

“COMBATANT REFUGEES: ARE THEY INNOCENT UNDER INTERNATIONAL HUMANITARIAN LAW?”

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INTRODUCTION

Protecting Civilians from the worst effects of violent conflict, human rights abuses and persecution lies at the heart of the humanitarian agenda. Central to this endeavour is the attempt to secure respect for the protected status conferred on civilians and displaced people by international law and custom. The laws that safeguards protected people are also obliged to make demands on a range of duty-bearers such as army men and the state authorities. This paper attempts to analyse the meaning and implications of three categories of protected status of people i.e., civilians, combatants and refugees. This is an important area of concern because of the inaccurate usage of these terms found in International Humanitarian Law (IHL). The Protection of Refugees is the most important of all humanitarian concern. The paper introduces a new term called, ‘Combatant Refugees’, and analyses the problems faced by the International community when dealing with such unprecedented visitors in the host state. The paper posits the use of International humanitarian law independent of the customary International law put forth by International Committee of the Red Cross (ICRC) and the refugee convention which concludes the problem of the treatment of refugees, access to asylum, *non-refoulement* and burden sharing of the host state.

PEOPLE IN CONFLICT

The refugee intake crisis has escalated all over the world at such a high rate. During conventional wars and non-international armed conflict, there is supposedly mass exodus of people from a country to the other. People having protected status possess the right to be protected in the state which they are not nationals of. Safeguarding civilians from the worst effects of violent conflict, human right abuses and persecution lies at the heart of the International humanitarian agenda. Both the terms, civilians and combatants have emerged over a long time under peculiar historical circumstances. Civilian status has a long history which has not been uncontested¹. The obligation

¹ Realising Protection: The Uncertain Benefits Of Civilian, Refugee And IDP Status 1 (Sarah Collinson, James Darcy, Nicolas Waddell & Anna Schmidt eds., 2009) *available at*

of the state hosting refugees to distinguish between those who bear arms and those who do not is an ancient one, which has been established in the interpretations and commentaries of the Geneva conventions. Similarly, the concept of *sanctuary*² long predates the modern doctrine of asylum and related refugee protection regimes. In both the cases, the basic pillars of the current legal protection were established in the aftermath of the Second World War and were shaped by that experience. The Additional Protocol to the Geneva Convention 1977 defines Civilians under Article 50 as any person who does not belong to one of the categories of the persons referred to in Article 4A(1),(2),(3) and (6) of the Third Convention and in Article 43 of 1977 Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Also it states that, the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character³. Even before this protocol, the Article 4 of the Geneva Convention, 1949, relative to the Protection of Civilian Persons in Time of War provides a definition of Protected Persons. According to the Convention, Protected Persons are those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals⁴. A clear explanation for this definition is found in the 1958 commentary of the convention⁵. On territory of the belligerent states, the protection is secured under Article 4 to all persons of foreign nationality and to persons without any nationality. In occupied territories, protection is accorded to all persons who are not of the nationality of the occupying State. However, some common categories are excluded from the above mentioned such as Nationals of a State which is not party to the Convention. The position of the nationals of neutral States in occupied territory are considered as 'Protected persons'. The practical application of this case does not depend upon the existence and non-existence of normal diplomatic representation. In such situations they gain dual status of guaranteed protection. One is the status as nationals of a neutral State and the other is their status as protected persons. Thus, the Article 4 forms the most important of all other Articles in the Geneva Conventions-IV because most the other ones apply only to the protected persons

<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5100.pdf>

² Denial Of Sanctuary: Understanding Terrorist Safe Havens 47 (Michael F.Scheuer ed., 2007).

³ *Treaties, States Parties and Commentaries*, International Committee Of The Red Cross, <https://ihl-databases.icrc.org/ihl/WebART/470-750064?OpenDocument> (last visited Feb. 25, 2017).

⁴ *Definition of Protected Persons*, International Committee Of The Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9861b8c2f0e83ed3c1256403003fb8c5/78eb50ead6ee7aa1c12563cd0051b9d> (last visited Feb. 18, 2017).

⁵ *Treaties, States Parties and Commentaries*, International Committee Of The Red Cross, <https://ihl-databases.icrc.org/ihl/COM/380-600056?OpenDocumet> (last visited Jan.20, 2017).

