



Dissertation on
TOPIC: Protection of Refugee Women under Contemporary
International Legal Regime: A Study



Under the Guidance of Prof. V. Vijaykumar

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DECLARATION

I, the undersigned, hereby declare that the work titled "*PROTECTION OF REFUGEE WOMEN UNDER PRESENT INTERNATIONAL LEGAL REGIME: A STUDY*" is the product of research carried out by me under the guidance and supervision of **Prof. V. Vijay Kumar**, Professor of Law at National Law School of India University.

I further declare that this work is original, except for such assistance taken from sources as have been referred to or mentioned at the respective places, for which necessary acknowledgement have been made.

I also declare that this work has not been submitted either in part or in whole for any degree or diploma at any other university.

Yogesh Pratap Singh

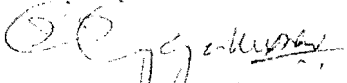
LL.M. Final Year

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CERTIFICATE

This is to certify that this dissertation entitled "*REFUGEE WOMEN: PROTECTION UNDER PRESENT INTERNATIONAL LEGAL REGIME: A STUDY*" submitted by **Yogesh Pratap Singh** as part of his LL.M Degree Course is a result of his bonafide research satisfactorily carried out by him under my supervision.

Date: 21-05-2007


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CHAPTER 1- INTRODUCTION

The concept of equality has emerged from Aristotle's thinking, "like should be treated alike and unlike should be treated differently". In the modern period, movement for human liberation and legal changes have inspired and compelled the use of the concept of equality as a legal tool for social change, demanding that it be delivered as well as guaranteed. Equality in human societies is commonly affirmed but rarely practiced. Despite general consensus on equality as a value, no society is organized on equality principles. As a matter of fact, social equality is hard to find anywhere. Social inequality, by contrast, is seldom defended but widely practiced.

The second-class status of women as a group is widely documented to be socially and legally institutionalized in various countries. As a result, women compared to men, are deprived of access to resources, benefits, opportunities, including dignity, respect, security, mobility, authority, credibility, speech, power, and full citizenship. According to **Prof. Amartya Sen**, "the phenomenon of gender inequality may be categorized as survival inequality, natality inequality,¹

¹ Natality inequality refers to the practices of sex-selective abortion often practiced for preferring a son in male-dominated society by means of high-tech sexism.

unequal facilities, ownership inequality, unequal sharing of household benefits, chores, domestic violence and physical victimization.”² This categorization is much relevant in the third world countries where disparity among men and women is alarmingly wide.

In this dissertation, an attempt has been made to deal with the concept of gender justice (equality) in the case of Refugee protection and emergence of this concept in the International and national legal systems.

Over one percent of the total world population today consists of refugees. A large number of that is women and their dependent children. An overwhelming majority of these women come from the developing world. South Asia is the fourth largest refugee-producing region in the world. Although migration is the ancient phenomenon and was prevalent everywhere but, migration in the South Asia seems to be a welcome addition to the corpus of courses on human rights and humanitarian norms of protection, care and justice for the people of the region.

² Dr. Amarty Sen. *The Argumentative Indian: Writings on Indian Culture, History and Identity*. The International Best seller, Penguin Books, 2005, p.224.

While international law on protection on refugees deals with the conditions, status and the rights of persons who have already escaped the persecution and crossed the border to seek asylum there are very few instruments that deals with the root causes for such flights. The other important consideration should be the gendered nature of forced migration. The sheer number of women among the refugee population portrays that it is a gendered issue. At least in the context of the south Asia it results from and is related to the marginalization of women by the south Asian states. These states at best patronize women and at worse infantilise, disenfranchise and de-politicize them. It is in the person of a refugee that women's marginality reaches its climatic height. The nation building projects in the south Asia has led to the creation of a homogenized identity of citizenship. This has led to women's alienation from the masculinist identity of model citizenry. One way of marginalizing women from body politic is done by targeting them and displacing them in times of states verses community conflicts. As a refugee a women loses her individuality, subjectivity, citizenship and her ability to make political choices. As political non-subjects refugee women emerge as the symbol of difference between us/citizens and its other/refugees/non-citizens. Women, therefore, find no place in the resource politics of the region. Also their lack of control over institutional structures of

protections adds to their vulnerability. By posing as gender neutral the states indeed becomes gender insensitive. Yet, while we know a great deal about the impact of women's position on other social outcome such as fertility, we have yet to develop a truly gendered understanding of the causes, processes and consequences of the migration.³ To understand this phenomenon an analysis of the present legal regimes of the protection becomes necessary in this paper.

To start with the first research question that whether the international Law is gender sensitive or not, initially the international has resisted the feminist analysis because the subject mater of the international law was primarily the state and not the individual. But as the international law developed it covered the individual as its subject matter. Now in the case of human rights instruments and humanitarian law the individual is the direct subject matter. If we consider the states and international organizations as the primary subject, we can look at the organizational structure of the both the subjects as found that the percentage of women is striking. Power structures within the governments are overwhelmingly masculine. In only few states women have the power position and in those where they do, their number are masculine. Women are generally

³ Silvia Pedraza. *Women and Migration: The Social Consequences of Gender*. Annual Review of Sociology, Vol. 17, (1991), pp.303-325.

underrepresented or unrepresented in the national and global decision making process.

States are patriarchal structure not only because they exclude the women from elite position and decision making role, but also because they are based on the concentration of power in, and control by, and elite and domestic legitimation of a monopoly over the use of force to maintain that control.⁴

International organizations are the functional extensions of the states that allow them too collectively to achieve their objectives. Not surprisingly, their structure replicates those of states, restricting women to insignificant and subordinate roles. Thus in the United Nation itself the, where the achievement of nearly universal membership is regarded as a major success of the international community, this universality does not apply to women.⁵

The *Charter of the United Nations* very specifically provides for the equal participation of the women in the United Nation staff: "*The United Nations shall*

⁴ See B. Reardon. *Sexism and the War System*, 15 (1985).

⁵ Hilary Charleworth, Christina Chinkin; Shelly Wright. *Feminist Approaches to International Law*. The American Journal of International Law, Vol. 85, No.4, Oct. 1991, p. 11.

place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organ".⁶

While there was no explicit opposition in the San Francisco but this above provision was inserted in the Charter on the insistence of the committee of women's organization. At the time of the United Nations birth the participation of women in the even the most developed countries was very nominal and inspite of this the framer of the Charter made the language of Article 8 negative rather than affirmative. In reality, women's appointment in the United Nations has not attained even the limited promise of Article 8.⁷

In 1978 a target of 25% women in professional United Nations Posts by 1982 was established. It had not reached by 1986. Stephen Lewis, then Ambassador and Permanent Representative of Canada to the United Nations, said in the fifth committee of the General Assembly". Progress in the field of women's opportunities and rights in this arena.....is so minutely incremental; it is like a

⁶ See Article 8 of the United Nation Charter.

⁷ In 1946 the Commission on status of women was constituted to promote the equal rights of women and prohibit the sex discrimination. ESC Res. 2/11 (June 21 1986). By 1975, the level of women participation in the professional positions within the United Nations and its specialized agencies was so low that one of goals of the United Nations Decade for Women (1976-1985) was to improve the female participation in the sought-after professional positions subject to geographical organization. "it is on this geographic posts which most of the attention of the General Assembly's fifth committee is focused because these jobs goes the power. As mentioned in the EQUAL TIME July 1985, p.5.

parody of social change". This target was subsequently reformulated by the General Assembly to 30% by 1990 and then 35% by 1995. A few of the United Nations agencies needs much attention in relation to the women's representation in the agencies. Women are primary suppliers of the child care in the world yet in 1989 the United Nations Children's Fund the agencies responsible for the welfare of the children had only 4 senior women officials out of total 29. More than half of the food grown in the Africa is produced by the women, yet the Food and Agriculture Organization had no senior women officials out of 51 positions in the 1989. Same position was in the case of representation of women in the World Health Organization (WHO) because health issues, especially the infant mortality and child mortality the major concerns of women and in 1989 it was only the 4 out of the 42 senior officials.⁸

The reason for mentioning this is that the 1951 Convention of the Status of Refugees was most probably the first internationally binding document after the establishment of the United Nations. By keeping the fact that majority of refugees in the world consists of women refugees in the view, *prima facie* we can

⁸ Hilary Charleworth, Christina Chinkin; Shelly Wright. *Feminist Approaches to International Law*. The American Journal of International Law, Vol. 85, No.4, Oct. 1991, p. 11.

infer that international refugee instruments are gender-biased because they do not make distinction between male and female refugees. No single women representative was present or consulted in the drafting of the seminal instrument conceptualized in Geneva in 1951- the 1951 UN Convention Relating to the Status of Refugees.⁹ Furthermore, the UNHCR's Handbook on Procedure and Criteria for the Determination of Refugee Status makes no reference to the female gender.

Despite the common acceptance of human rights as an arena in which attention can be directed towards women, they are still vastly unrepresented in the United Nations Human Rights Bodies. The only committee that has all women members, the Committee on Elimination of Discrimination against Women (CEDAW), the monitoring Body for the Elimination of All forms of Racial Discrimination against Women (Women's Commission), has been criticized by the Economic and Social Council (ECOSOC) for its "disproportionate representation" of women.

⁹ Navnita Chadha Behera. *Women and Migration in Asia: Gender, Conflict and Migration*, Vol.3, New Delhi: Sage Publications, 2006, p. 57.

In 1989 only a woman held one of the 29 senior posts in the United Nations High Commissioners for Refugees. In only 1990 first women was appointed as a High Commissioner for the refugees.

Women were often put under not just cultural but political control. They were restricted by representations and practices that homogenize and degrade them by transforming them into non-autonomous and dependent social category of "victim". They, as victims, have no political voice. Their individual identity is subsumed within the identity of their communities. Therefore, when women are displaced in large numbers the focus shift from them as a person to their communities.

International refugee protection is meant to substitute for the protection of the state. It is not enough for a person to have good reason to fear persecution on one of the five grounds in her own country to have a claim to international protection as a refugee. In most of the times women have to *face double persecution* one as a member of the targeted group (along with men and children) and second as being women, *persecution as women and persecution because of women*.

Instead of providing any breathing space, she is burdened with an extra yoke to establish the linkage between **gender, the well-founded fear of persecution and one or more of the definitional grounds.**¹⁰

RESEARCH METHODOLOGY

The Researcher has adopted descriptive and analytical methods of writing in this paper. The aims and objectives of this paper are to critically study the protection available to the women refugees in the present international legal regime and whether this is adequate. What is to be done to protect their Rights? Examination of certain suggestions, for effective implementation of the new dimension of refugee law is also attempted.

SCOPE AND LIMITATION

The scope of this dissertation is limited to the discussions relating to the protection of women refugees. The researcher is not touching deep discussion of enforcement mechanism and failure of International Law in implementing the

¹⁰ In most of the countries the women have been regarded as a vulnerable group and for this reason they have been given some more privileges as compared to the men. For example article 15 and 16 of the Indian Constitution, enables states to make special provisions for the advancement of women and children.

refugee law in states that have not ratified the Convention. The Researcher will concentrate on the relevant provisions of the International Instruments and laws in various countries including India.

HYPOTHESIS: The Hypothesis of the research is that the present International regime to protect women refugee is not gender sensitive.

RESEARCH QUESTIONS

1. Is the present international legal regime gender sensitive?
2. What is the International legal frame work for the protection of women refugees?
3. Is 1951 Convention adequate enough to protect the gender related claims?
4. Does the expression "a particular social group" include the gender related claim? If Yes, Is the phrase "*the membership of a particular social group*" is sufficient for the protection of refugee women or not?
5. To what extent, can a woman making a gender related claim of fear of persecution successfully rely on any one, or a combination of any said grounds in Art.1?

6. What are the key evidentiary elements, which decision-makers have to look at when considering the gender, related claim?
7. How CEDAW can supplement the 1951, Convention Relating to the Status of Refugees?
8. What is the legal framework in various other legal systems?

CHAPTERIZATION

This dissertation is divided into six chapters. The second chapter entitled, "**plight of women refugee women**" which is further divided in three sub chapters. Third chapter deals with the "**present international legal regime for the protection of refugee women**". Researcher has given one specific chapter to the effect of CEDAW on the present international refugee law regime. Chapter five is the "**comparative study of the national protection available for the refugee women**", where a brief study of four country's legal framework has been discussed. Last chapter deals with the "**conclusion and the suggestions**".

MODE OF CITATION:

The Researcher followed the "*The Chicago Manual of Style*" throughout this paper.

CHAPTER-2 PLIGHT OF REFUGEE WOMEN

Without taking into account refugee women's experiences, it is not possible to understand the refugee situation in a comprehensive and integrated manner. Omitting women's experiences leads to a deficient and incomplete refugee regime and results in inadequate and often very faulty responses to the refugee situation. There is thus a strong argument for the importance of listening to women's experiences, and also chronicling them, in understanding the refugee situation and forging appropriate responses. It is also important to mention that, in this paper I would like to focus only on the specific experiences, for the reason that it is not independently covered by the "membership of a particular social group". For example, when a women claims asylum on the ground that she is persecuted by her husband or her family, it is not on the ground that she is a woman, but the reason might be dowry demand, forced sterilization, forced abortion or also female genital mutilation. According to the definition of the refugee, the persecution should be on the ground that she is member of particular social group or in other words she is a woman. Thus in case of female specific experiences the grounds of persecution would be two fold, one is

definitely being a women and the other might be anything as forced abortion, dowry violence etc. In the case of *Islam v. SSHD; R v. IAT ex parte shah*, Syeda Shah was born in Pakistan but lived in UK between 1968 and 1972. She had six children. Throughout the marriage her husband beat her up regularly and finally, in 1992, she returned to the UK, leaving her children with the members of her extended family in Pakistan. She was granted leave to enter for six months as a visitor. On arrival in UK she discovered that she was pregnant. In June 1994, she applied for asylum on the basis that if she were return to Pakistan she would be accused of adultery and exposed to the operation of the Sharia law statutes, which prescribes stoning to death. Here in my opinion the ground of persecution is Adultery not the being women itself.¹¹

Besides this there might be some other reasons for examples, one child norm, homosexuality and compulsory military training etc. that could not be covered by the "membership of a particular social group".

