to include (not only individuals subject to persecution) but every person who in the words of the OAU Convention owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order...is compelled to leave...to seek refuge in another place outside his country of origin or nationality [2].

Furthermore, the Cartagena Declaration, adopted in 1984 by a group of Latin American states, added massive human rights violations to this list. Even though, it did not rise to a treaty level, the declaration carries considerable moral force in the region and elsewhere. The increase in the number of persons seeking asylum has caused national government, international communities and academicians to call for mechanisms to deal with the root causes of refugees' flow and for early warning systems. This does not end once but also a concern of host country, to claim for compensation of untold burden. Therefore, the discussion of new refugee policies in the international arena shows that it is time to find a concrete solution not only to the causes of refugee but to create an established cause of action for host country to claim compensation from the refugee's country of origin. In the past, the problem was a primarily reactive focus. As a result, the response to refugees avoids the principal player and has become a 'regime focused almost exclusively on post-flow relief and humanitarian protection. Ability to establish a successful liability against refugee state of origin will lead to prevention and of dealing with root causes, as a result, the possible means of reversing the growing numbers of those seeking asylum [3].

Historically, scholar such as Jennings is the first to address the issue in 1939, he argued that notion that refugees and host States affected and injured by the State of origin are entitled to reparations. As a response, number of modern scholars searched for appropriate proof to support Jennings' argument, they concluded that the Universal Declaration of Human Rights (UDHR48), article 8 calls for the right to a remedy and that it receives further support from the theory of international burden sharing. Luke T. Lee also argues that the right to compensation claimed by refugees and host States has long been recognized but has yet to be enforced. In other word, the law is available but it has not received any successful conclusion in the court of law due to ambiguity in

mechanism and channels to be used. Lee therefore appeal for a clear claims against the state of origin through a definition of appropriate mechanisms or channels that should explore to institute what would be the sanctions, if any, against States for non-compliance with their obligations. Most importantly, in substantive principles and procedures for compensation, as a result the enforcement of compensation obligations against the State of origin will render justice not only to refugees but also the host state that shouldered the burden partially or in total and it will further avert future refugee flows [4].

Conditions and Challenges of Refugee: The complexity of the problem, as well as the many and vocal interest groups concerned, make it difficult to sort out global refugee issues without answering two main questions. First, who qualifies as a refugee? Second, what are the most pressing issues facing them and the many institutions with which they interact? The precise answers will be to focus on the legal definition of refugee, then backing away for a broader look at those whom the definition encompasses and the issues connected to their situation (UNHCR; 2013). A refugee is defined by the 1951 United Nations Convention 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 of the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country [5].

Refugees have a lawful right to enter a country for the purposes of seeking asylum, regardless of how they arrive or whether they hold valid travel or identity documents. An asylum seeker is a person whose application for asylum or refugee status is pending in the administrative or legal processes. Australia received 13,770 humanitarian entrants in 2009-10. Refugees may have been granted permanent residency with free access to services, whereas those claiming asylum in Australia (after arrival) may have restricted entitlements dependent upon visa categories. These regulations are changing depend on one country to another.

Asylum seekers and refugees will differ in their country of origin, their reasons for leaving, their socio-economic status and healthcare needs. Beyond, there are several reasons that cause people flee their home country such as exposing to violence, threats, conflict, natural disasters, war or political instability. It may be a direct or indirect subject to human rights violations such as torture either physical or psychological, rape or persecution.

