CHANGING CONTOURS OF REFUGEE DEFINITION WITH RESPECT TO CRITICAL ANALYSIS OF 1951 REFUGEE CONVENTION

DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF LL.M

(HUMAN RIGHTS)

UNDER THE GUIDANCE OF Prof. (Dr.) Venkata Rao

ACADEMIC YEAR 2011-2013

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

BANGALORE

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CERTIFICATE

This is to certify that the dissertation titled ***"Changing Contours of Refugee Definition with respect to Critical Analysis of 1951 Refugee Convention"*** submitted by **KAJORI BHATNAGAR, Id 474, II LLM** in partial fulfillment of the requirements for the award of the degree LL. M (Human Rights Law), is a product of the candidate's own hard work carried out by her under my guidance and supervision.

The matter embodied in this dissertation is original and has not been submitted for the award of any other degree in any other university.

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DECLARATION

I, KAJORI BHATNAGAR, do hereby declare that this Dissertation titled ***"Changing Contours of Refugee Definition with respect to Critical Analysis of 1951 Refugee Convention"*** is the result of bona fide research undertaken by me in partial fulfillment of the LL.M. programme at National Law School of India University, Bangalore, India. This Dissertation has been prepared by me under the guidance and supervision of ***Prof (Dr.) Venkata Rao.***

I hereby declare that this Dissertation is my original work and relevant materials taken from the other sources have been cited properly at appropriate places and which are duly acknowledged.

I further declared that this work has not been submitted either in part or whole for any degree or any other University or like institution.

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ACKNOWLEDGEMENT

I would like to express my sincere gratitude to Prof. (Dr.) Venkata Rao and owe my foremost regards to him for giving me an opportunity to carry out this project work under his guidance. This work would not have been possible without his invaluable support and thought provoking comments. It is due to his patient guidance that I have been able to complete the task.

I also extend my gratitude to the Librarian and the Library staff who made available the required materials within time. I am indebted to all those who guided me while doing the research work. Their valuable contributions have played a vital role in the completion of this project.

Though I have tried out best at the same time I know that there is nothing called perfection so I would like to have all valuable suggestion for future

I dedicate this project to all the people who believe that hard work and creativity needs protection and encouragement.

Kajori Bhatnagar

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ABSTRACT

This thesis elaborates the refugee definition as described under Refugee Convention 1951 and 1967 Protocol. In this project article it has been shown as to how with changing circumstances the existing definition of refugee is improvised to include different phenomenon. Also there has been explicit mention of comparative analysis between Convention and the regional treaties. There are people who are compelled to seek refuge due to their sexual orientation or due to evil practices that are carried on in the name of religion. In such a case the term persecution has been given a broader meaning to include all such activities also that are not mentioned in the existing convention. Furthermore importance of having a national framework is elucidated along with suggestions of having durable solutions for refugee problems.

RESEARCH METHODOLOGY

AIM AND OBJECTIVE OF THE STUDY

The aim of this dissertation to understand changing contours of definition of refugee under refugee convention 1951 and 1967 protocol and its implication to contemporary problems.

SCOPE AND LIMITATIONS

The scope of the project is limited to comparative analysis of three regional treaties that are of United States of America, European Union and African Continent in chapter II. While in chapter III, two case studies, the one that deals with people who seek asylum due to their sexual orientation and other who face wrath of community because they belong to particular group in society and are discriminated against in name of custom and tradition are discussed. Specific provisions of Model law on refugees and constitutional aspects are explained.

METHODOLOGY

The methodology adopted is largely analytical and descriptive. Reliance has been placed largely on secondary sources like articles.

RESEARCH QUESTIONS

Whether the regional treaties are improvement over the 1951 Refugee Convention?

Whether there is lacunae in 1951 Convention and 1961 Protocol?

Whether the above mentioned convention is in sufficient to comply with present problem of discrimination on basis of sexual orientation and gender?

What are the considerations usually present while using this defense in a criminal case?

Whether Indian law is sufficient to deal with refugee problems?

Whether the durable solutions that deal with refugee solutions are sufficient to deal with refugee problems?

HYPOTHESIS

The 1951 convention along with 1967 Protocol were basically drafted to deal with refugee issues after World War II. There is ardent need of change in this convention with changing scenarios in world community at large.

MODE OF CITATION

A uniform system of citation is followed throughout in the contents.

CHAPTER I

INTRODUCTION

The 21st Century has witnessed different forms of migration and new refugee situations all facilitated by globalisation. The rights of refugees are of growing concern as the international community strives to maintain international peace and security which is the prime objective or raison d'être of the United Nations. Mass exoduses of people can pose a threat to international peace; therefore the organ charged with presiding over refugee matters is the Office of the United Nations High Commissioner for Refugees. Many complexities surround refugee law and the issues involving refugees continue to grow in magnitude and convolution. Human rights have developed at a rapid pace over the past sixty years impacting profoundly on the renovation of International Law. Refugee Law may be regarded as a remedial or analgesic branch of Human Rights Law with its aim being to ensure that the rights of the individual, although not protected by their State of nationality, are protected elsewhere in the international community. Essentially, refugee law is premised on the concept that refugees are entitled to claim the benefit of a premeditated and coherent system of rights. This body of law seeks to alleviate the suffering of victims of persecution and acts as a surrogate form of protection in the absence of national protection, thus conferring refugee status upon an individual

Chapter II of the dissertation deals with International conventions and Regional treaties concerning refugees. The study herein analyses the impact of European, African and American integration in asylum and immigration matters on changes in the integrative principles of refugee policy. The Fundamental Principles of 1951 Convention are discussed. Amongst the principles special emphasis is given to the most fundamental protection owed to a refugee i.e. protection against refoulment to a territory where the refugee's life or freedom would be threatened on a Convention ground. It is

this protection, and the protection of other rights as set out in the 1951 Convention, which is the objective of the exercise of refugee status determination. Then comparative analysis of 1951 Convention with the 1980 Refugee Convention of United States of America is done. This act came into being after the ratification of 1967 Protocol of Refugee Convention of 1951. This further enhanced the definition of refugees. Certain key provisions of the convention entail, "Incorporation of the Refugee Convention's definition of a "refugee"; Creation of a legal framework for the admission of refugees; It created convenience for a "normal flow" of refugees while also preserving the president's authority to admit, after consultation with Congress, refugees of special humanitarian concern in emergency situations; The most important phase in it was codification of principle of *non-refoulment* in domestic law, the cornerstone principle of refugee protection, by making mandatory the withholding of deportation of a person to a country where an individual's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Further the researcher has dealt with comparative analysis of 1951 Convention with the European Union. Reference has been made to *The Dublin Regulation* that determines which Member State is responsible for examining an individual asylum application. *The Asylum Procedures Directive* that lays out minimum standards for asylum procedures, making an important contribution to international law as this issue is originally not regulated by the 1951 Refugee Convention. *The Qualification Directive* which introduces the form of subsidiary protection, complementing the 1951 Refugee Convention, to be granted to people facing risks of serious harm. Reference has also been made about 1997 Treaty of Amsterdam that finally transferred asylum matters to Community competence. Further comparative analysis of 1951 Convention with the OAU 1974 Convention is done. The OAU Convention, Preamble Part 9, recognizes the UN Convention as "*the basic and universal instrument relating to the status of refugees*" and defines itself, in Article

VIII(2), as "*the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees*", thus not superseding but supplementing the UN Convention. In other words the researcher has tried to emphasize as to how the regional treaties have brought about additional attributes to bring forth improvement over the international convention.

Chapter III includes deliberations about refugee definition as described under Refugee Convention 1951 and 1967 Protocol. In this chapter it has been shown as to how with changing circumstances the existing definition of refugee is improvised to include different phenomenon. There are people who are compelled to seek refuge due to their sexual orientation or due to evil practices that are carried on in the name of religion. In such a case the term persecution has been given a broader meaning to include all such activities also that are not mentioned in the existing convention. Also this chapter has explained the concept of having a well founded fear of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion; and is unable or unwilling to avail the protection of the country, or to return there for fear of persecution. Reference has been made to Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. Further researcher has also discussed about environment refugees and has tried to decipher as to whether this could be justified ground for seeking asylum.

Chapter IV chapter describes the situations of refugees in India. The chapter begins with a statement that India has mixed record on status of refugees. It also does not have any national legislation that deal with the situation of refugees. In absence of any such framework the legal status of individuals recognised as refugees by the Government of India has been uncertain. It has been observed that even though India has been home for a large number and variety of refugees throughout the past, it has dealt with issue of

refugees on bilateral basis. India has been following a refugee regime which generally confirms to the international instruments and further confers rights on two categories, namely citizens and all people. While the Supreme Court of India has held impetus to rights of the refugees, various High Courts in India have also liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High Commissioner for Refugees (UNHCR) as playing an important role in the protection of refugees. With the help of a case study, the researcher has also tried to explain the situations where due to laxity in law certain immutable conflicts can arise.

Chapter V In concern with policy issues in lieu of refugees, the focus in this chapter has been on provision of durable solutions to refugees. Millions of refugees around the world presently have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection. There is a need for more coherence by integrating voluntary repatriation, local integration and resettlement, whenever feasible, into one comprehensive approach, implemented in close cooperation among countries of origin, host States, UNHCR and its humanitarian and development partners, especially NGOs, as well as refugees. As an interim response, the promotion of self-reliance of refugees is an important means to avoid dependency, take advantage of the initiative and potential contributions of refugees, and prepare them for durable solutions. Concerted action is called for, in particular, to resolve protracted refugee situations through a well-balanced package of support for the different durable solutions envisaged.

It is observed that there is no explicit international norm that obliges states to grant asylum and consequently to accept refugees into their territories. It is asserted that refugee problems demand durable solutions not only because of the cost to the international community, the burden on the host and the waste of the refugee lives but because in their second, third and fourth

generation refugees can be violent and destabilizing factor. Refugees are caused by government action and achieving durable solutions is dependent on political will, diplomacy and statesmanship of governments.

The researcher finally concludes by establishing the importance and need of having a refugee regime in today's scenario.

CHAPTER II

INTERNATIONAL CONVENTIONS AND REGIONAL TREATIES CONCERNING REFUGEES

The first section of this chapter deals with some fundamental principles of the 1951 Geneva Convention. The study further analyses the impact of European, African and American integration in asylum and immigration matters on changes in the integrative principles of refugee policy. The main focus in this regard would be to give a holistic view of regional treaties in respect of commonality and divergence in reference to the international convention.

Regional paradigms have the potential to raise standards and address issues that are specific to the region. The development of a coherent and comprehensive system across a region can improve and ensure access for those in need of protection. Common procedures can enhance efficiency, speed, quality and fairness of decision-making, while uniform and transparent standards of treatment can promote accountability. New substantive law can also be adopted, addressing additional matters such as gender considerations and the special needs of certain groups. On a practical level, harmonization can facilitate cooperation in the areas of training and expert knowledge, promoting greater resource management and ensuring coherence with other policies including border control and fighting transnational criminal activity. But there are also potential dangers and drawbacks associated with harmonization. Furthermore it has also been observed that regional regimes have shown certain improvement over the existing international regimes with the regional initiatives having certain aspects that are more cohesive to the refugee setup than the international convention.

FUNDAMENTAL PRINCIPLES OF 1951 CONVENTION

The refugees or the stateless people are those people who are forced to leave their countries due to boisterous circumstances that have constant threat to their as well as in some cases to their family's life and well being owing to their allegiance to a particular community, group, nationality, race, gender etc. They are owed international protection precisely because their human rights are under threat. The most fundamental protection owed to a refugee is protection against refoulment to a territory where the refugee's life or freedom would be threatened on a Convention ground. *Non-refoulment* is guaranteed, inter alia, by Article 33 of the Convention.[1] It is this protection, and the protection of other rights as set out in the 1951 Convention, which is the objective of the exercise of refugee status determination. Human rights principles are to be kept as basis for the interpretation of the definition of who is owed that protection. Indeed, the natural complementarity between refugee protection and the international system for the protection of human rights has been expressed and elaborated in a number of UNHCR documents and Conclusions of the Executive Committee. When attempting to apply the Article 1 criteria in the course of individual asylum procedures, decision-makers should have regard to all the relevant circumstances of the case.[2] They need to have both a full picture of the asylum seekers personality, background and personal experiences,[3] as well as

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[1] The principle of non-refoulement is also codified, explicitly or by interpretation, in Article 3 of the 1984 United Nations Convention against Torture, in Article 7 of the International Covenant on Civil and Political Rights, and in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is considered by many authorities to be a norm of customary international law, as evidenced in a number of conclusions or resolutions of international bodies, including Executive Committee Conclusions No. 25(b) and 79(i) and in Article 2 of the Declaration adopted at the Fourth Seminar of Arab Experts in Asylum and Refugee Law held in Cairo in November 1992

[2] UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, available at: http://www.refworld.org/docid/3b20a3914.html

[3] UNHCR Handbook paragraphs 34 to 50. See also the EU Joint Position on the Harmonised Application of the Definition of the term "refugee" in Article 1 of the Geneva Convention

an analysis and up-to-date knowledge of all the relevant objective circumstances in the country of origin.[4] In determining refugee status, the issues of the burden and standard of proof arise, as also does the related question of assessing the credibility of the individual. There are certain principles that are exclusive of UNHCR handbook that have to be referred to such as:[5]

- In accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion – in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of ***relevant facts*** so that, based on the facts, a proper decision may be reached. The asylum-seeker must also be provided an adequate opportunity to present evidence to support his or her claim. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the evidence is shared also by the decision-maker. In the context of exclusion and cessation, it is the authorities who assert the applicability of these clauses; therefore the onus is on them to establish the reasons justifying exclusion or cessation.
- The standard of proof for establishing a ***well-founded fear of persecution*** has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. It is generally agreed that persecution must be proved to be "reasonably possible" in order to be well founded.
- The particular circumstances of asylum-seekers often mean that they encounter obstacles in obtaining corroborative evidence and sometimes in providing evidence themselves, the assessment of the credibility of refugees may in some

[4] This note on the interpretation of Article 1 of the 1951 Convention addresses directly issues of interpretation which arise in the context of individual status determination. The issue of group determination under the Convention is not addressed here. This should not be taken to mean that the Convention does not or cannot apply in situations where individual status determination is not done. UNHCR Handbook, paragraph 44

[5] Supra note 2

cases be particularly difficult. Inability to remember all dates or minor details, minor inconsistencies, insubstantial vagueness or incorrect statements which are not material to the determinative issues should not be used as decisive factors in determining credibility, though they may be taken into account, together with other factors, in the overall assessment on credibility. Credibility is established where the applicant has presented a claim which is coherent and plausible and is therefore capable of being believed. Once the examiner is satisfied with the applicant's general credibility, the latter should be given the benefit of the doubt as regards those statements for which evidentiary proof is.