¹¹ However in this case, her asylum was initially refused by the Home Office, and then it is heard by another adjudicator and it was found that her fear was well founded, but it was not covered by the grounds of definition as given Article 1. In further appeal she got the asylum. This was the result of active and liberal judiciary.

Refugee women are vulnerable to violence at every stage of their flight- in the country of origin, along escape routes and in the border areas, in refugee camps, in countries of asylum, during repatriation and even in their country of resettlement. Thus broadly we can divide the refugee women's plight in three broad categories:

- Plight in the country of origin.
- Plight during the flight, as an asylum seeker.
- Plight in the country of refuge, or in refugee-camp.

In the country of origin:

Traditionally, the history chronicled the world of men on public places---in work places, organizations, church, and political places. In this history, women were included only when they left home and entered into work labour, took part in strikes, joined labour unions or worked for suffrage, since only then did their activities becomes public and accessible to the public for research. As Stacey and Throne emphasized, feminist historian shifted the focus of research by placing the women in the center and writing the history of the private sphere and relationship between private and public. Anthropology has been the most deeply transformed by the feminist contributions because the analysis of kinship and

sexual division of labour has always been its core. Thus, feminist thinking matured and went from women centered analysis to what Stacey call a "gendered" understanding on all aspect of the human culture- one that traces "the significance of gender organization and relation in all institutions and in shaping men's as well as women's lives.

First and most important question is what are the causes and consequences of migration and how the gender is related to the decision to migrate? Here we can divide the migration of women refugee in two parts:

Where the decision to migrate has been taken by the men i.e. husband and parents. And second where the decision to migrate is taken by the women themselves. The cumulative effects of the both categories results in the largest number of refugees in the world. In this paper I would give more emphasis on the latter part, because of the reason that the theme of the paper is centered on the women's experiences, which are different from the men. Instead of this women are most of the time doubly persecuted, one as member of the persecuted group along with men and children and another within that group due to being the women—because, as women, they are seen, for example, as symbolic bearers

of the honor and power of their family or clan or ethnic group, which is being targeted for persecution on one of the five grounds. --

Gendered Violence: Rape, honour killing, bride burning, genital mutilation, forced sterilization, forced abortion: Migration situation are universally often preceded and accompanied by physical violence. It is however, to be noted that violence of conflicts affects men and women differently and "the targets of ethnic violence are particularly women and they suffer the worst forms of cruelty and indignity in the form of rape. Gendered, sexual violence indeed stands out as a key denominator permeating refugee women's experiences. Women's vulnerability to gendered, sexual violence in conflict and refugee situations is a strong manifestation of women's patriarch ally governed position. Patriarchal norms manifestations in this context are, more ever dual in nature. On one hand, "desecration of women's honour to demoralize the enemy", for instance, has always been an important wartime strategy. On the other hand, another contrasting manifestation of the role of patriarchal norms in the gendered violence faced by the women is described by the Urvashi Butalia in what happening during the partition of India, where, when women were concerned, the debate entered another realm altogether—that of the honour of the nation,

and of its men." Characterizing the gendered violence drawing from patriarchal norms faced by many women in the partition, was thus the notion that " while the men could save themselves, it was imperative that the women—and through them, the entire race—be saved by them" through the martyrdom of women in the face of the threat of forced conversion and rape, through which "not only would they be rendered impure individually, but through them, the entire community could be polluted for they would give birth to impure children. Rape is not only the cause for flee but it always follow the women, during the flight and also in the country of refuge.

Female genital mutilation is another factor, which is practiced in Somalia and some other African Countries in the name of cultural or ritual practice. The world health organization (WHO) has defined FGM as all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.¹² The procedure is usually carried out by older women from the community and is generally performed between the ages of three and ten years although it may

¹² WHO June 2000 Fact Sheet NO.241.

carry out during infancy, adolescence, on marriage or during a first pregnancy.¹³

The WHO estimates that over 130 million women and girls have undergone FGM and that every year around 2 million mutilated girls are added to this number.¹⁴ I don't want to enter into the debate of the reason why this FGM is practiced? Whatever may be the reason it is inhuman and violative of the right to inherent dignity.

FGM as the Basis of an Asylum Claim: The debate of universalization of the human rights and their counter in the name of cultural relativism has highlighted this practice to world scenario. In the view of the writer the universalization of the *"concept of human right"* and *"the human rights"* are two different things. The concept of human rights is the basis the essence of which lies in the fact that *"human rights are those basic rights which a person has by virtue of being a human being"* and this concept is universal. Human dignity is the only core of all the civil, political or economic, social and cultural rights, and it is universal, while the human rights may vary. Cultural relativism is the procedural aspect that is

¹³ Heaven Crawley. *Refugees and Gender: Law and Process*. Bristol: Jordan Publishing Ltd. 2001.p.176.

¹⁴ FGM in a variety of its form is practiced throughout the world especially in Africa. It is also estimated that 15 percent or total circumcised women have undergone the most a form of FGM, that is, infibulations (excision of part or all of the external genitalia and stitching/narrowing of the vaginal opening. It consists of the removal of the clitoris, adjacent labia (majora and minora), and the long of the scraped sides of the vulva across the vagina, where they are secured with thorns or sewn with catgut or thread. A small opening is kept open to allow passage of urine or menstrual blood.

how the human dignity can be secured. And in any circumstances procedure cannot defeat substance.

Canada is the first country in the world to grant asylum because of female genital mutilation in the 1994. *In Farah*, a woman fearing FGM was found to be subjected to persecution due to her membership in two particular social groups, namely women and minor". Gender was determined to be an innate and unchangeable characteristic.¹⁵ In 1997, two families were granted asylum in Sweden on the grounds that the female members of these families would be in danger of genital mutilation if returned to their country or origin, Togo. Although the authorities did not recognize the families as refugees under the Refugee Convention, they did grant them residence permits on humanitarian grounds.¹⁶ The most significant recent cases, however, have been in the US. *In Kasinga*, a 19-year-old woman, who fled from Togo to avoid FGM was granted asylum by the US Board of Immigration Appeals, the highest administrative tribunal in the US immigration system.¹⁷

¹⁵ *Farah v. Canada* (MEA) (1994) 3 July. As cited by Heaven Crawley. *Refugees and Gender: Law and Process*. Bristol: Jordan Publishing Ltd. 2001.p.181

¹⁶ *Ibid.*181.

¹⁷ *In Re Kasinga Int.* Dec 3278 (BIA 1996).

The strongest argument in favour of the banning this practice as a pure violation of fundamental human rights of women is because it is linked to the philosophical core of all international human rights law: *the universal protection of individual autonomy*. One of the essential norms of international instruments, signed by the states, which are practicing it, is the moral wrongness or coercing a human being without just and legal cause, and also without her consent.¹⁸

FGM is now illegal in a number of countries even in those where it is customarily practiced. Many countries where FGM is not normally carried out, such as the UK, also have legal provision to cover those who arrive from elsewhere especially if they are migrants from FGM-practicing communities.

Another cause for the persecution is the violation of the reproductive right of the women. For example, one child norm, (as In China), only giving birth to the female child (in some Asian countries including India), and not independently covered by the conventional grounds of the Article.1 of the convention of the Refugee. For example in a case, an Indian woman was subjected to violence because she had daughters rather than sons, for this reason her husband tried to her for having an abortion during her third pregnancy. In granting asylum, the

¹⁸ Heaven Crawley. *Refugees and Gender: Law and Process*. Bristol: Jordan Publishing Ltd. 2001.p 180

CRDD founded that state protection was not available and there was no place in the India where she could live safely.¹⁹

Other Side of the Story: this problem of FGM and on the basis of this claiming an asylum in the Countries like USA, Canada, UK has got the recognition but not the legality because of the reason that once the women get the asylum in the country, then they advocates for their cultural rights in the country of refuge.

Plight at the International Border: Women as Asylum Seeker

Determination of the refugee status: (nature and ground of persecution): This is second stage where the refugee has to establish their case to get the protection from the present danger of persecution. On this issue there is no law yet, so the matter lies in whole discretion of the state, various states has made the different criteria for the granting refugee status. This process becomes more difficult in the case of women, because she is burdened with an extra yoke to establish the linkage between **gender, the well-founded fear of persecution and one or more of the definitional grounds**. The problems, which are common, are:²⁰

- Access to asylum procedures,

¹⁹ CRDD C97-00534, 13 January 1999.

²⁰ Kathleen Newland. *Seeking Protection: Women in Asylum and Refugee Settlement Process*. CM/MMW/200E, EP.8, 14 January 2004.

- Recognition of the harm they have suffered (or fear suffering) as rising to the level of persecution,
- Acknowledgement that forms of persecution specific to women reside in the sphere of public responsibility, and
- Qualification for refugee status on the basis of the kind of persecution they have experienced.

Here also two situations might arise, one when women came as a member of family with men, where she is generally represented by the husband or father. On the other hand the second might be when women have to establish persecution and the need for international protection have been those in which the instruments of persecution are consonant with traditional or historical practices—such as forced marriage, spousal battery, genital mutilation, honor killings and so forth—that are deeply discriminatory or even inherently persecutory but are seen as lying within the private sphere. The state often fails in its duty to protect women from such violence, particularly when it is directed against them within a family or community context because they have transgressed religious or cultural norms. Such persecution on account of religion or nationality often goes unrecognized in international refugee adjudications.

Women reproduce the group both physically and socially; violation of women is often a symbolic as well as a literal assault on the group, a strategy to humiliate and demoralize the targeted group. Their own views, beliefs, or actions may not be known or considered relevant by their persecutors, as only their kinship or affiliation matters. This pattern has, perversely, sometimes made it difficult for women to establish a nexus between their persecution and one of the five enumerated grounds, although "imputed" political opinion or nationality may be accepted.

Plight of Refugee Women in the Country of Refuge

The harassment of women within the family is no less inside the camps. Women in the camps continue to be subjected for the same reason that she is a woman. Many women have become the victims of local toughs and the authorities working in the camps. The foremost problem in the camps are, women may be forced into sex in exchange for material assistance for themselves and their children and some times the officials use the rations or identity papers in order to sexually coerce women.

SEXUAL EXPLOITATION BY THE UN AGENCIES (INCLUDING THE UNHCR)

This problem has taken the new turn to initiate a new debate because of the reason that the only specialized agency of the refugees, so called i.e. UNHCR is itself involved in this disgraceful violence.

The sexual abuse of the females and children are not the new wonder that is happening in the world arena. It is very much present in the International operations especially by the UN Peace keeping officials. There are so many instances we can easily get where the UN humanitarian staff has been alleged with the sexual abuse of women and children. This position becomes grimmer when it happens to the persons who are seeking alternate protection in lieu of their lost national protection and it is by the persons who are supposed to provide protection assistance in their grievances.

Reports of sexual exploitation and abuse by UN personnel of vulnerable people- often the very people that these UN workers were supposed to protect-have been surfacing for years. Particularly persistent and serious allegations of abuse by humanitarian workers of refugees in West Africa led the Office of the UN High Commissioner for Refugees (UNHCR) to commission a consultants' report in

2001 on this matter. The report was presented to UNHCR in January 2002 and soon after was leaked to the press, resulting in wide coverage by international media. UNHCR subsequently requested the Office of Internal Oversight Services (OIOS) to conduct a thorough investigation. The resulting report made public in October 2002, stressed difficulties involved in conducting the investigation given both the nature of the alleged abuse as well as the environment in which it occurred, yet it confirmed the existence of the problem of sexual exploitation of refugees and identified specific cases of misconduct by at least one UNHCR volunteer and one UN peacekeeper, as well as several NGO workers.²¹

Despite the stated policy banning any form of sexual contact by UN personnel with local population whether consensual or coerced and regardless of the age of persons involved, cases of sexual abuse continued. In early 2004, media reports indicated serious abuses perpetrated by personnel of the UN Mission in the Democratic Republic of the Congo (MONUC). The allegations included rapes, having sex with children, as well as wide spread coercion of vulnerable women and children into sex in exchange for food or money. Similar allegations surfaced

²¹ UNHCR are the primary agency responsible for the protection of refugee women and children, but the role of this organization is still in the suspicion, as one of its High Commissioner Mr. Ruud Lubbers was alleged of sexual harassment of a female employee at the UNHCR's headquarters in Geneva. Accessed from- http://www.expatica.com/actual/article.asp?subchannel_id=19&story_id=8018

also with regard to the peacekeeping operation in Burundi, and subsequently in other missions, including Haiti and Liberia.²²

UNITED Nations report prompted Secretary General, Kofi Annan to admit that U.N. peacekeepers and staff have sexually abused or exploited war refugees. He said he is "deeply troubled" by the increase.²³

INTER-AGENCY STANDING COMMITTEE WORKING GROUP ON PROTECTION FROM SEXUAL EXPLOITATION AND ABUSE IN HUMANITARIAN CRISES

The IASC Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises was established in May 2002 and mandated with a finite set of tasks by the Inter-Agency Standing Committee and the Executive Committee on Humanitarian Affairs (ECHA). These tasks have now been completed, and the Task Force is set to close at the end of June 2004.²⁴

The Task Force identified three areas for action: common elements of a code of conduct and standards of behavior for field staff; mechanisms and capacity for protection against sexual exploitation and abuse; and improved mechanisms for

2. [Securitycouncilreport.org/site/c.glKWLeMTIsG/b.1429245/k.E83E/update_report_no_3BRsexual_exploitation_and_abuse_by_UN_peacekeeping_personnelBR20_february_2006](http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1429245/k.E83E/update_report_no_3BRsexual_exploitation_and_abuse_by_UN_peacekeeping_personnelBR20_february_2006)

²³ <http://news.bbc.co.uk/2/hi/americas/4521481.stm> at 05-06-2007 at 5pm.