Especially, in the situation the threat is directly coming from their home government. After migrated to what is believed to be safe heaven, there are other challenges faced by refugees and asylum seekers. Their life may be totally changed. Some will have spent many years in refugee camps or have spent time in detention. Often they have had little or no healthcare access, either in their country of origin or in the country they subsequently fled to, an experience shown to have negative health outcomes. Many will have come from low-income countries, with high prevalence of diseases such as TB, HIV/AIDS and Hepatitis B. Bad experiences along the way such as rape or tortures by enemy may also be the cause [6]. Asylum seekers and refugees have also lost their housing, income and position in society, employment, social support systems, cultural norms, religious customs and language. Many will have suffered psychological trauma through the death or separation of family. They may not know the whereabouts of family or friends, or even if they are alive. Many will find it difficult to adjust to life in a new country after a prolonged period as a refugee. They may also face hostility when trying to re-settle into new communities. Loneliness and grief are often key issues.

Refugee's Burden to a Third Country: The burden of hosting refugees from other country is a circumstance caused by the state of origin in one way or the other, may it be the consequences of internal conflict or other related issues. To the host nations, accommodating refugees means feeding, clothing, sheltering and allowing them access to social services like education especially their children. Such costs are expensive and high, therefore, not all countries that are fortunate to take refugees can afford the burden of cost. Refugees also pose non-monetary burden to the host nation such as ideology; religion belief, various system of government practicing their home country, while ethnic or cultural different is another challenge of burden in their new society [7].

Regional Impact: The international organizations such as UNHCR, Red Cross and others may partially shoulder part of the cost, at times it was fully shouldered by the host country. Such costs are not considered extra burden to the host nation and therefore, request more spending from the nation purse unknown to their national interest. Subsequently, the host nations can be categorized into two; signatory party to refugees' Convention and non-signatory party to refugees' Convention. A signatory party may wish to cater much for the refugees'

accommodations due to her ratification commitment to the relevant convention and protocol, while non signatory states may consider the accommodation a burden to her national expenditures and decided to do little. Be it a signatory or non signatory state, the costs and their impact on national incentives drive a wedge between the goals of international refugee law and the reality of its enforcement. The former provide refugees with legal entitlements: direct prohibitions on persecution, remedies for displaced individuals and the rule of non-refoulement, which forbids nations to send them back to a situation of persecution [8].

The Compensation to Host State from the State: In an ideal world, nations would neither create nor reject refugees and rules to that effect would be perfectly enforced. However, in our imperfect world, due to numerous reasons, from internal and external forces that require safeguard of nation's sovereignty integrity. The fact that nation armed with the shield of sovereignty respond not only to moral obligations, but to economic and political incentives. It has been argued that solution to the refugee crisis should be looked in a better picture beyond reiterating aspirations, but also, such compensation that entitled by host state. As a result, it will deter a country to merely allow her citizen to get freely move to other state to secure asylum, bearing in mind that a compensation will be paid for burdening the host state, as a result, a peaceful strategic way is likely to be channeled by home state to keep or manage her problem and not allow it to go out of hand. In case of unavoidable circumstances, host state will not reluctant to admit refugees with the aim that the burden of those refugees will not solely rest on her shoulder but home country will bear at least partially. The justification for compensation to host state was based on the fact of limited human and financial resources to do so. While failure to do so will witness several countries that are yet to ratify the refugee law will continue to hold on [9].

State Responsibility under international law treaties and customary law, A state is considered to have violated international law especially, international human rights law in any occasion when it persecutes a subset of its people to such a degree that causes them to have to flee to another state. As a result, the state of prosecution and flew to other state, render a state to liable. In other words, the laws will not cover those who are internally displaced within their home countries, natural disasters and famine, as well as invasions or occupation, for which states bear no responsibility. The relevant treaties and conventions

for this claims include the 1951 UN Convention on the Status of Refugees, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and the ILC's 1980 Draft Articles on State Responsibility, each of which prohibits the kind of persecution that creates refugees. As Luke Lee argued three decades ago, "the country that turns its own citizens into refugees is in violation of all the articles of the Universal Declaration of Human Rights" [10].