It is to be noted that these are certain general features so numerated in the convention, especially in relation to article 1 that deals essentially with the definition of refugee. The definition clause itself has certain attributes that have been explained consequently in the progression of the chapter. Along with these features there are certain exclusive features that have been mentioned in articles 1 D, E and F such, as persons who are at present receiving from organs or agencies of the United Nations other than the UNHCR protection or assistance, a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of nationality of that country, any person with respect to whom there are serious reasons for considering that he/she has committed a crime against peace, a war crime or a crime against humanity or has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee and has been guilty of acts contrary to the purposes and principles of the United Nations. Further this convention would cease to apply under article 1 C if the person concerned has voluntarily re-availed himself of the protection of the country of his nationality; or having lost his nationality, has voluntarily re-acquired it or has acquired a new nationality and enjoys the protection of the country of his new nationality or has voluntarily re-established himself in the country which he fled or outside which he remained owing to fear of persecution or can no longer because the circumstances in connection with which he has been recognised as a refugee

have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality provided that this shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.[6]

COMPARATIVE ANALYSIS OF 1951 CONVENTION WITH THE 1980 REFUGEE CONVENTION OF UNITED STATES OF AMERICA

USA has been one of the favourite refugee 'destinations' in the world. It has not only ratified the core refugee treaty. But with passing of Refugee Act of 1980 it has brought its domestic regime in conformity with the international obligations. This legislation can be cited as one of the most comprehensive U.S. law concerning refugee admissions and resettlement. This act came into being after the ratification of 1967 Protocol of Refugee Convention of 1951. This further enhanced the definition of refugees. In the Refugee Act of 1980, Congress gave new statutory authority to the United States' longstanding commitment to human rights and its traditional humanitarian concern for the plight of refugees around the world. It is further accentuated that this act was an attempt to assure greater equity in the treatment of refugees and more effective procedures in dealing with them. The Act also sought to assure full and adequate federal support for refugee resettlement programs by authorizing permanent funding for state, local and voluntary agency projects.[7] Certain key provisions of the convention entail, "*Incorporation of the Refugee Convention's definition of a "refugee"; Creation of a legal framework for the admission of refugees; It created convenience for a "normal flow" of refugees while also preserving the president's authority to admit, after consultation with Congress, refugees of special humanitarian concern in emergency situations; Establishment of the Office of Refugee Resettlement ("ORR") in the Department of Health and*

[6] id

[7] Edward M. Kenndy, Refugee Act of 1980 International Migration Review, Vol. 15, No. 1/2, Refugees Today, pp. 141-156, by Centre for Migration studies Ney York,1981

Human Services to administer refugee assistance programs; It further provided that refugees receive up to three years of financial and medical assistance; It also established the legal status of asylum and the legal framework for the modern U.S. asylum system, allowing refugees with a well-founded fear of persecution to remain legally in the United States; The most important phase in it was codification of principle of non-refoulement in domestic law, the cornerstone principle of refugee protection, by making mandatory the withholding of deportation of a person to a country where an individual's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion."[8]

THE DEFINITIONAL CHALLENGE IN THE CONVENTION REGARDING CONCEPT OF REFUGEE

The inconsistencies in the definitional perspective come to limelight with the dilemma in concept of persecution on basis of belonging to a specific social group. It has already been mentioned that the definition of refugee was very similar to the definition of refugee mentioned in the 1951 international definition. To be eligible for asylum, applicants must show that they have suffered persecution or have a well-founded fear of persecution on account of one or more of the protected characteristics of the refugee definition, including membership in a particular social group. The interpretation of the "on account of" (or "nexus") and "particular social group" elements in U.S. law has posed particular challenges for refugees fleeing gender-based harm, such as rape, forced marriage, honour killings, domestic violence, and female genital mutilation, as well as for some refugees who have fled on account of their sexual orientation or gender identity. Refugees fleeing these forms of harm, whose persecutors often do not articulate the reasons for their actions, can face difficulties in obtaining direct evidence that their persecutors harmed them on account of their gender or other protected grounds. Gender-based asylum

[8] Renewing U.S. Commitment to Refugee Protection: Recommendations for reform on 30th anniversary of Refugee Act, Human Rights First, march 2010

claims have also often borne the brunt of misunderstandings of the concept of "social group," and given rise to misplaced concerns about defining large groups of people within a society as "particular social groups" for asylum purposes. Despite the pressing need for legal guidance on the particular social group and nexus elements, the Departments of Homeland Security and Justice have yet to act in promulgating long overdue regulations, though they have indicated an intention to re-launch the rulemaking process in a December 2009 announcement in the Federal Register. In 2000, the then-INS issued a proposed rule—which has never been finalized—that sought to clarify these aspects of the refugee definition, particularly as they relate to gender-based harms. Meanwhile, without that guidance, Immigration Judges and the Board of Immigration Appeals (BIA) have issued inconsistent and, in some cases, incoherent decisions, further convoluting the law and making it more difficult for asylum applicants with gender-based claims to prove that they fit within the refugee definition. Under decisions issued by the BIA in 2007 and 2008, asylum applicants who base their claim on their membership in a particular social group, in addition to providing evidence that the members of the group share a common immutable characteristic, have also been required to show that the group is both "discrete" and visible to society at large such that they can be distinguished from others in the eyes of the persecutor.[9]

As a result of the ten-year delay in resolving these issues, asylum applicants have been denied protection and returned to the hands of their persecutors, or have remained in legal limbo, postponing their ability to reunite with their children and bring them out of harm's way. For examples, after fourteen years of legal proceedings, the highly publicized case *Matter of R-A-82* was finally resolved on December 16, 2009, when an Immigration Judge granted Rodi

[9] Liebowitz H. Arnold, the refugee act of 1980: problems and congressional concerns, Annals of American Political and Social Science, Vol.467, Global Refugee Problem: U.S. and World Response, pp.163-171, by Sage Publications, Inc. in association with the American Academy of Political and Social Science, available at http://www.jstor.org/stable/1044935.

Alvarado asylum. Ms. Alvarado had fled her home country of Guatemala in 1995 after suffering over a decade of brutal domestic violence while receiving no protection from the Guatemalan police or courts, though she repeatedly asked for help. Finally achieving resolution in this particular matter is relief for Ms. Alvarado. However, the real struggle in this kind of scenario is to ascertain a clear standard of protection for other female asylum seekers like Ms. Alvarado and in other cases in which particularly vulnerable individuals are fleeing persecution due to their membership in a particular social group continues. [10]

Two basic regulatory or statutory fixes would ameliorate many of these problems. First, direct or circumstantial evidence should be admissible to fulfil the nexus requirement, including evidence that the persecution suffered fits into a generally accepted pattern of violence in the home country. This framework is consistent with the Supreme Court's nexus analysis in *INS v. Elias-Zacarias*. Second, the definition of particular social group should be guided by the "fundamental and immutable characteristics" standard, as articulated in the BIA's precedential decision Matter of Acosta, without additional requirements. This standard requires that members of a particular social group demonstrate that they share a common characteristic they either cannot change, or should not be required to change because the characteristic is fundamental to their identity or conscience.[11] Reversion to the BIA's long-established and well-regarded Acosta standard would eliminate the need for a particular social group be "socially visible," a requirement that is posing severe obstacles to a broad range of meritorious asylum claims, and has been criticized by federal court judges such as Judge Posner of the Seventh Circuit Court of Appeals, who recently observed that "if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible."

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[10] *Supra n.* 2

[11] id

RECOMMENDATION: CLARIFICATION IS REQUIRED ON THE "SOCIAL GROUP" BASIS FOR ASYLUM

„ The Departments of Justice and Homeland Security should promulgate regulations clarifying the interpretation of the "particular social group" category and "nexus" requirement. These regulations should provide that the definition of a "particular social group" is guided by the "fundamental and immutable characteristics" standard without additional requirements, and that "nexus" can be established by either direct or circumstantial evidence. If these changes are not made promptly through regulation, Congress should pass legislation.

COMPARATIVE ANALYSIS OF 1951 CONVENTION WITH THE EUROPEAN UNION

European states have a long tradition of providing a safe haven to the persecuted. By the year 1999, the EU Member States had committed themselves to create a Common European Asylum System to tackle the increasing asylum challenges at the European level.[12]

Over the following years, the EU has adopted a number of important legislative measures with a view to harmonise the Member States' differing asylum systems. *The Dublin Regulation* determines which Member State is responsible for examining an individual asylum application. *The Reception Conditions Directive* sets out the minimum conditions for the reception of asylum-seekers, including housing, education and health. *The Asylum Procedures Directive* lays out minimum standards for asylum procedures, making an important contribution to international law as this issue is originally not regulated by the 1951 Refugee Convention. *The Qualification Directive* introduces the form of

[12] Lineback, Charlotta. Refugees and the European Union, Department of Political Science, Lund University, Spring 2005.

subsidiary protection, complementing the 1951 Refugee Convention, to be granted to people facing risks of serious harm.[13]

The EU has also set up a *European Refugee Fund* to provide financial support to the Member States to allow their asylum systems to work efficiently. Eurodac, a community-wide information technology system has been launched to compare fingerprints and to determine whether an asylum-seeker has already lodged an asylum claim in another Member State. [14]

The EU has an important role with respect to asylum and resettlement issues inside and outside the Union. EU law and practice considerably influences the development of refugee protection mechanisms in many other countries. EU institutions such as the European Council, the European Commission, the European Parliament and the European Court of Justice have legislative, executive and judicial powers in areas directly relevant to UNHCR's mandate. To discuss the progression of refugee protection in EU it is imperative that the evolution of refugee protection under EU is discussed.

EVOLUTION OF REFUGEE PROTECTION UNDER EUROPEAN UNION

The evolution of refugee protection in Europe cannot be fully understood without taking account of the broader context to the development of the European Union framework. One of the most notable developments is that EU has developed enormously from a loose web of trade relationships, into a more robust regional system concerned with matters that go beyond economic union.

Economic priorities: With the adoption of the first Schengen Agreement on freedom of movement in 1985 came the imperative for cooperation on immigration and asylum matters and the genesis of the idea that refugee

[13] Arimatsu, Louise and Samson Giles Marika, The UN Refugee Convention at 60: The Challenge for Europe, International Law, March 2011

[14] id

protection or asylum policy should be managed on a Europe-wide basis. Over the following years member states at the intergovernmental level adopted a series of measures that were primarily concerned with limiting the flow of immigration. Measures dealing with 'asylum-shopping', the introduction of expedited procedures or 'manifestly unfounded' asylum claims and agreed interpretations of international commitments all suggested that refugee issues had become part of a larger immigration agenda, dominated by economic priorities.

Community Jurisdiction: As the European Union moved towards greater integration during the 1990s, proposals were advanced to move asylum from being a matter of intergovernmental cooperation to Community jurisdiction, initially without much success. Throughout this period the EU continued to adopt a series of restrictive measures that were intended to disqualify asylum applications in a summary fashion, and these were supplemented by cooperative measures to facilitate expulsion of failed asylum-seekers and illegal immigrants. The 1997Treaty of Amsterdam finally transferred asylum matters to Community competence. With this move, the Council of Ministers was given the authority to adopt legally binding instruments of harmonization while the European Court of Justice was extended a measure of judicial oversight in respect of asylum matters.

Regional Framework: In May 1999 the entry into force of the Amsterdam Treaty, which requires that EU legislation comply with the Refugee Convention and its protocol as well as other relevant treaties, initiated the first phase of the creation of the Common European Asylum System (CEAS).Its aim was to harmonize the legal frameworks of member states on the basis of common minimum standards. While the focus of this paper is on the development of refugee protection within the EU, the activities of the Council of Europe (CoE) in the sphere of refugee protection must also be acknowledged, since EU member states are also states parties to the CoE and are bound by the decisions of the ECHR. Since the late 1950s, the CoE has adopted numerous treaties on

refugee protection that have indirectly contributed towards development of the law within Europe. Since taking office in 2005, the Commissioner for Human Rights has announced that the protection of the human rights of asylum-seekers and refugees has been designated a priority area. But perhaps the most progressive development in recent years has been the completion of the draft convention on preventing and combating violence against women and domestic violence, transmitted to the Council of Ministers in December 2010.If adopted as proposed, this will represent the first treaty which expressly recognizes gender-based violence as amounting to persecution within the meaning of the Refugee Convention towards development of the law within Europe. Since taking office in 2005, the Commissioner for Human Rights has announced that the protection of the human rights of asylum-seekers and refugees has been designated a priority area. But perhaps the most progressive development in recent years has been the completion of the draft convention on preventing and combating violence against women and domestic violence, transmitted to the Council of Ministers in December 2010.If adopted as proposed, this will represent the first treaty which expressly recognizes gender-based violence as amounting to persecution within the meaning of the Refugee Convention.

THE COMMON EUROPEAN ASYLUM SYSTEM

Over the last decade the EU has adopted significant legislation as part of the CEAS, under the umbrella of three consecutive five-year programmes – or roadmaps – comprising the Tampere (1999–2004), Hague (2004–09) and Stockholm (2009–12) Programmes.

In mid-1980s five EU Member States (Germany, France, the Netherlands, Belgium and Luxembourg) expressed the desire to abolish the internal borders among them in order to facilitate the completion of the single market. They argued that the abolition of the borders necessitated the introduction of the so-called 'compensatory measures' that included strengthening external border controls and cooperation in the field of asylum and immigration. Thus, in 1985

these countries signed the Schengen Agreement that established common rules regarding visas, the right to asylum and checks at external borders. A further convention implementing the agreement was signed in 1990 and took effect in 1995. The Schengen Agreement was initially concluded outside the EU Treaty framework and was only incorporated into the EU *acquis* following the signing of the Treaty of Amsterdam in 1999.

Again outside the Treaty framework, a larger number of governments, including the United Kingdom (UK), were negotiating a Convention aimed at designating a single country as responsible for the handling of an asylum application. The goal of this Convention was to prevent the phenomenon of 'asylum shopping' whereby asylum seekers made multiple application claims in different Member States following their rejection in another state. The Dublin Convention was signed in 1990 but only entered into force in 1997. It is the precursor of the current 'Dublin II' Regulation.

EU Member States also launched a number of non-binding cooperation initiatives. These were the so-called 'London Resolutions' (1992) consisting, in fact, of two resolutions and one conclusion and deal with the issue of 'safe third countries'. The Resolution on manifestly unfounded asylum claims introduced a common definition of such claims and established that an accelerated examination procedure may be applied in dealing with them. The Resolution on harmonised approaches to questions concerning host third countries specified criteria according to which a third country (outside the EU) may be designated as 'safe' and thus should be responsible for examining the applicant's claim and/or for providing protection. The conclusion concerning countries in which there is generally no serious risk of persecution established a harmonised approach to such 'safe countries of origin'. Applications from such countries were to be considered as 'manifestly unfounded' unless the asylum seeker could demonstrate that their country of origin is not safe in their particular case.[15]

[15] History of CEAS, From Schengen to Stockholm, a history of the CEAS, available at http://www.ecre.org/component/content/article/36-introduction/194-history-of-ceas.html

The first efforts to cooperate at the European level in the early 1990s can largely be attributed to the influx of refugees which a number of Member States, especially Germany and France, were facing following the conflicts on the Balkans and the collapse of the communist regimes in Eastern Europe.

The entry into force of the Treaty of Amsterdam allowed Member States to adopt legally binding instruments in asylum and immigration policies and gave the Commission a strong role in initiating legislation. The Finnish town of Tampere hosted a special EU Council summit dedicated to the creation of an Area of Freedom Security and Justice in 1999. Under this initiative and the ensuing Tampere Program (1999-2004), negotiations started on the creation of a Common European Asylum System (CEAS).

EU Member States wanted a common asylum system to deal with a number of specific problems stemming from the large differences in asylum systems and practices among them. 'Asylum shopping' has already been mentioned as a problem. Another aspect is that asylum seekers were perceived to gravitate towards countries with higher recognition rates and social benefits. To deal with these challenges, EU Member States decided to harmonise their asylum systems and reduce the differences between countries on the basis of binding legislation.

The first phase of the CEAS was completed in 2006 under the Hague Program (2004-2009). The system includes three directives and one regulation. These instruments are currently under review and the European Commission has proposed improvements and modifications in four "recast proposals" that should be agreed by 2012.

EU Members States are also moving forward with another phase of the "Freedom, Security and Justice" initiative. This new phase is called the Stockholm Programme and should be completed by 2014. This phase will see the scope of the CEAS broaden and may incorporate issues such as access to the EU, the resettlement and integration of refugees, external processing of

asylum claims, regional protection programmes and responsibility sharing mechanisms between EU Member States. A new EU agency called the European Asylum Support Office based in Malta will also be established.

It should be noted that European legal hierarchy places EU directives above national laws. For this reason the development of new asylum directives at the EU level is of utmost importance to actors seeking to influence national laws and policies. EU Member States have therefore adapted their national laws to comply with the first phase of the CEAS. There are three exceptions to this rule. The Republic of Ireland and the United Kingdom negotiated an opt-out clause and are not bound by the CEAS, although they can decide to opt-in whenever they want. Denmark however, is not party to the CEAS.[16]

THE PRESENT SITUATION

The Stockholm Programme sets out the European Union's (EU) priorities for the area of justice, freedom and security for the period 2010-14. Building on the achievements of its predecessors the Tampere and Hague programmes, it aims to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens.[17]

In order to provide a secure Europe where the fundamental rights and freedoms of citizens are respected, the Stockholm Programme focuses on the following priorities:

EUROPE OF RIGHTS

European citizenship must be transformed from an abstract idea into a concrete reality. It must confer on EU nationals the fundamental rights and freedoms set out in the EU Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. EU citizens must

[16] id

[17] Sindabona Channel Louis, Refugee Protection Common European Asylum System, Faculty of Law, University of Lund, 2004.

be able to exercise these rights within as well as outside the EU, while knowing that their privacy is respected, especially in terms of protection of personal data. The Europe of rights must be an area in which: Citizens and their family members may exercise in full the right to free movement; diversity is respected and the most vulnerable groups of people (children, minorities such as Roma, victims of violence, etc.) are protected, while racism and xenophobia are tackled; the rights of suspected and accused persons are protected in criminal proceedings.

