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INTERNATIONAL HUMANITARIAN LAWS AND REFUGEE LAW

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**CENTRE FOR INTERNATIONAL HUMANITARIAN LAW AND
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IN COLLABORATION WITH

**INTERNATIONAL COMMITTEE OF THE RED CROSS AND
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PREFACE

The National Students' Conference is an annual event organized by the Institute of Law, Nirma University (ILNU) in collaboration with International Committee of the Red Cross, regional delegation, New Delhi and United Nations High Commissioner for Refugees. The conference is a flagship event of the Centre for International Humanitarian Law and Human Rights since 2011. The aim of the conference is to encourage young scholars to write well researched papers on issues pertaining and related to Humanitarian Laws and Human Rights. Today, the Conference has grown into a unique platform for the discussion of contemporary issues and perspectives related to IHL among young scholars. Each year, the conference brings together students, professionals and practitioners who bring with them their unique experiences which create a dynamic and diverse learning environment. The conference from its third edition in 2013 has also collaborated with the United Nations High Commissioner for Refugees (UNHCR) thereby bringing within its ambit various interesting aspects of Refugee Law as themes for discussions. With this the Conference undoubtedly makes an effective contribution to the whole process of reaffirmation and development of IHL and Refugee Laws.

As part of the same initiative, the Centre publishes selected articles on issues concerning the implementation of International Humanitarian Law and Refugee Law. The aim is to encourage young scholars to research and learn about the critical areas of law surrounding this subject. We hope this book contributed and enhances the knowledge and research in the field of International Humanitarian Law. We would like to thank all student presenters for their papers which have been covered in this edition. The Centre would also like to extend its heartfelt gratitude for the active assistance provided by the Student Members of this Centre in successfully bringing out this book.

MESSAGE FROM THE DIRECTOR

It gives me immense pleasure to address the readers through the Seventh Conference Proceeding compiled and published by the Centre for International Humanitarian Law and Human Rights. I congratulate the Research Centre for completing seven years of its journey in organizing the National Student's Conference on International Humanitarian Law (IHL) and Refugee Law (RL) and in there making constant efforts in promoting the study of IHL and RL amongst students, practitioners and academicians.

In times of constant disruption and changing contours of armed conflict and Human Rights violation, the challenges of upholding the principles of International Humanitarian Law and Refugee Law increases manifold and therefore it becomes very important to engage civil society, international law practitioners and student community to spearhead and engage in a meaningful dialogue, dissemination of knowledge and implementation of law, when needed. The task is clearly not easy but it is the duty of all of us to engage in spreading knowledge of these discipline and ensuring its relevance in protecting the lives and dignity of victims of armed conflict.

The themes covered in the Seventh National Student's Conference and papers included therein also addressed the dilemma of present day conflicts and is an attempt to create awareness and ensure participation of the student community and academicians to engage in necessary dialogue on the development and application of IHL. The themes covered in the conference includes contemporary issues ranging from asymmetrical warfare and challenges in the enforcement of IHL. On these lines, we witnessed in-depth research and perspectives on protection of the vulnerable during an armed conflict. Furthermore, contemporary issues revolving around climate change refugees were also discussed at length. The vast range of issues deliberated herein should help initiate new avenues of research and discussions and provide impetus to advance the Humanitarian Law discourse.

The editorial team deserves special thanks for their outstanding efforts in reviewing and publishing the manuscript. On behalf of the Institute of Law, Nirma University, I also thank the International Committee of Red Cross (ICRC) and United Nations High Commissioner for Refugees (UNHCR) for their constant support and encouragement in organizing the National Student's Conference in particular and towards the grater cause of International Humanitarian Law and Refugee Law.

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MIGRANT WOMEN AND THE REFUGEE CRISIS: SURVIVING THE CONFLICT

- Adyashree Khuntia* and Siddharth Trakroo**

ABSTRACT

Almost every day, thousands of people leave their countries forcibly whether as a result of a civil war, political instability or because of the risk of serious human rights violations and move to other countries in the search of a better life. And this displacement has led to a refugee crisis where brutalization of women has become a persistent trend. Wars are gendered, both in reasons and results. Even though women do not participate in active warfare in majority but they overwhelmingly suffer a greater harm as compared to their male counterparts. While forcibly displaced men and boys also face existential issues, women and girls can be exposed to particular protection problems related to their gender starting from human trafficking, exploitation, sexual and gender-based violence to early marriages, overwhelming economic strife, and psychological scarring. Single women travelling alone or with children, pregnant and nursing women, adolescent girls, and aged women are among those who are particularly at risk. Also many a times, the work done for the restoration of conflict ridden societies, fail to take into account women's realities and needs. Therefore, a system ensuring that migrant women have effective access to justice needs to be prioritized and gender sensitive asylum procedures need to be established for protection of migrant women

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from gender based disparities. This paper aims to discuss the various issues faced by women refugees with special emphasis on the discrimination faced by them with regard to their gender and also the different ways how these women are braving these humanitarian crises of the modern times and living with their new gender roles therefore establishing themselves as prospective peace builders, rather than just being victim of circumstances.

Keywords: women refugees, gendered wars, peace builders

INTRODUCTION

Many parts of the world are today experiencing a refugee “crisis”, as millions of forcibly displaced people attempt to flee from their conflict ridden countries. Whilst the majority of these refugees are men, increasing numbers of women are also leaving their homes in search of safe haven. In 2015, the number of international migrants globally was 244 million. Women made up just under half of such migrants and 52% of those in Europe and Northern America. Forced displacement increased in 2015, with 65.3 million individuals being forcibly displaced worldwide as a result of conflict, violence, or human rights violations. This is 5.8 million more than the previous year (59.5 million).¹ Over one million refugees, migrants and people seeking asylum arrived in Europe in 2015² and 299,582 arrived in Europe in 2016¹¹, the majority coming from refugee-producing countries, especially Syria, Afghanistan and Iraq. The above mentioned statistics portrays the ever rising problem of the refugee crisis and the other issues which comes along with it such as the safety of asylum seekers, the problems faced in transit by the refugees, reintegration of these people into society, etc.

REFUGEE CRISIS IN THE GLOBAL SCENARIO

The current refugee crisis can be majorly divided into two categories: refugees and internally displaced persons. A refugee is someone who has been forced to flee his or her country because of persecution, war or violence and has a well-founded fear of persecution for reasons of race, religion,

¹ UNHCR, Global Trends: Forced Displacement 2015, 2016.

² *Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015*(10 July ,2018 ,3;30 PM), <https://www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom>

nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.³ An internally displaced person, or IDP, is someone who has been forced to flee their home but never cross an international border. IDPs are not protected by international law or eligible to receive many types of aid because they are legally under the protection of their own government.⁴ The number of internally displaced persons stood at almost 40 million at the end of 2014. Current data suggests that women living in protracted displacement slightly outnumber men and their hardships get worse over time.⁵

This migration and displacement round the world has led to a situation where brutalization of women has become a persistent trend. Women represent almost half of the 244 million migrants and half of the 19.6 million refugees worldwide and this refugee crisis has created multiple forms of vulnerability and insecurity for refugee women including various forms of sexual and gender-based violence.

The problem is not restricted to one country or even to one continent as it has become a global problem. Each country is facing a problem regarding the same or is dealing with the consequence of the problem in other countries. While Afghanistan is notorious for its political instability and discriminatory cultural practices in the name of Islam with the Taliban also imposing a string of social, cultural and economic restrictions on the population like women and girls not being allowed to attend school or university. It also faces a major issue of underreporting of sexual violence with the United Nations Assistance Mission in Afghanistan (UNAMA) verified only 11 cases of conflict-related sexual violence against women, girls and boys committed by parties to the conflict including the Afghan National Border Police, the Afghan Local Police and the Taliban in 2016.⁶ Similar conflict also prevails throughout Libya which remains a country of transit,

³ *What is a Refugee?* (11 July,2018,7:30 PM) , <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>

⁴ See supra note 3.

⁵ *Woman Refugees and Migrants* (12th July,2018,7:45),<http://www.unwomen.org/en/news/in-focus/women-refugees-and-migrants#notes>.

⁶ *Conflict Related Gender Violence*,(12th July,2018, 8;46pm),<http://www.un.org/en/events/elimination-of-sexual-violence-in-conflict/pdf/1494280398.pdf>

with 162,895 arrivals to Italy by sea recorded by UNHCR in 2016, eventually leading to sustained violence against unarmed civilians. A 2017 report by UNICEF on reported sexual violence and abuse of women refugees disclosed that nearly half of migrant women in Libya reported sexual violence or abuse multiple times and at multiple locations. Sexual and gender base violence is also majorly prevalent in the conflict ridden state of Somalia with the vulnerability of women increasing owing to a lack of preventive measures, limited access to justice and weak clan protection. There is an estimated 18,650 women and children who are refugees or asylum seekers. The figures showcase the sad state of affairs prevalent throughout the world.

GENDER BASED VIOLENCE

There is no common definition for gender based violence as it varies with respect to different communities, countries, geographical situations etc. However often, violence against women is considered to be synonymous with gender based violence not making it clear whether or not the violence is derived from the unequal power division between men and women in the society. Hence the adjective 'gender based' is important in order to show that gender and the subordinate status of women plays a major role in their increased risk of being affected by violence.

However legally, gender-based violence was defined by the U.N. Convention for the Elimination of All Forms of Discrimination against Women (1992) as:

*A violence that is directed against a woman because she is a woman or violence that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.*⁷

The Sustainable Development Goals include a specific target to “eliminate all forms of violence against all women and girls in the public and private spheres.”⁸ However today the phenomenon of gender-based violence is pervasive around the world, experienced by some one in three women in their lifetimes. Gender based violence is also in rise in conflict ridden

societies because the nature of conflict has changed over a period of time. In the past conflicts were between different countries however the trend now is that conflicts are largely contained within a country's borders and are increasingly waged against unarmed civilians. In 2016, sexual violence was a widely used tactic of war, with widespread and strategic rapes, including mass rapes, allegedly committed by several parties in an armed conflict, mostly in conjunction with other crimes such as killing, looting, pillage, forced displacement and arbitrary detention. The term "conflict-related sexual violence", refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict.