Even so, treaty law might be unable to provide a fully satisfactory solution. First, misbehaving nations might not have signed the relevant treaties. Second, the treaties might not have provisions for the kind of damages we describe below and also the terms of the treaties might allow individual nations to withdraw easily from the treaty. However, where treaties fail, customary international law (CIL) may offer a better avenue for claim. One major argument under international law suggests that countries of origin owe compensation not only to the refugees they create, but to the nations that carter for the need and necessity, as well as their own legal and moral obligations must house them. By pushing refugees into other nation. the country of origin has violated the sovereignty of other nations by forcing them to accept people within their borders, as a result, need to pay for such violation. The first case on the theory of liability was articulated in 1891, when US President Benjamin Harris claimed: The banishment, whether by direct decree or by not less certain indirect methods, of so large a number of men and women is not a local question. A decree to leave one country is, in the nature of things, an order to enter another some other. The logic behind country to country claim was cited in the Trail Smelter arbitration [11].

The major obstacle to success in claim by state is the sovereign immunity, a state might be in breach of its obligations and yet immune to claims for money damages. As noted above, state sovereignty and its minions, including immunity, have long been problem to the enforcement of international refugee laws. This point was recently driven home by the ICJ's decision in the Method of determining compensation was also considered to base on market-based approaches to the refugee problem such as proportional sharing of burdens among host nations, tradable quotas held by those nations and compensation for refugees and host nations. However, argument has been rolling regarding whether host nations do have enough reason to share the burdens-sharing. As a result, EU has also faced with similar issue and it cannot engineer a burden- treaty especially, where the nations in question are already sharing burdens and therefore could

make ready tradeoffs [12]. Whether there is a market-style solution through which host nations can be given better incentives to accept refugees, countries of origin can be discouraged from oppressing them and persecuted refugees themselves can be empowered. The international community would give persecuted refugee groups financial claims enforceable against the countries that expelled them.²⁸ The groups could trade those claims to other countries as a way of offsetting the costs of acceptance. The new host nations could then seek to enforce the claims directly, use them to offset any debts that they have. According to Grotius, in International law the principle of respect to sovereignty is enforceable in practice with the use of remedies when a right or obligation is violated. Both municipal tort law and international law share the maxim stated in his work, *DeJure Belli ac Pacis*, in 1646, Grotius stated that 'fault creates the obligation to make good the losses. Oliver argues that in international law, as in domestic law, rights without remedies are illusionary. The underlying principles of respect for rights and obligations and of remedies, link municipal tort law to international law. Therefore, Oliver believed the practice of seeking compensation for damages within the international arena can be applied for the same purpose of ensuring respect for legal rights and obligations. As this has been shared by Judge Huber in the Spanish Zone of Morocco Claims, responsibility is the necessary corollary of a right.

One of the major cases that host nation can claim for compensation under the pretext of the principles of international law was the case has been constantly used to analyze the refugee problem. It can be found in Trail Smelter arbitration, it involved pollution across borders, but has been the tribunal held that "under the principles of international law, ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." The court awarded money damages for immunity a state might be in breach of its obligations [13].

In the case of *Germany v Italy Jurisdictional Immunities* case, which held that Germany might have violated international law (even *jus cogens*) through the actions of its military during World War II, but that no remedy was available to the plaintiffs in the domestic courts of Italy and Greece. If the country being sued is one who has consented (via a treaty) to the jurisdiction of an international tribunal that has been set up to tackle

these issues, sovereign immunity is not an issue since the country has waived it for conflicts within the treaty's scope. But if not, or if no such tribunal exists, then suit is likely to be brought in a domestic court and the question of immunity will be central, as it was in the Jurisdictional Immunities litigation. The possible assertion of sovereign immunity presents. However, the Declaration of Human Rights can radicalize the Jurisdictional Immunities, for instance, "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the constitution or by law" [14].