²⁴ <http://www.peacewomen.org/un/pkwatch/discipline/IASCTFfinalreport04.pdf>

delivering assistance. On this basis, the Task Force developed a plan of action, which was adopted by the IASC in July 2002 and annexed to the report of the Secretary-General to the General Assembly on the West Africa investigation, *Investigation into sexual exploitation of refugees by aid workers in West Africa: Note by the Secretary-General, A/57/465* (2002). In addition to Specific preventive and remedial measures, the Report and Plan of Action established six core principles to be incorporated into the codes of conduct and staff rules and regulations of member organizations. These core principles represent the agreed principles and standards of behavior that humanitarian agencies – both UN and NGO – expect of their staff.²⁵ Several other attempts have been made by the United Nations for combating these serious problems the list of which is attached as the Annexure I.

Traumas, hardships guilt and shame of post rape living, the agony of witnessing near and dear ones dying due to malnutrition, sickness of fight, the terrible

²⁵ The brief points are:

- Terms of Reference for in-country Focal Points on Sexual Exploitation and Abuse.
- Terms of Reference for in-country Networks on Sexual Exploitation and Abuse. These terms of reference, building substantially on the work done in Sierra Leone at an interagency level, will encourage information sharing and better coordination to prevent and respond to abuse and exploitation
- Model Information Sheet for Local Communities. This tool alerts beneficiaries to standards of behaviour for humanitarian personnel, as well as basic mechanisms to report abuse.
- Model Complaints Referral Form. This tool is designed to allow for systematic monitoring and investigation of cases.
- Scenarios covering prohibited acts. This tool is designed to assist organizations in training and staff sensitization, so that humanitarian workers and peacekeepers have a full understanding of the acts prohibited under the SG's Bulletin.
- Implementation Guidelines.

feeling of the loss of home, valuable possessions, family members, dignity and identity and the unending agonizing wait for the day of return are not merely images of possible sufferings. These are the realities of feminine refugee hood. These are happening all the times, are well known and well documented.²⁶

Racial harassment is harassment directed against you because of your race or because you are a refugee or asylum seeker. It can include threats, throwing things, abusive language and damage to your home or property. Health is another important aspect, which represents the socio-cultural context of the refugee women in the country of refuge. The research in this area raises questions about how variables such as country of origin, age, circumstances of migration, lifestyle changes and economic status impact health.²⁷ It is also important to know if that influence persists or changes over time, and how. Research is needed to explore whether immigrant women under-utilize preventive services due to differences in concepts of health, health care, or because of systemic barriers. There are policy implications for the allocation of resources for health promotion and disease prevention, and for improving

²⁶ Paula Benerjee. *Women and Forced Migration*. Calcutta: Mahanirvan Calcutta Research Group. 2006. p. 75.

²⁷ Janzen, B. *Gender and Health: A Review of the Recent Literature*, Winnipeg: PWHCE. (1998), pp. ii, 22.
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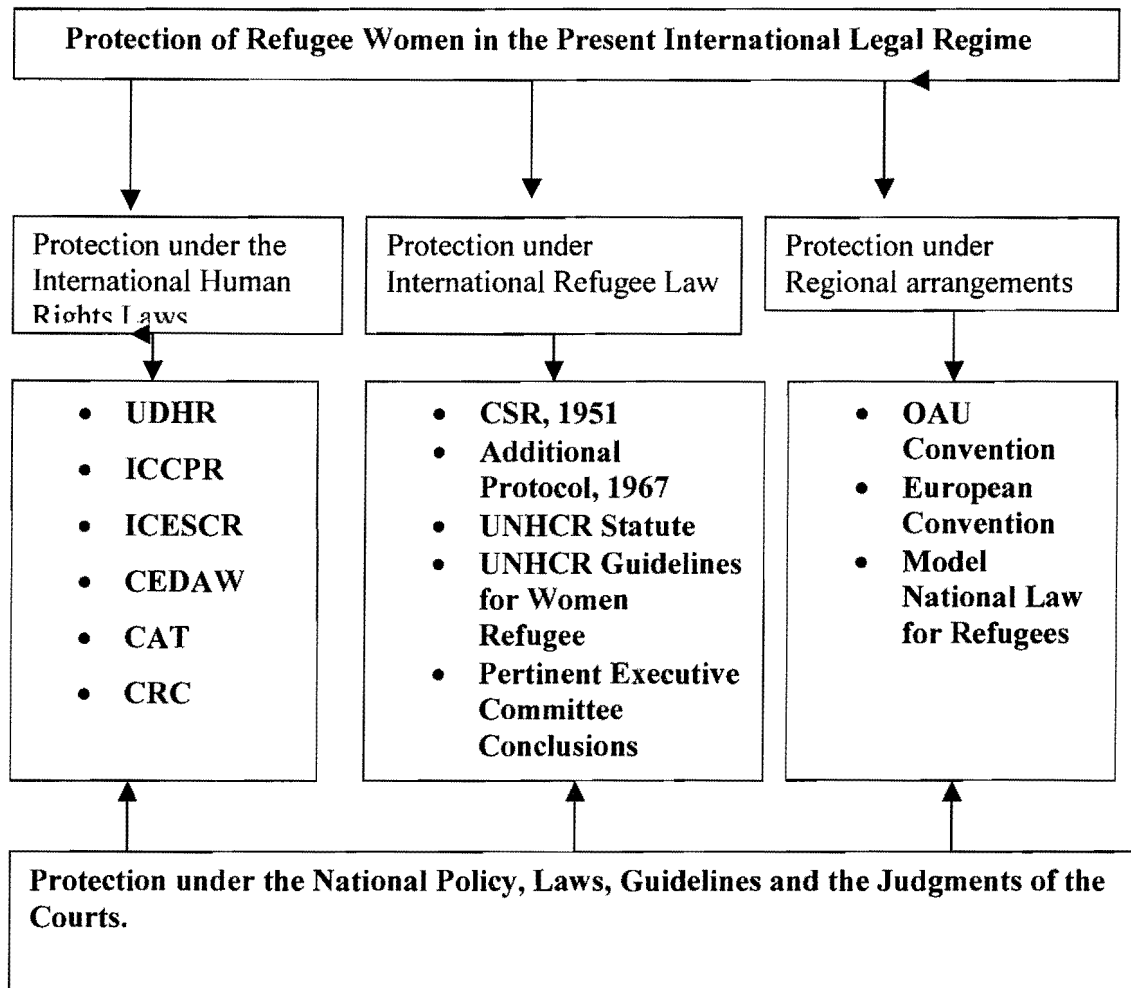
accessibility and the capacity in health and social services to meet the health needs of immigrant and refugee women.

CHAPTER-3 PROTECTIONS UNDER PRESENT INTERNATIONAL LEGAL REGIME

As briefly mentioned in the introduction, United Nations very soon after its inception started thinking about sensitization of various branches of International law.²⁸ It had made several attempts to raise the women participation in the structural arrangement of United Nations agencies. For the purpose of study we are segmenting the protection available to the refugee women in the international law as follows:

- Protection under the International Refugee Law
- Protection under the International Human rights Laws
- Protection under other Arrangements.

²⁸ In 1995 in Beijing, China, women gathered at the UN Fourth World Conference on Women to review and appraise the Nairobi Forward-looking Strategies for the Advancement of Women to the Year 2000 and to adopt a Platform for Action, which identified goals for obstacles to the advancement of women in the world. In the resulting Beijing Platform for Action, women won a broad-based agenda for promoting and protecting their human rights worldwide, while establishing the principle of shared power and responsibility between women and men in all arenas. In Beijing, the world acknowledged that women's rights were central to development and peace, and that women's issues and global issues are one and the same.



International Refugee Law: The 1951 Geneva Convention and the 1967 protocol is the important instrument relating to the status of refugees, but the assessment of who fulfills the criteria for the recognition of convention refugee is the task of the contracting state in whose territory the claimant is applying for the status of refugee. A refugee for the purpose of the convention is the person;

“who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who nor having a nationality or being outside the country of his former habitual residence as a results of such events, is unable or, owing to such fear, is unwilling to return to it.”

The convention definition is gender neutral and it does not include gender as a ground of the persecution. If we examine the provisions of the convention and protocol, there is no specific provision which meat out the need and demands of women refugee, because as we already mentioned that women often feel different type of persecution different from the man. We can argue that, wherever in the convention the word “He” is used, it includes the ‘she’ also, but for the feminist thinker this is also a case of in sensitization. But here I would not enter into this debate, because my argument is that women’s persecution experience, their needs is different from the men so, the neutral provision would not be sufficient for the protection of the refugee women.

The provision which is specifically related to the protection of women in the refugee convention is; Article 24 (1) (b), which is related to the social security (legal provisions in respect of employment injury, occupational disease, maternity, sickness, disability....etc).

The Conference of Plenipotentiaries on the Status of Refugee and Stateless Persons; 1951, considering the unity of family, the natural and fundamental group of society, recommends to take the necessary steps for the protection of refugee family with a special care to the minor and girl child.

Membership of a particular social group

After a briefest discussions, the drafting conference for the 1951 Convention deciding against adding "sex" to the list of convention reasons in Article 1A(2), because its member doubted that 'persecution on account of sex' would ever arise.²⁹ The Convention was of course meant to apply to women and men equally, but it has increasingly been argued that this omission, coupled with the Convention's use of masculine pronouns throughout, led the distinctively female experiences being marginalized.³⁰

²⁹ UN Doc. A/CONF.2/SR.5

³⁰ Heaven Crawley. *Refugees and Gender: Law and Process*. Bristol: Jordan Publishing Ltd. 2001.p.170.

Aleinikoff distinguishes two broad approaches in the international jurisprudence concerning particular social group: one the “protected characteristics” or ‘immutability’ approach exemplified by the US board of Immigration Appeals decision in matter of Acosta, and the Canadian Supreme Court decision in the Ward case. The second approach ‘social perception’ stance of the Australian High Court in Applicant A. it is the former, which has dominated.

UNHCR in the protection of Women Refugees

United Nations High Commissioner for the refugee is the agency, which is responsible for the protection of refugees in the world. The United Nations High Commissioner for Refugees³¹ (UNHCR) has recognized the plight of women refugees and strongly condemns persecution through sexual violence which is also a particularly serious offence against the human dignity and supports the recognition as refugees of persons whose claim to refugee status is based upon the well founded fear of persecution, through sexual violence, for the reasons of

³¹ It is mandated to lead and coordinate international action to protect refugees and resolve refugee’s problem world wide. Its primary purpose is to safeguard the rights and well beings of refugees. The agency, in collaboration with states where it operates, does this in several ways by ensuring the basic human rights of such vulnerable persons. UNHCR also ensures that refugees are not returned involuntarily to a country where they face persecution, by striving to secure their right to seek asylum and find safe refuge. The organization provides long term solutions by helping refugees repatriate to their homeland, integrate in countries of asylum or resettle in the third country.

race, religion, nationality, membership of a particular social group and or political opinion, and accordingly recommended the development by the states of appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution different from the man, and the importance of initiating the procedures for determination of refugee status, whereby the asylum-seekers who may have suffered sexual violence are treated with particular sensitivity.

The EXECOM of the UNHCR has passed several times the resolutions for the special care of women refugees. For example, Executive Committee Conclusion (EXECOM) NO.73, XLIV (1993); examines the implications of sexual violence for protection, and calls upon states and UNHCR to ensure the equal assess of women and men to refugee status determination.³²

- *Executive Committee Conclusion No. 64- 1990*

REFUGEE WOMEN AND INTERNATIONAL PROTECTION

The Executive Committee,

Noting with serious concern the widespread violations of the rights or refugee women and their specific needs;

³² There are other resolutions of the UNHCR EXECOM on the Refugee Women, for example; Conclusion No. 39 (1985), 46 (1987), No.60 (1989).

Underlying the potential of refugee women and the need to ensure their full participation in analyzing their needs and in designing and implementing programmes, which make appropriate use of their resources;

Reaffirming its *Conclusion No. 39* on Refugee Women and International Protection, the EXCOM had observed that:

Stressing that all action taken on behalf of women who are refugees must be guided by the relevant international instruments relating to the status of refugees as well as other human rights instruments, in particular, for states parties thereto, the United Nations Conventions on the Elimination of All forms of Discrimination Against Women;

Recognizing that ensuring equal treatment of refugee women and men may require specific action in favour of the former.

- *Executive Committee Conclusion No.88-1999*

PROTECTION OF REFUGEE FAMILY

The Executive Committee,

Reaffirms Conclusion No. 9, Conclusion No. 24, Conclusion No.84, and Conclusion No.85 on family reunion and family unity and on refugee children

and adolescents; and re-emphasizes that the family is the natural and fundamental group unit of society and is entitled to protection by the society and the state.

UNHCR has framed the gender guidelines for the protection of women refugees. Though these guidelines have made a major initiative to sensitize international law, but it is not adequate enough. The whole question is the legal validity and the binding ness of these guidelines. One more question arises, can a state that is party of the convention deny the UNHCR the access in his country, or a country that is not a party in the convention can provide the access. In this scenario the guidelines made by the UNHCR becomes less effective.