1. ROOTS OF GENDER BASED VIOLENCE

The root causes of gender based violence mainly lie in the society's attitudes towards women and practice of gender discrimination, which permanently places women in a subordinate position to men. The lack of social and economic value for women and the work done by them and the stereotyped gender roles place a women in a position where she is emotionally and financially dependent on a man for her existence. And this reinforces the assumption that men have the final decision making power and say over women. All the above lead to a vicious circle of violence, exploitation and abuse because this inequality of power is misused to the disadvantage of the women who cannot negotiate or make decisions. The disregard for or lack of awareness about human rights, gender equity, democracy and non-violent means of resolving problems help perpetuate these inequalities.⁹ Apart from this, the lack of laws relating to sexual and gender based violence and lack of trust in the law enforcement authorities also play vital role in the increase of gender based violence over the years.

⁷ U.N. Convention for the Elimination of All Forms of Discrimination against Women (1992) (General Recommendation No. 19), paragraph 6.

⁸ *Goal 5: Achieve gender equality and empower all women and girls*, Sustainable Development Goals, (13th July, 2018,8:51pm), <https://www.un.org/sustainabledevelopment/gender-equality/>

⁹ Yonas Gebreyosus, *Gender-Based Violence against Female Refugees in Refugee Camps*, (13th July, 2018, 6:57pm), <https://www.grin.com/document/212288>

2. GENDER BASED VIOLENCE DURING REFUGEE CYCLE

As armed conflicts continue to escalate round the world, negative economic and security impacts are inevitable. Populations impoverished by these conflicts, such as refugees and IDPs, are exposed to exploitation and human right violations, such as Sexual and Gender-Based Violence (SGBV).¹⁰ These conflicts put women and children vulnerable to extreme risks and deprivations. These are the five phases during which different types of violence takes place:

Phase 1: During conflict, Prior to flight : Abuse by persons in power; sexual bartering of women; sexual assault, rape, abduction by armed members of parties in conflict, including security forces; mass rape and forced pregnancies

Phase 2: During flight: Sexual attack by bandits, border guards, pirates; capture for trafficking by smugglers, slave traders.

Phase 3: In the country of asylum: Sexual attack, coercion, extortion by persons in authority; sexual abuse of separated children in foster care; domestic violence; sexual assault when in transit facilities, collecting wood, water, etc.; sex for survival/forced prostitution; sexual exploitation of persons seeking legal status in asylum country or access to assistance and resources, resumption of harmful traditional practices.

Phase 4: During repatriation: Sexual abuse of women and children who have been separated from their families; sexual abuse by persons in power; sexual attacks, rape by bandits, border guards, and forced/coerced repatriation.

Phase 5: During reintegration: Sexual abuse against returnees as a form of retribution; sexual extortion in order to regularize legal status, exclusion from decision-making processes; denial of or obstructed access to resources, right to individual documentation and right to recover/own property.¹¹

¹⁰ IRAQ, (13TH July, 2018, 7:30pm) <http://www.undp.org/content/dam/rbas/doc/SyriaResponse/Iraq%20143-151.pdf>

¹¹ *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*, (14th July, 2018, 8:47pm), https://www.unicef.org/emerg/files/gl_sgbv03.pdf

3. ADDITIONAL PROBLEMS FACED BY WOMEN AS COMPARED TO MEN

Women have a lot less opportunities as compared to men to improve their way of living. Their pre- defined responsibilities of giving child care, cleaning dishes, doing household chores, creates obstacles in their participation in events outside their home because of the time- consuming nature of these activities. In the world's conflict zones, 10 million girls are not in school; girls account for only 30 percent of refugees enrolled in secondary school. They have very few opportunities to go to school or get a job which leads to lack of self- confidence and negotiating skills required to make the critical decisions about their future.

Also, women refugees are considered to be “victims” of war and therefore their capability as a peace builder is not taken into consideration. Women are deliberately excluded from formal talks and peace deliberations which results in gender- insensitive approach towards the issues being discussed. Sometimes issues which women are more likely to raise, are often marginalized and sometimes fully excluded. These include issues such as sexual violence, abuses by government and rebel security forces, and also the provision of key social services.¹²

4. CONSEQUENCES OF GENDER BASED VIOLENCE

Gender based violence severely affects the physical, sexual, and mental health of a woman. These effects can be immediate and acute as well as long lasting and chronic. The higher the intensity of violence, the higher is the impact on a woman's health. In many cases, the negative health consequences may also continue to exist long after the violence has stopped. Apart from the health consequences, gender based violence has serious psychological consequences. The psychological consequences of gender based violence include depression, anxiety, post-traumatic stress disorder,

¹² Yumna Asaf, *Syrian Women and the Refugee Crisis: Surviving the Conflict, Building Peace, and Taking New Gender Roles*, (14th July, 2018, 7:56pm) www.mdpi.com/2076-0760/6/3/110/pdf

shock, memory loss, and sexual dysfunction.¹³ Thus, gender based violence causes immeasurable social and psychological damage. Also, the costs to society are extensive.

WAY AHEAD: POSSIBLE SOLUTIONS AND RECOMMENDATIONS

GBV undermines the dignity, autonomy and security of the victims; and the overall social and economic development of the entire society, hereby often re-enforcing gender in-equalities.¹⁴ Therefore these are some of the recommendations which can be followed in order to tackle gender based violence:-

1. SAFE RESIDENCE FOR WOMEN REFUGEES

Arriving in countries of exile, the first challenge awaiting these refugee women, specifically those who are unregistered and are not going to live in formal refugee camps, is to find a home to live. The priority for them is to put a roof over their children's head and find a safe refuge in a new or unfamiliar environment. Therefore, the government of the refugee giving countries should take into account this problem, and provide for safer residence.

2. APPROPRIATE SANCTIONS FOR OFFENDERS

There must be strong penal sanctions against convicted offenders of gender based violence so that it serves as a deterrent. Refugees who commit such acts should be treated the same way as nationals would be i.e. with due process safeguards and penal sanctions. Penalties for convicted perpetrators of sexual and gender-based violence should, in general, respect the fundamental principle of non-refoulement, or no forced return to the country of origin. Wherever possible, sanctions should also incorporate efforts to support rehabilitation of perpetrators through, for example, education/awareness raising on human rights and gender, and victim compensation.¹⁵

¹³ *UNHCR. Guidelines for Prevention and Response*, (18th July, 2018, 5:45pm), <http://www.unhcr.org/publications/operations/3b9cc26c4/sexual-violence-against-refugees-guidelines-prevention-response-unhcr.html>

¹⁴ *Gender-Based Violence, Health and the role of the Health Sector*, (15th July, 2018, 9:36pm), http://web.worldbank.org/archive/website01213/WEB/0__CO-56.HTM

¹⁵ See Supra note 11.

3. STRINGENT SECURITY MEASURES

Both the male and female community leaders should be empowered. The local police should be sensitized towards the gender based violence and their capacities should be increased so that they discharge their responsibilities effectively. A definite camp layout should be there in all the refugee camps in order to reduce women's exposure to risks. For the same purpose, more female security personnel should be employed along with existing law enforcement agencies. Security should be increased when refugee women go to collect firewood or engage in other out of the house jobs. Separate washrooms based on gender should be created in order to create a safe environment for the women. Finally, the existing data based on gender based violence should be analyzed and the security issues should be discussed in depth.

4. IMPROVE HEALTH CARE

GBV is very common, but most health care providers fail to diagnose and register GBV, not only due to socio-cultural and traditional barriers, lack of time, resources and inadequate physical facilities; but even more so due to lack of awareness, knowledge and poor clinical practices with limited direct communication and failure to do a full physical examination, not to mention register and monitor the effectiveness and quality of care.¹⁶ Health personnel should be sensitized, educated and trained in order to provide better care to the victims of gender based violence. They should also provide emotional support and counseling to the victims and acknowledge their autonomy, abuse and injustice. The examination of the victims should be done under utmost confidentiality. Victims should be given proper post exposure treatment along with counseling for HIV/AIDS/ STIs etc. Finally community based care should be given to the victims of GBV and their families.

5. RESILIENCE THROUGH EDUCATION

A large no of women refugees mostly the young ones lack access to quality learning resources, effective teaching, and ways to make connections with

¹⁶ See supra note 14

the rest of the world. They face the real possibility that they will become a lost generation, dependent upon others for their survival. Women and girls can play an extremely important role within the refugee community. And education is the key which is required so that they can participate in the rehabilitation process. They are not only lacking the traditional educational achievements, but the workforce requirements themselves are rapidly changing around them.¹⁷ So in today's day and age, technology should be used to impart quality education in conflict ridden societies so that the women are not further marginalized from the society.

6. OTHER RECOMMENDATIONS

The programs which are being designed to tackle gender based violence must reduce the vulnerability factors and must be tailor made according to the need of each country as each country has varying circumstances. The programs being developed must also take into consideration age, gender, and diversity of affected populations systematically for better results. Alternative approaches to socio-economic problems must be developed for transitions of refugees and IDP'S into more sustainable livelihoods, strengthening resilience at the household, as well as the individual level.

CONCLUSION

In the paper, we tried to discuss about the severe conflicts that have affected societies all around the world, which has had devastating consequences for everyone involved but for women and girls in particular, as it affects them differently considering the male-dominated nature of these war-torn societies. Therefore in order to achieve peace, there needs to be a complete change in the gender relations. This has to be done not just as a stepping stone but as a fundamental part of the road to peace. Also, the narrative of considering women to be victims of war needs to be changed so that they are not unheard in the process of rebuilding their country. It must be made clear that a women's experience as a victim of gender based violence and their

¹⁷ *Refugee Education: Is technology the solution?*, Promising practices in Refugee Education, (19th July, 2018, 3:15pm), https://static1.squarespace.com/static/583af1fb414fb5b3977b6f89/t/59d6b90a6f4ca3f9b427d2e4/1507244300889/18_PromisingPractices_TECH+COMPILATION_WEB.pdf

active participation in peace building are not two mutually exclusive aspects and need to be taken in consideration together when negotiating peace. In the present desperate times, where thousands of women have been massacred by insane acts of violence in refugee camps, inclusive peace talks is the best way forward.