EU citizenship promotes citizens' participation in the democratic life of the EU through transparent decision-making, access to documents and good administration, as well as guarantees citizens the right to consular protection outside the EU.

EUROPE OF JUSTICE

A European area of justice must be realised throughout the EU. Access to justice for citizens must be facilitated, so that their rights are better enforced within the EU. At the same time, cooperation between judicial authorities and the mutual recognition of court decisions within the EU must be further developed in both civil and criminal cases. To this end, EU countries should make use of e-Justice (information and communication technologies in the field of justice), adopt common minimum rules to approximate criminal and civil law standards, and strengthen mutual trust. The EU must also aim to achieve coherence with the international legal order in order to create a secure legal environment for interacting with non EU-countries.

The Stockholm Programme recommends the development of an internal security strategy for the EU, with a view to improving the protection of citizens and the fight against organised crime and terrorism. Within the spirit of solidarity, the strategy will aim to enhance police and judicial cooperation in criminal matters, as well as cooperation in border management, civil protection and disaster management. The internal security strategy will consist of a pro-

active, horizontal and cross-cutting approach with clearly divided tasks for the EU and its countries. It will focus on the fight against cross-border crime, such as, trafficking in human beings, sexual abuse, sexual exploitation of children and child pornography, cyber crime, economic crime, corruption, counterfeiting and piracy, drugs.

In the fight against cross-border crime, internal security is necessarily linked to external security. Therefore, account must be taken of the EU external security strategy and cooperation strengthened with non-EU countries.

ACCESS TO EUROPE

The EU must further develop its integrated border management and visa policies to make legal access to Europe efficient for non-EU nationals, while ensuring the security of its own citizens. Strong border controls are necessary to counter illegal immigration and cross-border crime. At the same time, access must be guaranteed to those in need of international protection and to vulnerable groups of people, such as unaccompanied minors. Consequently, the role of Frontex (the European external borders agency) must be reinforced so that it can respond more effectively to existing and future challenges. The second generation Schengen Information System (SIS II) and the Visa Information System (VIS) are also essential for reinforcing the system of external border controls and must therefore be made fully operational. Work must also continue on the development of the common visa policy and on intensifying regional consular cooperation.

EUROPE OF SOLIDARITY

On the basis of the European Pact on Immigration and Asylum, the EU must develop a comprehensive and flexible migration policy. This policy should centre on solidarity and responsibility, and address the needs of both EU countries and migrants. It should take into consideration the labour-market needs of EU countries, while minimising brain-drain from non-EU countries.

Vigorous integration policies that guarantee the rights of migrants must also be put in place. Furthermore, a common migration policy must include an effective and sustainable return policy, while work needs to continue on preventing, controlling and combating illegal immigration. There is also a need to strengthen dialogue and partnerships with non-EU countries (both transit and origin), in particular through the further development of the Global Approach to Migration.

Efforts must be made to set up the Common European Asylum System (CEAS) by 2012. In this regard, the development of the European Asylum Support Office is essential. By providing a common asylum procedure for EU countries and a uniform status for those who have been granted international protection, the CEAS would create an area of protection and solidarity within the EU.

EUROPE IN A GLOBALISED WORLD

The external dimension of EU policy must also be taken into consideration in the area of justice, freedom and security. This will assist in addressing the related challenges the EU is facing today, as well as strengthen opportunities for cooperating with non-EU countries. EU action in this field is to adhere to the following principles: maintaining a single external relations policy for the EU; working in partnership with non-EU countries (including candidate, neighbouring and EEA/Schengen countries, the United States of America and the Russian Federation);promoting European and international standards and values, as well as ratification of United Nations, Council of Europe and the Hague Conference of Private International Law Conventions ;exchanging information on bi- and multilateral activities; acting in the spirit of solidarity, coherence and complementarily; using all available instruments and resources effectively; informing on, monitoring and evaluating actions in the external dimension of justice and home affairs; using a proactive approach to external relations.

COMPARATIVE ANALYSIS OF 1951 CONVENTION WITH THE OAU 1974 CONVENTION

It is asserted that the main intention of having the 1951 United Nations Convention Relating to the Status of Refugees was mainly in order to assist the return to their countries of many millions of people who were forcibly displaced, deported or resettled during the Second World War. Article 1A(2) of the UN Convention explicitly stipulated that only those persons who were affected as a result of the events which occurred before 1 January, 1951, would be considered as refugees. Hence, they were the only persons entitled to protection by the United Nations High Commissioner for Refugees (UNHCR) acting on behalf of the international community. Owing to the turbulent situations that were rampant in Africa in 1960's, victims fled their country of origin, but these people did not receive much assistance until the 1967 amendment, that removed the limitations and further broadened the refugee status. The 1967 Protocol acknowledged that new refugee situations had arisen, such as the massive influx of Rwandese refugees into Tanzania, Uganda and Zaire in 1961. To enable all refugees to enjoy equal status, the date 1 January, 1951, was omitted from the definition and refugee status was applied without geographical limitations. According to the amended UN Convention, a person must meet four conditions to be considered a refugee.

"He or she must be outside his or her country of origin; must have a well-founded fear of persecution; the fear must be based on either race, religion, nationality, membership of a particular social group or political opinion; and he or she must be unable or unwilling to avail himself or herself of the protection of that country, or return there, for fear of persecution".[18]

[18] Awuku O. Emmanuel, Refugee Movements in Africa and the OAU Convention on Refugees, by Cambridge University Press, Journal of African Law, Vol. 39, No. 1 , pp. 79-86, 1995, available at , http://www.jstor.org/stable/745608

DIFFICULTIES IN IMPLEMENTATION OF 1951 CONVENTION

In implementation of the international convention one of the major crises that arose was of that of narrow scope of definition which did not include all the displaced victims especially in African aspect. The conflicts resulting from the struggle for independence and the end of the colonial era in Africa caused a succession of massive refugee movements. Later, political events deriving from the transformation of the economic and social systems in the newly-independent nations led to further refugee problems. There was sometimes a grievous difficulty in application of the definition in the UN Convention as it was not broad enough to cover all refugee situations in Africa. A particular problem was that it required the displaced person to satisfy both *subjective* and *objective* fear of persecution. The subjective element referred to the frame of mind of the person. It was required to be supported by objective criteria, that is, the condition in the country of origin. Many externally displaced persons in Africa, however, did not meet both criteria of well-founded fear of persecution as people often fled from areas of potential as well as actual hazards. It is further to be noted that, most of the refugee movements in Africa have been in large groups which make it difficult to determine each case individually and apply the subjective test.[19]

These difficulties and the general concern about the rising tide of refugees prompted the African state parties to the 1951 UN Convention and the Organization of African Unity (OAU), founded in 1963, to call for a regional Convention, which would take account of the specific refugee problems in Africa. Article 5 of the UN Convention indicates that its provisions do not "impair any rights and benefits granted by a Contracting State to refugees" apart from the UN Convention, which means that contracting states can grant more far-reaching rights to refugees and that other international refugee instruments and

19 Africa Rights Monitor: African Refugees: Patterns and Policy, Africa Today, Vol. 32, No. 4, Food, Famine and Development, pp. 71-78, by Indiana University Press, available at http://www.jstor.org/stable/4186327

supplement the UN Convention. The final draft that dealt with specific Aspects of Refugee Problems in Africa was adopted in 1969 and came into force in 1974. The OAU Convention, Preamble Part 9, recognizes the UN Convention as "*the basic and universal instrument relating to the status of refugees*" and defines itself, in Article VIII(2), as "*the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees*", thus not superseding but supplementing the UN Convention. Furthermore it has been observed that the external displacement of people in Africa is not necessarily caused by "persecution" or "well-founded fear of persecution". These people have, however, reasonable grounds to fear for their safety if compelled to return to their country of origin. In addition to the refugee definition contained in the UN Convention, Article 1(2) of the OAU Convention covers any person compelled to leave his or her country "*owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality*". This definition is based solely on objective criteria, which means that persons leaving their country because of war, violence or civil disturbances are to be given refugee status by the state parties to the OAU Convention, irrespective of whether or not they can satisfy subjective criteria. Similarly, the article on non-discrimination is broader in the OAU Convention. Like the UN Convention, it stipulates that the provisions contained in the Convention shall be applied to all refugees without discrimination as to race, religion or nationality, but adds to the grounds membership of a particular social group and political opinions.

The large-scale refugee movements have made most member states in Africa adopt a pragmatic approach to the determination of refugee status in large groups, especially when rapid action is essential. The 1965 Refugee Control Act, section 3, of the United Republic of Tanzania, for example, states that the Government of Tanzania, by order of the Minister of Home Affairs, gives prima facie refugee status to all Burundian and Rwandese refugees who crossed into Tanzania in the aftermath of the failed coup d'état in Burundi. Prima facie group determination of refugee status means that large groups are considered to be

"refugee" groups in the light of the circumstances which have led to their departure from their country of origin. Prima facie refugee status is, thus, a "status at first glance" in the absence of evidence to the contrary. This is usually done by the government of the host country in situations of mass influxes and where a refugee status determination based on individual screening is not feasible. The UNHCR also resorted to prima facie group eligibility, focusing on objective factors rather than on the criterion of "well-founded fear of persecution". The UNHCR has, thus, extended its mandate to externally displaced persons who do not meet the refugee criteria set out in the UN Convention and takes the expanded OAU refugee definition into account when dealing with refugee problems in Africa, although there has not been any formal amendment of the general definition in the UN Convention. The problem which arises from the application of prima facie group eligibility is that there may be-among the thousands of genuine refugees-some persons who do not actually qualify as refugees. Some of those may intentionally enter the refugee camps in the host country to cause disturbances, carry out violent attacks or dissuade people from returning to their country of origin, as was recently observed in the refugee camps around Rwanda. With regard to Paragraph 2 Article 1, the refugee definition in the OAU Convention is wider than that in the UN Convention. It is, however, narrower with respect to the exclusion and cessation clauses. In general, the exclusion and cessation clauses in the OAU Convention follow closely those of the UN Convention. The Exclusion Clause, Article 1(5) specifies the circumstances in which refugee status does not apply. The provisions of the OAU Convention do not apply to any person who: (1) has committed a crime against peace, a war crime, or a crime against humanity; (2) committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (3) has been guilty of acts contrary to the purpose and principles of the United Nations or contrary to the principles of the OAU. The Cessation Clause spells out the conditions under which a refugee ceases to be a refugee. Article I(C) of the UN Convention states that the Convention ceases to apply to any person who: (1) has voluntarily re-availed

himself of the protection of the country of his nationality; (2) has voluntarily re-acquired his lost nationality; (3) has acquired a new nationality; (4) has voluntarily re-established himself in the country which he left; or (5) if the circumstances in the country of origin have changed enabling him to return. The OAU Convention contains two additions, Article I (4)(f) and (g). The Convention ceases to apply to any person who: (1) has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, and (2) has seriously infringed the purposes and objectives of the OAU Convention, which refers in particular to the prohibition of subversive activities

CONCLUSION

The concept of comparison of treaties with the convention basically entails elaboration of various approaches that have developed over time in various regional setups. In some situations where there is refugee problem that is specific to a particular region, in that situation the regional setups come into play covering the gaps of the convention. Application of these treaties at regional level also increase solidarity amongst nations to come together to resolve certain refugee issues amicably. It is not contented that international law in this regard is completely flawed, but the regional treaties are in one way improvement over the convention, covering those aspects that have gained impetus over the years in a particular region and the convention alone is not able to resolve the same. The next chapter specifically deals with the fact as to whether there are inadequacies in the convention to resolve certain contemporary issues.

CHAPTER III

CHANGING CONTOURS OF REFUGEE DEFINITION

A refugee is person who is outside his country of origin having a well founded fear of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion; and is unable or unwilling to avail himself of the protection of the country, or to return there for fear of persecution.

It was in twentieth century that there was a need felt to have laws to protect the interests of the people who were displaced due to war. The various international conventions provided for such provisions which played a significant role in safeguarding interests of refugees. But these conventions were limited to providing protection from specific instances of persecution. One such example can be deciphered from the convention that dealt with displacement of people due to Bolshevik Revolution in Russia in 1917. The main thrust of the earlier conventions was to facilitate travel and identity documents to the refugees in question. Subsequently various conventions developed which gave a broader meaning to the definition of a refugee. The first one was in the year 1933 which dealt with providing international status to refugees. Presently it is the 1951 convention which mainly deals with providing protection to the refugees. It can in other words be termed as Magna Carta of the refugee convention.[20]

APPLICATION OF THIS CONVENTION

This convention deals with both the situations wherein refugee status could be granted or refused. According to this convention and 1967 protocol, the term refugee applies to any person who is considered a refugee under the

[20] Hyndman, Patricia, The 1951 Convention Definition of Refugee: An appraisal with particular preference to the case of Sri Lankan Tamil Applicants, Human Rights Quarterly,Vol.9,No. 1 (Feb,1987), pp.49-73, The John Hopkins University Press , available at http://www.jstor.org/stable/761946,last visited on 26th November,2011

arrangements of 12th may 1926 and 30th of June 1928 or under the conventions of 28th October 1933 and 10th February 1938, the protocol of 14th September 1939 or the constitution of international refugee organisation. [21]

This also includes people who due to events occurring before 1st January 1951 and owing to various other factors have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and also those who are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail the protection of that country. A peculiar situation that is also covered under this convention is of people who do not have a nationality and being outside the country of their former habitual residence as a result of such events, are unable or, owing to such fear, are unwilling to return to it.[22]

Further this convention has been supplemented by other conventions which have further broadened its horizon or it can be said its applicability, such as The Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa, a regional treaty adopted in 1969 that added to the definition found in the 1951 Convention a consideration that included, any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.[23]

In 1984, a colloquium of Latin American government representatives and distinguished jurists adopted the Cartagena Declaration which provided that persons who flee their countries because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts,

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[21] Convention and Protocol relating to the Status of refugees, available at http://www.unhcr.org/3b66c2a910

[22] Id

[23] Jastram, Kate and Marilyn Achiron, Refugee Protection: A guide to international Refugee law, UNHCR.

massive violation of human rights or other circumstances which have seriously disturbed public order are to be given protection under this act.[24]

The 1967 Refugee Protocol which was subsequently added is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. The Refugee Convention and Protocol cover three main subjects:

- The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status
- The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or refoulement, to a territory where their lives or freedom would be threatened
- States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention

By acceding to the Protocol, the member States have agreed to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. Hence it can be said that the, States have reaffirmed that both treaties are central to the international refugee protection system.[25]

It seems that over the years the definition of 'refugee' has been developed to cover all the aspects of refugee status. However, it is also observed that still there are certain issues which are not addressed by these conventions. These issues involve certain practices that are deep rooted in the culture of certain areas and people seek refuge to escape such anomalies. The concern is that these issues are either not covered or do not fulfil the criteria of the present

[24] Id

[25] *Supra* n.2

convention with its supplements. The following case studies further substantiate the lacunae in the definition.

THE CASE OF ASYLUM AND THE DOCTRINE OF INTERNAL FLIGHT IN THE LIGHT OF HJ (IRAN)

One of the controversies that surround the 1951 convention is sexuality as the grounds of an application for refugee status. This contention comes into limelight when the provision regarding persecution is discussed. This case concerns homosexuals who are discriminated due to their very orientation. The state of Iran persecutes these people because they are presumed to be a dishonour to the societal setup and community orientation of that particular area. It was held that if there exist a material reason for the applicant living discreetly on his return would be fear of persecution which would follow if he were to live openly as a gay man then in that case the place where such a person seeks refuge must be granted the same. If such a person has a well founded fear of persecution to actually reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the convention exists to protect i.e. the right to live freely and openly without fear of persecution.

