At Sea? The State of International Refugee Law

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Instruments of international human rights law are innately sombre. They are sombre because they have been necessitated by tragic histories; sombre because they, realistically, recognise the capacity of men and nations to inflict violations; sombre also because, even as they seek to reduce indignities and suffering, they are aware of their powerlessness to prevent those conditions entirely. The sombreness of international refugee law- a prominent body of jurisprudence which may be seen, variably, as an arm of international human rights law or as an accompaniment to it- has become multiplied in recent years. If Henry Dunant remembered Solferino, our globally interlinked generation will remember Cox's Bazar, the southern border of the United States, and, more indelibly, the Mediterranean. The vital principles of dignified asylum and international protection, which manifest themselves in refugee-law norms such as non-discrimination, non-penalization and non-refoulement, are under threat today, even in the countries which made seminal contributions to the construction of the edifice that is international refugee law. The rule of law has suffered deterioration- while such deterioration is obvious in the case of countries which make refugees of their own people, it is unusually palpable even in the territories which are expected to host the victims of persecution. International refugee law today, therefore, appears as attempting to negotiate a hugely significant and consequential period in its existence. Even as the essential merit of international human rights law as an inscription of human freedoms endures, the old and foundational question about its efficacy has been made urgent by the inhospitable situations which refugee populations are encountering around the world. Is the corpus of international human rights law powerful enough to defend itself? How much of the success of that body is predicated on ethical politics and governance, and how much of it can assert and affirm itself even when faced with the absence of such politics and governance? This question, though unsettling, is important and invigorating. Attempting to answer it, with a focus on international refugee law, is perhaps a timely and educative exercise. It invites a contemplation of the international order; a survey of the general progress achieved in the implementation of international human rights law and of the pathways of neighbouring realms such as international humanitarian law and international criminal law.

The Convention Relating to the Status of Refugees, 1951 (the Convention), despite the initial estimate of a short lifespan, has continued to be relevant for nearly seventy years. That relevance is in large measure aided by the Convention's rootedness in the Universal Declaration of Human Rights (UDHR), which recognises the right to seek and attain asylum in dignity, and which, unlike the Convention, was intended, from its very inception, to forever declare itself to humanity. The general sympathetic spirit of the Convention also benefited from the breadth and acceptance lent to it by the 1967 Protocol. It has been for many decades 'the centrepiece of international refugee protection' and, without doubt, the most visible text in international refugee law. One of the aims of the proposed research is to assist in understanding the evolution of international refugee law and to provide an assessment of its present state. It will begin with an exegesis of the drafting history of the Convention- also of Article 14 of the UDHR- and the intergovernmental discussions which moulded its particular provisions. The research will scrutinize the Convention's implementation over the years, traversing the various refugee crises of the past which it was called upon to address. The additional instruments which attached themselves to international refugee law- such as relevant UN General Assembly resolutions;

the work of the Executive Committee of the High Commissioner's Programme; regional refugee mechanisms in Europe, Africa and South America; the Dublin Regulation; the New York Declaration and the Global Compact- will be examined. This history and legal framework will be used to probe the current tensions which exist in the practice of refugee protection, and to essay an optimistic vision for its future trajectory.

The perspective gained from the study outlined in the above two paragraphs may also be juxtaposed against the issue of internal displacement and statelessness, and the progress of the two major UN Conventions on the latter subject.

Further, the research will seek to assay the strength of the principle of non-refoulement. While the ethical force of that principle is clear, an assessment of its legal strength is important in scenarios where we witness the 'push back' of refugee populations, at land and marine frontiers, by national governments. If the principle of non-refoulement has been recognised, as the UN General Assembly appears to have done, to be a norm of customary international law- with the consequence that even those states which do not expressly subscribe to it are under an obligation to obey it- how much acceptance has that recognition enjoyed? And what are the legal implications for a state when it violates a norm of customary international law? The relevance of this question is immediate even in the context of recent Indian state practice towards refugees. If non-refoulement is indeed a non-violable norm, a state cannot, lawfully, return a refugee simply because it is not a party to the Convention. Reading the drafting histories mentioned previously will prove useful in this context too.

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