INTERNAL ARMED CONFLICTS IN SOUTH ASIA: UNFOLDING OF AN UNCHECKED HUMANITARIAN CATASTROPHE

- Alok Kumar Chaurasia* and Parimal Kashyap**

INTRODUCTION

Towards the turn of last decade, there has been a marked decline in the occurrence of inter-state conflicts in the world in general and South Asian region in particular. However, internal armed conflicts in this region are on an ever widening spree and continue to perpetrate atrocities of epic proportions. These armed conflicts can be attributed to wide variety of factors, ranging from changing dynamics of internal security due to ethno-political, communal-religious bias, to socio-economic diversities in the region. The nature of armed conflicts, and the extent of fatalities in Myanmar has brought South Asia into the limelight again and has flung open the gates of humanitarian abuse. The ethnic cleansing of Rohingya Muslims has left more than 65,000 dead or missing, and millions displaced. The relentless persecution of ethnic minorities over the years, and the rise of Buddhist nationalism in Myanmar has led to eruption of one of the worst humanitarian disasters the world has ever seen. The tragedy of Rohingyas in Myanmar is merely one of the many maladies plaguing the southern region of the continent. The ongoing armed conflict in Afghanistan between government forces, Taliban, and several other armed groups has resulted in

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casualties amounting to thousands of people in 2018 alone with 67 % of deaths attributed to notorious anti-government armed groups.¹

These armed groups deliberately target innocent civilian population by means of suicide bombers which are the leading cause of civilian deaths,² with a clear purpose to upset the established order and create chaos. Close to the heels of Afghanistan, Pakistan has had similar troubles in dealing with violent armed groups in Baluchistan and Waziristan. Pakistan due to its proximity with Afghanistan, is often intermingled with the regional conflicts in the tribal areas surrounding the border shared by both the countries. Attack on schools by Taliban,³ indiscriminate suicide bombings by rebel forces⁴, and random drone strikes have ravaged the landscape showing no regards to the norms of armed conflicts. Resorting to unfair means of engagement has also caused bloodbaths during insurgencies in India⁵ and Nepal. Unfortunately, civilians have been at the receiving end of the spill over of the conflict. It has been over a decade since the conflict in Nepal has seen its end but the ghosts of the war-torn nation still haunt the region with allegations that the conflict era crimes are going unpunished and that the transnational commissions that have been set up lack transparency and fall short of international standards.⁶ To the southernmost end of the continent lies the country of Sri Lanka which has seen several decades of relentless armed conflict between government forces and Liberation Tigers of Tamil Eelam (LTTE) that ended in 2009. Throughout the conflict, LTTE controlled

¹ UNMA, *Quarterly Report On the Protection of Civilians in Armed Conflict* (April 12, 2018) <https://reliefweb.int/sites/reliefweb.int/files/resources/unama_protection_of_civilians_first_quarter_2018_report_11_april_0.pdf> (last visited July 12, 2018).

² *Id.*

³ Saroop Ijaz, *Rise in Militant Attacks on Schools in Pakistan*, HUMAN RIGHTS WATCH (May 14, 2018) <<https://www.hrw.org/news/2018/05/14/rise-militant-attacks-schools-pakistan>> (last visited July 10, 2018).

⁴ Salman Masood, *Death Toll in Pakistan Suicide Bombing Rises to 128*, THE NEW YORK TIMES (July 14, 2018) <<https://www.nytimes.com/2018/07/14/world/asia/pakistan-suicide-bombing-election.html>> (last visited July 16, 2018).

⁵ South Asia terrorism portal, *Fatalities in Left-wing Extremism: 2018*, <http://www.satp.org/satporgtp/countries/india/maoist/data_sheets/fatalitiesnaxal05-11.htm> (last visited July 13, 2018)).

⁶ Kamal Bhattarai, *Justice Eludes Victims of Nepal's Civil War*, THE DIPLOMAT (Feb. 09, 2018) <<https://thediplomat.com/2018/02/justice-eludes-victims-of-nepals-civil-war/>> (last visited July 15, 2018).

and governed various areas of claimed territories and was engaged in a constant melee with the armed forces which led to numerous allegations of war crimes and crimes against humanity on both the parties to the conflict.⁷

NIAC AND THE POLITICS OF DENIAL IN SOUTH ASIA

Existence of an armed conflict is like an edifice upon which International Humanitarian law (IHL) is dependent for its application. An armed conflict should be either International Armed Conflict (IAC) according to Common Article 2 of the Geneva Conventions or Non-International Armed Conflict (NIAC) under Common Article 3 of the Geneva Conventions and/or Article 1 of Additional Protocol II. Common Article 3 covers the set of applicable humanitarian laws in case of an armed conflict not of an international nature. However, it fails to provide any definite set of directions or criteria to map out its scope of application. International Criminal tribunals have tried to fill that gap to ensure that the atrocities don't go unpunished.

Common Article 3 prohibits parties to a conflict from indulging in certain violent acts, Paragraph one prohibits violence to life and person, murder, torture, mutilation, taking hostage, carrying out executions. Additional Protocol II provides for the protection of persons affected by armed conflict and their humane treatment, irrespective of their religion, colour or race. Part IV of the protocol states that civilians shall never be objects of attack and they should be protected from military operations.

For an NIAC to exist two conditions need to be fulfilled, firstly, that the hostilities reach a certain level of intensity,⁸ the armed conflict should be a protracted one within the territorial limits of the state.⁹ Secondly, the dissident armed groups must possess a degree of organisation.¹⁰ A thorough review of the conflicts in the region does not only bring us to the conclusion

⁷ OHCHR, *Report of the OHCHR Investigation on Sri Lanka*, ¶ 49, U.N. Doc. A/HRC/30/CRP (September 2015).

⁸ Prosecutor v. Bemba, ICC-01/05-01/08, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 225 (June 15, 2009).

⁹ Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, ¶ 70 (October 2, 1995).

¹⁰ *Supra* note 8, ¶ 224.

that most of the major conflicts do fall in the realm of armed conflict, but also that violations of the basic humanitarian norms has been omnipresent in these conflicts.

Consider the case of Afghanistan and Pakistan, they have incurred thousands of casualties, and have been dealing with Taliban for over a decade now with the help of NATO, leading many to question the nature of conflict with some claiming it to be a classic example of a cross border NIAC.¹¹ Proponents have argued that intervention by a foreign state on the side of government against an armed group is not enough to transform an NIAC into IAC.¹² International tribunals have ruled that outside support by a state against a rebel group does not transform an NIAC into an IAC.¹³ While the propositions are debatable, what remains constant is the flagrant violations of IHL. Reports suggest that more than 25,000 civilians have been killed and thousands injured since the war started¹⁴ while disproportionate drone strikes have reached unprecedented levels.¹⁵ Inability of drone strikes to conform to principle of distinction has led to allegations of war crimes.¹⁶ This by no means suggests that armed groups on the opposite side escape liability for the atrocities they have committed. Once the threshold for armed conflicts is reached, the acts of terrorism constitute war crimes within the meaning of IHL. Municipal courts of the South Asian states seem to affirm this view.¹⁷

¹¹ Milanovic, Marko, *The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts*, in Clapham, Andrew, Gaeta, Paola and Sassoli, Marco (ed), *THE 1949 GENEVA CONVENTIONS: A COMMENTARY*, 27-44 (Oxford University Press).

¹² DAPO AKANDE, *CLASSIFICATION OF ARMED CONFLICTS: RELEVANT LEGAL CONCEPTS, IN INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32 (Elizabeth Wilmshurst ed., 2015)

¹³ *Prosecutor v. Bemba*, ICC-01/05-01/08, Confirmation of Charges, ¶ 246, (June 15, 2009).

¹⁴ Crawford, Neta, *Update on the Human Costs of War for Afghanistan and Pakistan, 2001 to Mid-2016*, Boston University, (August 2016).

¹⁵ Josh Smith, *Afghan civilian casualties from air strikes rise more than 50 percent, says U.N.*, REUTERS, <<https://www.reuters.com/article/us-afghanistan-casualties/afghan-civilian-casualties-from-air-strikes-rise-more-than-50-percent-says-u-n-idUSKBN1CH1SZ>> (last visited July 15, 2018).

¹⁶ Amnesty International, *"Will I Be Next?" US Drone Strikes in Pakistan*, <<https://www.amnesty.org/download/Documents/12000/asa330132013en.pdf>> (last visited 15 July, 2018).

¹⁷ *Madan Singh v. State of Bihar*, (2004) 4 SCC 622 (India).

Myanmar has been involved in an armed conflict with Arkhine Rohingya Salvation Army leaving thousands dead, injured and millions displaced,¹⁸ making it an obvious example of a NIAC. The conflict has been cited as a textbook example of ethnic cleansing.¹⁹ The atrocities committed range from forced deportation and torture to sexual violence and wilful killing making it an obvious case of war crimes and crimes against humanity.²⁰

India has always treated both the situation in Kashmir, and the insurgencies in Central and North Eastern region as a law and order situation and not one of an armed conflict. On the Northern end, the country has been constantly engaged with well-organised armed terrorist groups for decades. In the central region, the threat of Naxalite activities has risen to an all-time high with almost 4000 people dead²¹ and counting. The duration, vigour, the geographical intensity of the conflict, the robust organisational structure of Naxalites²², and the involvement of Indian military raises little doubt on the existence of a NIAC.