It was also asserted that the principle that no change of behaviour, however modest, in order to avoid persecution can be demanded of asylum seekers, because the very act of making a modification demonstrates the well-founded fear of persecution from which the Refugee Convention protects him.[26]

In order to decide granting of asylum on basis of sexual orientation International refugee law needs to be considered. UNHCR has also made recommendations and guidelines which set benchmarks to which national legislation, regulations and practice that should be followed in member states. In 2007, a group of 29

[26]Buxton, Richard, Asylum and doctrine of internal flight in light of HJ(Iran),C.L.J,70(1),41-49, available at http://login.westlawindia.com

human rights experts launched The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. These principles are an attempt to apply existing international human rights law in the area of sexual orientation and gender identity. Although these principles have no legal validation, but these have been supported by several countries. The 23rd principle deals with the right to asylum, which says that:

"Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.

States shall:

a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum;

b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity;

c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity."[27]

The UNHCR provides an analysis of the right to claim asylum on the grounds of sexual orientation according to the 1951 Refugee Convention and its 1967

[27] Yogyakarta Principles, http://www.unhcr.org/refworld/docid/48244e602.html and Michael O'Laherty and John Fisher, " Sexual Oreintation, Gender Identity and International Human Rights Law:Contextualising the Yogyakarta Principles" , in Human Rights Law Review , 2008 , 8(2) , pp. 207-248, available at http://hrlr.oxfordjournals.org/cgi/contents/abstarct/8/2/207

Protocol, following prevailing international legal interpretation and custom in its Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.[28] The Guidance Note also serves as guidelines for countries in forming and implementing legislation and regulations. Another practical overview of the current jurisdiction with regards to the rights of asylum on grounds of sexual orientation is the International Commission of Jurists Practitioners Guide on Sexual Orientation, Gender Identity and International Human Rights Law chapter VIII.

Both the UNHCR Guidance Note and the ICJ Practitioners Guide focus mainly on two isses which are, persecution or threat of persecution for sexual offences and whether this threat comes under the arena of persecution. This problem surfaced in UK in 1990's. The immigration tribunals in UK were reluctant to criticize another country's criminal laws or penalties imposed for their breach in context of application by homosexuals. However this phenomenon changed in the year 1979 wherein UNCHR guidelines suggested a method for determining the persecutory intent of another country's criminal laws.

The 1951 Refugee Convention states that a refugee is someone who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". Most often, persons seeking asylum on grounds of sexual orientation have been associated with "particular social group". UNHCR has developed guidelines on what constitutes membership of a particular social group which state that,

"A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

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[28] UNHCR, UNHCR Guidelines Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,available at http:// www.unhcr.org/refworld/docid/48abd5660.html

In order to decide what constitutes a particular social group, UNHCR looks at both characteristics which are often "innate, unchangeable, or which is otherwise fundamental to identity", as well as "perceived" nature as a group by society. UNHCR considers homosexuals to be an example of such a group. Homosexuality is at once seen as an innate characteristic as well as a characteristic so fundamental to human dignity that the person should not be compelled to forsake it.

According to UNCHR guidelines somebody who flees persecution because they are known as homosexuals in their country of origin may still be perceived to belong to such a group despite a later change of sexual practice. UNHCR also holds that persons seeking asylum on grounds of sexual orientation might also fulfil the criteria of the 1951 Refugee Convention because of political opinion and religion. In the former case, it is possible to argue that an individual's opinion on sexuality constitutes a political opinion that in some cases will differ from the official policy of the country. Likewise, religion might be relevant in the case where the attitudes of religious authorities are particularly hostile towards sexual minorities or sexual minorities in other ways do not conform to strongly-held religious beliefs in society.

The second important issue in this regard is whether people who seek asylum on basis of their sexual orientation have a reasonable apprehension of persecution or threat of persecution.

Sexual minorities will often face discrimination and harassment from either private individuals or government representatives, and this will often be central in the asylum claim of individuals. In its 1992 Protection Handbook, UNHCR states that:

"Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures

of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved."

Hence the decision to grant asylum varies from case to case and according to variant circumstances too. There is also a policy that is adopted by UNHCR that if a person is persuaded to forsake or conceal one's sexual orientation because it is forbidden by the state, it would also be discussed under persecution.

The instances of persecution can also be made out of social, cultural or other types of community pressure , for example when pressuring an individual to marry a person of the opposite sex despite the former's wish. There have been claims made by sexual minorities often reveal exposure to physical and sexual violence, including periods of detention, medical abuse, threat of execution and honour killings. Types of violence and pressure might vary depending on the gender, as lesbians have in many cases been subjected to so-called correctional rapes, often by relatives and acquaintances, and often on the request of their close family.

Statistically it is observed that around 80 countries criminalize homosexuality, with punishments varying from a fine to possible death sentence. UNHCR has stated that a law can be persecutory per se in, inter alia, cases where they reflect cultural and social norms which are not in conformity with international human rights standard. This includes the criminalization of homosexuality. However, a law need not amount to being persecutory in itself unless applied to particular groups only (like homosexuals) or if it is arbitrarily or unlawfully executed.

The main question that arises is to determine the real character of the law that is prevalent. In cases where severe punishments are actually imposed, the persecutory character of the law is especially evident. While in other cases it may not be that evident. It is observed that the act of homosexuality is not very

easy to prove. For example, In Iran, where homosexual activity is punishable by death, the testimony of four men who have seen the act (i.e. the penetration) themselves is necessary in order to find the accused guilty. It is also possible that in some cases some cases persons may publicly be found guilty of other subsidiary crimes instead of homosexuality in an attempt to deflect potential criticism from Western countries.

Although the laws may be dormant but it is possible that homosexuals are meted with discrimination or various forms of assault etc. They may not be able to complain about the same as it may lead to their own persecution. There have been cases reported where the authorities in power such as the police and the judges themselves were involved in atrocities to the people in distress. Hence such people ask for asylum facilities to avoid any such persecution.

Thus after analysing the UNHCR guidelines and the situations that predominantly exist in many countries which are oppressive and extremist especially when dealt in cases of homosexuals, it is observed that: (1) a person need not have faced persecution in the past to actually avail the advantage of the provisions and safeguards so provided by the guidelines, (2) all that is required is that the person has a well founded fear of persecution if the person is returned back to the native state. Most importantly UNHCR has stated that a person must not in any circumstances conceal his/her sexual orientation in order to avoid persecution. Rather the individuality of a person irrespective of their sexual orientation should be respected.

THE CASE OF FGM (FEMALE GENITAL MUTILATION)[29]

These are gender specific crimes committed especially against women and girls. These women and girls are required to have an international protection because in most of the states wherein this phenomenon is practised, the

[29] Guidance Note on Refugee Claims relating to Female Genital Mutilation, 2009, available at http:// www. Unhcr.org/refworld/pdfid/4a0c28492.pdf

authorities of these states are either unable to provide protection or are reluctant to do so.

The applicability of the 1951 convention and 1967 protocol can be discussed as where, the convention deals with the phenomenon that there should be a well-founded fear of prosecution due to reasons of race, religion, nationality, membership of particular social group or political opinion. It can be observed that and also it has now been widely recognised by states that the fear of girl or woman of being subjected to FGM may be for belonging to a particular community or social group.

UNHCR defines a particular social group as a group of persons who share a common characteristic other than their risk of being persecuted or who are perceived as a group by society. This characteristic would often be one which is innate, unchangeable or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

It s observed that gender and age of claimants of refuge from FGM are both innate and cannot be changed at a given moment in time. Also their plea to not undergo any physical alteration can be considered so integral to their human dignity that it becomes fundamental to exercise their human rights. Under the convention size of the group does not hold any relevance and thus broader definition to include young girls or women or narrow definition of girls belonging to a particular ethnic group can be imputed. There have also been instances wherein the women or girls who have opposed FGM face prosecution behest the local clergy or political leaders have been prosecuted for the same. The claim for refuge can be asked for by the parents of the chid in case they feel the apprehension of FGM. The refugee status would be given to the child and the parents *mutatis mutandis,* can be granted derivative status.

This kind of protection has been provided by many states and can be observed in various cases such as *Farah v. Canada*[30] wherein the Immigration and

[30] 10th May 1994, available at http://www.unhcr.org/refworld/docid

Refugee Board of Canada described FGM as a "torturous custom" and recognized it as a form of persecution. The United States Board of Immigration Appeals held in case of re *Fauziya Kasinga* [31]that the level of harm in FGM constituted persecution. Further in another leading case of *Fornah (FC) (Appellant) v. SSHD (Respondent)*[32] the House of Lords stated that "it is common ground in this appeal that FGM constitutes treatment which would amount to persecution within the meaning of the Convention". The House of Lords also found that "it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment". Similar approaches have been adopted elsewhere in Europe, including in Austria, Germany and Belgium.

THE CASE OF ASYLUM AND DOMESTIC VIOLENCE[33]

I. DOMESTIC VIOLENCE AS PERSECUTION

The Executive Committee of UNHCR has concluded that persecution through sexual violence not only constitutes a gross violation of human rights, but it is a particular serious offense to human dignity also. When sexual violence is committed for reasons of race, religion, nationality, membership of a particular social group or political opinion, it may be considered persecution under the definition of the term "refugee" if it is perpetrated or knowingly tolerated by the authorities, or if the authorities refuse or prove unable, to offer effective protection. The Executive Committee supports the recognition as refugees of persons whose claim refugee status based upon a well-founded fear of persecution, through sexual violence, for one of the five enumerated grounds that are; race, religion, nationality, membership of a particular social group or political opinion. Hence according to many experts in this field, it may be

[31] 13th June 1996

[32] UK House of Lords (UK HL 46) 18th October 2006, available at http://www.unhcr.org.reworld/

[33] Donkoh, Bemma. *Domestic Violence in context of refugee definition*,28th July 1999, available at http://cgrs.uchastings.edu/documents/media/unhcr_dv.htm

inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. It is also further contented that other serious violations of human rights for the same reasons would constitute persecution. In the instances wherein domestic violence, met the aforementioned standard, should be determined to be persecution.

II. WELL-FOUNDED FEAR OF FUTURE PERSECUTION

A well-founded fear of domestic violence on account of race, religion, and nationality, membership of a particular social group or political opinion is the basis of a valid asylum claim. Domestic violence perpetrated for reasons of one of the enumerated grounds is past persecution which establishes a well-founded fear of future persecution. A fear of future persecution in the domestic violence context can also be determined to be well-founded by relying on credible testimony from the applicant and experts to establish a pattern or practice of persecution or particularly lack of state protection or complicity of state actors where persons similarly situated to the applicant are involved.

It is asserted that past persecution can be recognised as one of the imperative reasons of one of the five grounds is not the only way to establish a well-founded fear of future persecution. Thus, we need not only emphasize the past atrocious mistreatment suffered by the applicant because a woman who has never been abused can establish a well-founded fear of future persecution for reasons of one of the five grounds by providing credible testimony regarding the treatment of similarly-situated women. However, a woman who has suffered atrocious abuse, but for whom there is no showing that it was suffered for reasons of one of the five grounds is not a refugee.

Establishing a well-founded fear in the context of domestic violence does not entail merely confirming its occurrence, but rather the discriminatory nature of a State's protection from domestic violence and the consequences that may follow a woman's efforts to leave a domestic violence situation. Knowledge of

the legal protections that are available to women, including access to divorce, should also be a part of the analysis of the well-founded this fear. For example, in 1996 the Congress in Guatemala passed the Code on Domestic Violence that prohibits physical, sexual, psychological and emotional violence carried out in the private and public spheres. Thus, it would be proper to consider the passage of the Code and how the provisions are being enforced in determining whether a particular fear is well-founded.

III. INTERNAL FLIGHT ALTERNATIVE

The availability of an internal flight alternative is considered in a determination of the well-founded fear. The analysis of an availability of an internal flight alternative is particularly relevant in the domestic violence context as it occurs within the family by private actors and there may be the mistaken belief that an internal flight alternative is more feasible when non-State actors are involved.

"The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality... Persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country if under all the circumstances it would not have been reasonable to expect him to do so."

In a 1995 memorandum, UNHCR's Department of International Protection in Geneva determined that the possibility to find safety in other parts of the country must have existed at the time of flight and continue to be available when the eligibility decision is taken and the return to the country of origin is implemented. Thus, the issue of when the internal flight alternative was available helps us to understand how reasonable the applicant's fear was and is. However it is also essential that this alternative of internal flight should be a durable solution.

IV. Bases for Fearing Persecution

An asylum claim involving domestic violence can be made on any of the enumerated grounds in the refugee definition. Amongst them emphasis could be laid on existence of certain features that would be a part of discussion of political opinion and particular social group

A. Political Opinion

An individual may have a well-founded fear of persecution for reasons of political opinion because opposition to domestic violence may be a political opinion or a political opinion is attributed to an individual as a result of opposition to domestic violence. The aforementioned political opinion could involve views on the status of marriage, women or men. Also, domestic violence can be used as a tool of repression of other political views that are not related to domestic violence, the status of marriage, women or men.

B. Particular Social Group

The UNHCR Executive Committee recognizes that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1 A (2) of the Convention.

UNHCR's position on social group as recently stated in its intervention submitted to the House of Lords in the United Kingdom is that individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live may, in principle, constitute a particular social group. The values at stake must be of such a nature that the person concerned should not be required to renounce them.

This will be the case where those values represent fundamental human rights. In many societies, women are more likely to believe in -- or be perceived as

believing in -- values at odds with the social mores of society, as they are subject to discriminatory rules. Women who object to those rules -- or are perceived to object to them -- are capable of constituting a particular social group.

UNHCR agrees with the Court of Appeal in the United Kingdom cases of Shah and Islam that persecution alone cannot determine a group where none exists.

A particular social group means a group of people who share some characteristic which distinguishes them from society at large. That is to say, that the distinguishing characteristic which defines the group consists in a shared set of values which are not shared by society at large or, conversely, a common decision to opt out of a set of values shared by the rest of society. The characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons.

A person may be a member of a social group if he or she is perceived to hold certain beliefs or values and thus it is not necessary that this person actually holds such beliefs. It is the shared values and beliefs that define the group and not reaction to the behaviour that defines the group. However, the reaction may provide evidence in a particular case that a particular social group exists.

The above cited provisions of UNHCR's various guidelines and the Executive Committee conclusions can be interpreted to establish that certain victims of domestic violence can be included in the refugee definition.

CONCERN OF ASYLUM AND ENVIRONMENT REFUGEES

There has been a study by certain environmental concerns that due to adverse environmental conditions in certain areas the people were coerced to leave

their habitual place of residence and flee to safer havens. An instance of such kind was shown by National Geographic when it released its visual almanac called "Stateof Earth 2010". In that almanac there was an article about "forced migration" which portrayed environmental degradation and global climate change driving the displacement of populations. It was projected that as a result of environmental effects like desertification, ice melt, storm surge, sea level rise, and hurricane/typhoon/cyclones; people living in Bangladesh, Gobi in China, Alaska in the U.S., Tuvalu in Pacific Ocean and Haiti had to leave their homes and seek safer havens.[34] In order to determine the situation of environmental refugees it is imperative to first determine as to who exactly these people are. Several authors have given several interpretations regarding this concept. Some of them even refuted the existence of these people as such. Authors such as El-Hinnavi and Jacobson divided the categories of environmentally displaced people (EDP's) on the basis of environmental displacement. They divided them as temporary displacement due to temporary environmental stress; permanent displacement due to permanent environmental change, and temporary or permanent displacement due to progressive degradation of the resource base. Suhrke argued that the division can be drawn into migration stimulated by sea level rise, deforestation, desertification and drought, land, water and air degradation.[35] One of the pertinent definitions has been given by Norman Meyers wherein he has defined EDP's as

"[...] who can no longer gain a secure livelihood in their homelands because of drought, soil erosion, desertification, deforestation and other environmental problems, together with associated problems of population pressures and profound poverty. In their desperation, these people feel they have no alternative but to seek sanctuary elsewhere, however hazardous the attempt. Not all of them have fled their countries, many being internally displaced. But all

[34] Til ,Nazi. How to protect and assist Environmentally Displaced Persons (EDP's)?, Lund University, 2010

[35] id

have abandoned their homelands on a semi-permanent if not permanent basis, with little hope of a foreseeable return."