Protection under International Human Rights Laws

"The Human Rights of the women and the girl child are and inalienable, integral and indivisible part of universal human rights. Gender based violence and all form of sexual harassment or exploitation, including those resulting from

cultural prejudices and international trafficking are incompatible with the dignity and worth of the human person and must be eliminated.³³

International law protects the right of women and children refugees to be free from discrimination in the enjoyment of their rights.³⁴ They also have the right to be protected from violations of their bodily integrity.³⁵ Women refugees, as "persons," must also be treated equally before courts and tribunals,³⁶ including in the verification and categorization process described in this report.³⁷ Similarly Articles 2, 3, 5, 6, 7, 8, 9, 22 and 23 of the Universal Declaration of Human Rights provides for the enjoyment of various political and social rights without any discrimination on any kind including the sex. Article 16 and 25 are directly relating to the women's right to marry with her full consent, protection of the motherhood with special care and assistance.

International Covenant on Economic, Social and Cultural Rights also ensure the

³³ Rebecca M. M. Wallace. *Making the Refugee Convention Gender Sensitive: the Canadian Guidelines*. The International and Comparative Law Quarterly, Vol.45, No.3 (July 1996), pp.702-711.

³⁴ See Article 2 of ICCPR, provides that, "each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³⁵ See Art. 6 of ICCPR, guarantees Right of life, Art.7, provides freedom from torture, cruel, inhuman or degrading treatment or punishment.

³⁶ See Article 14(1), which provides "All persons shall be equal before the courts and tribunals.

³⁷ The Human Rights Committee has broadly interpreted the phrase "suits at law" for which Art.14 (1) applies, in addition to the criminal cases. See, *YI v. Canada*, No.112 (1981).

equal rights of men and women to enjoyment of all economic, social and cultural rights set forth in the present convention.³⁸ Widest possible protection to the family, fully consented marriage, and special protection to the mother during a reasonable period before and after the childbirth³⁹ are other important protection provided by the covenant.

International human rights law establishes state accountability for abuses by private actors and requires states to show due diligence in preventing and responding to human rights violations.⁴⁰ The due diligence requirement extends to a government's responsibility to address violence against women. In her first report, the U.N. Special Rapporteur on violence against women, its causes and consequences emphasized, "In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against

³⁸ See Article 3 of the ICESCR.

³⁹ See Article 10 of the ICESCR.

⁴⁰ In its General Recommendation 19 on violence against women and state obligations, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) emphasized: "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence." CEDAW Committee, General Recommendation No. 19, para 9.

women."⁴¹

The United Nations reaffirmed this obligation in the Declaration on the Elimination of Violence against Women, stating that governments have an obligation to "prevent, investigate, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by states or by private persons."⁴² A state's consistent failure to do so amounts to unequal and discriminatory treatment, and constitutes a violation of the state's obligation to guarantee women equal protection of the law.⁴³

⁴¹ Special Rapporteur on violence against women, its causes and consequences, "Preliminary Report Submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45," (Fiftieth Session), U.N. Document E/CN.4/1995/42, November 22, 1994, para. 72.

⁴² Declaration on the Elimination of Violence against Women, G.A. res. 48/104, 48 U.N. GAOR Supp. (no. 49) at 217, U.N. Doc. A/48/49 (1993), art. 4.

⁴³ See CEDAW, art. 15, and ICCPR, art. 26. See also, Committee on the Elimination of Violence Against Women (CEDAW Committee), General Recommendation 19, Violence against women, (Eleventh session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994) (contained in document A/47/38), para. 6. For further discussions of international obligations with respect to violence against women by private actors, see Dorothy Q. Thomas and Michele Beasley, "Domestic Violence as a Human Rights Issue," *Human Rights Quarterly*, vol. 15, no. 1 (February 1993); Human Rights Watch, *Global Report on Women's Human Rights* (New York: Human Rights Watch, 1995), pp. 39-44, and Ken Roth; "Domestic Violence as an International Human Rights Issue," in Rebecca J. Cook, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), p. 326.

Other Attempts to construct the international law gender sensitive are:

- A joint programme, "ILO-UNHCR Partnership through Technical Cooperation: Socio-economic integration of refugees, returnees and IDPs" was launched at the end of 2003. This programme referred to as the "ILO-UNHCR TCP Partnership" sets the framework for the rapid deployment of ILO livelihood experts to UNHCR's field operations.
- Vienna Declaration and Programme of Action, adopted

A COOPERATION LINKING RELIEF TO DEVELOPMENT

In recognition that refugees and returnees can be agents of development who can contribute to sustainable social and economic development where they live, either in asylum or in their country of origin, UNHCR and ILO have cooperated on various activities over the last forty years in order to develop sustainable solutions for refugees/returnees, effectively combining their respective expertise. UNHCR's relief expertise and ILO's development expertise are mutually reinforcing, thereby contributing to a smooth transition from relief to development. The partnership also contributes to one of the main Millennium Development Goals, the reduction of poverty, as displaced populations are one of the most vulnerable to poverty. It also follows the Secretary General's call for closer co-operation among UN agencies to achieve greater efficiency. The last three years have witnessed more consistent and significant cooperation between the two agencies. Following an exchange of letters between the High Commissioner for Refugees and the Director General of the ILO in 2001, a number of measures have been taken. Respective focal points and working groups have been established. The ILO-UNHCR partnership is centered around the creation of programmes for durable solutions targeting refugees/returnees, and focusing on micro-finance, skills training, women's economic empowerment, labour-based reconstruction and local economic development.

following the UN world conference on Human Rights Vienna, June 1993.

- Statute of International Tribunal for Prosecution of Person. (See.Art.5 (g)).

- Statute of International Tribunal of Rwanda. See Art. 3, in which Rape designated as a crime against humanity.
- Inter-American Convention on Prevention, Punishment and Eradication of violence Against Women (1994) 33 I.L.M. 1534.
- The fourth world conference on women held in Beijing 1994, identified violence against women as a crucial area of concern

Regional Arrangements

In addition to the international arrangement made for the protection of the refugees especially for the women there are some other regional arrangements which also recognize the rights of women as a refugee on the basis of their peculiar and strategic need and importance.

Model National Law on Refugees

By the fact that India has a long tradition and experience in accommodating inflows of refugees, and demonstrating its faith in the principle of non-refoulment, it affirms its commitments to uphold human rights principles through accession to all major human rights treatise, and adoption of appropriate legislative steps to implement them in the form of the Model National Law on

Refugees.⁴⁴ This model national law on the refugee considers Sex as a ground for seeking asylum. Besides this the AALCO (Asian-African Legal Consultative Organization) has also made the gender as a ground for seeking refugee status. Article of the text defines "refugee"

As a person who, owing to persecution or a well founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group.

⁴⁴ This law has been drafted in keeping the view the initiatives taken by the parliament under Article 37 and 253 of the Indian Constitution to provide the administrative system free from arbitrariness and guarantees equality, fairness and due process of law.

CHAPTER-4 CEDAW, INTERNATIONAL BILL OF RIGHTS FOR WOMEN

CEDAW is an effort by the United Nations to set comprehensive international legal standards for women. By accepting the Convention, countries commit to implementing a series of measures to end discrimination against women, including:⁴⁵

1. to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women;
2. to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
3. to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.

States Parties are now under obligation to provide, to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.⁴⁶

⁴⁵ See Article 2(d), 4 and 5 of CEDAW, which ensures the protection from any kind of the discrimination. It also mandates the state parties to modify the social and cultural practices which are based on the inferiority of the women in relation to men, and against the inherent human dignity.

⁴⁶ See Article 15(4) of Convention.

CEDAW COMMITTEE:

The CEDAW Committee⁴⁷ recommends that effective complaints procedures and remedies, including compensation, should be provided to survivors of gender-based violence.⁴⁸ More specifically 'States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault and sexual harassment in the workplace;

(ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;

(iii) Protective measures including refuges, counseling, rehabilitation and support services for women who are the victims of violence or who are at risk of

⁴⁷ Committee consists 24 individual experts, elected for the term of 4 years by the meeting of state parties. It meets twice in a year, and examines the states reports and adopts concluding comment. It also adopts general Recommendations.

⁴⁸ CEDAW Committee, General Recommendation, 19, Art.24(1).

violence.⁴⁹

“The Committee is deeply concerned by the significant number of cases of female genital mutilation among migrant women of African descent. The Committee recommends that the State party urgently take all appropriate measures, including legislation, to eradicate the harmful traditional practice of female genital mutilation.”

(Switzerland, 28th session, Jan. 2003)⁵⁰

Human rights law also requires that governments address the legal and social subordination women face in their families and marriages. CEDAW provides that states “shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”⁵¹ In particular, states are required to afford to women the right to enter into marriage only with their free and full consent,⁵² equal rights with their spouses in marriage and during any separation or divorce,⁵³ equal parental rights and responsibilities,⁵⁴ and equal rights with regard to the number and spacing of their

⁴⁹ Ibid.

⁵⁰ Concluding comments of CEDAW, for example, as mentioned by, Heisoo Shin, Vice- Chair, CEDAW.

⁵¹ See Article 16 of CEDAW.

⁵² See Article 16(1) (b) of CEDAW.

⁵³ See Article 16(1) (c) of CEDAW. Also, Art.16 of the Universal Declaration of Human Rights guarantees the right to marry and equal rights during the marriage and dissolution of the marriage and the requirement of full and free consent.

⁵⁴ See CEDAW, article 16(1)(d).

children.⁵⁵

CEDAW explicitly acknowledges social and cultural norms as the source of many women's human rights abuses and obliges governments to take appropriate measures to address such abuses. CEDAW requires states to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁵⁶

The UNHCR Executive Committee ruled in 1990 that severe discrimination as outlined and outlawed in CEDAW could form the basis for the granting of refugee status. Although CEDAW made a significant change in sensitizing the international legal regime but there still exists some issues which are unanswered. One is if refugee women marry with an Indian of in any other country what would be the legal effect of this?

⁵⁵ Ibid. Article 16(1) (e).

⁵⁶ Ibid. Article 5(a).

CHAPTER 5 NATIONAL PROTECTION: A COMPERATIVE PERSPECTIVE

The basis for selecting the four common law countries is the reason that these countries have gained reputations as sites for rights revolutions (of various strengths and focuses, to be sure) but differ in a number of dimensions, particularly in their constitutional structures, the reputation of their judges for creativity and activism, the present of right consciousness in popular culture, and the strength of their legal mobilization support structure.⁵⁷ In this book he compared the rights⁵⁸ revolutions occurred in the four major democracies, USA, Canada, UK and India, where he find that USA and Canada where the complete rights revolution occurred for the reason of active judiciary and the strong *support structure*.⁵⁹ He placed Britain in a unique position, and India is a country where there was a good environment for the right's revolution but due to the lack of support structure the revolution could not occur. Because the protection of refugee especially for the women is mostly based on the judicial activism, the comparison I find logical among these countries.

⁵⁷ Charles Epp. *The Rights Revolution, Lawyers, Activists and Supreme Court in Comperative Perspective*. Chicago and London: The University of Chicago Press.1998.

⁵⁸ He very categorically mentioned what he mean of the term "right", he used it for the new rights that emerged in judicial interpretation. He has focused mostly on the women's rights and the rights of criminal defendants and prisoners.

⁵⁹ Support structure, according to him consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing.

CANADA

Summary Points

Canada is the party to the convention relating to the status of the refugee and therefore it has obligation to protect the refugee and asylum seekers.

Canada is the first country to frame the guidelines for the treatment of refugee women. Canada is also a signatory of the UN Declaration on the Elimination of Violence Against Women.

*Indeed Canadians welcome refugees
And do not let them starve
Yet one is always unsatisfied and broke
For the little we get
Hardly suffices our food and shelter.
They are strange people coming from everywhere
Never notice you or even greet you
Each one keeps to himself
Always hastily locking his door.
I feel isolated and sick with loneliness
Deprived from my beautiful Africa
And the land of my inspirations and songs.
I must be contended with the fate
That my God has reserved for me.*

Refugees in Canada
Composed by Hawa Jibril and translated by Faduma A. Alim

Canada, like other countries in the study, has a history of discrimination on the basis of sex. As late as 1928, the Canadian government tries to prohibit women from being appointed to the senate, and the Supreme Court agreed, ruling that women were not “persons” qualified to serve in the Senate within the terms of the British North American Act.⁶⁰ This decision was overturned by the judicial committee of the British Privy Council and ordered her seated. But in some important respects, however, Canadian law began to reflect a concern about sex discrimination earlier than the law of the other countries in this study.⁶¹ Nonetheless, pressure from women’s right organizations demanding further law reform grew in the sixties, leading the government appointing the Royal Commission on the status of women in 1967.⁶² This was the beginning and basis for the right’s revolution. By 1990, however it was not uncommon for scholars to characterize women’s right as the leading component of the court’s equality rights agenda and the leading example of the politicization of the judicial

⁶⁰ In *Re Meaning of the word “persons”* (1928) S.C.R. 276, on the other hand most of the provinces by that point allowed women to serve in provincial legislatures.

⁶¹ Between 1950 and 1962, eight of the twelve Canadian provinces passed legislation banning sex discrimination with regard to pay. The statutory Canadian Bill of Rights of 1960, prohibited discrimination on the basis of sex in the exercise of a range of other basic rights.

⁶² Charles R Epp. *The Rights Revolution*. The University of Chicago Press, Chicago and London. 1998.
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process. Equality rights from the symbolic core of the new charter—the groups, among them women, identified for the constitutional protection in the charter's equality guarantees.⁶³ The women's right's revolution occurs in the Canada, by the reason of this good basis, supported by the adequate support structure. A huge number of the women's organizations established during the seventies. The number and organization of women's lawyer also increased significantly after 1970. Charles Epp concludes his argument by saying that "*A dramatic rights revolution has occurred in the Canada in the last several decades. This was possible by the activism of Supreme Court on the civil rights and liberties, supported by interest groups and government financing.*"⁶⁴

Policy and the law in Canada

Immigration and Refugee Protection Act is the primary legislation dealing with the refugees in the country of Canada.

Immigration and Refugee Board (IRB): This government department is responsible for the admission and protection of the asylum seekers and refugees.

⁶³ Cairns, *Charter versus Federalism*. As quoted by the Charles Epp in his book.