Future Prospects: Increased attention to the problem of refugee has yet to make it more tractable. Unlike wars between nations, civil wars, particularly when they divide countries along racial, ethnic, linguistic, or religious lines, do not resolve themselves easily or neatly. It leads a situation where people loss live, other flew both internally and outside the country of origin. When states are monopolized by or identified with one ethnic group to the exclusion or marginalization of others, displaced persons easily fall into a vacuum of responsibility in the state. In Burundi, for example, the Tutsi-dominated army does not provide protection for internally displaced Hutu. In the Sudan, the Arab, Muslim government of the north is directly engaged in persecuting the non-Arab, non-Muslim population of the south, 4 million of whom have become displaced. Consider that within Africa, there are more than a thousand ethnic groups divided among artificially created states. With democratic and pluralistic governments few and far between, most internally displaced persons cannot rely upon their government. It should be noted that even when the governments allow in international aid to their displaced populations, they often remain suspicious of such efforts. They fear that the assistance will undermine their own authority. For this reason, governments are often unwilling to allow humanitarian organizations to mount cross-border operations or to negotiate with the rebel forces. This has been the case in Angola, the Democratic Republic of the Congo and Sierra Leone [15].

The proponents of compensation for refugee flows such as Lee, Jennings and van Boven have done so on the basis that the 'burden' of caring for refugees has fallen onto the shoulders of refugees, donor States and asylum States, but the responsibilities of the countries of origin both toward their own citizens now turned refugees and toward the countries of asylum saddled with the burden of caring for refugees are overlooked. Their argument

follow a logical line of reasoning grounded in basic legal concepts, closer analysis reveals inherent difficulties and complexities. These include the difficulty in clearly establishing a cause of action and enforcing any compensation due. Also, the implications of a potential right to compensation from the State of origin must be cemented. Obviously, the right to compensation to serve as a preventative measure for future refugee flows? A greater understanding of these complexities may cast doubt upon the idealism of Lee and others. However, if such a right is to become truly effective in the matter of prevention of refugee flows and of bringing justice to refugees, these must be taken into consideration in order to achieve such goals in the international and refugee law future.

Refugees do not always choose to stay in the place where they first arrive, which opens up the possibility for some ex ante bargaining with other countries. Moreover, the protracted nature of many refugee crises likewise indicates, unfortunately, that there is time to identify potential welfare-enhancing trades. Despite the need to claim for compensation and the preventive solution message sent to the countries of origin, there are number of reasons why no tangible solution had been established to grant major successful decision that has clearly determine an existing case. First, problem arises from the relative lack of international legal statements on the 'right to compensation' and its practical implementation. The earliest General Assembly resolution to mention compensation was in 1948 in reference to the Palestinian refugees stating that 'compensation should be paid for the property of those refugees choosing not to return and for loss or damage to property.

Another issue is the right to respect the state sovereignty and the human right law. It implies at least two important corollary rights of the State, namely, 'a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; [and] a duty of non-intervention in the area of exclusive jurisdiction of other States. As the General Assembly declared in 1970 that:

Every State enjoys sovereign equality. Such equality in rights and duties, members of the international community. .. In particular, sovereign equality includes the following elements...(b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States; (d) the territorial integrity. .. of the State [is] inviolable... (f) each State has the duty to comply

fully and in good faith with its international obligations and to live in peace with other States [16].

For a host state to have *locus standi*, she should 'invoke the violation of one of its substantive interests, namely, an interest protected by a legal right', especially those listed in the UN Declaration on Friendly Relations. Even though no record of State claimed against another for a violation of territorial integrity caused by a refugee flow, the Trail Smelter arbitration (1965), The tribunal found Canada liable under international law for allowing fumes to cross international boundaries, thus causing damage. Lee argues that the particularities in this case apply to States which fail to prevent their citizens from crossing international borders thereby imposing 'burdens' on receiving States without their permission and violating basic international law principles regarding inter-State relations." Some of these 'burdens' may include depletion of resources; 'cultural differences' where a government is 'concerned about maintaining fragile ethnic balances'; and risks to internal security [17].