Further Jacobson has also given another typology of environmental refugees:

"• Those temporarily displaced because of local disruption such as a landslide or Earthquake,

• Those that migrate because environmental degradation has undermined their livelihood or represents unacceptable risks to health, and

• Those who relocate because land degradation has triggered desertification or because of other permanent and indefensible changes in their habitat"

There are various factors that lead to this kind of displacement such as loss of ecosystem services, climate change and environmental disasters. Further authors such as Meyers have further classified the conditions leading to migration as the main environmental factors and associated factors.

They count long-term environmental degradation (desertification, deforestation and forms of land degradation, drought, water deficits, large-scale pollution, global warming), natural disasters (rather short-term phenomena including floods, cyclones and earthquakes), major environmental accidents (e.g. Chernobyl nuclear reactor accident), and development disruptions of environments (large scale projects like large dams) as the main environment factors. Population growth, pervasive famine and poverty are seen as associated factors. They are intensified if not partly induced by environmental degradation. Even migration may be triggered by the main causes and in alignment with an associated factor, it can also be motivated by non-environmental kind of factors like economic and political deficiencies in homeland country and the prospect of supportive reception in a host country or area . So the decision of migration is not so simple as to make over just one factor. There are different dynamics behind deciding to migrate. In the literature it is mostly perceived as multi-causal. But a lot of authors agree that there is a

link between migration and environmental factors in certain cases. All these factors above can be potential pressure points for acknowledging a modification in the current refugee regime.

Accordingly, UNHCR identified root causes of refugee flows in the 1993 "State of the World's Refugees": political instability, economic tensions, ethnic conflict and environmental degradation. In that way environmental factors have been recognized as one of the root causes of forced migration that have stimulated what has been more and more delineated as "environmental refugees".

THE REFUGEE DEFINITION AND EDP'S

According to the definition of refugee as mentioned in the convention, The refugee is a person who is out of his/her country of nationality or previous accustomed residence, they must be unable or unwilling to assist themselves of the protection of their country or return there, this kind of unwillingness or inability is required to be ascribable to a well founded fear of being persecuted and this fear must be for causes of one of the five convention grounds (membership of a particular social group, political opinion, race, religion or nationality). The people who fulfill this criterion are convention refugees while others are recognized just as voluntary migrants. Environmental degradation has been recognized as one of the reasons of migration by UNHCR in the year 1993. The assertion that environmental degradation was a main cause of refugee flows was interpreted as a direct response to increasing number of articles putting forward a connection between environmental degradation and population movement, and a acknowledgement that the numbers of displaced people internally were much bigger than the pointed by the statistics on refugee flows.

It is sometimes argued that there is gap in the refugee convention regime as the EDP's are not recognized as people who should be given refugee status. One such limitation can be explained with the definition of the word persecution. As mentioned above the definition of refugee encompasses the conditions when

someone is persecuted by the state for certain reasons. It is worth noting that in case of EDP's it is difficult to actually define the persecutor and the fear of persecution. If a narrow view of definition is taken then EDP's can never be included as refugees until natural causes itself are deemed to be put in as reasons of persecution. Due to this limitation, there is dearth of international protection for this people. Environmental conditions do not comprise a foundation for international protection, even though it has been argued that "[...] environmental conditions should be considered as one element forcing people to flee their places of origin and such should be afforded similar rights and protection as refugees fleeing because of other causes." Authors such as Biermann and Boas have agreed that the existing refugee protection regime of the UN appears to be insufficiently prepared, in the light of the rising environmental displacement crisis. There is a lack of comprehensiveness that the regime's existing mandate which only covers political refugees who have fled their countries due to state-led persecution settled on race, political opinion, religion or ethnicity. Another limitation is that of the criteria that there is uncertainty regarding the fact whether the internally displaced people due to environmental factors would get the benefit of refugee convention.

It is suggested that confirming to human rights standards, the present definition of refugees could be extended or broadened to include EDP's also. While citing examples from regional treaties, under 1969 OAU Convention, a person who may be in danger of return to a condition of severe disturbance of public order (instead of the more serious fear of persecution) is under the protection. One may not need specific fear of persecution in this regard to actually get protection of a refugee. The reason behind citing this example is that with changing times to encompass protection to majority people owing to human right concerns the definition either needs to be interpreted broadly or should be modified to include to EDP's also.

However it has to be seen that such protection should not be indiscriminate and indefinite. It is suggested by some scholars that the EDP's could get same

status as that of economic refugees in that case there would not be indiscriminate benefit entailed to them. At the same time there are many scholars who feel that acknowledging EDP's as such cold actually increase the flood of environmental refugees. To curtail this aspect it has been suggested by some authors that a new convention or treaty is formulated that would consist of all such aspects that deal with EDP's. Other suggestion is by authors such as Biermann and Boas (2008). They outline an independent, separate legal document and political regime developed under a protocol for recognizing, protecting and resettling those displaced by environmental factors. They emphasize on "climate refugee" concept instead of environmental refugees; because they want this protocol to be based on the political support from nearly all states as parties to the United Nations Framework Convention on Climate Change. The protocol can assist "climate refugees" through associating their protection with the whole climate regime. They mention several principles that this protocol would work under:[36]

- The objective of the protocol should be maintaining a planned and voluntary resettlement and reintegration of displaced people over a long period of time instead of a just disaster relief and emergency reaction.
- They need to be perceived and treated as permanent immigrants in the receiving countries or regions. They cannot go back to their home countries.
- The whole groups of people like populations of provinces should be taken as a basis for the needs for the creation of the new regime, rather than the individually persecuted people (like in the current UN refugee regime).
- The new regime will be directed less toward the protection of people outside their home countries than toward the support of national bodies, local governments and communities to protect people within their boundaries.

[36] id

- The protection should be viewed as a global issue and a global responsibility.

However it has been observed that in scenarios of either having amendment in the convention itself or letting the definition of refugee remain as such would rather not resolve the problem. In order to remove the cold feet of the states and provide protection and assistance to the people in need the most applicable option looks like a balanced protection through maintaining this protection temporarily, lasting as long as the existence of threat. In a state of affairs where states seek for relieving their present responsibilities, suggesting expansion of their present responsibilities to cover EDPs would be like going against the tide.

To furnish EDPs with protection and assistance that they need, there should be an intention to present more applicable options to state parties. In short, it is perceived more reasonable to propose the development of new apparatus which would protect EDPs instead of proposing an expansion in the definition of current concepts like refugees. Furthermore it would also be helpful as certain states that have not ratified the refugee convention would actually be able to recognize the environmental refugees owing to the international obligations they have concerning the environment. For instance in Indian context, refugee convention is not ratified but it is part of various conventions dealing with environmental issues. Hence owing to international obligations there is possibility that environmental refugees are recognized.

CONCLUSION

After giving due consideration to the UNHCR guidelines and the case studies discussed above it is observed that the 1951 refugee convention and 1967 protocol are not insufficient according to the contemporary circumstances, but the provisions of the convention can be implemented or utilized in such a way to cover all the lacuna's or it can be said all the circumstances that are in question now. For instance to cover the aspect of persecution it is not imperative that actual danger to life and limb is there. The thing that is required is that there is a sufficient cause that comes under the phenomenon of imminent danger.

But in certain aspects as that of environmental refugees it is suggested that there is new framework as such. The reason behind such stipulation is to provide balanced protection through maintaining this protection temporarily, lasting as long as the existence of threat. It is to ensure that EDP's get international recognition and protection and they are not defied of protection by states owing to their very status.

CHAPTER IV

NATIONAL FRAMEWORK REGARDING REFUGEES

"India has a mixed record on refugees," This was the comment of SAHRDC[37] executive director Ravi Nair.

The above mentioned statement avows to the current situation in India. In absence of any definite framework in concern of refugees the decisions in granting of asylum have been very indecisive and have been largely based on the discretions of the concerned judges. It has also been observed that such discretions have been a matter of political vendettas and have been shifting over time. For instance in the year 1959 New Delhi allowed refuge to the Dalai Lama, a spiritual leader of Tibetans who favoured autonomy for Tibet under Chinese rule, and permitted him to set up a government-in-exile in Dharamsala in the northern state of Himachal Pradesh – though it did not officially recognize it as a government. When over 80,000 Tibetans followed their spiritual leader they were not only granted resident permits but also employment opportunities. Today, there are around 110,000 Tibetan refugees in India, according to SAHRDC.

However, the Tibetans who came to India in more recent years have not been received well. While India advocated Tibetan independence for decades, it reportedly accepted China's claim on Tibet between 2003 and 2006, apparently in exchange for China's acceptance of Sikkim as part of India. This became evident when India and China agreed to reopen the Nathu La pass, which connects India's Sikkim state with Tibet, on July 6, 2006 – the birthday of the Dalai Lama. The pass had been sealed after the 1962 Sino-Indian War. This reopening of Nathu La was little more than a symbol of the Sino-Indian deal.

[37] SAHRDC stands for South Asian Human Rights Documentation Centre.

THE PRESENT SITUATION

The foremost position in Indian regard has to be understood as non-ratification of the 1951 Convention or the1967 protocol. Furthermore it also does not have any national legislation that deal with the situation of refugees. In absence of any such framework the legal status of individuals recognised as refugees by the Government of India has been uncertain. Hence the decision as whether to treat a person as a group of persons or refugees or not is taken on the merits and the circumstances of cases coming before it. It has been observed that even though India has been home for a large number and variety of refugees throughout the past, it has dealt with issue of refugees on bilateral basis. India has been following a refugee regime which generally confirms to the international instruments. For instance India is a signatory to a number of United Nations and World Conventions on Human Rights, refugee issues and related matters. India's obligations in regard of the refugees arise from latter. India became a member of the Executive Committee of the High Commissioner's Programme (EXCOM)[38] in 1995. India voted assertively to adopt the Universal Declaration of Human Rights (UDHR)[39] which affirms rights for all persons, citizens and non-citizens alike. Further quantifying in this regard is India's [40]initiative in adopting UN Declaration of Territorial Asylum in 1967, ratification of International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. Further accentuating India's Position is acceptance of principle of *non-refoulment* as envisaged in the Bangkok Principles, 1966,

[38] The EXCOM is the organization of the UN, which approves and supervises the material assistance programme. Membership of this committee indicates particular interest and greater commitment to refugee matters.

[39] Article 13 'Right to Freedom of movement', Article 14 'Right to Seek and Enjoy Asylum' and Article 15 ' Right to Nationality'

[40] Article 12 that deals with 'Freedom to Leave any country including the person's own' and Article 13 dealing with ' Prohibition of expulsion of aliens except by due process of law

which were created for the guidance of member states in respect of matters concerning the status and treatment of refugees. These principles also contain provisions relating to repatriation, right to compensation, granting asylum and the minimum standard of treatment in the state of asylum.

REFUGEES AND INDIAN LEGAL FRAMEWORK

Indian legal system basically confers rights on two categories, namely citizens and all people. In this way refugees encounter the Indian legal system on two counts. There are laws which regulate their entry into and stay in India along with a host of related issues. Once they are within the Indian Territory, they are then liable to be subjected to the provisions of the Indian penal laws for various commissions and omissions under a variety of circumstances, to begin with justification of their very status as a refugee only or in other words determination of refuge claim These are various constitutional[41] and legal provisions with which refugees may be concerned under varying circumstances and situations such as in determination of their claim or the validity of their stay in Indian soil.

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[41] *List I (Union List)* Entry 14 - confers on the Parliament exclusive power to make laws with respect to "entering into treaties and agreements with foreign countries and implementing treaties, agreements and conventions with foreign countries. Entry 17, Speaks about citizenship, naturalisation and aliens; Entry 18. Speaks about Extradition; Entry 19, Speaks about Admission into and Emigration & Expulsion from, India; passport and visas

List III (Concurrent List) Entry 27 - speaks about Relief and Rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India & Pakistan. Part II - Citizenship Articles 5 to 11: These Articles provide for Rights of Citizenship of migrants from Pakistan; Rights of Citizenship of migrants to Pakistan; Rights of citizenship of certain persons of Indian origin residing outside India; voluntary acquisition of other citizenship and Parliamentary rights to regulate citizenship.

CONSTITUTIONAL PROVISIONS

There are a few Articles[42] of the Indian Constitution which are equally applicable to refugees on the Indian soil in the same way as they are applicable to the Indian Citizens.

The Supreme Court of India has consistently held that the Fundamental Right enshrined under Article 21 of the Indian Constitution regarding the Right to life and personal liberty, applies to all irrespective of the fact whether they are citizens of India or aliens. While the Supreme Court of India has held impetus to rights of the refugees, various High Courts in India have also liberally adopted the rules of natural justice to refugee issues, along with recognition of the United Nations High Commissioner for Refugees (UNHCR) as playing an important role in the protection of refugees. it has to be noted that in absence of any legislative framework, it is the UNHCR that plays an active role in determination of refugee claims and statuses. A similar approach in this regard is true in Indian context also. For instance Hon'ble High Court of Guwahati has in various judgements, recognised the refugee issue and permitted refugees to approach the UNHCR for determination of their refugee status, while staying the deportation orders issued by the district court or the administration.

In the matter of *Gurunathan and others vs. Government of India*[43]and others and in the matter of *A.C.Mohd.Siddique vs. Government of India and others*[44], the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will. In various other similar kind of cases before the Madras High Court, Sri Lankan refugees had prayed for a *writ* of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not

[42] Articles 14, 20 and 21

[43] WP No.S 6708 and 7916 of 1992

[44] 1998(47)DRJ(DB)p.74

want to return to continue to stay in the camps in India. The Hon'ble Court was held that "since the UNHCR was involved in ascertaining the voluntariness of the refugees' return to Sri Lanka, hence being a World Agency, it is not for the Court to consider whether the consent is voluntary or not." Further, the Court acknowledged the competence and impartiality of the representatives of UNHCR. The Bombay High Court in the matter of *Syed Ata Mohammadi vs. Union of India*[45], was pleased to direct that "there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR." The Hon'ble Court further permitted the refugee to travel to whichever country he desired. Such an order is in line with the internationally accepted principles of '*non-refoulement*' of refugees to their country of origin.

The Supreme Court of India has in a number of cases stayed deportation of refugees such as *Maiwand's Trust of Afghan Human Freedom vs. State of Punjab*[46]; and, *N.D.Pancholi vs. State of Punjab & Others*[47]. In the matter of *Malavika Karlekar vs. Union of India*[48], the Supreme Court directed stay of deportation of the Andaman Island Burmese refugees, since "their claim for refugee status was pending determination and a *prima facie* case is made out for grant of refugee status." The Supreme Court judgement in the Chakma refugee case clearly declared that no one shall be deprived of his or her life or liberty without the due process of law. Earlier judgements of the Supreme Court in *Luis De Raedt vs. Union of India*[49] and also *State of Arunachal Pradesh vs. Khudiram Chakma*[50], had also stressed the same point.[51]

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[45] Criminal writ petition no.7504/1994 at the Bombay High Court

[46] Crl. WP No.125 & 126 of 1986

[47] WP (civil) No. 1294 of 1987

[48] Crl. WP No.243 of 1988

[49] (1991) 3SCC 544

[50] 1994 Supp. (1) SCC 615

[51] Anantachari.T, Refugee In India: Legal Framework, Law Enforcement and Security, ISIL,2001

ARREST, DETENTION AND RELEASE

In guaranteeing various humanitarian accords to refugees, it is also imperative to ensure that security of state is not in peril. There has to be a strong role by the security forces to ensure that thorough check of the concerned claimants is done. But at the same time as has already been mentioned the porous borders and in some areas the unmanned terrain, makes this aspect difficult. In contemplating this feature another attribute of principle of *non-refoulment* in Indian context can be discussed here. The reference herein is made to the concept of 'International Zones' which are transit areas at airports and other points of entry into Indian territory, which are marked as being outside Indian territory and the normal jurisdiction of Indian Courts, and are major 'risk factors' for refugees since they reduce access of refugees to legal remedies. This legal abstraction can be considered as violative of the internationally acknowledged principle of *non-refoulement* as in this situation a person might be detained without having recourse to any judicial remedy in order to justify his/her claim. The case of a Palestinian refugee who was deported to New Delhi International Airport from Kathmandu was sent back to Kathmandu from the transit lounge of the Airport. He was once more returned to New Delhi International Airport on the ground of being kept in an 'International Zone', is clear example of case on the above point barring legal remedies to the detained refugee. The only relief in such a case is through the administrative authorities.