⁶⁴ Charles R Epp, *The Rights Revolution*. The University of Chicago Press, Chicago and London. 1998
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The IRB is supposed to be at arms-length from Citizenship and Immigration Canada (CIC), and it has three divisions - the CRDD which makes decisions on refugee claims,⁶⁵ the Adjudication Division⁶⁶ which makes decisions about detention, and the Immigration Appeals Division. CIC,⁶⁷ which is headed by the Minister of Citizenship and Immigration, is responsible for a variety of things from issuing work permits and emergency medical coverage to deportations.⁶⁸

⁶⁵ Whatever your background, filing a refugee claim can be described as a paper nightmare. From the moment your refugee claim is referred [to the CRDD,] you have 28 days in which to fill out a 13 page Personal Information Form (PIF) which asks you for a detailed life history. In short they want to know everything. This right to 28 days to prepare becomes meaningless if you don't have good legal counsel, if you don't have good interpreters, and unless you are still able to communicate what happened to you. Many individuals who have been persecuted may not have the capacity within a four-week period to recount this coherently in order to win their refugee hearing.

⁶⁶ At the refugee hearing, you are entitled to one or two board members who act as judges. There is one refugee hearings officer employed by Citizenship and Immigration Canada, the lawyer or counsel for the refugee claimant, an interpreter, and perhaps a Minister's representative. The process is a private one, and no media are allowed. At the hearing, you go through the written evidence which is submitted ahead of time - such as identity documents, country condition reports, human rights reports, any medical examinations, psychiatric examinations, psychological examinations, and so on. Vancouver's acceptance rate is less than 50%. Whichever way the decision goes, you are handed back to the Immigration Department.

⁶⁷ If you are accepted as a refugee, then you can make an application for permanent status in Canada as a refugee. If you are not accepted, you can appeal to the Federal Court of Canada but this must be done within three weeks of receiving your decision. Currently, only 10 to 20 percent of cases get heard. Even if you get to argue your case before the Federal Court of Canada, you can only present the evidence that was already used in the IRB hearing and argue that an error was made. You cannot introduce new evidence. Even if the lawyer at your refugee hearing did a terrible job, you are stuck with the written record nonetheless.

⁶⁸ If you are not granted leave by the Federal Court, or the Federal Court does not find in your favour, you do not have many options. You can try to do what is referred to as a humanitarian and compassionate (H&C) application. There is also what is referred to as a PDRCC (post-determination refugee claimants in Canada), which assesses the risk to your life if you are deported. The PDRCC must be filed within three weeks of receiving your negative refugee decision regardless of whether you need a translator to understand it. Acceptance rates for PDRCCs are extremely low - less than 5 percent.

Because so many refugees could not produce documents deemed satisfactory by Citizenship and Immigration Canada, the Canadian government adopted an amendment to the Immigration Act that created a new category of refugees without identity documents: the Undocumented Convention Refugees in Canada Class (UCRCC). According to Citizenship and Immigration Canada, the purpose of the UCRCC regulation was "to provide a disincentive to undocumented arrivals who were perceived as ... posing a potential security threat". Moreover, it discriminates particularly against women and children because they are less likely than men to have identity documents.⁶⁹ If not accepted as a refugee, the removals department can deport you with or without notice.

Development of protection jurisprudence for the refugees especially for women refugee is the result of this revolution, which made Canada a country, which can be regarded as the role model for other countries concerning the protection of refugees and asylum seekers. In March 1993 the guidelines for the women refugee claimants fearing gendered related persecution is issued by the Canada.

⁶⁹ The women were perplexed by the change in the policy that occurred in 1997, when five years of waiting period for undocumented Somali refugees came into effect.

Canada became the first country, which issued the gender related guidelines to sensitize the International community in relation to the protection of women refugee. This guideline includes gender as a "social group" in the 1951 convention. This guidelines are reviewed and updated in 1996 has now become the torchbearer for the other countries.

The guidelines essentially provide a framework for analysis of adjudicators in the handling of gender-related persecutions. The guidelines address "four critical issues" which are identified as being characteristics of most gender related claims, viz, the nature and ground of the alleged persecution, assessment of the harm feared, the key evidentiary issues and the special problems encountered at the time of determination.⁷⁰ The guidelines differentiate between the persecution feared on the ground other than membership of a particular social group and persecution feared by virtue of being a particular social group. The refugee convention is silent on the issue that what constitutes a particular social group. It is the judiciary who has interpreted this phrase, and with relation to the gender persecution the decision of Canadian Supreme Court

⁷⁰ Rebecca M. M. Wallace. *Making the Refugee Convention Gender Sensitive: The Canadian Guidelines*. The international and Comparative Law Quarterly; Vol. 45, No.3 (July 1996). P.703-704
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In the case of Ward is worthy to mention. The Court provided in this case that the meaning of phrase "particular social group" is "the general underlying themes of the defence of the human rights and anti-discrimination that form the basis for the international refugee protection initiative and accordingly identified three possible categories of "particular social group".

- 1 Group defined by an innate or unchangeable characteristic.
- 2 Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, and
- 3 Groups associated by former voluntary status, unalterable due to its historical permanence.

Category (1) is the pertinent one for women alleging gender-related persecution as it was held to "embrace individuals fearing persecution on such basis as gender, linguistic or sexual orientation." In seeking to establish a "particular social group" the guidelines provide that what is relevant is that the group suffers of fear to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the situation of general population or from other women. A sub-group of women can be identified by reference to the fact of their

exposure and vulnerability –for physical or other reasons-to violence including domestic violence in an environment that denies them protection.

The guidelines provide the adjudicators with a six months framework to handle with the asylum and immigration related claims. Claims must be regarded to: -

- The particular circumstances which gave rise to the fear of persecution;
- The general conditions of the country of origin;
- The seriousness of the treatment which the claimants fears;
- Whether the fear of persecution is for a conventional reason;
- The availability of state protection; and
- Whether the fear of persecution is well founded.

The status of the guidelines is such that, if the immigration and refugee Board fails to address specifically in its reasons the gendered based persecution allegedly suffered by the applicant, it will be deemed to have "an error of law".⁷¹

Of the 44,500 asylum applications received by Canada in 2001, Canadian authorities decided 22,887 refugee claims, and recognized 13,336 as refugees.

⁷¹ *Mohamed v. Secretary of State of Canada*. Decision of Federal Court of Canada, 14 Feb.1994.
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Canada granted protection to 97% of Afghan asylum applicants, 92% of Somali applicants, and 85% of Colombian applicants. Among the leading source countries Hungary and Mexico had the lowest approval rate at 27 and 28%.

The most tangible impact of the Canadian Guidelines was the Guidelines issued on the same direction by the US Immigration and Naturalization Service in the year of 1995. These are the things, which make the Canada, role model for the other countries. But it is not without exceptions. *Third Country Safe Agreement* between the Canada and the America is one example, which created the constraint for the asylum-seekers. One finding of a longitudinal study on expedited removal was that the program has a gendered impact: A greater proportion of women are more often removed via expedited removal (instead of under regular immigration proceedings) in comparison to men.

At present the rights and privileges of the all refugees in Canada are restricted in many folds.⁷²

- Refugees in Canada are prohibited are sponsoring their family members until they have become landed immigrants.

⁷² Settlement Experiences of Somali Women in Toronto. Presentation for the seventh International Congress for Somali studies. York University, Toronto, Ontario, Canada, July 10 1999.

- Refugees are also not entitled for the Canadian travel documents. If they leave Canada for any reason they are not allowed to return here.
- Restriction on the post-secondary education.
- Refugees can only temporary work permits, by this reason some of them becomes ineligible for some jobs.

One of the refugee women mentioned it anguish as

"The greatest problem I am facing is that three of my own children are in Kenya. ...I am four years in Canada. ...and for four years I haven't seen my children. ...If I could have [my landed immigrant] document I could have visited them or sponsored them so that they could have joined me. My biggest disappointment is that I cannot sponsor my children."

UNITED STATES OF AMERICA

Summary Points

The United States of America is the signatory of the 1951 Convention on the status of refugees.

The proportion of new legal immigrants admitted into the United States who were female rose from 49.8 percent in Fiscal Year (FY) 1985 to 54.5 percent in FY 2004.

The proportion of the adult foreign-born population in the United States that is comprised of women declined from 54.6 percent in 1970 to 50.4 percent in 2004.

In FY 2004, 47.3 percent of all female immigrants legally admitted into the United States entered the country through the immediate-relative category of the family-based immigration system, compared to 37.6 percent of male immigrants.

Initially the land of United States was regarded as the safest and popular place for the refugees but the incident of 9/11 has changed the scenario completely.

As it is evident from the US practice and the constitutional practice that a treaty signed and accepted by the President of USA, it becomes the part and parcel of the law of the land. USA is the party to the main 1951 convention on the status of refugee and therefore USA has taken the obligation to provide the every protection to the refugees who seeks asylum in this country. The minimum standards contained in these documents require, among other things: that administrative detainees be held separately from criminal detainees; that detainees are advised of all relevant rights, such as the right to receive

information in languages they understand; that detainees are allowed adequate opportunities to communicate with and receive visits by legal counsel and family members; and that detainees are given a daily opportunity to see a medical doctor when ill. In the case of immigration detainees, the United States has largely ignored these basic international standards.

This general rule - that those seeking asylum should not be detained - arises out of the fundamental obligations all governments have to asylum seekers under international law. The most basic obligation of governments is to avoid forcing asylum seekers to return to their home country, if return would expose them to continued persecution. In international law, this is known as the principle of *non-refoulement*, which, translated from French, literally means "non-driving back." In practice, the principle of non-refoulement means that governments are obligated to develop fair procedures to determine whether a given immigrant is in need of protection and deserves asylum. They must permit asylum seekers to remain in the country to which they have fled, at least until such time as it is safe to return to their home country. The Universal Declaration of Human Rights articulates this principle clearly, stating that "everyone has the right to seek and enjoy in other countries asylum from persecution."

Depriving a person of his or her liberty is a serious matter, as the international standards discussed in the preceding section make clear. Immigrants detained by the INS are protected both by those international laws and standards and by the laws of the United States. Over the decades, the United States has developed elaborate systems of rules and standards designed to ensure that the deprivation of liberty will never be arbitrary and that if individuals are deprived of their liberty after just legal proceedings, the conditions in which they are held must be humane.

Law and Policy in the United States

By the "**Illegal Immigration Reform and Immigrant Responsibility Act 1996**,"⁷³ (IIRIRA) United States has started fashioned obstacles, to take asylum in USA. This has created more problems for the refugee women specially. In April 1997, IIRIRA went into effect, eliminating many of the statutory rights that immigrants had enjoyed for decades. The impact of many of the statutory changes is not yet

⁷³ The Act has three important provisions, **1. Expedited Removal** (INS inspectors has power to deport persons immediately from the border of airport, if they don't have valid travel document. This is severely misused). **2. Mandatory Detention** (of the asylum seeker who are subject to expedite removal, this power and discriminatory practice of parole system is totally depends on the discretion of the local immigration officer). **3. One Year Filing Dead line** (this one year dead line results mostly in the refusal of asylum claim which affects badly the women and children).

completely clear, since they are being implemented by the INS in a somewhat piecemeal fashion while legal challenges to some of the law's provisions were underway at the time the research for this report was conducted.⁷⁴

Under IIRIRA, all immigrants who have been "admitted" into the United States at any point have a right to go through a "removal hearing" before being removed from the country, while those who were never properly admitted, regardless of their physical presence in the United States, are entitled to no hearing at all but may be instantly sent back to their home countries under a procedure that IIRIRA calls "expedited removal."⁷⁵ Immigrants going through full removal hearings are given some due process rights under the law (for instance, they have the right to be represented by an attorney, although at no expense to the government). But immigrants in "expedited removal" have virtually no due process rights at all.

If the asylum officer does not find that a credible fear exists, an asylum seeker can be ordered removed, but is entitled to a written explanation and to review of the decision by an immigration judge within seven days. The law also mandates

⁷⁴ For instance, the American Civil Liberties Union has challenged the legality of the retroactive application of the law and the prohibitions on federal court review.

⁷⁵ "Admission" is defined as a lawful entry after inspection and authorization by an immigration officer. INA 101(a)13.

that all those seeking asylum in the United States shall be detained, "pending a final resolution of credible fear of persecution, and, if found not to have such a fear, until removed."⁷⁶ This can mean months of detention in one of the immigration centers or local jails around the country used by the INS.

The provisions of IIRIRA relating to potential asylum seekers directly flout international standards relating to asylum seekers. Most obviously, international standards establish that asylum seekers should not be detained, except in grave and exceptional circumstances. International standards also provide that if detained, asylum seekers must have the right to challenge the legality of their detention promptly before an independent and impartial authority, but IIRIRA permits no such opportunity.

IIRIRA also places the burden on asylum seekers to come forward at the point of first contact with the INS to express a credible fear of persecution. Many asylum seekers are unable to do this: their lack of knowledge of asylum procedures and requirements, their lack of English language skills, and, often, their extreme disorientation and trauma render them uniquely ill-suited to immediately and persuasively establish that they have a fear of persecution. With little

⁷⁶ INA 235(b)(1)(B)(iii).

understanding of the situation in which they find themselves, many asylum seekers who would be capable of establishing asylum claims in a fair and thorough procedure, with the assistance of counsel, may have little or no chance to accurately express their fear of return in a three-minute interview with a busy immigration officer. Yet that interview, according to the INS, constitutes an immigrant's "only opportunity to present information concerning fears or concerns about being removed from the United States."⁷⁷

Another fundamental problem with IIRIRA is that it places enormous power in the hands of immigration officials and asylum officers, who may be inadequately trained or who may have only a few minutes to spend with each entering immigrant. As the INS has noted, "In [fiscal year] 97, the Service conducted more than 475 million primary inspections. During the primary inspection stage, the immigration officer literally has only a few seconds to examine documents, run basic lookout queries, and ask pertinent questions, to determine admissibility and issue relevant entry documents."⁷⁸

IIRIRA's procedures for identifying asylum seekers are grossly inadequate and lack the most basic guarantees of fairness and thoroughness. These procedures

⁷⁷ Immigration and Naturalization Act, 235 (b) (1) (B) (ii).