On the other hand, for the general principles of international law approach is that in recent years, host States have become increasingly more restrictive in their policies of admitting refugees, viewing them as a direct threat to their sovereignty and territorial integrity. As one Malaysian newspaper put it in regard to Vietnamese refugees, 'the crux of the issue is that the flow from Vietnam is no longer just a humanitarian problem. It has become as much a weapon of war as a softening-up raid by waves of bombers. The current reluctance of EU member to restrict admission of Arab and sub Saharan African refugees is another.

According to Garvey, the law of State responsibility reflects the realities of the times and that building on traditional principles of inter-State obligations. ..accommodates the realities of domestic politics in asylum States where the problem of the refugee is perceived today as a clear and present danger. Focusing on the responsibility of the State of origin to other States helps to alleviate the 'perception, based in fact, that major refugee flows in recent years have been encouraged or even instigated by governments of States of origin as premeditated acts of deliberate policy. Emphasis on the State of origin as part of the international burden sharing regime is needed to alleviate the receiving States who are growing increasingly reluctant with their views of refugees as 'social, economic and political burdens [18].

In conclusion, to rely on the general principles of international law is more plausible due to the fact that it does little good to label the State of origin as a persecutor of its own citizens; 'to censure these governments as persecutors is often the surest route to exacerbating a refugee crisis because it diminishes the opportunity to gain their necessary co-operation' by challenging their State sovereignty.

CONCLUSION

Whenever crisis, war or any internal conflict occur, millions is displaced or seek refuge in another nation due to conflict and persecution. The League of Nations appointed the first High Commissioner for Refugees and the international community's treatment of such internal displaced persons or refugee in another nation has come a long way since. This success, however, does not mean that the current system for handling refugees is sufficiently effective or accountable. That there are nearly 55 million forcibly displaced persons around the world is a sufficient evidence of that.

In the case of mass displacement, the international community relies on individual states to shoulder the primary responsibilities of their care and to extend hospitality to those who cannot risk remaining in their own countries. No state is obliged to help any other state that admits refugees. Hence, few, if any, provisions to assist nations that accept refugees and displaced persons are codified by law, leaving the costs of their safe harbor sit on a nation's own balance sheets. As a result, their reception of refugees frequently comes at a great cost and with few, if any, assurances about how long the displaced people will stay in their host nation.

Having well known that the refugee problem is an international one, every state that admits refugees acts on behalf of the international community in defense of fundamental human rights principles. In turn, asylum states are entitled to expect the support of others, whether it is through financial, political, or material aid, or ideally, through more active efforts to mitigate the problems that create refugees in the first place. Tragically, such support is rare and the cost of caring for refugees is disproportionately borne by those nations that are least able to afford it. Most refugee-hosting countries are in politically unstable regions like the Middle East.

Refugees from State B may seek asylum in State A, rather than in States C or D. While it is possible to provide explanations as to why State A has a moral responsibility to the refugees fleeing from State B, in a world of multiple

States, it is more difficult to account for and allocate this responsibility. Where there are several state actors, why should State A have any more responsibility for the flight of the refugees from State B than would States C or D? Furthermore, would state B ready to bear the cost of burden that state A has shouldered. The major argument has been spelled out on the content of moral obligation [19].

There are two possible types of coercion for which the State of origin may be held responsible. The first is 'direct' coercion where the State directly uses 'threat or use of force, violations of human rights and removal or denial of the means of subsistence. The other is indirect which implies 'actions that are applied through subsidiary means to coerce the victims.in according with the Declaration on Principles of International Law on Compensation to Refugees, indirect coercion may also refer to 'deliberate creation or perpetuation of conditions that so violate basic human rights as to leave people with little choice but to flee their state of origin.

The challenges of host country on the state of origin, especially at present when the population of refugee has increased and create a cause of alarm not only to the host nation but the entire world remain unpredictable in the nearest future.

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