DECONSTRUCTING REIGN OF IMPUNITY IN SOUTH ASIA

Creation of impunity in any sphere is a two-step process. Violation of norms, when coupled with lack of accountability leads to impunity. South Asian states have failed to check both the violations and accountability gaps. Thus, several factors contribute to the creation of a reign of impunity in the region.

Firstly, States have failed to enforce adequate laws to uphold humanitarian values in conflicts. The argument finds its basis in abysmal ratification rates of global instruments and poor domestic regime to govern conduct in an armed conflict. Being a party to the Geneva Conventions, all states are

¹⁹ UN News, *UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar*, (Sept. 11, 2017) <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar> (last visited July 11, 2018).

²⁰ Burma Link, *War Crimes and Crimes Against Humanity*, <https://www.burmalink.org/background/burma/international-crimes-and-impunity/war-crimes-and-crimes-against-humanity/> (last visited July 13, 2018).

²¹ *UCDP Battle-Related Deaths Dataset v.5-2015*, UPPSALA UNIVERSITY,

²² Shrey Verma, *Rakshak Found: Far Reaching Consequences of the Naxalite Problem in India: Understanding The Maoist Problem* 23–32 (2011), <http://www.rakshakfoundation.org/wp-content/uploads/2011/08/White-Paper-on-Naxalite-Movement-in-India.pdf> (last visited July 13, 2018).

obligated under common Article 3 to ensure protection to people taking no active part in the hostilities. However, saving Bangladesh, neither are most states party to the Additional Protocols of the Geneva Conventions and nor have most of them enacted a domestic legislation to effectively implement its provisions. In 2004, the Nepalese Supreme Court quashed writ petitions against the government and the Maoists for alleged violations of the 1949 Geneva Conventions stating that the convention wasn't applicable to an internal conflict.²³ Position in other states where such legislation exists isn't any different either. Governments have been keen to exclude themselves from the legislation, meaning that an aggrieved person is barred from launching a cause of action against state. Courts have also done their part to weaken the legislations by applying a rather restrictive interpretation of the scope and application of these legislations.²⁴ Moreover, the existence of legislations which provide unfettered power to security forces for their operations say a lot about the attitude of states towards IHL norms.²⁵ Entrusting armed forces with such powers only encourages them to completely disregard IHL norms and roam around with impunity.

Another crucial factor that possibly leads to violations is lack of awareness of norms. While non-state actors involved in armed conflicts are expected to have little or no training in IHL,²⁶ even states have also failed to satisfy treaty law obligations²⁷ of training their armed forces in laws of conduct in an armed conflicts.

²³ Bipin Adhikari, *Supreme Court Order to Implement Geneva Conventions of 1949: A Helping Hand for Those Who Need It*, http://bipinadhikari.com.np/Archives/Opinions/Supreme%20Court%20Order%202%20Implement%20Geneva_Spotlight_20040116.pdf (last visited July 15, 2018).

²⁴ Rev. Mons Sebastiao Fransisco Xavier Dos Remedios Monterio v. The State of Goa, AIR 1970 SC 329 (1969) (India).

²⁵ Armed Forces (Special Powers) Act, 1958 (India).

²⁶ ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, <www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf> (last visited July 8, 2018).

²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 47, 48, 127 & 144, August 12, 1949, 75 U.N.T.S 287, and in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 83, June 8, 1977, 1125 U.N.T.S. 3.

Apart from these factors, peculiar nature of NIACs explains the violations. It is worth noting that imbalance between state's security forces and non-state armed forces in South Asia is a major cause of violations as weaker dissident forces try to overcome their inferiority by employing strategies that overtly violate basic norms of conduct in an armed conflict. These strategies could range from using civilians as human shields, forced recruitment and use of child soldiers for abduction or willful killing. The situation gets worse as dominant forces seek to cope with this difficult situation by employing methods and means of warfare that violate principles of distinction and proportionality.²⁸

National commissions for inquiry in these developing countries are plagued with issues that range from insufficient funding to restricted mandate to not measuring up to international standards. Systemic weaknesses in the criminal justice system, including absence of witness protection laws only compound the ineffectiveness of Commissions of enquiry. The fact that none of the South Asian states have ratified either Additional Protocol I or Declaration on Article 90 leaves little scope for application of International Fact Finding Commission, nor do they allow International organizations of similar nature to investigate into these concerns.

Finally, inter-governmental organizations have been largely indifferent to the atrocities and violations carried out with impunity in this region. Rohingya crisis exemplifies Security Council's failure to use its special power to activate International Criminal Court's jurisdiction into the numerous international crimes.²⁹ The fact that the case has been taken up by the prosecutor *proprio motu* only adds to the legitimacy of the claims of violations.³⁰

²⁸ UNSC, *Report of the Secretary-General on the Protection of civilians in armed conflict*, UN Doc. S/2010/579 (2010).

²⁹ Rome Statute, art. 13(b).

³⁰ International Criminal Court, *Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" to Pre-Trial Chamber I*, ICC-RoC46(3)-01/18, (April 11, 2018) https://www.icc-cpi.int/CourtRecords/CR2018_02081.PDF (last visited July 14, 2018)

THE WAY FORWARD

While there are multiple factors behind the plight of civilians victimized by unfair conduct of parties in the conflicts, there are several ways by which the position could be unturned.

Firstly, states must come forward to ratify the additional protocols. Ratification would not only setup a robust international regime, it would also induce states to bolster their domestic laws and their implementation.

Secondly, as discussed above, lack of awareness and training in norms of IHL are one of the significant causes of violations of norms of IHL. Thus, providing dissemination and training to members of the armed forces could be a stepping stone in the process of ensuring adherence to norms of engagement. Past practice affirms its potency.³¹ Indeed, targeting commanders with sanctions would create an incentive to stop deliberately ordering or implicitly tolerating violations committed by their soldiers. Sanctions can compel commanders to change behaviour and exercise better control over troops.

Thirdly, in a situation like that of South Asia where international law is unevenly employed, role of national committees is of paramount importance. States could learn a lesson from Iraq or Peru where national committees on IHL have played an indispensable role in strengthening and enforcing IHL norms in conflicts.³² Finally, inter-governmental bodies have a great role to play in ensuring that the violations are not committed with impunity. One of the major reasons behind failure of prosecution is lack of sufficient evidence. States have either lacked political will to conduct an efficient investigation or have simply lacked resources to do so. In such a scenario, Security Council or Human Rights Council could mandate states to make use of Fact-Finding Commissions to launch enquiry into gross violations of IHL norms in NIACs and make every effort to make its findings available to affected parties.³³

³¹ David Lloyd Roberts, *Training the armed forces to respect international humanitarian law The perspective of the ICRC Delegate to the Armed and Security Forces of South Asia*, (1997) 319 INT'L REVIEW OF RED CROSS 445.

³² ICRC, *Universal Meeting of National Committees and Similar Bodies on International Humanitarian Law* (Nov. 30, 2016).

³³ UNGA, *One humanity: shared responsibility Report of the Secretary-General for the World Humanitarian Summit*, UN Doc. A/70/709 (Feb. 2, 2016).

With abysmal state of treaty law norms in the region, it would not be illogical to endorse Security Council intervention in the conflicts. Needless to say, the Security Council must overcome political barriers to play an active role in checking violations and ensuring accountability for violations of IHL norms. This could be done in multiple ways: firstly, Security Council could make use of its power to issue sanctions over states found in violation of IHL norms.³⁴ This idea isn't alien to Security Council as it has threatened sanctions against several African states for endorsing sexual violence in internal conflicts before.³⁵ Secondly, it must be determined to exercise its power to trigger International Criminal Court's jurisdiction with respect to conflicts in South Asia too.

IHL demands states to ensure that conflicts aren't accompanied with violations but with regards to South Asia, states themselves have been culprits. Counter-terrorism efforts, asymmetric warfare and the emergence of new threats and enemies cannot legitimize the loosening, or the outright dismissal, of rules that are aimed at sparing civilians and limiting harm to what is necessary to weaken the dissidents.

Promotion of inclusiveness and transparency through the well proven method of decentralizing authority will provide some much needed remedy to the existing situation. The remedial process need not only deliver the intended result but should also be looked upon by people as fair and righteous. The need right now is not for shake up in law regime but a cooperation between countries both individually and collectively to awaken authorities and personnel to carry out their responsibility effectively.

³⁴ UN Charter, art. 41.

³⁵ UNSC Res. 1820, S/RES/1820 (June 19, 2008); UNSC Res. 2242, S/RES/2242 (Oct. 13, 2015), 5.

SITUATING THE PRINCIPLE OF NON REFOULMENT IN THE INDIAN LEGAL SCENARIO

- Aman Kumar*

ABSTRACT

The problem of Refugees' and 'India' share an umbilical cord. Indian independence was accompanied by the mass exodus of Hindu refugees from the newly created Pakistan. In the years that followed, refugees from Tibet, Afghanistan, Bangladesh and Sri Lanka sought refuge in India. However, it is the ongoing genocide of Rohingya muslims in Myanmar that has brought to light India's contentious position on Refugee's rights. Where on one hand the government has granted citizenship to about 4300 hindu and Sikh refugees, it is shying away from even recognising Rohingyas as 'refugees' and plans to deport them. While India isn't a party to the 1951 Refugee Convention, it is a signatory to the 2016 New York Declaration for Refugee and Migrants, thereby giving a tacit recognition to the Principle of Non-Refoulment (Article 33 of the Refugee Convention; Paragraph 24 of the New York Declaration). But there are some complex legal questions involved with regards to the Indian government's stance on the Rohingya Issue. Is the principle of non-refoulment a Customary International Law? Does India have an erga omnes obligation towards refugees? Can an obligation erga omnes trump national interest? Can the exceptions to the principle of non-refoulment validate India's position on Rohingyas? This article aims to emphasize India's obligations under Customary International Law and look for possible solutions to the ongoing Rohingya issue.