⁷⁸ *Federal Register*, Vol. 62, No. 44, March 6 1997, p. 10318.

ignore the U.S. obligation, under international law, to create fair procedures to identify asylum seekers and to ensure that no one is returned to a country in which he or she will face persecution. IIRIRA creates a grave danger, amounting to a virtual certainty, that some asylum seekers will be wrongly detained and wrongly returned to their home countries in violation of the principle of non-refoulement.⁷⁹

After the 9/11 disaster the government made several changes in the Board of Immigration Appeals, and also the transfer of INS (Immigration and Naturalization Service) to the Homeland Securities.⁸⁰ At the same times serious concerns have arisen against the authority of INS to detain the persons, and discriminatory parole policy, which was mainly made aiming to the

⁷⁹ Two recent reports on the expedited removal process conclude that it has been a major human rights failure. In *Slamming the 'Golden Door': A Year of Expedited Removal* (April, 1998), the Lawyers Committee for Human Rights (LCHR) found that at airports, immigrants and asylum seekers suffer from abusive treatment by INS officials, inadequate translations, and the denial of access to counsel. LCHR also noted "serious concerns" about the credible-fear determination process, including inconsistencies among asylum officers in the conduct of interviews, poor translation, and lack of preparation time for asylum applicants. LCHR also noted that the process has led to unnecessary imprisonment of bona fide asylum seekers.

Another report, by immigration attorneys working with the legal advocacy group Catholic Legal Immigration Network, found that immigrants and asylum seekers in expedited removal were at times shackled to airport benches for up to eighteen hours before being transported to detention facilities and that such aliens were denied food, were separated from traveling companions, and were denied telephone access. Some were permitted to make telephone calls but could not do so because their address books and other possessions had been confiscated. The report also found that many asylum applicants did not receive written information about the credible fear interview process in languages other than English, and did not receive adequate lists of free legal service providers. Reported in *Siskind's Immigration Bulletin*, November 1997.

⁸⁰ Refugee Women at Risk: Unfair US Laws Hurts Asylum Seekers. A Report prepared by the Lawyers Committee for Human Rights (LCHR), USA.

“Mohammedans”. The new US “Advance Passport information System”⁸¹ and *Immigration Zones* (Holding area which is treated as the foreign territory) are the some important developments which finished, what America had achieved in the last fifty years.

New Policy: The Senate passed the Comprehensive Immigration Reform Act of 2006 (S. 2611), several provisions of the Bill endanger the life of the refugees, and it also contains some extreme provision which would criminalize the asylum seekers.⁸²

New Border Strategy: The President Bush in his speech on 28 Nov.2005

⁸¹ By this scheme the authorities can trace the full detail of the persons who are going to travel the United States. For Example, Indian Wollywood actor Kamal Hassan was caught by the authorities on the airport, because his name “hassan” is similar to the Muslim name.

⁸² For asylum seekers, the Hagel-Martinez compromise still contains a number of harsh provisions. For example:

- An asylum seeker could be prosecuted for using a false passport to escape to the U.S. Although an amendment was made to provide an exception for asylum seekers, the language leaves many unprotected. (Section 208)
- An asylum seeker could be denied the chance to seek a “stay” to prevent her deportation while her appeal is pending before a federal court. As a result, she could be deported back to her country of persecution while her case is still before the U.S. court. (Section 227(c))
- The bill would also require the expansion of summary deportation procedures, known as “expedited removal,” to individuals apprehended within 100 miles of a land border and within 14 days of entry. This expansion would increase detention and undermine due process. (Section 227)
- The bill would allow the prolonged detention of asylum seekers whose cases are on appeal to the federal courts, and the indefinite detention of both immigrants and failed asylum seekers. (Section 202 seeks to reverse the U.S. Supreme Court’s *Zadvydas* decision.)

announced the new "*Strategy to Enhance America's Homeland Security through Comprehensive Immigration Reform*". Under this scheme the immigration or border patrol officers has been vested the power to deport the asylum seekers from the border, a power earlier vested in immigration judge.⁸³

Role of Courts

The Fifth and Fourteenth Amendments to the U.S. Constitution state that no person may be deprived of "life, liberty, or property, without due process of law." The U.S. Supreme Court has long recognized that the Constitution's most fundamental guarantees apply both to citizens and non-citizens, including those non-citizens who have illegally entered the United States.

In *Shaugnessy v. United States*, for example, the Supreme Court insisted that aliens are entitled to due process before being deported: "Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."⁸⁴ Similarly, in *Plyler v. Doe*, the Supreme Court reaffirmed its commitment to protecting the rights of aliens: "Whatever his status under the immigration

⁸³ Darryl Fears. *Bill Shifts Burden to Asylum-Seekers*. Washington Post Staff Writer Sunday, May 1, 2005; Page 104

⁸⁴ *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."⁸⁵

INS detention and removal policies fall within the ambit of the Constitution's due process guarantees. Most obviously, when it detains a person, the INS takes away his or her liberty. In the case of asylum seekers, deportation or removal from the United States and return to their country of origin - refoulement - may actually constitute a deprivation of life, since those forced to return may literally face death at the hands of their abusive home governments. Thus, one federal appellate court has declared that although "deportation is not a criminal action...the consequences may more seriously affect the deportee than a jail sentence. The liberty of the individual is at stake and "meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness."⁸⁶

A woman from the Dominican Republic who fled severe domestic violence was ordered deported under the Act's summary expedited removal process. A rape

⁸⁵ *Plyler v. Doe*, 457 U.S. 202, 210 (1981).

⁸⁶ *Johns v. Dept of Justice*, 624 F.2d. 522, 524. (5th Cir. 1980).

survivor from Albania was deported to her country of persecution under the same process. Women who have fled forced marriage, rape, forced sterilization, domestic violence, and other gender-related violence have been detained in jails – sometimes for lengthy periods of time, without the opportunity to challenge their detention before a judge. Other women who sought asylum based on fears of “honor killings” and genital mutilation have had their asylum claims rejected based on the one-year filing deadline.

“Regina Norman Danson is arrested in New York on charges that she lied under oath and entered United States with fraudulent passport in 1997 on pretext that she would be subject to genital mutilation if she returned home to Ghana; INS opposed her original request for asylum but appeals court granted her request in 1999; her lawyer asserts that she told truth.”⁸⁷

In *Rodi Alvarado’s case*, by the order dated 19 January, 2005, Attorney General John Ashcroft made the decision not to deny asylum, instead of sending the case back to the administrative Board of Immigration Appeals.⁸⁸ The fate of Ms. Alvarado now rests with the Department of Justice and the Department of Homeland Security, which are expected to issue rules to cover such claims.

⁸⁷ William Glaberson (New York Times), Metropolitan Desk. September 10, 2002, Tuesday. Late Edition-Final. Section B, Page.3, column 1, words. 511.

⁸⁸ Rodi Alvarado is a Guatemalan woman who has survived domestic violence by her husband over the period of ten years, receiving no help from the state or police or court. So she fled United States for safety.

Even though the United States government outlawed the practice of FGM and recognized the practice as a form of persecution for those seeking asylum, immigration and human rights activists, as well as legislators like Representative Carolyn B. Maloney (D-NY), continue to criticize the Immigration and Naturalization Service (INS). They argue that the INS, which implements U.S. immigration law, is not following the BIA decision in the *Kasinga* case because it has failed to protect numerous asylum seekers who are fleeing sex based and gender-related persecution.

"It was not easy for me to decide to leave my homeland. But when I came here, my head was full of the things I learned about America from my school books in Togo. They taught me it was a country that always helped the needy, a country that sent aid to refugees. My teachers told me it was a great land, where people believed in justice. Instead . . . I was taken to prison in shackles and in handcuffs, and I was abused by prison guards. Yet I am not a criminal. I had done nothing wrong. Why was I put in prison? Why was I treated this way?"

As of March 2, 2006, 182 countries - over 90% of the members of the United Nations - are party to the CEDAW. The United States remains the only industrialized country, which has not ratified this convention.

UNITED KINGDOM

"When the baby came out, it was hard. I did not have anything for the baby, no money, no clothes. One of the outreach staff gave me a kettle so that I could boil water for the baby. It was very difficult, as I had to leave the baby to queue for food. I was frightened it would choke. I often went without food".

The UK receives just 2 per cent of the world's refugees, of whom 30 per cent are estimated to be women. They include women who have fled for their lives from the most war torn and politically unstable countries in the world.⁸⁹

Summary Points

The United Kingdom, as a signatory to the 1951 Geneva Convention, is committed to offer asylum to people fleeing from persecution

Most asylum seekers in Britain are from countries that are in conflict.

Asylum seekers have had varied experiences which may include personal experience of violence as well as assaults on their social, economic, and cultural institutions.

Many asylum seekers are highly skilled and previously had a high standard of living

Many are being dispersed throughout Britain to areas that have had little experience of working with refugees

Many of them are living below the poverty line which poses a threat to their health.

⁸⁹<http://www.refugee-action.org.uk/information/documents/executivesummary.pdf>

Some Important Facts

- It is estimated that 350,000 people in London entered the country as asylum seekers in the last 15 years.⁹⁰
- One third to one half of asylum seekers are likely to be female.⁹¹
- In 2002, 21,775 women sought asylum in the UK as principal applicants and half of those applying as dependents were female.⁹²
- The main countries of origin of asylum seeking women in 2002 were Zimbabwe, Somalia and the Democratic Republic of Congo.
- Women's reasons for asylum are usually complex and based on more than one ground under the Refugee Convention. Many have suffered gender-based persecution which asylum decision-makers have little information on.⁹³
- The Government's 'white list' of countries from which all asylum claims will be refused includes countries where "domestic violence is prevalent without any state protection" and those where trafficked victims have come from.

⁹⁰Greater London Authority. 2003. *Capitalwoman 2003: The annual conference for women – a day of diversity, celebration and debate*. GLA. London.

⁹¹Dumper, H. 2003. *ICAR Navigation Guide: Women refugees and asylum seekers in the UK*, London. Information Centre about Asylum and Refugees in the UK. ICAR. London.

⁹²Ibid.

⁹³Ceneda, S. 2003. *Women asylum seekers in the UK: A gender perspective. Some facts and figures*. Refugee Women's Resource Project, Asylum Aid. London.

- When they arrive in the UK, women refugees receive little support, and the support they do receive is often inappropriate for their needs.
- One study has shown that newly arrived refugee women feel so unsafe in the UK that 83% live under self-imposed curfew.⁹⁴

“The marginalisation of refugee women has meant that until recently their voices have not always been given the platform to be heard. The traditional gatekeepers and spokespersons for refugee communities have, in the main, been male community leaders. It is only through the establishment of specific women’s projects that the issues that concern them are beginning to be identified and addressed”.

A study of asylum seeking women in Brighton identified six specific areas where more services for women were needed:

- training and employment,
- education (including English as a second language),
- social services,
- health,
- housing and
- racial harassment.

⁹⁴ Ibid.

Definitions of refugee status

Asylum seeker— asylum claim submitted, awaiting Home Office decision

Refugee status (accepted as a refugee under the Geneva Convention)— given leave to remain in the UK for four years, and can then apply for settled status (Indefinite leave to remain, see below). Eligible for family reunion for one spouse and all children under 18 years

Indefinite leave to remain (ILR)— given permanent residence in Britain indefinitely. Eligible for family reunion only if able to support family without recourse to public funding

Exceptional leave to remain (ELR)— the Home Office accepts there are strong reasons why the person should not return to the country of origin and grants the right to stay in Britain for four years. Expected to return if the home country situation improves. Ineligible for family reunion

Refusal— the person has a right of appeal, within strict time limits

LAW AND POLICY IN UK

To know the real position of the gender sensitization in the United Kingdom, we have to look at the nationality laws, immigration laws, and refugee law and policy prevalent in the United Kingdom. The UK nationality legislation is based on the principle that men and women have equal rights in the area of nationality. The basic legislation is the Immigration Act 1971, as amended by the Asylum and Immigration Appeal Act 1996, the Immigration and Asylum Act 1999, and the Nationality, Immigration and Asylum Act 2002. The Human Rights Act 1998,

incorporating the European Convention on Human Rights into United Kingdom law, has also applied to asylum cases since October 2000.

White Paper, Fairer, Faster and Firmer—A Modern approach to Immigration and Asylum:

Under the terms of “Social Security(Persons from Abroad)(Miscellaneous Amendments), Regulations, 1996, asylum seeker whether male or female, who apply for the asylum on arriving at the UK Port, are entitled to take benefits until a decision is taken on their application. However, the persons who made the application for asylum seeking after entering into the country is not entitled to get these benefits. The government is reviewing the present arrangements relating to the benefits of the asylum seekers, as it is quite unacceptable that any asylum seeker should be left destitute, and will make any necessary changes in due course.⁹⁵

In the case, if the status determination process does not complete within the period of six months, or if the person is denied the refugee status and therefore he has filed the appeal, in both the cases asylum seeker would have the right to employment in the country. Women who got the asylum in the United Kingdom

⁹⁵Gender Guidelines for Asylum Determination. National Consortium on Refugee Affairs. A Research Paper prepared by European Union Foundation for Human Rights.

shall have the same right as the residents of the United Kingdom. Ethnic minority women have the same rights as their counterparts in statutory services.⁹⁶

NASS (National Asylum Support Service): The National Asylum Support Service (NASS) is the Home Office agency responsible for administering the accommodation and financial support system for asylum seekers. It published “NASS domestic violence policy bulletin 70” in the year 2004. This policy bulletin is essential information for anyone involved in supporting or advising asylum seeking women who have suffered domestic violence the UK. It **outlines procedures** that NASS case officers should follow to deal with any report of a NASS supported woman suffering from DV. The bulletin highlights the need to advise a woman to consider whether she needs to **take action in relation to her immigration status**, for example, claiming asylum in her own right if she was a dependant on the claim of her separated partner.⁹⁷

⁹⁶ Ibid.