Articles 22(1), 22(2) and 25(1) of the Indian Constitution reflect that the rules of natural justice in common law systems are equally applicable in India, even to refugees. The established principle of rule of law in India is that no person, whether a citizen or an alien shall be deprived of his life, liberty or property without the authority of law. The presence of these provisions and its interpretation by the Courts has proved that India by and large has been custodian of human rights of people and has always respected the very essence of law itself i.e. the principles of rule of law or natural justice as such. The Constitution of India expressly incorporates the common law precept that

may not be in direct words but interpretations of the mentioned articles by Courts and jurists quantify the intention of the constitution makers.

The Indian Constitution does not contain any specific provision which obliges the state to enforce or implement treaties and conventions. A joint reading of all the provisions as well as an analysis of the case law on the subject shows international treaties, covenants, conventions and agreements can become part of the domestic law in India only if they are specifically incorporated in the law of the land. The Supreme Court has held, through a number of decisions on the subject that international conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law. Courts may apply international law only when there is no conflict between international law and domestic law, and also if the provisions of international law sought to be applied are not in contravention of the spirit of the Constitution and national legislation, thereby enabling a harmonious construction of laws. It has also been firmly laid that if there is any such conflict, then domestic law shall prevail. But it has to be noted that in has already been explained in preceding part of the chapter that, the constitution itself incorporates certain basic features of the international covenants and declaration. Hence even if there is no specific provision dealing with compliance of the international treaties and covenants, the basic humanitarian features are already recognised in Indian Constitution. The only variance that would be attributed in this regard would be in interpretation of various cases owing to difference in circumstances of each case.

ISSUES OF CONCERN

India does not have on its statute book a specific and separate law to govern refugees. In the absence of such a specific law, all existing Indian laws like The Criminal Procedure Code, The Indian Penal Code, The Evidence Act etc. Moreover Indian state being a welfare state focuses on guaranteeing human rights to the refugees under various constitutional provisions.

PROBABLE REASONS OF INDIA'S NON-ACCESSION TO 1951 CONVENTION AND DENIAL OF HAVING A LEGISLATIVE FRAMEWORK

EUROCENTRIC DEFINITION: India refrained from signing the United Nations General Assembly Resolution 319 IV of 1949 which was to put in place the Convention Relating to the Status of Refugees 1951. The foremost objection so imposed by Indian state in this regard was regarding the Euro centric definition of 'refugee' which emphasized only on the violation of civil and political rights while undermining the violation of the social, economic and cultural rights. It was further contented by the concerned authorities that the definition was inadequate as it did not take into account the protection of those individuals or groups who are escaping the situation of internal wars or generalised violence. It is to be noted that in the South Asian region, none of the states have ratified the convention reasons essentially being inability to deal with the requirements of the South East Asian region, which faces the problems of mass influx and mixed flow; these problems have not been addressed by the Convention. It is worth mentioning that in the absence of any legislation it is the UNHRC that manages or can be said acts as a watchdog over the matters entailing refugees. But it has a very restrictive role to play, as India has its own administrative arrangements for dealing with temporarily or permanently settled refugees.

CONCEPT OF 'BURDEN SHARING': Apart from this, the Convention, according to India, has not expanded upon the principle of international burden sharing. The major concern in context of South Asian region is that the basic intent of northern states in advocating a regional solution is that of burden shifting which is in sheer violation of principle of solidarity and burden sharing. In the Asian context attention may be drawn to the adoption of an addendum to the 1966 Bangkok principles by the Asian-African Legal Consultative Committee (AALCC) in 1987 calling for greater international burden- sharing. A

common perception that arose out of this consultation was that the principle of burden sharing should be given a global and not a regional interpretation. The additional principles that were adopted were:

I. The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the principle of burden sharing should be viewed in this context.

II. The principle of international solidarity and burden sharing needs to be applied progressively to facilitate the process of durable solutions for refugees whether within or outside a particular region, keeping in perspective that durable solutions in certain situations may need to be found by allowing access to refugees in countries outside the region due to political, social and economic considerations.

III. The principle of international solidarity and burden sharing should be seen as applying to all aspects of the refugee situation, including the development and strengthening of the standards of treatment of refugees, support to States in protecting and assisting refugees, the provision of durable solution and the support of international bodies with responsibilities for the protection and assistance of refugees.

IV. International solidarity and cooperation in burden sharing should be manifested whenever necessary, through effective concrete measures in support of States requiring assistance, whether through financial or material aid or through resettlement opportunities. It is true that a balanced approach may be called for in terms of burden sharing but it is not certainly one, to cite Goodwin-Gill once again, "which inequitably raises the interests of one country (or group of countries) over another. Refugee problems are, by definition, international problems, and their resolution is the responsibility of the community of nations. South East Asia showed how vast numbers could be

moved successfully to new locations beyond the region".[52] Owing to this there is also an apprehension of having an additional financial burden on the concerned state that receives mass influx of refugees. The discernible issue in this regard is the principle of non-refoulment that impose further burden upon the economy of states. This has been one of the prime concerns of non accession of Indian state to the Convention.

Insufficiency in the definition of the term Refugee: There is no legal framework in Indian context that would actually define the word the refugee. In absence of this much importance is given to Foreigners act (1946), which is contemporary law that is consulted by the authorities to deal with refugee crisis. The National Human Rights Commission has submitted various reports in this regard[53], urging the promulgation of a national law, or at least, have changes or amendments to the outdated Foreigners Act (1946). The primary and most significant lacuna in this law is that it does not contain the term 'refugee'; consequently under Indian Law, the term foreigner is used to cover aliens temporarily or permanently residing in the country. This in one sense places refugees, along with immigrants and tourists in this broad category depriving them of privileges available under Geneva Convention.

Security Issues: India has been a safe haven for large number of refugees for a very long time. It can be traced back to Iranian refugees who came to India as early as 12th or 13th century. The security considerations are amongst highest priorities in Indian state owing to its geopolitical location and porous borders. It is not argued that there is deficit in the management of security forces. Vastness and, sometimes even the treacherous nature of the border terrain make it difficult to physically man the entire international borders of India. The

[52] Chimni,B.S. The Law and Politics of Regional Solution of the Refugee Problem: The case of South Asia, RCSS Policy Studies 4, available at http://www.rcss.org/publication/policy_paper/RCSS%20Policy%20Studies%204.pdf.

[53] Dhawan, Rajeev. 'On the Model Law for Refugees: A Response to the National Human Rights Commission (NHRC)', NHRC Annual Reports 1997-1998,(New Delhi: PILSARC,2003).

gaps in the border left unguarded, are often used by refugees to illegally enter/exit the Indian Territory. If caught while entering illegally, the authorities may return the refugee across the border, sometimes even without ascertaining relevant refugee claims of persecution in the country of origin, though this is not in strict conformity with the internationally acknowledged principle of non-refoulment. When this happens, the refugee may face 'forced return' to the country where he/she came from. In the alternative, the border guarding force may interrogate and detain the person as permissible under the law of the land, at the border itself, pending decision by the adrninistrative authorities regarding his plea for refuge/ asylum. In all such cases, the person will have to be ultimately handed over to the local police who will exercise their powers under relevant provisions of the Criminal Procedure Code (Cr.PC).

Owing to this factor, anti-refugee law legislators argue that the proposed law would encourage more refugees to enter India with promises of increased legitimacy, more rights and government services which will increase the threat of social, economic and political insecurity. A three-dimensional model that explains risk to national security through refugee movements has been explained by Mahendra P Lama in his report 'Managing Refugees in South Asia'. This model is explained as:

1. Strategic-level security, when refugees are armed and when government loses control over the refugees.
2. Structural level security is threatened by increasing demands on and conflict over scarce resources.
3. Regime-Level security is threatened when refugees enter the domestic political process and create pressures on the government.

According to the Indian policy makers, these three dimensions heighten the risk of further inward movement and present obstruction in formation of any law. However these three dimensions lie in the sphere of political security. But there has been an observation that, this is not the only reason of this kind of a

problem. The fear of risk to social and economic factor is more prominent amongst local populace that has good amount of refugee influx.

Observance of basic tenants of refugees: one of the factors contributing to the legislator's hesitancy is the contention that India has observed the basic tenants of treatment to refugees as proposed in the Model Law and the convention. India's Supreme Court has extended the application of article 14 and 21 to refugees also. Further it is claimed by policy makers that India affirms the principle of Non-Refoulment which is integral to any law on refugees. Hence keeping in mind all these perspectives, the policy makers are hesitant either on having own national law or acceding to international convention and protocol.

The Benefits of having a Refugee Law

In finding durable solutions to refugee problems in India, three perspectives could be taken note of. One is in having a completely new legislation, other is accession to international norms and standards and thirdly it is reformation in the present policy of refugees as such. Most of the experts in this area believe that reformation of present policy of refugees is the most feasible option. The registration of Foreigners Act, 1939, The Foreigners Act, 1946 and the Foreigners Order, 1948 are the primary documents dealing with the treatment of foreigners in India. Both these acts empower the Indian Government to mandate medical examinations, to limit employment opportunities and to control the opportunity to associate and the ability to refoule or return refugees. However all these aspects are barred by the international Refugee Convention.[54] Owing to such discrepancies in Indian Policy and international convention the agencies that watch over refugees such as UNHCR and NHRC strongly contemplate formation of national refugee legislation. Furthermore various refugee agencies have made various highlights on the inequality and non-uniform conferring of rights and privileges to specialised groups of

[54] Thames,H.K. "India's Failure to Adequately Protect Refugees," Washington College of Law 2000, available at http:// www. wcl.america.edu/hrbrief/v7il/india.htm

refugees. For instance, the Tibetan refugees have been granted land to set up educational institutions as well as various centres for their convenience. Also a concept of recognising government in exile has been given to Tibetans, a recognition that has never received any prominence in any other part of the world. They are allowed to have special recognition within the Indian sub-continent. Similar kind of ideology was adopted with Sri-Lankan Tamil refugees also, who were given preferential treatment, before Rajiv Gandhi's assassination took place.

As far as security issues are concerned that have been explained , it has been explained by many experts such as V Suryanarayan that enactment of refugee protection legislation will enable the creation of a framework for determination of refugee status based on agreed standards of refugee status determination, protection and treatment. To further accentuate his point he has cited the Rajiv Gandhi assassination case, in which it was reported that most of the accused were registered as Sri Lankan Tamil Refugees. He further says that having a regulatory mechanism would decrease anomalies. With the presence of regulatory framework, administrative discretion would no more remain the sole criteria but there would be an established protocol to deal with refugee situations. Logistics to have secured database to quell insurgencies and infiltration can be deduced with formulation of a regulatory framework.

CASE STUDY

The researcher has tried to emphasise the need of a regulatory framework to deal with issues refugees in Indian context. In this regard a recent judgment by court in case of nationality issues has been discussed.

On December 22, 2010 the Delhi High Court passed a judgement (W.P.(C) 12179/2009) supporting the right of a Tibetan born in India to claim Indian citizenship by birth, as per the Indian Citizenship Act (CA). In this particular case a Tibetan girl Namgyal Dolkar, who was born in India in 1986, had contested the denial of an Indian passport to her by the Regional Passport

Office in Delhi, which had said that she could not be considered an Indian citizen. She had argued her case based on the Indian Citizenship Act (CA). The High Court said that Namgyal Dolkar "is an Indian citizen by birth in terms of Section 3(1)(a) CA." It ruled that "She cannot therefore be denied a passport on the ground that she is not an Indian citizen in terms of Section 6(2)(a) PA."

Section 3(1)(a) of the Citizenship Act says that every person "born in India, – (a) on or after the 26th day of January 1950, but before the 1st day of July, 1987" "Shall be a citizen of India by birth."

The Court ruled that the RPOs argument against granting of a passport to Namgyal Dolkar was "erroneous" and asked it to start the process of granting her a passport.

The Court also said an Indian Ministry of Home Affairs's "policy decision not to grant Indian citizenship by naturalization under Section 6(1) CA to Tibetans who entered India after March 1959 is not relevant in the instant case." The Court made a distinction between Tibetans who have *entered* India and those who were **born** in India. The court also said, "The holding of an identity certificate, or the Petitioner declaring, in her application for such certificate, that she is a Tibetan national, cannot in the circumstances constitute valid grounds to refuse her a passport." To date, all Tibetans who are considered stateless are provided with a travel document called the Identity Certificate by the Indian Government.

IMPLICATIONS OF THIS RULING: According to the analysis by the researcher in this regard this ruling by the court would create uncertainties in status of many refugees who had come to India to seek asylum but due to certain factors, no comprehensive settlement or repatriation procedures were taken up. In those situations they remained in India and some of them have next two or three generations being born in India. Such is the case with Tibetan refugees also. If this judgment is considered then the Tibetans present in India who are born between a specified times periods would no longer would have refugee

status. At the same time the Indian Government has always recognized Tibet government as government in exile. In that case there is a probability of having an issue of dual citizenship that is violative of constitution of India.

The prime focus of researcher in this regard is that in absence of any defined national framework, there are various anomalous situations like this that can arise. Furthermore there is also a possibility of other refugees taking advantages of this loophole. This may become an encouraging factor for other refugees to consider Indian state as most eligible haven which may create various social and economic problems as interests of citizens might get affected

CHAPTER V

POLICY ISSUES CONCERNING REFUGEES

In concern with policy issues in lieu of refugees, the focus in this chapter has been on provision of durable solutions to refugees. In other words this refers to provision of safe haven by either integrating them in the host nations, resettlement in third countries that are different from host nations in situations wherein it is difficult to go back to countries of origin or voluntary repatriating them to their countries of origin. Millions of refugees around the world presently have no access to timely and durable solutions, the securing of which is one of the principal goals of international protection. There is a need for more coherence by integrating voluntary repatriation, local integration and resettlement, whenever feasible, into one comprehensive approach, implemented in close cooperation among countries of origin, host States, UNHCR and its humanitarian and development partners, especially NGOs, as well as refugees. As an interim response, the promotion of self-reliance of refugees is an important means to avoid dependency, take advantage of the initiative and potential contributions of refugees, and prepare them for durable solutions. The success of the search for durable solutions depends in large measure on resolute and sustained international cooperation and support. Concerted action is called for, in particular, to resolve protracted refugee situations through a well-balanced package of support for the different durable solutions envisaged.[55]

In regard with repatriation it should be noted that *non-refoulment* is the principle recognised by the international community. Any deviation from it has to be done with valid reasons for the same. Though it has been observed, that in practice there is derogation from this rule. It is observed that there is no explicit international norm that obliges states to grant asylum and consequently to

[55] Redoubling search for Durable Solutions, Agenda for Protection,3rd ed, available at http://www.essex.ac.uk/armedcon/story_id/rethinkingdurablesolutionsrefugees.pdf

accept refugees into their territories. Goodwin Gill finds that state practice permits only one conclusion: the individual has no right to be granted asylum. He further explains that there is no necessary connection between *non-refoulement* and admission or asylum. Maria Teresa Gil Bazo affirms that there is no international recognition of the right to be granted asylum of universal scope.[56] A similar observation has been made in regard with article 33(1) of the Refugee Convention. It asserts that this article does not give individuals the right to receive asylum in a particular state. This right cannot negate the sovereign right of the state to regulate entrance of aliens in their territory. It is further explained by Goodwin Gill[57] that this principle of non-refoulment is not so much about admission to a state, as it is about not returning them to their own states where their life is in peril and there is danger of persecution. But it is also contented by authors like James Hathaway that interpretation of article 33 with article 1 could also be interpreted as imposition of *de facto* obligation to accept asylum seekers. The condition that has been emphasised herein is that access to state is imperative to guarantee right of *non- refoulment* and a thorough fair procedure should be followed. The focus of discussing this concept is that the scope of durable solutions comes to the limelight as and when refugees are recognised as such. It is asserted that refugee problems demand durable solutions not only because of the cost to the international community, the burden on the host and the waste of the refugee lives but because in their second, third and fourth generation refugees can be violent and destabilizing factor. Refugees are caused by government action and achieving durable solutions is dependent on political will, diplomacy and statesmanship of governments. The economic considerations are essential for the process of integration while finding solutions are largely based on political will. If the host nation rejects or detains the refugees, then no durable solutions can be

[56] Maria-Teresa Gil Bazo, New issues in Refugee research, UNHCR Research paper no. 136, Refugee Status, Subsidiary Protection and the Right to be Granted Asylum under EU Law, available at http:// www.unhcr.org/reseacrh/:

[57] Goodwin Gil, The Refugee in International Law, 2nd ed, Oxford University Press, 1996.

deduced. However a new life can begin even in a poorest nation if international assistance is achieved.[58]

VOLUNTARY REPATRIATION

The slowdown in achieving durable solutions that has occurred in the last decade has largely been caused by a decline in voluntary repatriation. This decline in turn was caused by the virtual conclusion of the period of the independence struggles which produced refugees but also resulted in their repatriation when the goal was achieved.