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INTRODUCTION

India is yet again in the face of a refugee crisis. Only this time, it has decided to break away from its rich and respected tradition of sheltering them. That tradition was built on trust, respect, international relations, geo-political circumstances etc. It wasn't guided or regulated by any international law. Breaking form the past, it has now decided to deal with the ongoing Rohingya crisis with hard hands. It has decided to 'deport' the Rohingyas.¹ The wheres and hows and whens of such decision are yet unknown. The decision has been challenged at the Supreme Court by two of the Rohingya refugees.² While the matter is *sub-judice* it gives us an opportunity to understand the obligation, if any, which India has to protect the Rohingyas. First of all, there is no domestic law in this regard. Secondly, India isn't a signatory to the Refugee Convention of 1961 (RC 1961) which provides protection to the refugees. Further, since independence, India has not formulated any uniform policy to guide its response to these crises.

Thus we need to turn to the international human rights principle of non-refoulment. The principle loosely means that any state can't refuse to grant refuge to a refugee who is in its territory. The primary source of the principle is Article 33 of the RC 1961. Since India is not a party to the convention, it is not bound by it. But the principle is also enshrined in other international conventions to which India is either a 'signatory' or has acceded to them. Then there is the debate about the principle being a Customary International Law (CIL) and thus being binding on all states irrespective of the fact that whether they are members of any international convention enshrining this principle. Also to be considered is the jus cogens nature of the principle.

However, considering the vast population of the country (second largest) and its ancillary problems like poverty, illiteracy, unemployment etc the question merits attention that 'should India use its limited and ever so decreasing

¹ Saif Khalid, *Rohingya in India Fear deportation to Myanmar*, ALJAZEERA, (Sep. 12, 2017, 09:10 PM), <https://www.aljazeera.com/amp/indepth/features/2017/09/rohingya-india-fear-deportation-myanmar-170911134706072.html>.

² *Supreme Court agrees to hear plea challenging govt plan to deport Rohingya refugees*, OUTLOOK INDIA, (Sep 01, 2017, 12:12 PM), <https://www.outlookindia.com/website/story/supreme-court-agrees-to-hear-plea-challenging-govt-plan-to-deport-rohingya-refug/301068>.

natural resources (for example WATER) for upkeep of refugees'? The decreasing natural resources warrant more attention since no UNHCR fund or international aid can provide for these.

So what should a state of the third world do while dealing with refugee influx, especially when its counterparts from First and Second world are erecting walls and separating children from their parents?

PRINCIPLE OF NON REFOULMENT

The main source of the principle is Article 33 of the RC 1961. It states that '(n)o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. A detailed discussion on the various components of the article is beyond the scope of this paper. Suffice it to say that the Article forbids '*contracting states*'³ from returning any person who is in their territory, if the person's life is threatened on the five accounts stated in it. But as stated earlier, India isn't a 'contracting state' of the convention and accordingly isn't bound by this Article. So does this mean that India can refoul? To answer this we must go through other conventions which also enshrines this principle and further see whether this principle has attained the status of a CIL and *jus cogens* or not?

NON REFOULMENT AND THE CONVENTION ON THE RIGHTS OF THE CHILD

Recognising the special needs of children because of, *inter alia*, their 'physical and mental immaturity'⁴ the United Nations (UN) General Assembly, through its resolution 44/25, adopted the Convention on the Rights of the Child (CRC) on 20th November 1989. The Convention entered into force on 02nd September 1990, thirtieth day after the 20th instrument of

³ Vienna Convention on the Law of Treaties 1969 defines a Contracting State in Article 2(1)(f) as a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

⁴ UNCRC, Preamble, ¶ 9.

ratification or accession was deposited with the Secretary-General of the UN.⁵

The convention provides for either Ratification⁶ or Accession⁷. India accordingly *acceded* to the CRC in 1992. This means that it has establishe(d) on the international plane its consent to be bound by (CRC).⁸ It has enacted some legislation in furtherance of its obligations arising out of the CRC. They are the Protection of Children from Sexual Offences Act, 2012, the Juvenile Justice (Care and Protection of Children) Act, 2015 etc.

As far as the principle of non refolement is considered, it is provided in Article 22 of the CRC which states that '(s)tates (p)arties shall take appropriate measures to ensure that *a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures* shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties'. (Emphasis mine)

Thus the CRC places obligation on the state parties to provide 'appropriate protection and humanitarian assistance' to a refugee child. The Article categorises children as one 'who is seeking refugee status' and one 'who is considered a refugee in accordance with applicable international or domestic law and procedures'.

The first category covers a child who is seeking refugee status. This is a very dicey categorisation considering it's very improbable that a child will land in a foreign country all by itself. More often than not it will be with its parents/guardians who will claims refugee status on behalf of the child. Now if India is planning to deport refugees, it's highly unlikely that those refugees,

⁵ This was in accordance with Article 49 of CRC.

⁶ UNCRC, Art. 47.

⁷ UNCRC, Art. 48.

⁸ Vienna Convention on the Law of Treaties art 2 ¶(1)(b), May 23, 1969, 323, 333.

who have children, will leave them behind. Considering such odd scenarios where they do decide to leave it or where a child land up all by itself, and where the state decides to grant it refugee status, what will the future hold for it? Is it also the receiving states' duty to provide a guardian for the child? What will be the states' duty when that child attains adulthood? These are some serious loopholes which need to be fixed.

To determine the second category of child would be extremely difficult since the international law on refugees i.e. RC 1951 isn't applicable to India, neither does India have any domestic law to deal with refugee crisis.

NON REFOULMENT AND THE CONVENTION AGAINST TORTURE

India signed the Convention against Torture (CAT) on 14th October 1997. Article 3 of CAT enshrines the principle of non refoulment. It states that '(n)o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Thus under CAT 'torture'⁹ is the sole ground of non refoulment and this makes the guarantee of protection circumscribed.¹⁰ If the fear is ripe that the person, if returned, will be subjected to torture then it's the duty of the state to not expel, return or extradite him.

CAT provides for ratification¹¹ or accession¹² and since India has not done either it follows that it has not establishe(d) on the international plane its consent to be bound by (CAT).¹³ It has been more than twenty years since

⁹ The term Torture has been defined in Art. 1 of the UNCAT as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

¹⁰ Mike Sanderson, *The Role of International Law in Defining the Protection of Refugees in India*, 33 Wis. Int'l L.J. 46, 89 (2015).

¹¹ UNCAT Art. 25.

¹² UNCAT Art. 26.

¹³ Vienna Convention on the Law of Treaties art 2 ¶ (1)(b), May 23, 1969, 323, 333.

India signed the CAT, but it is yet to ratify the same by enacting a domestic legislation. On 30th October 2017, the Law Commission of India submitted its 273rd report titled “Implementation of ‘United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment’ through Legislation”. The report also had a draft bill titled “The Prevention of Torture Bill, 2017”. It is noteworthy that this draft has no provision for non-refoulement. Though the report was prepared in pursuance of a request by the Central Government, any subsequent action on the report by them lies in limbo.

CUSTOMARY INTERNATIONAL LAW NATURE OF THE PRINCIPLE OF NON REFOULEMENT

Article 38(1) of the statute of the International Court of Justice (ICJ) lays down sources of international law. Clause (b) of the article recognises customs as a source of international law. The concept of Customary International Law (CIL) was explained by the ICJ in the Libya/Malta case,¹⁴ where the court observed that the substance of customary law should be ‘looked for primarily in the actual practice and *opinio juris* of states’.¹⁵ Unlike a treaty, customary international law is understood to bind all states, new and old, whether or not they have participated in its generation.¹⁶

The conventional expressions of the principle of *non-refoulement* in instruments such as the (RC) 1951 Convention, the OAU Refugee Convention, the American Convention on Human Rights, and the Torture Convention are of a norm-creating character, as opposed to the mere expression of contractual obligations, and have been widely accepted as such.¹⁷ In addition to this the principle also finds place in several non-binding international instruments like Declaration on Territorial Asylum,

¹⁴ Libya/Malta, Continental Shelf Case, Judgment, 1985 I.C.J. (June 3)

¹⁵ MALCOLM SHAW, INTERNATIONAL LAW, 74, (Cambridge Univ. Press, 6th Edition, 2008).

¹⁶ Hilary Charlesworth, *Law-making and sources*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW, 187, 195 (James Crawford and Martti Koskeniemi eds., Cambridge Univ. Press, 2012).

¹⁷ Sir Elihu Lauterpacht QC and Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 87, (Erika Feller Volker Turk and Frances Nicholson eds. Cambridge Univ. Press, 2003).

Asian- African Refugee Principles, Cartagena Declaration, Bangkok Principles etc. It is of course true that there are many official pronouncements by UNHCR and others to the effect that non-refoulement is part of (CIL).¹⁸

The Executive Committee of UNHCR had observed in 1996 that the principle of non-refoulement is not subject to derogation. This is particularly significant as India became a member of Executive Committee in 1995 and so was a member of the committee during the time that this conclusion was discussed and agreed.¹⁹

However, there is a section of scholars who believe that considering non refoulment as a CIL is nothing but a 'wishful thinking'.²⁰ James C Hathaway has observed that it is absolutely untenable to suggest that there is anything approaching near-universal respect among states for the principle of non refoulement.²¹

The question then becomes that can general CIL become binding on India or can India be a persistent objector to this CIL? It is my opinion that the principle of non refoulment is not a CIL. Firstly, it is important to understand that for the purpose of this paper non refoulment, as is provided for in Article 33 of RC 1951 is being considered. Secondly, this principle, as is enshrined in other human rights treaties can't be said to be of same character. For instance where the RC 1951 and CAT impose a negative obligation on states under CRC the states are given a positive obligation. Further, where the obligation under RC 1951 is of not expelling or returning, under CAT it is of not expelling or returning or 'extraditing' and under CRC it is the states' duty to ensure that the child receive appropriate protection and humanitarian assistance. Moreover, the RC 1951 caters to 'refugees', CAT

¹⁸ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 364 (Cambridge Univ. Press, 2005).

¹⁹ Mike Sanderson, *The Role of International Law in Defining the Protection of Refugees in India*, 33 *Wis. Int'l L.J.* 46, 104 (2015).