⁹⁷ <http://www.asther.hagos@refugee-action.org.uk>, accessed on 18th of May 2007 at 4 pm.

The Equal Opportunities Commission (the government organisation promoting gender equality): The Equal Opportunities Commission is working to eliminate sex discrimination in Britain today. If women and men had equal chances in life, things would be different. It runs a helpline for women suffering harassment on 0845 015901.⁹⁸

United Kingdom has also specific arrangements dealing with the racial discrimination. Many police forces have special units to deal with “hate crimes” (these are crimes motivated by hatred, like racism, or attacks on women or gay or lesbian people or asylum seekers) with their own trained officers and procedures to encourage people to report incidents to them. These are usually called “*community safety*” units. Although they are keen to take action against racial harassment, they will also understand if you are too frightened to pursue a legal case, and will offer support and help whatever you decide.

There are strict laws about safety in workplaces in the UK, although employers may sometimes ignore them. Employers have to ensure that the workplace is a safe and healthy place to work, by

⁹⁸ <http://www.eoc.org.uk/s>, accessed on 18th of May 2007 at 4 pm.

- Ensuring that machinery is safe and properly maintained
- That there are safe systems for using equipment
- That substances that may damage your health are properly controlled
- The free protective clothing or equipment is provided if needed
- That workplaces are properly heated, lighted and ventilated
- That there are proper sanitary, washing, first aid and rest facilities
- Make sure that there are proper means of escape from fire, alarm systems and emergency procedures
- Reporting any injuries, accidents or dangers to the appropriate authorities

Role of the Courts

The British courts have become a principal forum for hearing criticisms of Britain's sex-discrimination laws. Over the course of recent decades, women's rights advocates have criticized British Sex-discrimination law on several grounds. First, for the some years after the European Unions's Equal Pay Directives of 1975, the British government did not amend the British law to that effect. Second, some lower courts had interpreted the sex-discrimination Act of 1975 to allow "begin" discrimination as well.

British jurisprudence on 'social group' starts from the 1995 case of *SSHD v. Savchenkov*. At the second appeal, the tribunal decided that, "...given the evidence of the existence and insidious power of the mafia, individual which the mafia seeks to recruit and who refuge do form a social group. They are identifies by the approach and refusal. Whether or not the group is liable to persecution is then a question of evidence."

IN a case, the House of Lords upheld Zainab Fornah's right to refugee status as a young woman from Sierra Leone who, after abduction and repeated rape by rebel soldiers during the country's civil war, was threatened with female genital mutilation (FGM) when she returned home. The House of Lords, the UK's Supreme Court, accepted that women facing practices such as FGM were as deserving of protection under the Refugee Convention as men and women facing persecution on political or religious grounds.⁹⁹

A Home Office spokesman said it recognized gender-related persecution. "We have put in place policy guidance and training for caseworkers to ensure that our processes are as accessible and sensitive to the needs of women as possible."

⁹⁹ "Two landmark asylum judgments" by Francis Webber, IRR News, 26 Oct. 2006, Accessed from , <http://www.irr.org.uk/2006/october/ha000025.html> dated- 29 Oct.2006.

Anna Reisenberger, acting chief executive of the Refugee Council, welcomed the judgment, but said the case demonstrated the "severe difficulties" that refugees fleeing gender-based persecution have faced.

"We are dismayed that this woman's case had to go all the way to the House of Lords," she said.

Role of Voluntarily Organizations in the Protection of women Refugees

Refugee women's organisations provide essential services addressing the poverty and discrimination that asylum seeking and refugee women face in Britain. Refugee women's organizations also provide valuable opportunities for refugee women to gain experience through volunteering and training that help them overcome barriers to employment.¹⁰⁰

1. Women for Refugee Women

Women for Refugee Women aims to highlight the failure of the UK Government and the courts to recognise gender-based persecution in asylum decisions. And, the impact on women of

¹⁰⁰ The government is also funding the voluntary refugee organization who is working for the welfare of the individual refugee and their community building programme. The government also considering that particular position or the women refugee, due the cultural and domestic differences, and promoting the voluntary groups to facilitates the women organization in this sector.

- State-enforced destitution
- Indefinite immigration detention
- Violent deportation

This organization call on the UK government to ensure that the persecution women face, including rape, honour crimes and female genital mutilation, is taken seriously in asylum claims; we call on the government not to make destitute, detain or deport women who are at risk of gender-related persecution.

On 16th May at the ICA in London, Women for Refugee Women brought together women refugees and invited women from the media, politics, law and the arts to raise awareness of the injustice faced by women refugees in the UK. A film, directed by Jenny Abbott, showed four women asylum seekers talking about the horrific events that forced them to flee their homes, and the despair they experienced on having their claims for asylum turned down in the UK.¹⁰¹

¹⁰¹ <http://www.refugeewomen.com/event.php> accessed on 9th April 2007 at 4.39 pm. The movie shown in the gathering was based on the real experiences of refugee women and two of them were present in the audience.

The culmination of the event was three refugee women speakers; Farhat Khan from Pakistan, Harriet Angyangokolo from Uganda, and Peace from the All-African Women's Group at the Crossroads Women's Centre. Their courageous and powerful speeches were clear calls to action for women in the UK to support asylum seeker women in their pursuit of justice.

2. Refugee Action

The Refugee Action work with refugee women to campaign for better conditions and actively support Action for Refugee Women, a national network of refugee women's organizations and individuals.¹⁰²

We assist statutory agencies to develop appropriate services for women, like women-only English language classes or home tuition for women who, for cultural and religious reasons, can't attend mixed classes, and the choice of a female doctor or interpreter. We also support other advice agencies to give women the choice of a female caseworker and interpreter, women-only drop-in sessions, social events and assist women's self-help groups. As a result of campaign started by the Refugee Action:

¹⁰² <http://www.refugee-action.org.uk/campaigns/Women.aspx>, accessed on 9th April 2007 at 4.39 pm.
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- NASS agreed to fund places in women's refuges for women fleeing domestic violence as common practice;
- NASS agreed to offer all women single sex accommodation if preferred;
- A working group was set up, led by Refugee Action and consisting of relevant NASS staff and colleagues from the other agencies, to look specifically at the needs of women refugees and asylum seekers. Nothing was in place before to look specifically at the needs of women.

3. The Refugee Council

The refugee council is primary voluntary organization that is working for the assistance of refugees in the concerns of education, social security and health care, and also in the case of statutory services and organizational support specifically in the case of women refugees.

4. Refugee women Resource Project (RWRP):

This is set up by a charity organization named '*Asylum Aid*, in 2001 to provide assistance and free legal representation to the women asylum seekers. The primary object of the project is-

- To help women to access the asylum determination process in the UK

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- To ensure that women's asylum claims are fully considered.
- To highlight procedural and evidential obstacles for women.

5. The European Council on Refugee and Exiles, (ECRC):

The ECRC is the prime functionary in the Europe which is working for the protection of the rights of the asylum seekers and the refugees. Its one of the major agenda is to improve the conditions of refugee women and asylum seekers. The council has given the huge guidelines for the protection of women refugees in the European countries.¹⁰³ The Important remarks are as follows:

- The European States should develop the effective guidelines to protect the women refugee in the line of Canada, USA and UNHCR.
- Persecution should cover all the serious harms, for example rigid dress code, restriction on the education or honour killing, all these can be resulted in the persecution.

¹⁰³ The ECRE Position on Asylum Seeking and Refugee Women is based on a wide range of relevant international refugee and human rights instruments. It is also based on the UNHCR 'Guidelines on the Protection of Refugee Women' and 'Guidelines on Sexual Violence against Refugee Women', the six UNHCR Executive Committee Conclusions on Refugee Women, the 4th UN World Conference on Women 'Beijing Platform of Action' (E5), the Australian Department of Immigration and Multicultural Affairs 'Guidelines on Gender Issues for Decision- Makers', the Canadian Immigration and Refugee Board 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Update)', and the United States 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women'.

- States should also consider the persecution by the non state actors, because in the case of women the persecutor is generally the non-state actors, for example in the domestic violence.¹⁰⁴
- Safety “Internal flight alternative”.

The meaning of particular social group under the refugee convention continues to cause the British courts difficulties, especially in relation to the gender based claims. Even so the temptation of lawyers representing female asylum applicants-especially who have experienced domestic violence but also, for want of any obvious alternative, victims of sexual assault-must be couch their argument in social group terms, citing Islam & Shah.¹⁰⁵ As far as the other institutional structure of support structure is concern the Britain is leading to all countries at least in the case of protection of refugee women.

¹⁰⁴ The states has responsibility from both the Vertical violation (violation by the states itself), and horizontal violation (violation by non state actors), because the simple reason that, it is state which has the primary duty to protect the persons.

¹⁰⁵ Navnita Chadha Behera. *Women and Migration in Asia: Gender, Conflict AND Migration*. Vol.3. New Delhi: sage Publications 2006.p.57.

INDIA

(Udaracharitanam tu Vasudhevyā Kutumbakam)

Summary Points

India is not party either to the convention on the status of refugee nor the additional protocol on the status of refugees.

India is a member of the EXCOM which is the primary policy making body of the UNHCR.

India has hosted a large number of refugees from the Tibet, Sri Lanka, Myanmar, and Afghanistan.

India has three categories of refugees namely, category I, category II, and category III. The basis for this segmentization is the recognition and kind of protection.

India is providing a different kind of treatment for the different categories of the refugees.

India does not have any specific law and policy to deal with the refugees.

India is one of the largest refugee populated country, but there is yet no law or consistent policy to deal with the problems of refugee. India is not a party to the Convention on the Status of Refugee, 1951, or Protocol of 1967.¹⁰⁶ In spite of the absence of legal policy India is hosting the huge number of Tibetan, Sri Lankan, Afghanistan, Bhutanese and Burmese refugees. This shows the responsibility

¹⁰⁶ India is a member of the EXCOM which the central policymaking body of the UNHCR.
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which India is carrying.

According to one observer South Asian attitude to women has been guided by "mystified notions of chastity".¹⁰⁷ This has led to the acceptance that women in South Asia belong to their communities. Indian and Pakistani attitude during the nascent stage of State building institutionalised this through their treatment of abducted women.

India is a very sincere member of the international community right from its inception.¹⁰⁸ But when we talk about national legal frame work, yet there is no law specifically dealing with refugee. What India has in the name of legislation is: *Foreigners Act 1946, Indian Passport Act,1920* and *Registration of foreigners Act,1939*. So in the absence of specific enactment, these statutes apply to the refugees in India. But that is not all. India has two important equipments-

- One is an instrument i.e. Indian Constitution, which is the fundamental law of superior obligation, and

¹⁰⁷ Samir Das. *Ethnic Assertion and Women's Question in Northeastern-India*, s.A.K. Jana, ed., Indian Politics at the Crossroads (New Delhi: 1998) p.177.

¹⁰⁸ India is the party to UDHR, ICCPR, ICESCR, and CEDAW. The reason for mentioning this is, this is not only the refugee convention and protocol which is responsible for the protection of refugee, but all other important international instruments play a crucial role. For ex. The very fundamental basis is derived from the UDHR in the form of Art.13, 14 and 15. in the case of protection of women refugee, it becomes more important, because CEDAW is more effective than the refugee convention, to which India is a party.

- Other is an institution, i.e. Indian Judiciary specifically Supreme Court of India, which deemed to be the most powerful court in the world.

Besides these two, the National Human Right Commission (NHRC) has also played a very crucial role in the protection of refugees.¹⁰⁹ NHRC are involved in various seminars and conferences relating to the rights of refugees and also relations with the UNHCR. Commission also made a three member committee to look into the matter of ratification of the refugee convention and recommended for the ratifying the Convention.

Articles 14, and 21 of the Constitution¹¹⁰, which is the source of Rule of Law and Natural Justice, does not discriminate between citizen and non-citizen, therefore all the refugees in India has the protection of these two articles of the Constitution. Besides these provisions, Article 51(c) of the Constitution mandates that *“state shall make an effort to- foster respect for international law and*

¹⁰⁹ NHRC has given directions for the humanely treatment of chakamas, bhutanees, and afghan refugees. However in case of Tibetan refugee and Srilankan refugees the government of India and the respective states have done enough but in case of chakmas, they don't have proper home, health care, education. NHRC had given directions to the Government of North-East for proper treatment of chakmas. But the non compliance of these directions made forced to the NHRC to move to the Court. NHRC had also issued directions to the Government of Tamilnadu to take care the tamil refugees living in the special camps, especially after the assassination of Rajiv Gandhi.

¹¹⁰ **Art.14**, provides-*“State shall not deny any person any person equality before the law and equal protection of the laws”*.

Art.21 says, *“No person can be deprived by his life and personal liberty except in accordance with the procedure established by law.”*

treaty obligations in the dealings of organized people with one another”.

On January 6, 1992 the Indian and the Sri Lankan governments signed a bilateral agreement to begin refugee repatriation on 20 January. Soon the programme was suspended when UNHCR raised doubts about their safety once they return.¹¹¹ In July 1992 the GOI signed an agreement with the UNHCR and allowed the agency a token presence in Madras. By April 1993 refugee camps were reduced from 237 to 132 in Tamil Nadu and 1 in Orissa. Representatives of UNHCR were allowed to be in the transit area and could speak to returning refugees. Before conflict was resumed in 1995 some 55,000 refugees were repatriated from India to Sri Lanka and again a majority of them were women. Thus when problems ensued once again these repatriated women faced it even without the support of their family.