The newly independent countries with their insecure and fragile government setups are centres of refugee flows as they undergo nation building or revolutionary changes as they are engaged in conflicts with their neighbours. Hence a lot of deliberation is required to consider voluntary repatriation as a durable solution. It is one of the most feasible options according to UNHCR, international community and individual states but this has its own limitations in relation to mandate influence and resources. Even UNHCR can assist only for a year.

Voluntary repatriation as a practice involves certain elements which discuss attributes of this particular concept. To begin with it has a *strong political element* in it, i.e. the civil and political situations that force people to flee their homes and seek refuge in other nations. Such situations arise after the government of a particular state has gone against its own citizens due to specific reasons such as their race, ethnicity or any other political vendetta's that such people hold for instance situations in Afghanistan, Vietnam etc induce people to search for safe havens . International politics have major role to play in this regard. Much voluntary repatriation occurs after overthrow of tyrant, independence or change of regimes. In other words it occurs once political situation stabilises and it gets safe for people to return to their own homes. Continuation of power of the regime that was responsible for atrocities is a

[58] Stein,Barry. Durable Solutions for Developing Country Refugees, International Migration Review, Vol.20, No.2, The Center for Migration studies of New York, Inc, summer, 1986

dissuading factor for return of refugees. However this could be one of the factors and not the only factor. Situations of return of victims of revolutionary change are also very prominent factors for return of refugees. For instance in case of Tibetan refugees, their return is totally unfeasible as such an activity would result in their persecution. Repatriation for such refugees can only happen if they surrender the characteristics that marked them as victim, it that is possible and acceptable to the regime. Thus in most of the cases voluntary repatriation depends only upon the developments that occur at source nation i.e. the situations shall be conducive enough to mark the return of the concerned victims.

Another aspect of voluntary repatriation is passage of time. This phenomenon is prominent in case of spontaneous return of refugees. Many people flee their homes for confused and disorderly combination of reasons that mix political persecutions with economic and social disruptions.[59] These people have vague expectations and misconceptions and premonitions and there is spontaneous return of these people once these aspects are over. However it becomes difficult for international community and UNHCR i.e. those agencies that are responsible for providing aid to the refugees who return in such situations. For instance in case of Ethiopia a special programme was arranged for return refugees from Sudan and Somalia. However the entire programme was cancelled in case of Sudan due to political turmoil that made provision of assistance impossible. However voluntary repatriation is not always the best option or even answer. Some peoples may be better off out of the land where they were forever the despised minority as in case of Palestinian minority. Hence it can be said that better and innovative means shall be developed to ensure voluntary repatriation. As such there are only three promulgated durable solutions and each one being equally effective is imperative. At least in some proportions partial repatriations could be practiced wherever feasible.

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[59] id

CASE STUDY:

DJIBOUTI EXPERIENCE

A tripartite commission[60] comprising of two concerned governments and UNHCR was setup to establish a return programme. The program was aimed at those rural refugees in Djibouti who had fled from an area of fighting, turmoil and drought. While those people who had fled due to political oppositions were not the part of this repatriation program. Returning refugees were given certain basic kits for their victuals such as food, clothing etc. It was designed to progress slowly and was to work upon the reports of the returning refugees. This was facilitated by separating innocent, unwittingly involved refugees from those politically committed. However there were reports of this exercise having push factor i.e. there were reports of this practice not being voluntary as an issue arose that some refugees were told that they won't be given ration if they did not repatriate. Nevertheless Djibouti has been example of an active participation by UNHCR and treading on the path of humanitarian non political character.

RESETTLEMENT

Refugee resettlement whether implemented on a formal or ad hoc basis is a process by which certain people who have fled conflict, persecution, or other crisis are selected to leave a country of asylum and start life anew in a third country that is willing to receive and protect them on a permanent basis. Many of the new resettlement programs remain small and weakly institutionalized and traditional resettlement countries still take in the bulk of UNHCR-sponsored refugees.

[60] The Dijbouti Tripartite commission is symbolic of UNHCR's active pursuit of voluntary repatriation. A similar approach was used after the 1983 flight of refugees from Uganda to Rawanda.

THE PURPOSES OF REFUGEE RESETTLEMENT

Refugee resettlement has multiple facets within the international refugee regime. It is a powerful tool of protection for individual refugees, a means to secure other rights, a durable solution for those who cannot go home or integrate in the country of first asylum, and a means by which states can share the responsibility for refugees with overburdened host countries and by doing so bolster their commitment to providing first asylum. [61]

Refugees flee their countries in search of safe haven. There is a possibility that even the country of first asylum is not safe. Refugees escaping persecution may find that the agents of their persecutors, the government of the home country, or a rebel group operate with impunity across the border, or that there are groups with similar agendas in the place of exile. For instance, Afghan women who escaped the misogynistic rule of the Taliban often found themselves at risk in Pakistan, especially if they transgressed the strictures on female education, work, or dress. These women even though in Pakistan, were not free from strange bondages. For instance women who did not have the protection of a male relative were particularly vulnerable to exploitation and abuse.

Refugee camps sometimes fall under the control of one faction in a multi-faceted conflict, as was the case among Cambodian refugees in Thailand and Rwandan refugees in eastern Zaire. In such situations, refugees associated with different factions are often targeted. Ethnic minorities among refugees, like the Roma among ethnic Albanian Kosovar refugees in Macedonia, may become a scapegoat in eyes of the concerned agencies, can be abused, or excluded from provision of any kind of assistance or benefits that other refugees get in similar situations.

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[61] Nicholson,Mike. Refugee Resettlement Needs outpace growing number of resettlement countries, Migration information source, available at ,http://www.migrationinformation.org/ USFocus/display.cfm?ID=912, November 2012

The major persuading factor which leads refugees to seek asylum are inability or unwillingness of local law enforcement authorities to intervene when refugees are victimized. UNHCR may conclude that the only way it can guarantee the protection of some refugees is to refer them for resettlement, usually on an individual basis. Countries like United States, Canada, and Australia also accept protection cases identified through means other than UNHCR referrals, but UNHCR remains the main gatekeeper for resettlement as a means of protection.

The ability to move from one place of refuge to another is one of the few means that refugees have to affect the human right to family unity. Refugee families are often separated in the process of flight and may end up in different countries. The countries with the largest resettlement programs (Australia, Canada, and the United States) give some preference to close relatives of refugees already settled in these countries. Resettlement is also used to enable refugees to get vital medical treatment not available to them in the country of first asylum. Some countries with relatively small resettlement programs specialize in these resource-intensive cases.

Planned resettlement has an important role to play in bringing exile to an end, not only for individual refugees, but also as part of a comprehensive plan for an entire refugee population. In the aftermath of a peace agreement, for example, as in Angola in 2002, the majority of refugees may choose to return home. Some may prefer and may be allowed to remain permanently in the country of first asylum, eventually assuming citizenship. Zambia is opening this possibility for some Angolans who have lived there for many years. But there are also likely to be some refugees who for some reason are not able to return safely or to integrate locally, and for them resettlement may be the only solution in sight. Several thousand Somali Bantu, a minority group descended from slaves and subject to brutal discrimination by the dominant clans in Somalia, are being

processed for resettlement in the United States. Repatriation would place them in renewed danger, and their host country is not willing to have them remain indefinitely.

Beyond providing individual protection and a durable solution for some refugees, resettlement can function as a broader support for refugee protection by assuring countries of first asylum that other countries are willing to share responsibility for refugees, thereby ensuring burden sharing. Resettlement can act as a safety valve where the presence of a particular group within a refugee population may cause tensions with the local people or create security concerns. In a few cases, countries of first asylum have demanded resettlement as the price for keeping their borders open to refugees: in Macedonia in 1999 or Southeast Asia in the late 1970s and early 1980s. With such a small number of resettlement places available, there is an obvious danger in this pattern becoming widespread.

UNMET NEEDS, UNFILLED PLACES, UNCERTAIN FUTURE

The number of refugees seeking resettlement hugely exceeds the number of places available. Paradoxically, and despite this overwhelming imbalance, more than 10,000 agreed resettlement slots expire unfilled in an average year. As Mark Hetfield of the Hebrew Immigrant Aid Society, a US resettlement agency, points out, "Over the last decade more than 100,000 refugees in need of resettlement could have been rescued from danger, or been provided with an opportunity to lead productive fulfilling lives, rather than living off handouts in squalid camps or struggling underground as urban refugees." Part of the explanation for the "unfilled seats in the resettlement lifeboat," as Hetfield puts it, lies in the difficulties in identifying who among the millions of refugees worldwide is most in need of resettlement as a means of protection.

UNHCR has established criteria that are supposed to be applied uniformly, but the work of identification is extremely labour-intensive and subject to many

pitfalls. The pressures on resettlement staff from desperate refugees can be intense, endangering objectivity. With so precious a resource at stake, fraud and corruption are constant dangers. Refugees often have genuine difficulty in establishing their identity by modern bureaucratic standards, having lost, been robbed of, or never possessed documents recording their birth, residence, and relationships. These concerns have been greatly heightened owing to security developments.

Refugee resettlement remains an essential tool of protection, solution, and international burden sharing. But with the US resettlement program on an uncertain trajectory, Europe contemplating a new approach, and new countries starting to participate, refugee resettlement at the end of this decade may look very different than it does today.

REHABILITATION OR LOCAL INTEGRATION

The other primary durable solution for particular set of refugees is local settlement. It is pointed out that expansion of local settlement can be projected as a way of taking up the slack caused by the decline in voluntary repatriation. The ICARA II (Second International Conference on Assistance to Refugees in Africa) Declaration notes: *"Where voluntary return is not immediately feasible or possible, conditions should be created within the country of asylum for a temporary settlement or the integration of refugees into the community and their full participation in its social and economic life."* Despite this declaration many host countries are hesitant about either temporary settlement or local integration. Operationally temporary settlement is not very different from local integration. Both involve a host permitting refugees to "participate on an equal footing in its social and economic life". There will be at most only small differences in the forms of assistance needed for one or the other type of settlement. In terms of policy the main difference is that temporary settlement is not meant to be a durable solution, the refugees are allowed to remain while waiting for voluntary repatriation to become feasible. However different states have certain explicit policies in regard with local integration of refugees, for

instance one kind of immigration puts restriction on where newly arrived refugees can settle. Many countries practice (or have practiced) such settlement policies; examples include the UK, Germany, and Sweden.[62] Under the new UK Asylum and Immigration Bill, refugee immigrants are placed outside London and Southeast England - the two regions where most previous immigrants reside. Germany imposes severe restrictions on where refugee immigrants can settle: unless having found a paid job, people must stay in a part of the country assigned by the government. In Denmark as well as the Netherlands, authorities try to disperse immigrants by obliging all municipalities to provide dwellings for a certain number of refugees (Dutch Refugee Council 1999). In addition, local dispersal policies have been used within European metropolitan areas. Sweden is another example, where a new system for refugee immigrant reception was introduced in the mid 1980s. One aspect of the system was that asylum seekers were placed in regions outside the metropolitan areas to a greater extent. Thus, settlement policies are commonly employed, and a vital ingredient of the policies is the attempt to reduce immigrant concentration in big city areas. Given the delays and difficulties of arranging repatriation many hosts consider a temporary settlement decision to be of equal weight with a local integration decision. Temporary settlement is not tantamount to integration but hosts are clearly hesitant due to fear it will eventually become permanent settlement and de facto integration. Nonetheless a host government faced with few alternatives may prefer temporary settlement because it delays a commitment and may be more acceptable to domestic political forces. In reality the lot of many refugees is temporary asylum in camps with care and maintenance assistance and no durable solution in sight. Countries of asylum are hesitant to grant refugees permanent residency even when it is clear that repatriation is far off or unlikely. Host hesitancy toward

[62] Other examples of such policies can be deduced by US immigration authorities whereby refugees are distributed through private organizations that arrange housing; the dispersion of immigrants across the US is not an explicit objective, Belgium is another country that follows such policy.

temporary or permanent settlement is based on more than just a financial balance sheet and derives from many interconnecting factors such as:

(a) Support for the refugees political cause, particularly independence, secession or autonomy would be weakened if they were integrated and ceased to be a visible reminder of the cause. This sort of a role was played by the Palestinians for longest but this category also includes: Khmer in Thailand, Ogaden Somalis in Somalia, Afghans in Pakistan, and Saharawi in Algeria.

(b) The size of the refugee population may be too large for the host to absorb. A refugee group may be too large either in absolute terms, three million Afghans in Pakistan, or in proportion to the size of the host, 40,000 refugees in tiny Djibouti or Somalia hosting refugees' equivalent to about twenty percent of its population. Absorptive capacity is highly subjective, however, and many countries with relatively light burdens such as Hong Kong, Thailand, Malaysia nonetheless feel unable to integrate refugees.

(c) Fear that local settlement would encourage more refugees to flee to the host country. It is extremely difficult to determine whether or not a magnet effect actually exists, but the fear expressed is plausible and genuine

(d) Fears of being accused of giving priority to refugees rather than to needy nationals or alternatively that the refugees' economic skills bring them into competition with nationals. This is one of the most common themes in refugee situations everywhere.

(e) Unwillingness or inability to make a financial contribution from their own scarce resources, or by going into debt for the sake of refugees.

(f) Fear that the refugees may skew development plans and priorities because they are in the wrong place with the wrong needs.

(g) There is also a concern that due to apparent differences in ethnic, cultural, social and political backgrounds the refugees might make them

unacceptable to local population and thereby make them unsuitable for integration..

However elucidation of the above-mentioned criteria's puts certain durable solutions themselves in tight situations. At one hand we have the concept of nationalism that entails full loyalty and cooperation amongst citizens, keeping their self interests aside. The concern of nationalism or nation-states are deemed to be much above ethnicity, race etc. But if such ideologies build up a nation, the aggressive sides of the same also exclude others from any recognition.

Historically the development of nationalism and of nation-states has been a violent process with many instances of war, massacre, extermination, forced assimilation and expulsion or flight. For instance most exemplary of the regional setups, Europe achieved its nationalism reach its present state of maturity and stability after a century that included two world wars and many other horrors. There are many pathways to becoming a nation-state, but one of the most common, which fits the circumstances of most developing countries, is first to have a territory with relatively stable boundaries and then the nationality develops within the shell, India is one such example in this regard. Most often there is a core or dominant nationality that determines the content of the emerging nationalism in competition, often violent, with other ethnic groups or nationalities within the territory. The losers may be assimilated, remain as a minority, be exterminated, flee, or be expelled. India-Pakistan partition could be referred to explain this aspect. This painful refugee-producing scenario fits developing countries utmost.