²⁰ K. Hailbronner, *Nonrefoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980S*, 128, 129 (D. Martin ed., 1986)

²¹ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW*, 364 (Cambridge Univ. Press, 2005)

caters to 'persons' and CRC caters to 'a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures'. Though the underlying objective is the same, but we can't ignore the subtle differences. A commitment to protect a 'person' from torture can't be read as to mean granting protection to 'refugees' for they are two distinct category of people and the nature of threat to their life is also different. India's actual practice, thus far, was of granting refuge, but India hasn't ratified any of the convention enshrining the principle of non refolement and hence its opinio juris in this regard can't be assessed.

CONCLUSION

The above discussion points to only one direction i.e. to the fact that the principle of non-refoulment, since it's not a customary international law, isn't applicable to India. There is no clear and authoritative judgment against this conclusion. So does this mean that India is well within its right to go ahead with its plan to deport the Rohingya refugees? The answer to this has a very slippery base but is in negative.

Despite not being a member of the RC 1951 India's 'state practice' clearly highlights the fact that India has been a 'receiving country'. It has treated the refugees in a humanitarian way despite having no international obligations as such and there seems no immediate reason to do away with that practice.

Moreover, the plan of deporting the refugees has many inherent problems. Where will the refugees be deported to? Who will regulate such deportation? One answer to the first question could be Myanmar. The country has signed agreements with Bangladeshi government for repatriation of Rohingya refugees.²² But then what if Myanmar refuses to take back the Rohingya refugees from India? Will they then be shoved off the shore? Further, regarding the question on regulation of such deportation, India can't expect help from UNHCR for 'deportation' as it will be against the agency's goal of 'promoting voluntary repatriation of refugees'.²³ Thus any action to carry

²² *Rohingya Crisis: Bangladesh and Myanmar agree repatriation timeframe*, BBC NEWS, (Jan 16, 2018, 09:06 PM), <https://www.bbc.com/news/world-asia-42699602>

²³ Statute of the Office of the United Nations High Commissioner for Refugees, Preamble, Dec. 14, 1950

forward its plan of deportation is bound to meet a dead end. But this does not mean that India has to be so clueless while dealing with any future refugee crisis.

A simple introspection will reveal that India has found itself in this situation largely because of the absence of a cogent law vis-a-vis the Refugees. It still uses the Foreigners Act 1946 to deal with every crisis of refugee influx. The act is meant to regulate 'entry of foreigners in India, their presence therein and their departure there from'. It defines foreigner as 'a person who is not a citizen of India'. Comparing it with the definition of refugee discussed at the beginning of this paper, one can see the ridiculousness of the idea of treating 'refugees' as a 'foreigner'. Thus the need of the hour is of a comprehensive legislation which will cater to all issues of a refugee crisis. Having a proper refugee regulation regime will also put a check on the ancillary problems of human trafficking, terrorism etc.

Further, it's about time that India should take lead in drafting a regional convention dealing with the refugee crisis. Along with sheltering refugees from its neighbouring countries, India has received refugees from distant countries like Afghanistan, Ethiopia, Iran, Iraq, Liberia, Myanmar, Somalia and Sudan.²⁴ The refugee problem is not limited to South Asia only. In the aftermath of the Second World War, between 1975 and 1996, approximately three million people from Cambodia, Laos and Vietnam sought refuge in Southeast Asia.²⁵ Thus it is clear that a majority of Asian countries have faced the refugee crisis in one way or the other. It should also be noted that almost all of the refugee influx has been intra-asia and this gives impetus to my proposal of having an Asian level convention on the rights of the Refugees.

As of now, there is no sub-regional convention among the SAARC nations in this regard. The Bangkok Principles is a legally non-binding document. The ASEAN Human Rights Declaration, which has provisions for Assylum Seeker, too is a non-binding document. Thus considering the ongoing influx

²⁴ Prabodh Saxena, *Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future*, 19 Int'l J. Refugee L. 246, 247 (2007).

²⁵ SARA E. DAVIES, LEGITIMISING REJECTION - INTERNATIONAL REFUGEE LAW IN SOUTHEAST ASIA, 85, (Martinus Nijhoff Pub., 2008)

of refugees, mostly from Myanmar and Syrian conflict, it's necessary that the region should have a convention vis-a-vis the refugees and India, considering the staggering number of refugees it has housed thus far, should take a lead in drafting of such convention.

DUTY OF THE STATE TO PROTECT REFUGEES AND THE FUNDAMENTAL RIGHTS OF CITIZENS: REFUGEES LAWS AND OBLIGATIONS OF INDIA

- Filzah Belal* and Rajesh Bzad**

ABSTRACT

Refugees and asylum seekers are those who fled to another nation looking for security and protection of life. There are various groups of refugees within India itself; however, their status remains uncertain. Various fundamental rights that are granted to the citizens are denied to such refugees even though they have been living in India for a long time.

The Judiciary has time and again protected the interests of these refugees and protected the various fundamental rights that are available to them, for example, the right to life under Art. 21 which seek to protect the life of all 'persons'. Even though India is not a signatory to the Convention on Refugees, 1951, it has upheld its obligations on humanitarian grounds towards various refugee groups. Apart from that, India is also obligated to protect these refugees under its other international obligations, for instance, EXCOM, Bangkok Principles, etc.

On the other hand, India has also maintained its stance on not compromising the rights and security of its own citizens merely to protect the refugees. Even the Judiciary has emphasized through numerous judgements that rights of citizens are more important than that of refugees. This has taken a toll on some refugee groups that have come to India

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seeking asylum, which will be studied in the context of Bangladeshi immigrants and Rohingya Muslims.

Through this paper, the legal status of refugees will be critically analysed. Their fundamental rights will be weighed against the fundamental rights of citizens. The protection given to them will be discussed keeping in mind India's legal national and international obligations that bind the State towards concerned refugees. A comparison with the European Nations and Canada will reflect the circumstantial differences which lead to a difference in the approach of taking in refugees within their respective territories.

Keywords: *Refugees, Asylum, Seekers, Judiciary, Fundamental Rights, Duty of State.*

INTRODUCTION

The term 'Refugee' is commonly used to refer to those persons who are forced to leave their homes for reasons like conflict and violence due to an environmental change in the political situation in the country. Refugees are those persons who flee to another nation looking for security and protection of life because they cannot return to their own country due to fear of persecution. When they seek refuge in another nation, they are given the 'refugee' status. Refugee status is also given to applicants by the United Nations.¹

The widely accepted legal definition of a refugee according to the Refugee Convention is the one provided for in the 1951 Convention, which formed the basis for legal determination of the status of refugees.² This definition was often criticised because of its narrowness and failure to expressly recognise common causes of mass displacement like war or general violence. Art. 1 of the Convention as amended by the 1967 Protocol defining a refugee as: "A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or

¹ UNHCR, Identity Documents for Refugees Identity Documents for Refugees, EC/SCP/33, UNHCR, 20 July 1984, URL: www.unhcr.org/excom/scip/3ae68ccea4/identity-documents-refugees.html

² UNHCR, Note on Determination of Refugee Status under International Instruments, EC/SCP/5, UNHCR, 24 August 1977

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, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."³

Refugees' concerns are human rights and safety, not an economic advantage. When these refugees leave their home and go to the first country to seek asylum, that country is called the '*country of the first asylum*'. Mostly the first country that borders their own, in the country they take refuge either refugee camps or in an urban area and when they come to such a country they don't have proper official documentation so that it is difficult for them to find safe shelter. Many are forced to move between countries in search of refuge. Some live in '*protracted refugee situations*', meaning that refugees live in exile outside their home countries for five years or more without a long-term protection solution in sight.

One of the landmark examples of refugees seeking shelter in the recent past can be seen in regard to Syrian refugees. There are many reasons behind this like violence because of the Syrian civil war, collapse of infrastructure, children in danger and distress because of the many people who died. Half the children are out of school, the economy is shattered and four-fifths of the population lives in poverty. These Syrian refugees are going to different countries to seek refuges like Turkey, Lebanon, Jordan, Iraq and Egypt.

There are many refugee laws in place in the international law realm. The only international instruments directly applying to refugees are the United Nations Convention Relating to the Status of Refugees, 1951 and the Protocol Relating to the Status of Refugees, 1967 and these are open to state, but each may be signed separately. These instruments only apply in the countries that have ratified an instrument, and some countries have ratified these instruments subject to various reservations.

³ UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, UNHCR, December 2011, URL: <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

Talking about India, it does not have any specific and separate law to govern refugees. All existing Indian laws apply to the refugees as well. Even though India is not a signatory to the 1951 Convention or the 1967 Protocol, India is a signatory to a number of United Nations and World Conventions on Human Rights, refugee issues and related matters. India's obligations in regard to refugees arise out of the latter. India became a member of the EXCOM in 1995. India voted affirmatively to adopt the Universal Declaration of Human Rights which affirms rights for all persons, citizens and non-citizens alike, and has voted affirmatively to adopt a number of other international legal documents such as the UN Declaration of Territorial Asylum, 1967; ratified ICCPR and ICESCR in 1976; ratified UNCRC in 1989; ratified CEDAW in 1974 under which Art. 1 imposes legally binding obligation. India accepted the principle of *non-refoulement*⁴ as envisaged in the Bangkok Principles, 1966, which were formulated for the guidance of member states in respect of matters concerning the status and treatment of refugees.

OBLIGATIONS OF INDIA

India is a signatory of many World Conventions and United Nations on Human Rights, refugee issues and other related matters. India became a member of the Executive Committee of the High Commissioner's Programme (EXCOM) in 1995. India also adopted the Universal Declaration of Human Rights which affirms rights for all persons, citizens and non-citizens alike. Art. 13 of the Universal Declaration of Human Rights guarantees '*Right to Freedom of Movement*', Art. 14 '*Right to Seek and Enjoy Asylum*' and Art. 15 the '*Right to Nationality*'.