After Rajiv Gandhi's assassination the politicians began to shun the refugees.¹¹² As most of these were women they were initially considered harmless but with the number of female suicide bombers swelling there was a marked change in

¹¹¹ B.S. Chimni, "The Legal Condition of Refugees in India," *Journal of Refugee Studies*, Vol. 7, No. 4, 1994, p. 385.

¹¹² C. Amalraj. *Sri Lanka: The One-eyed Hope*, *The New Leader*, 1-15 June, 1995, p. 19.

GOI's attitude to women refugees (About 23 female suicide bombers died by March 1998.¹¹³ What the government of India failed to acknowledge was that the number of female bombers swelled after the IPKF operations, due to a demographic imbalance.¹¹⁴ The government turned a blind eye when touts came to recruit young women from the refugee camps in Tamil Nadu to work as "maids" in countries of Middle East. Most of these women were then smuggled out of India and sent to the Gulf countries. Often they were badly abused. On such case that caught the public eye was that of a young girl called Sivitha. She was smuggled to the Gulf with thirty other women. Her employer "took sadistic pleasure in thrashing her." Twice she fell into a coma. Unable to bear this she sought refuge in the Sri Lankan embassy. She was sent back to Sri Lanka, into the war torn area of Vavuniya. She tried to get back to India to her parents but failed. Ultimately she committed suicide.¹¹⁵

Burma was also a country coupled with a continuous internal disturbance in the country which made their nationals to migrate. India is the most suitable option for these refugees. There are many ethnic minorities that have suffered discrimination under successive Burmese governments, and massive persecution

¹¹³ Source: Yerimalai Report.).

¹¹⁴ Joke Schrijvers, "Constructing Womanhood, Tamilness and The Refugee," in Selvy Thiruchandran ed., *Woman, Narration and Nation: Collective Images and Multiple Identities*, New Delhi, 1999, p. 179.

¹¹⁵ "The Maid Running Madness," *South Asia Refugee Information*, Vol. 3, September, 1996, p. 1. Also see "A Journey Without End: Sri Lankan Tamil Refugees in India," *Refugee Watch*, No. 2, April, 1998, pp. 9-

by the present Burmese regime. Following the brutal crack down of 1988 by the State Law and Order Restoration Council (SLORC), against democratic movements in Burma refugees came to Mizoram in large numbers. As in any displaced population more than fifty percent of the Chins who came to India were women. Many of these women took up jobs in local schools. Yet when the pushback came even they were not spared.¹¹⁶

The situation of the Rohingya refugee women is even worse than the Chins.

Role of Courts

The heart of the protection jurisprudence lies in the judicial activism in the India. On the basis of investigation made by the NHRC itself, it found the position of the *Chakamas* was hideous and they were dying on account of deny access to for want of medicine, NHRC filed the petition in the Supreme Court. Supreme Court, referring to the earlier cases, as *State of Arunachal Pradesh v. Khudiram chakma*,¹¹⁷ and *Louis De Raedt v, Union of India*,¹¹⁸ comes to the conclusion that, protection of art. 21 of the Constitution are available to the chakmas also. The Apex Court stated:

¹¹⁶ Government of India followed largely a hands-off policy regarding the Chin refugees.

¹¹⁷ (1994) Supp.1 SCC 651

¹¹⁸ (1991) 3 SCC 554

*"We are a country governed by the Rule of Law. Our Constitution confers certain rights on every human being and certain other rights on citizens. Every person is entitled to equality before the law and equal protection of the laws. So also, no person can be deprived of his life or personal liberty except according to procedure established by law. Thus the State is bound to protect the life and liberty of every human being, be he a citizen or otherwise, and it cannot permit any body or group of persons, e.g., the AAPSU, to threaten the Chakmas to leave the State, failing which they would be forced to do so. No State Government worth the name can tolerate such threats by one group of persons to another group of persons, it is duty-bound to protect the threatened group from such assaults and if it fails to do so, it will fail to perform its constitutional as well as statutory obligations. Those giving such threats would be liable to be dealt with in accordance with law. The State Government must act impartially and carry out its legal obligations to safeguard the life, health and well being of Chakmas residing in the State without being inhibited by local politics. Besides, by refusing to forward their applications, the Chakmas are denied rights, constitutional and statutory, to be considered for being registered as citizens of India."*¹¹⁹

¹¹⁹*National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 743.*
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In another landmark judgment *Chairman, Railway Board v. Chandrimadas & Ors* Supreme Court came with a strong dictum in favour of refugee women, who is gang-raped by the Railway employees, was awarded compensation of Rupees 10,00,000.¹²⁰ To give this judgment, the Supreme Court relied on the case of *Bodhisattwa v. Ms. Subdhara Chakraoborty*,¹²¹ where it was declared that "Rape is the violation of right to life and human dignity, and is an offence against the society. We are, however, concerned here with the argument raised by the state that the victim was a foreign national and, was therefore, not entitled to any relief under the public law domain for the violation of fundamental rights which are available only to the citizens of this country. The Supreme Court rejected this contention for two reasons: *firstly*, on the ground of domestic jurisprudence based on constitutional provisions and *secondly* on the ground of human rights jurisprudence founded on the UDHR. The Court referred to the Preamble and various articles of the UDHR, and provisions from CEDAW¹²² and then observed that "our Constitution guarantees all the basic and fundamental human rights set out in the UDHR to its citizens and other persons. The Chapter dealing with the fundamental rights is contained in Part-III of the Constitution."

¹²⁰ 2000(2) SCC 465.

¹²¹ (1996) 1 SCC 490

¹²² India is the party to the Convention on Elimination of All forms of Discrimination against Women, CEDAW.

Instead of these national arrangements, in last December UNHCR opened the Women's Protection Clinic in the area of the New Delhi, where most of these women refugees mainly from north-western Myanmar live. There is a crèche next door where women can leave their children, and the clinic itself employs two trained consultants, one with a legal background and the other with psychosocial expertise.¹²³

¹²³ It is important to mention that although India is not a party to the refugee Convention and Protocol, but India is a member of EXCOM, which is the primary policy making body of UNHCR.

CHAPTER-6 CONCLUSION

Although the interpretation of Refugee convention remains the prerogative of state, it is important that law evolves to protect all the applicants (irrespective of their sex) experiencing genuine fear of persecution. A gender sensitive approach does not involve a lowering of standards regarding refugee determination. The only thing which is required is the approach should be changed while treating women, because women often feel different type of persecution than men.

This dissertation was started with the hypothesis that the present international legal regime is not gender sensitive does not stand after a long analysis and scrutiny of the present international instruments specifically the human rights and humanitarian documents. Right from the beginning the United Nations is aware of this issue and from time to time it attempted to gender sensitize the United National Agencies.

On a broader plane, listening to women refugee's experiences, and chronicling them, is of particular importance because women's experiences add a critical and vital dimension to any analysis of the refugee situation's impact on women and

men, on the relation between them and also the relation between gender and social as well as historical process. On the basis of the above discussion we can easily made an inference that present international legal regime is gender sensitive, particularly the CEDAW has made the significant change. But in case of the refugee women, the situation is different and the protection available in this regime is not adequate enough to meet the present challenge (female specific experiences). Refugee women find their voices submerged, both in the protection regime and leadership structures because of inadequate legislation and legal awareness and the prevailing patriarchal system specifically in the South Asia.

Regarding the comparative study of the four states, I reached on the conclusion that, though Canada and United States had a good history to protect the refugee especially the women, but now the exceptions are prevailing over the rule. That is the reason, instead of celebrating the historical milestone of Canada's 25th anniversary of signing and ratifying the Convention on the Elimination of all Forms of Racial Discrimination against Women (CEDAW), women in Canada are mobilizing to ensure that governments honour and respect their international and domestic human rights commitments. This is because over several months now, the federal government has acted in ways that deny most women's

realities, undermine women's access to justice, and abandon its own obligation to advance women's human rights in Canada. However the contribution of UK in the refugee protection is phenomenal. This is possible because of good and strong support structure. India stands on a very peculiar situation apart from the other three countries, because all other three countries are the signatory of the 1951 Convention while India is not. Ratifying the convention is one aspect but the negative part of the India's revolution is that India does not have a proper policy in spite of the huge refugee population, which generally resulted in the form of discrimination among the various categories of the refugees in India. India is also lacking the sufficient required support structure. But it does not dilute the work done by the India in the interest of refugees especially the role of Courts in India is phenomenal. Therefore I am not agree with the conclusion given by the Carles Epp, that in India right revolution could not occur because of lack of support structure. It might be true in other aspects but in case of refugee protection it is not correct. Indian courts in this regard are far ahead of the other courts in the other countries. Chandrima Das is the only example in this regard. There are so many instances when the court gave the order to protect refugees.

MEDIA LITERACY

The role and approach of the media is another important aspects in the protection of refugees more particularly in the case of women, because their reach to the media is very less and also the women feel hesitant to talk the media people. The media rarely considered them as mothers, wives, daughters, sisters trying to reunite with family members, or as courageous women trying to independently survive. Of course some Some did provide another perspective on the migrants' situation, their circulation tended to be smaller and less likely to reach government policy makers. There is an emergent need to sensitize the media in relation to issues of accountability, responsiveness and representation of this marginalized class of the world i.e. 'women refugees'.

- Gender should be included as a ground of persecution in the convention on the status of refugee, to sensitize the refugee convention. Theoretically it does not make any difference but it might sensitize more the people and officials dealing with gender related claims. Moreover it would not create any harm or it does not lessen the standard of present Convention.
- From the view point of this paper, listening to women's experiences, also chronicling them, is particularly important in understanding the refugee

situation and forging appropriate responses because patriarchal norms lie at the heart of many of women refugees, gendered experiences and vulnerabilities and the fact that many of women refugee's claims go unrecognized. Only through listening the women themselves can the interplay of these norms in what constitutes the great majority of the refugee experience be comprehended and responded to in a constructive and sustainable manner. Indeed, where listening to women in itself can be seen as amounting to participation. Gender-sensitivity needs to exercise in a spirit which enables a better and a more sensitive exploration of the experiences of both women and men.

- The representation of the women in the various international human rights committees under the various international human rights instruments.
- There should be committee consisting only of women to supervise and train the UN peace keepers NGO's working for the refugee women and children, to save from the sexual abuse.
- Women should unite and fight for their rights. For example, the Tibetan refugee women association which is fighting for their rights.

- A new system for *fast-track asylum claims* should be introduced in effort to cut lengthy delays in processing cases.¹²⁴ For women there should be separate cell, consisting only women administrators.

¹²⁴This system is being successfully functioning in the Scot land.

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ANNEXURE- I

Selected Security Council Resolutions

- S/RES/1590 (24 March 2005) was the first resolution to affirm zero tolerance of sexual exploitation in all UN peacekeeping missions.
- S/RES/1565 (1 October 2004) renewed the MONUC mandate and requested the Secretary-General investigate allegations of sexual exploitation by UN peacekeeping personnel and to take preventive measures.
- S/RES/1460 (30 January 2003) on children in armed conflict noted with concern the exploitation of children by peacekeepers.
- S/RES/1436 (24 September 2002) included a reference to the need for the prevention of sexual abuse and exploitation as part of the mandate renewal for peacekeeping in Sierra Leone.
- S/RES/1400 (28 March 2002) renewed the mandate in Sierra Leone, expressing concern about allegations of sexual abuse.

Selected Secretary-General's Reports/ Letters

S/2005/72 (9 February 2005) was a report to the Council on steps taken by the Secretary-General to address allegations of sexual exploitation within MONUC.

Selected Presidential Statements

S/PRST/2005/21 (31 May 2005) condemned, in the strongest terms, all acts of sexual abuse and exploitation committed by peacekeepers and welcomed the comprehensive report prepared by Prince Zeid.

Security Council Debates and Briefings

- S/PV.5294 and resumption 1 (27 October 2005) was an open debate on women, peace and security during which several delegations spoke about sexual exploitation and abuse in peacekeeping.
- S/PV.5191 (31 May 2005) Prince Zeid and Under Secretary-General Jean-Marie Guéhenno's briefed members of the Council in an open meeting.
- S/PV.5129 and resumption 1 (23 February 2005) was an open debate on children and armed conflict during which several delegations raised concerns about sexual exploitation and abuse by UN personnel.

Secretary-General's Bulletin

ST/SGB/2003/13 (9 October 2003) was the Secretary-General's Bulletin containing definitions of sexual exploitation and abuse, classifying such acts as serious misconduct for all UN staff, including UN agencies, and stressing that these rules should also apply to entities and individuals working in cooperative arrangements with the UN.

Other Relevant Documents

- S/2006/85 (10 February 2006) a letter on behalf of the Non-Aligned Movement to the President of the Security Council raised concerns

about the Council's encroachment on the powers and functions of the General Assembly and ECOSOC.

- A/60/640 (29 December 2005) report of the Secretary-General, which contained an annex with information on progress made in the implementation of measures to combat sexual exploitation and abuse in peacekeeping.
- A/RES/59/300 (30 June 2005) a General Assembly resolution that welcomed the report of Prince Zeid.
- A/59/782 (15 April 2005) a report of the Secretary-General that contained data on reports of sexual exploitation and abuse and measures taken.
- A/59/710 (24 March 2005) was a comprehensive report by Prince Zeid.
- A/59/661 (5 January 2005) was a report of the investigation by the Office of Internal Oversight Services into allegations of sexual exploitation within MONUC.
- A/RES/57/306 (22 May 2003) a General Assembly resolution that inter alia requested the Secretary-General to issue a bulletin on sexual exploitation and abuse and to maintain data on all investigations and actions taken regarding the matter.
- A/57/465 (11 October 2002) contained the report of the OIOS on sexual exploitation of refugees in West Africa.