INNOCENCE OF CIVILIANS - A DANGEROUS ONE

Clearly, the significance of civilian status is far from being simply a theoretical and academic question which so far has been discussed. From the works of Slim, Keen & Lee who reviewed the history of attitudes to civilians and the ethical and religious underpinning to IHL,⁶ they consider the popular idea of ‘innocent civilian’, and highlight the problems in this idea. The idea is backed by a good example, which asserts the chances of presumed ‘innocence’ or ‘guilt’. The refugee population in the eastern Zaire in the 1990s is one prominent example of this tendency. The authors review that civilians remain civilians if they take no part in the armed hostilities⁷. In *Les Faites d’arms et de chivalrie (1408)*,⁸ a French Author called Christine de pisan argued for the protection of the poor people on the grounds that of their unarmed status and non-involvement in the high politics : that ordinary people should not bear the penance of that wherein they meddle not themselves. This alludes to the concept of the innocence of civilians, and the idea that civilians should be protected has often subsequently been linked to their innocence. However the more the emphasis is on the ‘innocence’ of the civilians it may carry significant dangers. Foremost, in this view the civilians may be deemed legitimate targets if they are politicised and therefore not ‘truly’ innocent at all. In the case of Afghanistan, the militarisation of the society made it very difficult to draw a clear distinction between civilians and combatants. In the video recorded before the bomb attacks in London in 2005, one of the bombers, Mohamed Siddiq Khan, argued that civilians in the West were directly responsible for the deaths of the Muslims caused by the actions of the Governments they had elected⁹.

REFUGEES - PROTECTED PERSONS

Refugees are civilians whose particular circumstances entitle them in the law and custom to specific forms of protection. They are individuals, or sometimes whole communities, who are unable to secure protection from their own government and who seek international protection from their own government and who seek International protection in the most direct way possible – by fleeing across national boundaries. The role of being a Civilian or Combatant is rather stable but this concept changes after the term ‘refugee’ is brought into the limelight. The 1951 Refugee Convention and its Protocol of 1967 provides definition to the term ‘refugee’ and protection guaranteed to them by the International community. The Refugee Convention builds

⁶ Realising Protection, *supra* note 1, at 14.

⁷Howard Adelman, *The Use and Abuse of Refugees in Zaire-April 1996 to March 1997*, <https://web.stanford.edu/~sstedman/2001.readings/Zaire.htm> (last visited Feb.18, 2017).

⁸ *Id.*, at 28.

⁹ Vikram Dodd & Richard Norton-Taylor, *Video of 7/7 ringleader blames foreign policy*, THE GUARDIAN(Sept. 2, 2005), <https://www.theguardian.com/uk/2005/sep/02/alqaida.politics>.

on the Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries. This term became popular mainly after the Mass evacuation, forced displacement, expulsion, and deportation of millions of people which took place across most countries involved in World War II. A number of these phenomena were categorised as violations of fundamental human values and norms. This mass exodus of people also marked the largest movement of refugees in the history which had been caused by the hostilities, or enforced by the former Axis and the Allied powers based on the ideologies of race and ethnicity, culminating in the post-war border changes enacted by the International settlements¹⁰. The meaning of refugee is always interpreted in submissive manner opposed to how civilians and combatants are viewed. A person seeking refuge is conceptually treated as a civilian by the authorities of the host country but this varies in actual practice. This makes it clear that all the three terms have become intertwined in usage and wrongful interpretations of which are possible, arise out of the misleading usage. During mass influx of asylum seekers from a country because of the armed conflict persisting there, it has been recorded that almost all people who have been living near the areas of conflict and violence tend to flee the country¹¹. No common civilian would live in the region where there is armed conflict or even chances of bloodshed in the near future. There are chances for genuine civilians to stay during conventional wars because of their extreme patriotism which they display but still the numbers are extremely low. The Asylum seekers are obliged to show a peaceful and humanitarian character in the host country to gain the refugee status. This kind of obligation is an International humanitarian legal requirement, whereby the host state needs to assure the evidence that the asylum seeker displays a civilian like character. The host state evinces this requirement to all the people fleeing with utmost respect. But this may not be the case every time; combatants who have been actively using arms in their country may enter a host country to take temporary refuge. Most of them will not be to cause mayhem in the host country but some refugees may take advantage of the hospitality of the receiving State.

AD-HOC PROTECTION OF AFGHAN REFUGEES

Afghan refugees in Pakistan and Iran represent by far the largest group of refugees to be protected on the basis of ad-hoc national arrangements. Although Iran is a signatory to the 1951

¹⁰ Neil Durkin, *Our Country's Greatest Achievement*, BBC NEWS (Dec. 9, 1998), https://web.archive.org/web/2013111114857/http://news.bbc.co.uk/2/hi/special_report/1998/12/98/50th_anniversary_declaration_of_human_rights/231204.stm.