India voted affirmatively to adopt the UN Declaration of Territorial Asylum in 1967. India ratified the International Covenant on Civil and Political Rights (ICCPR), Art. 12 of the ICCPR deals with '*Freedom to leave any country including the person's own*' and Art. 13 '*Prohibition of expulsion of aliens except by due process of law*'. India ratified the International Convention on Economic, Social and Cultural Rights (ICESCR) in 1976.

⁴ Ananthachari, T., Refugees in India: Legal Framework, Law Enforcement and Security, ISIL Year Book of International Humanitarian and Refugee Law, [2001] 1 ISIL Yearbook of International Humanitarian and Refugee Law

India ratified the UN Convention on the Rights of the Child in 1989. India ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1974 under which Art. 1 imposes a legally binding obligation.

Under Art. 2A of the UN Convention on the Rights of the Child, the State must ensure the rights of “*each child within its jurisdiction without discrimination of any kind*”; Art. 3 lays down that “*In all actions concerning children the best interest of the child shall be a primary consideration*”; Art. 24 relates to ‘*Right to Health*’; Art. 28 to ‘*Right to Education*’ and Art. 37 to ‘*Juvenile Justice*’.

India accepted the principle of *non-refoulement* as envisaged in the Bangkok Principles, 1966, which were formulated for the guidance of member states in respect of matters concerning the status and treatment of refugees. These Principles also contain provisions relating to repatriation, right to compensation, granting asylum and the minimum standard of treatment in the state of asylum.

CONSTITUTIONAL FRAMEWORK

The Constitution of India guarantees certain Fundamental Rights to refugees. Namely, right to equality (Art. 14), right to life and personal liberty (Art. 21), right to protection under arbitrary arrest (Art. 22), right to protect in respect of conviction of offences (Art. 20), freedom of religion (Art. 25), right to approach Supreme Court for enforcement of Fundamental Rights (Art. 32), are as much available to non-citizens, including refugees, as they are to citizens.

The constitutional rights protect the human rights of the refugee to live with dignity. The liberal interpretation of Art. 21 has received now includes right against solitary confinement, right against custodial violence, right to medical assistance and shelter.

In *National Human Rights Commission v. State of Arunachal Pradesh*,⁵ the Government of Arunachal Pradesh was asked to perform the duty of

⁵ A.I.R. 1996 S.C. 1234.

safeguarding the life, health and well-being of Chakmas residing in the State and that their application for citizenship should be forwarded to the authorities concerned and not withheld. In various other cases, it was held that refugees should not be subjected to detention⁶ or deportation and that they are entitled to approach the U.N High Commissioner for grant of refugee status.

In *P. Nedumaran v. Union of India*⁷ the need for voluntary nature of repatriation was emphasized upon and the Court held that the UNHCR, being a world agency, was to ascertain the voluntariness of the refugees and, hence, it was not upon the Court to consider whether consent was voluntary.

Similarly, according to B. S. Chimni, the Supreme Court has erred in concluding in *Louis de Raedt v Union of India*⁸ that there is no provision in the Constitution obstructing the absolute and unlimited power of the government to expel foreigners under the Foreigners Act of 1946.

Moreover, in *Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and Ors.*,⁹ the Indian Judiciary cleared its stance regarding the same powers and discretion of the state even though the principle of non-refoulement is *jus cogens* in nature.¹⁰ Derogating from this customary international law, India has recently also expelled many Bangladeshi illegal immigrants, as well as Rohingya Muslims.

INCORPORATING INTERNATIONAL LAW IN DOMESTIC LAW

With regard to adopting international conventions in domestic laws, in *Vishaka v. State of Rajasthan*, the Court observed that reliance can be placed in international laws. Therefore, the question that arises is whether India can refer to the 1951 Convention in interpreting the domestic legislation and whether it is really necessary to ratify these conventions. It is to be noted that merely ratifying the 1951 Convention does not ensure that

⁶ Naresh Chandra Ganguli v. State of W.B., (1960) 1 SCR 411.

⁷ WP (Civil) Nos. 12298 and 12343 of 1992 (Mad).

⁸ (1991) 3 S.C.C. 554.

⁹ A.I.R. 1998 S.C. 465.

¹⁰ Allain, Jean, *The Jus Cogens Nature of Non-refoulement*, (2001) 13, Int. J. Refugee Law.

the asylum seekers will not be kept out and also, Art. 42 of the same Convention permits reservations with respect to the rights of refugees which will defeat the purpose of ratifying the Convention.

Keeping in mind that India has ratified the UNCRC, Article 21A is a very crucial provision in the Constitution of India which also provides for the Right to Free and Compulsory Education. It is the duty of the State to provide free and compulsory education to all children in the age of six to fourteen years¹¹. This Article can be extended to cover both primary as well as secondary education.¹²

According to this Art., only the setting up of schools to provide education to children is not sufficient. Proper necessities and facilities must also be given to such children.¹³As has been held by the Supreme Court in *Mohini Jain v. State of Karnataka*,¹⁴ the Right to Education is “concomitant” to Article 21 which grants the Right to Education.

NON-REFOULEMENT

In the Principles concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966, it is stated under Art. III (3) that: “*No-one seeking asylum in accordance with these Principles should, except for over-riding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.*”¹⁵

¹¹ *Bachpan Bachao Andolan v. UOI*, A.I.R. 2011 S.C. 3361 (3379); *State of T.N. v. K. Shyam Sunder* (2011) 8 S.C.C. 737.

¹² *State of Maharashtra v. Sant Dnyaneshwar Shiksham Shastra Mahavidyalaya* (2006) 9 S.C.C. 1.

¹³ *Environmental & Consumer Protection Foundation v. Delhi Admn.*, (2012) 10 S.C.C. 211.

¹⁴ (1992) 3 S.C.C. 666.

¹⁵ High Commissioner, UNHCR, Note on Non-Refoulement, UNHCR, 23 August 1977, URL: www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html

Art. 6 (1) of the International Covenant on Cultural and Political Rights¹⁶ (hereinafter referred to as ICCPR), under Art. 3¹⁷ of the Universal Declaration of Human Rights (hereinafter referred as UDHR), and also under Art. 11 (1) of the International Covenant on Economic, Social and Cultural Rights¹⁸ (hereinafter referred to as ICESCR), the right to life and an adequate standard of living is recognized. India being a signatory to these international instruments must abide by them.

The Supreme Court has acknowledged that these rights under the international agreements must be enacted in a way into the domestic laws so that it has the same meaning and interpretation.¹⁹

FUNDAMENTAL RIGHTS AND REFUGEES IN INDIA

India which is known as the largest democracy is an ideal country to live freely and enjoy one's basic rights. One of the most striking features of the Indian Constitution is Part III which enshrines the Fundamental Rights given to all citizens of the country. These Fundamental Rights are given to all citizens to ensure that they live freely and their basic needs in a democracy are safeguarded.

Most of these Fundamental Right is synonymous with the rights granted to all human beings under the UDHR. Further, the Fundamental Rights also uphold the spirit of the ICCPR and the ICESCR, as well as CEDAW and the UNCRC.

What is most interesting about these Fundamental Rights is that while all of them are available to the citizens, some of these Fundamental Rights give protection in the same manner to such persons who are not citizens. The

¹⁶ Art. 6 ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

¹⁷ Art. 3 UDHR: "Everyone has the right to life, liberty and security of person".

¹⁸ Art. 11(1) ICESR: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

¹⁹ Chairman Railways Board v. Chandrima Dass, A.I.R. 2000 S.C. 988.

landmark judgement in *Chairman, Railways Board v. Chandrima Dass*²⁰ dealt with a case of rape of a Bangladeshi woman in India which was strongly condemned by the Apex Court. While passing the judgement, it laid down that all persons are entitled to a living a life with dignity, be it a citizen or any other person within the territory of the State.

Art. 14 in the Constitution of Indian states that all persons must be treated equally. The scope of this Art. also includes the right of every person to equal protection which requires affirmative action by the State towards un-equals by providing facilities and opportunities.²¹ The right to equal protection is a right that is not only granted to all citizens but is also given to non-citizens is ambiguous. However, it was held by the Supreme Court that even though a person can be granted, Art. 14 within the territory of India it did not imply an equal implementation of laws on all persons unless they are citizens.²² In this way, the Supreme Court had further stated that refugees are not absolutely entitled to Art. 14.²³

With advancing time and a need in the present scenario, the Supreme Court that held in a previous judgement that *“equal protection of the laws is now being read as a positive obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes so that everyone may enjoy equal protection of the laws and nobody is denied such protection. If the state leaves the existing inequalities untouched by its laws, it fails in its duty of providing equal protection of its laws to all persons. The state will provide equal protection to all the people of India who are a citizen of India and as well as non-citizen of India.”*²⁴

Further, Art. 21 of the Constitution of India grants all persons the right to life. The expression “life” assured under Art. 21 does not connote mere animal existence or continued drudgery through life, it holds a much wider meaning which includes the right to be free from restrictions and

²⁰ A.I.R. 2000 S.C. 988.

²¹ *Panchayat Varga Sharmajivi Samudaik Sahakar Khedut Co-operative Society v. Haribhai Mevabhai*, (1996) 10 SCC 320 (para 10).

²² *N. S. Gujral v. Custodian of Evacuee Property*, A.I.R. 1968 S.C. 457.

²³ *National Human Rights Commission v. State of Arunachal Pradesh*, A.I.R. 1996 S.C. 1234.