Francis X. Sutton pointed out that this sort of familiar nation-building pattern has a reverse side that hitherto has been ignored. Nation-building, "the fiercely natives sentiments", "narrow and particularistic sentiments" of the integrative revolution "raise important barriers to the acceptance of refugees, even where there are favouring ethnic, cultural, or political soil dairies". Sutton goes on: "if this analysis is sound, the prospects of long-term settlement of refugees in

places of first asylum in the Third World do not look very encouraging. The most exemplifying illustration regarding Sutton's point is the Banyarwanda tragedy. In 1982 uprooting of Rwandese refugees who had been in Uganda for two decades and had long ago achieved self-sufficiency took place. About 70,000 refugees were affected, half were driven back into Rwanda and the others forced to take refuge at relatively unaffected refugee settlements in Uganda. The ruling political party directed the attack on the Banyarwanda reportedly because they supported the opposition party and were convenient scapegoats for Uganda's numerous failings. Most of the refugees who were attacked had been spontaneously settled. It was further explained that Uganda had followed the policy of temporary settlement and none of the refugees were given any nationality.

For years many have pointed to "traditional hospitality" by people in developing countries as a major factor ameliorating the condition of refugees. This hospitality has been particularly effective when ethnic connections exist between refugee and host. However, there are situations in which local acceptance of kin can lead to national problems, imbalance and rejection. For instance in Lebanon the Palestinian refugee's involvement with national politics upset a delicate balance and contributed to tragedy. In Malaysia ethnic Chinese refugees from Vietnam were rejected against a backdrop of a delicate national ethnic balance. In Pakistan a wary eye is kept by national authorities on Afghan refugees in the province of Baluchistan where the refugee's ethnic kin have long resisted national control.

It may be necessary to question whether the relative outlooks in regard with the three durable solutions in recent years are wrong or too optimistic. The refugees and development approach has been pushing local settlement as the most available durable solution. This preference has come about through a process of elimination, voluntary repatriation has slowed down; resettlement is not realistic and not from a record of successes. An extra degree of caution needs to be given to local settlement. A durable solution means integration and

most host countries are offering only temporary settlement. That could evolve into de facto integration but temporary settlement could also become rejection and expulsion. Much more attention needs to be paid to incorporating a chance for citizenship into settlement schemes. Without that chance, it may well be that the only real durable solution is voluntary repatriation, followed by resettlement in pluralistic societies as second best.

THE FUTURE

Durable solutions actually consist of development of 4Rs that are repatriation, reintegration, rehabilitation and reconstruction. These four aspects also vary in regard with sate of origin and the host states. The main motive of having these aspects is to develop strategies for creating conducive environments for refugees that they had lost due to turmoil in their region. The focus herein is to guarantee human rights to refugees. As all protracted situations or mass influxes have unique characteristics, varied approaches and partnerships have been developed to improve the prospects for durable solutions in specific situations. These range from concepts such as the 4Rs, Development Assistance for Refugees and Development through Local Integration to the strategic use of resettlement. They also include the Group Methodology, the strengthening of protection capacity in regions of origin and managed labour migration. All offer ways to complement and facilitate access to the three traditional durable solutions.

However over the years it has been found that these initiatives are not enough and there are other areas that remain to be explored. To begin with whether the present Framework for Durable Solutions be applied to internally displaced persons. Internally displaced persons, or IDPs, are among the world's most vulnerable people. Unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries. They may have for similar reasons of fleeing from their original areas as refugees (armed conflict, generalized violence, human rights violations), IDPs however legally remain under the protection of their own government – even though that

government might be the cause of their flight. As citizens, they retain all of their rights and protection under both human rights and international humanitarian law.[63] The concern herein then develops is adoption of framework of durable solutions in concern of IDP's. Further the implications of durable solutions do no end on IDP's only; they further need to develop in case of urban refugees also. For example, would the solutions pertinent to Somali refugees on the Eastleigh Estate in Kenya's capital, Nairobi, be the same as for Somali refugees in the Dadaab camps in the same country. Also refugees' preferences need to be taken into account when implementing durable solutions. Furthermore proper emphasis need to be given to participatory approaches to ensure choice and compliance with the principle of voluntarism, i.e. as already mentioned that when repatriation is to be done, it shall be precisely voluntary and there shall be no forcing of refugees to repatriate. The role of regional approaches, as in the European Union or the West African region, and their reconciliation with global standards in this regard needs to develop. Although these situations remain to be resolved, it is clear that the search for solutions must be comprehensive and collaborative. In each case, this means political engagement. UNHCR's work on durable solutions recognizes the potentially complementary relationship between the three durable solutions and the way in which they can be most effectively applied within the context of comprehensive plans of action. The strategic use of resettlement, in particular, highlights how it is most effective when used not in isolation but to complement other durable solutions. From a political perspective, ensuring that stakeholders provide a combination of the durable solutions may bring previously unattainable solutions within reach. Such comprehensive approaches would need to be developed on a situational basis and be linked to wider peace-building and post-conflict reconstruction initiatives across the UN system. For instance in 1989, UNHCR helped to nurture comprehensive agreements relating to Indochina and Central America, achieving political agreements to overcome particular protracted relief. It was

[63] Internally Displaced People, available at http://www.unhcr.org/pages/49c3646c146.html

also emphasised that to resolve such issues e strong individual and institutional leadership, and willingness to engage in political facilitation.

In seeking to implement its new approaches, while UNHCR has tried to play the role of catalyst by advocating the mainstreaming of displacement issues across the UN system, the states have followed policies that best suit their interest. Rather than confining to legal protection, on one extreme, or indefinitely expanding its mandate, on the other, UNHCR may take on a role that is primarily one of innovation, advocacy and facilitation. Issues such as development, migration, peace-building and security all affect the welfare of refugees and the search for durable solutions, yet rely on the collaboration of other UN agencies and NGOs in order to ensure coordinated policy-making. Creating linkages across the issue-areas of global governance represents a crucial means to channel states' existing interests and other UN agencies' expertise in these areas into improving access to durable solutions.[64]

[64] *Supra n.*1

CASE STUDIES

THE CASE STUDY OF KOSOVO

THE REASON OF ASYLUM:

After the World War II, the Communist government of Marshal Tito recognised the principle of self-determination in a bid to win support of the ethnic Albanians and other minorities. This principle was incorporated in the 1946 constitution and, according to *Mouvement Pour Une* Alternative Non-Violent (MAN). This action further contributed to an accelerated departure of Serbs from Kosovo (MAN 1993). Already this area was sensitive enough due to ethnic conflicts going on between Serbs and Albanians over decades. Another reason for this outward flow was the alleged harassment of the Serbian population by the Albanians. There have been several reports that deduce that, the attempt at ethnic cleansing by the Albanians was initially made easier by Tito's explicit order forbidding he return of Serbs who fled during the war. Tito, who had promised the Kosovo Albanians that he would help them seize power, in some regards intentionally and in some unintentionally encouraged large-scale immigration from Albania. The reason of mentioning the particular provision in the 1974 constitution in this regard is that because autonomy of state was realised again, that created furore amongst the Albanian population of the state to again ask for separatist states. It is observed that amendment in the constitution provided for the effective disintegration of Serbia. Serbia was divided into three constitutional units allowing Kosovo to become a de facto republic. In addition, the constitution allowed Kosovo and Voivodina to have an influence on Serbian affairs but ensured that Serbia had no say in the affairs of its former provinces. The other issue was the fact that the powers of the provinces were defined by the constitution of Serbia. This provided Serbia with a legal justification for attempting to change the constitutional status of Kosovo without the prior consent of the other republics. However certain other reasons

that contributed to the conflict and degradation of Kosovo have also been recognised. In the words of the US Department for Army Area Handbook on Yugoslavia (USDAAHY), Kosovo's drive for republic status was supported by blatant Albanian intervention, which fuelled ethnic tension and led to the outbreak of the conflict.

Secondly, Yugoslavia's richest republics were frustrated by federal investment requirements designed to improve Kosovo's economic situation without any return for their money. Thirdly, uncontrollable nationalism in one part of the federation (i.e. in Kosovo) threatened to encourage similar bursts of independence elsewhere in the multinational state.

According to Agon Demjaha, the dissolution of the former Yugoslavia and the abolition of the autonomy of Kosovo in 1989 escalated the conflict to a new level. Kosovo became a de facto Serbian colony. The Albanians created parallel state institutions that had the objective of establishing local sovereign authority. Meanwhile, the international community failed to implement a workable conflict prevention strategy and instead focused much more on the management and containment of the escalating conflict.[65]

Demjaha notes that, while the Dayton Agreement retroactively rewarded the armed struggle of the Bosnian Muslims and Serbs (each getting their own territory and political structures), the hopes of Kosovo Albanians receded into an indefinite future, triggering the emergence of the Kosovo Liberation Army (KLA). The appearance of the KLA and the actions of Serbian police and military forces caused the first human catastrophe in the summer of 1998. The international community only decided to act when, on 15th January 1999, 45 ethnic Albanians were massacred in Racak.[66]

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[65] Schnabel, Albercht and Ramesh Chandra Thakur ,Kosovo and Challenge of Humanitarian Intervention, United Nations University,2000

[66] id

A peace conference was organised for February in France and both the Albanian and the Yugoslav delegations agreed to participate. The Albanian delegation insisted on a referendum on independence after an interim period, while the Serbian delegation resisted the prospects of a NATO presence[67] in the province and eventual independence for Kosovo. After the Albanian delegation unilaterally signed the peace deal, NATO decided to move forward with air strikes against Yugoslavia. After almost three months of bombing, a military technical agreement between NATO and Yugoslavia was signed, and on 12 June 1999. The international security forces with NATO at its core were deployed throughout Kosovo.

After finding many of their friends and relatives murdered and their houses burned, numerous returning ethnic Albanian refugees began to take revenge on the remaining Serb population, prompting them to flee Kosovo.

THE PROCESS OF REINTEGRATION AND REHABILITATION

One of the key features of rehabilitation and reintegration mechanisms is active role played by UN agencies. It provided for provisional system of providing administration, safety and security. The UN Security Council Resolution 1244 of June 1999 created a unique political and institutional hybrid, a UN protectorate with unlimited power whose purpose is to prepare for substantial autonomy and self-government. Furthermore UN agencies also undertook major task of implementation of the Programmes to address the long-term needs of returnees including the rehabilitation and reconstruction of the infrastructure, administrative and governance structures and social relations as most of these structures were totally uprooted due to long legacy of war. The main focus of international community and organisations involved in this reconstruction was to assist refugee returnees and efforts to rebuild Kosovo. According to the

[67] NATO's role in Kosovo, available at http://www.nato.int/cps/en/natolive/topics_48818.htm

USAID[68], the immediate requirements included the establishment of community structures and authorities in Kosovo, provision of emergency food and accommodation, establishment of a secure environment and rule of law and the provision of essential life-saving services. It is to be noted that in dealing with any of the durable solutions conscientious planning and diligent implementation (with the full participation of the refugees themselves) have to be there to ensure returnees being successfully resettled and reintegrated. In regard with the developmental procedures in Kosovo many expectations with the concerned programme are met. Also certain activities have been undertaken by UNHCR in this regard as it supports the work of the Commission for Real Property Claims which enables refugees to receive confirmation of their rights to property left behind in Bosnia and Herzegovina. Close cooperation with the relevant authorities in Croatia and the FRY(Federal Republic of Yugoslavia) and support to refugees from Croatia who would also like to reclaim their left property is also envisaged by the concerned agencies. All these activities support the development of durable solutions, whether through repatriation or through local integration. UNHCR facilitated the repatriation of some 50,000 refugees to Bosnia and Herzegovina and to Croatia during 1999. Refugees, who, because of their background, are not able to repatriate to their own country or integrate in the FRY, were considered for resettlement. However these criterion were adjudged from case-to-case basis

CONCLUSION

The demand for durable solutions that has been expressed in the early 1980s has not yet developed sufficient momentum to improve substantially the prospects for refugees. The desire for having substantial durable solutions for concerned problems has produced increased attention to the problem. The concern of the international community in resolving to durable solutions can be observed as it has been part of since 1983 "Durable Solutions" has been an

[68] United States Agency for International Development, in reference to the agency so concerned with development of projects in Kosovo

item on the agenda of UNHCR's Executive Committee. Also the 1984 Second International Conference on Assistance to Refugees in Africa (ICARA II) dealt with theme on durable solutions which was described as "Time for Solutions", and in 1984 Principles for Action in Developing Countries "demand durable solutions" were contemplated. But only modest results have been achieved in actually attaining more durable solutions. There is increased effort for durable solutions by international community as such. Whether it has been in Kosovo or any other such state such as Burundian refugees in Tanzania, international community, i.e. UNHCR in some cases as in Burundi has taken up active steps. It initiated Old Settlements Task Force in consonance with governments of Tanzania and Burundi to setup a consolidated comprehensive approach to develop durable solutions. However there has been a different impetus in concern with developing nations. Majority of developing nations avoid having any durable solution due to cost factors. In 1980 the UNHCR Working Group on the Fund for Durable Solutions reported: the durable solutions would require in favourable circumstances at least $1,000 to $1,500 per capita from the fund itself in addition to outside funding. The emphasis herein is that there shall be development-oriented approach to refugee assistance. While it is difficult to justify high per capita costs for an isolated refugee settlement, these costs are more acceptable for a settlement that is linked to a process of integrated area development where agricultural production complements and stimulates nonfarm activities, goods and services. However it is acceptable that there would be differences according to circumstances of each case. An area wherein there is not much travesty of resources would have better development as compared to area that has such attributes missing. It should be remembered that refugee assistance is humanitarian assistance to restore victims of injustice to full membership in a human community.

CONCLUSION

The 1951 convention relating to status of refugees and the 1967 Protocol to the convention are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect fundamental human value on which global consensus exists and are only instruments on which specifically deal with refugee law. Beginning with European refugees from Second World War, the convention further developed to remove limitations to include all kinds of in discrepancies. International refuge convention has same impetus that it had when it was adopted over fifty years ago. The end of cold war did not reduce the instability in the international community. The ethnic-cultural turmoil's often exploited by politicians and populists in different regions of the world have erupted into conflicts and strife that further create such situations wherein thousands of people are left displaced and separated for generations together. There are also long-standing refugee situations resulting from conflicts which have not been resolved with the ending of cold war which sometimes lead to endemic instability and insecurity. The growth of irregular migration, including further issues of illicit trades further pose a grievous challenge. The different parts of the dissertation have discussed legal themes of contemporary relevance to the international refugee protection regime and in particular the interpretation of the 1951 Convention.

One of the important features that are interpreted by the convention as well as the regional treaties is that of principle of *non-refoulment.* This principle holds specific importance as principle of customary international law also. The scope of this principle is to be determined against background of a number of recurring issues. While the formal requirements of non-refoulment may be limited to Convention refugees, the principle of refuge is located within the body of general international law. It encompasses those with a well-founded fear of being persecuted or those who face other relevant harm. A combination of legal and humanitarian aspects imposes limitations on return of individuals to countries in which they may suffer inhumane or degrading treatment.

Furthermore membership of a particular social group as defined in article 1A (2) of the convention and in an aspect certain regional treaties have also received wide connotations. During the early setup of the convention, this ground was the most uncertain ground for grant of asylum. However over the years, depending upon the particular circumstances of the case and society of origin, many categories of social groups have been recognised including for example women wherein they face gender based persecutions or it can be tortures. Though gender and sex are not explicitly mentioned in the convention, they have advanced both in theory and in practice over the past decade. In case of women their gender itself becomes the ground of discrimination as has been described in chapter 2 in case of female genital mutilations. The discriminated groups further include families, occupational groups, homosexuals etc. It is envisaged that though neither general international law nor treaty obliges any state to accord to durable solutions, but it is imperative that right of refugees to return home, in some cases receive adequate compensation for settling down in third countries. Owing to today's scenario, it is not sufficient that there is refugee settlement only at international or regional levels. It is also imperative that there is national framework that deals with all aspects of refugees.

It can thus be concluded that there can be no real peace in this world as long as hundreds of thousands of men, women, and children, through no fault of their own, but only because they sacrificed all they possessed for the sake of what they believed, still remain in camps and live in misery and in the greatest uncertainty of their future. Eventually, if positive solution for the same is arrived at, the uprooted are bound to become easy prey for political adventurers, from whom the world has suffered too much already. Hence the need of the hour is that all concerned agencies at international and national levels should join hands in an all-out effort to solve this problem.

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