¹¹ UNHCR, *Global Trends: Forced Displacement In 2015*, 30 (2016), *available at* <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html>.

Convention and 1967 protocol, it chose to give Afghans the status of *mohajerin*, meaning - people seeking asylum for religious reasons. As, their protection and assistance was dependent on whatever benefits might be offered to them on the basis of hospitality, rather than emanating from Iran's treaty obligations. Pakistan not being a signatory to the 1951 convention or any of the International refugee instrument, and like Iran has regarded its hospitality to Afghans as a religious and humanitarian duty, rather than a legal obligation. By the end of the 1990s, partly in response to a decline in international support for hosting Afghan refugees, both countries had started hardening their approach to refugee protection. After 1992, the Iranian Government ceased to grant asylum automatically to asylum seekers from Afghanistan and after 1997 it stopped registering new arrivals altogether. As a result of that, many Afghans in the country were supposedly illegal aliens. Around 90,000 refugees were deported in 1998, and 100,000 in 1999. In Pakistan, during this time, most of the Afghans who arrived during the 1990s were neither registered nor issued with identity documents. They were exempted from Pakistan's immigration laws and thus from deportation as illegal immigrants¹², but from January 2000 Afghan asylum seekers were no longer offered automatic asylum and could no longer claim exemption from the country's Foreigners Act. The principle of distinction which is widely been used to differentiate civilians and combatants is by whether they are carrying arms when they are crossing the country's border But this is seemingly an outdated strategy for the process of distinction. The country is prone to view refugees as anti-nationals if they suspected to be a hazardous for the national-security. But the state cannot stop the inflow of refugees because of the Principle of *Non-refoulement* which is legally binding on the States of the world.

THE RELATIONSHIP BETWEEN NON-REFOULEMENT AND 'COMBATANT REFUGEES'

Non-refoulement is a principle of customary International law prohibiting the expulsion, deportation, return or extradition of an alien to his state of origin or another state where there is a risk that his life or freedom would be threatened for discriminatory reasons. This principle has a stand in the International level because it has been mentioned in the Article 33(1) of the 1951 Convention relating to the Status of Refugees. Article 31, 32 and 33 of the Refugee Convention 1951 are about the unlawful prohibition of expulsion of the refugees in the contracting state. In the Article 33 relating to the Prohibition of Expulsion or return (Refoulement), the provision for being not extraditing may not be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by final judgement of a particularly serious crime, constitutes a danger to the

¹² Sarah Collinson & Others, *supra* note 1, at 33.

community of that country¹³. The only step which can be taken to counter the unknown combatant inflow is to identify and distinguish between civilians and combatants during cross border movement due to war or conflict period and provide internment to the combatants who are unwilling to go back to their country. This kind of treatment is fair enough and supposedly a better option than extraditing them to the country which they fled. But many aspiring 'Combatant refugees' loose arms and gain confidence of the army of the host nation and slowly change themselves as civilians by not engaging in armed conflict with anyone. As the process of internment only causes extra burden to the contracting state, this mechanism also is short lived. These Combatant Refugees enter the country as asylum seekers who display a very civilian behaviour. As there is no other efficient mechanism to find out whether the person is some sought of terrorist or infiltrator to the host country, there is no chance of serendipity which may occur because of that.

DISCUSSIONS

With regard to the misconceptions existing in the definition of Civilians in the Article 50 of the 1977 protocol of the Geneva Convention, the present study ascertains that the use of the exception in the protocol: person may be considered as civilian if there is a doubt, shall work only for individual civilians but not for mass influx of civilian population during Conventional Wars and Non-international Armed conflicts. The Protection of Refugees is provided only because of the 'Protected Person' status gained under the IHL. Since, it is not fully permissible to accept some of them as true refugees, only Ad-hoc protection has been provided Afghan Refugees in Pakistan and Iran. The paper analyses the relationship between *Non-refoulement* and 'Combatant Refugees', after dwelling deep into the constrains of the applicability of the customary principle, the researcher has recommended the use of the principle without any partiality towards all plausible civilians. And asserts the use of internment process for all Combatants who may pose a severe threat to the security and integrity of the host country. Hence, the researcher has suggested that the Protection of truly deserving refugees irrespective of whether they are civilians or combatants must be safeguarded by using implying proper interpretation of the International Humanitarian Law.

¹³ *The Refugee Convention 1951*, United Nations Of High Commisissor For Refugees, <http://www.unhcr.org/3b66c2aa10> (last visited Jan.25, 2017).