²⁴ *St. Stephen's College v. University of Delhi*, 152 (2008) DLT 228.

encroachments.²⁵ Similarly, in another case, it was held that the right to life under Art. 21 meant the right to live with dignity and free from exploitation.²⁶

It has been held that the 'foreigners' are entitled to the protection of Art. 21 under the Constitution of India.²⁷ Any threat to the life and liberty of this refugee community amounts to a violation of Art. 21 of the Constitution of India. The jurisprudence or the philosophy of right to life, as envisaged by Art. 21, enlarges its sweep to encompass human personality in its full blossom.²⁸

But at the same time, 'foreigners' can take the recourse of Art. 21 which extends the protection of life and personal liberty, yet it doesn't imply that they have the right to reside and settle in this country according to their wish which equates to restricting their 'liberty'.²⁹

The power lies in the hands of the Government of India to expel 'foreigners' which is absolute and unlimited and which also meant that the Executive Government had an unrestricted right to expel a foreigner.³⁰ This is absolutely in the discretion of the State and is not contradicted by any Constitutional provisions. Moreover, states reserve the right to refuse them certain rights which are enjoyed by their own nationals.³¹

FUNDAMENTAL RIGHTS OF CITIZENS: A COMPARISON

In *Hans Muller of Nurenburg v. Superintendent, Presidency Jail, Calcutta and Ors.*³² recognized that the State has the right to expel foreigners in such cases when they pose a threat to the country. It further established that is a discretionary power in the hands of the government and is not obstructed by any law or any constitutional provision. However, this provision is only

²⁵ Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295.

²⁶ Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

²⁷ Louis De Raedt v. Union of India, (1991) 3 S.C.C. 554.

²⁸ Consumer Education and Research Centre v. Union of India, A.I.R. 1995 S.C. 922.

²⁹ Louis De Raedt v. Union of India, (1991) 3 S.C.C. 554.

³⁰ Cherchi Domenico Ferdinando v. Union of India, A.I.R. 2004 Del. 147.

³¹ Sarbananda Sonowal v. Union of India, A.I.R. 2005 S.C. 2920.

³² A.I.R. 1998 S.C. 465.

restricted to those who come within the definition of 'foreigners' under the Foreigners Act, 1946.

The Judiciary has taken a very clear stand in *Louis De Raedt v. Union of India* whereby it the Supreme Court stated that in case of a conflict between the rights of a citizen and a non-citizen, preference has to be given to the citizens. In other words, India safeguards the Fundamental Rights granted to the refugees as long as it is not violative of the Fundamental Rights granted to the citizens.

It is the same stand that the Supreme Court has further reinstated when it adjudged upon the question of Rohingya Muslims who sought asylum in India.

DUTY OF THE STATE TO PROTECT

It has been well established by law that it is rather the duty of the state to protect the people within their territory. The dilemma, in this case, is whether this duty is only restricted to citizens, or whether it includes all persons within the State.

It is simple to comprehend that it is the failure on the part of the State if it cannot protect the people within its territory, which includes refugees who have taken asylum there. At the same time, it is also the duty of the State to protect its own people from disturbances being caused by the refugees.

The Constitution of any country is crafted to suit the needs of the people of that country, and while it leaves scope to accommodate and adjust, its prime concern is never to serve the other people. Yet, countries have to abide by their international obligations. The Constitution of India under Art. 51 makes the State bound to respect its obligations on humanitarian grounds.

India hosts a large number of refugees but is not bound by the principal legal instrument that governs the status of refugees, i.e. the Convention on Refugees, 1951. It stipulates various principles that govern the status of refugees in host countries. The most prominent principles are that of non-discrimination, non-penalization, non-refoulement, etc. Though the entire

document gives a comprehensive governance scheme of refugees being taken in by any contracting state, it also very well preserves the dignity and basic human rights of the refugees. However, India is not bound by these provisions despite having so many refugees, since it has not ratified the Convention till date.

On the other hand, India contends that it fulfils all the basic needs of the refugees, despite having not ratified the Refugee Convention, 1951. It claims that it hosts a large number of refugees on humanitarian grounds and takes care of all needs accordingly. But at the same time, it also makes sure that while it caters to the needs of the refugees, it does not compromise on the safety and requirements of the citizens.

In *Sarbananda Sonowal v. Union of India*, the Supreme Court duly noted that in any case that the refugees pose a threat to the national security of the country. There are certain grounds on which only can these refugees be expelled from India, thereby nullifying the principle of non-refoulement in the country. These grounds are internal disturbance and disruption of public order. The judiciary has maintained this position ever since 1994 in *Khudiram Chakma v. State of Arunachal Pradesh*³³ where the judgement upheld that according to Sec 3 of the Foreigner's Act, 1946, the Central Government may by order make provisions for prohibiting, regulating or restricting the entry of foreigners. According to the Indian law in the same act, the term 'foreigner' includes refugees, and this gives the authority to the State to expel refugees on the conditions mentioned above.

THE CASE OF BANGLADESHI REFUGEES AND THE NRC

Since over decades, the problem of illegal immigrants from Bangladesh has persisted in Assam. Even after the Assam Accord was signed and the border sealing was initiated, the threat of more influx still persists. After a consistent strain on the resources of the country, the current government, in the State as well as the Union, has taken steps to solve the problem.

As soon as the Sonowal government came to power in Assam in the year 2016, the work of the NRC has gained pace. Even the people of Assam have

³³ 1994 Supp (1) S.C.C. 615.

raised their voice against the huge influx of illegal immigrants from Bangladesh. A well-crafted strategy to eliminate such illegal immigrants is the NRC, which is short for the National Register of Citizens. Through this mechanism, the influx of immigrants from 1950 to 1966 will be tallied with the current census to identify the illegal immigrants and subsequently who shall be ousted from the country.

The identification process for NRC is based on legal government documents which can prove one's citizenship to the country. However, one of the major threats is how many illegal immigrants have already been granted citizenship for vote bank politics. This hasn't stopped the government from going ahead with the plan, and it has successfully published the first draft list on 1st January 2018. Further processing will end the process resulting in the final list of citizens which scheduled to be published in July 2018. Even the mandatory Aadhar Card processing has not yet begun in Assam and is on hold until the NRC is complete.

A major issue that stands is the true identity of these illegal immigrants,³⁴ and one of the major causes is the current government itself, which is believed to have a not-so-secular ideology. This was reflected in the Citizenship (Amendment) Bill, 2016 which proposes to categorically exclude 'Muslim' refugees into the country from various countries including Bangladesh.³⁵

Even the judiciary has taken the same stand stating in its Supreme Court judgement in *Assam Sanmilita Mahasangha v. Union of India*³⁶ that a long-term continuous influx from Bangladesh into Assam has resulted in a lot of internal problems in the region including depletion of state's resources, as well as socio-economic issues in addition to causing a threat to the local

³⁴ Jamwal, NS, Border Management: Dilemma of Guarding the India-Bangladesh Border, (2004) 28:1, Strategic Analysis, URL:https://idsa.in/system/files/strategicanalysis_Jamwal_0304.pdf

³⁵ Garg, Priya, Citizenship (Amendment) Bill, 2016: For the Protection of Minority Communities or Implicit Discrimination, SCC Online Blog, 16 October 2017 URL: <http://blog.sconline.com/post/2017/10/16/citizenship-amendment-bill-2016-protection-minority-communities-implicit-discrimination/>.

³⁶ (2015) 3 SCC.

tribal population's tradition and culture.³⁷ Growing population and rising insurgency have always been matters of concern for the State in this context. The Union, under Art. 355 of the Constitution of India, is bound to protect the State from such influx terming it as 'external aggression'.

At the same time, there has been no expressed support for the Bill, 2016 as even many scholars argue that it will be in violation of Art. 14, as well a threat to the secular nature of India. This Bill will in many ways protect the Hindu Bangladeshi illegal immigrants in attaining citizenship in the State, and this will also help them in getting their names in the NRC; however, it will cost huge to the Muslim Bangladeshis³⁸ who will be treated unfairly under Art. 14 as they will be discriminated against.

THE CASE OF ROHINGYA MUSLIMS: WORLD'S MOST PERSECUTED PERSONS?

Art. 14 aims at striking down hostile discrimination or oppression of inequality to give equal protection to all persons and when the State fails in doing so, it fails to deliver equal justice to the members of the aggrieved community.³⁹ The scope of Art. 21 can also be extended to the instant case as the cause of loss of lives of many refugees and the continuing threat to the rest of the communities can be argued to the inability or failure of the State. This is in violation of the different facets included within the ambit of Art. 21 to ensure the right to life in its proper sense, and not just meeting the 'animal needs' as was adjudged by the Supreme Court in *Chameli Singh v. Union of India*.⁴⁰

At a time of need when the asylum seekers under Art. 14 and 21 of the Constitution of India be given a chance at living a healthy and dignified life,⁴¹

³⁷ Das J, Talukdar D, Socio-Economic and Political Consequence of Illegal Migration into Assam from Bangladesh, (2016) 5:2, Journal of Tourism and Hospitality.

³⁸ Ashraf, Ajaz, Fact check: Are illegal Bangladeshi migrants responsible for increase in Assam's Muslim population?, Scroll.in, 16 January, 2018, URL: www.scroll.in/Art./864879/illegal-bangladeshi-migrants-are-not-responsible-for-the-increase-in-assam-s-muslim-population

³⁹ Ramesh Prasad v. State of Bihar, A.I.R. 1978 S.C. 327

⁴⁰ A.I.R. 1996 S.C. 1051

⁴¹ Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652.

what is happening is contrary. The State has expressed that these refugees cannot be taken in as they will result in causing internal disturbances by creating further socio-economic and political complexities which will lead to major issues in the future.

In fact, these asylum seekers are being subjected to refoulement and are deprived of the advantage of non-penalization under the Refugee Convention of 1951 only because India is in a position to do so legally. Despite being requested by the international community, it has turned a blind eye to the Rohingyas. Even the recent Citizenship (Amendment) Bill, 2016 stands as disadvantageous to them at this point in time.⁴² Whether it is a lesson learnt from the influx of Bangladeshi illegal immigrants or is it just a political move, it is hard to tell.

Though the United Nations in its 1992 General Assembly Resolution A/RES/47/80 has condemned ethnic cleansing and any violence or hatred on a racial basis, the organization has failed to find a solution for these Rohingyas in a practical manner. This humanitarian crisis has led to the Rohingya Muslims being addressed as the world's most persecuted people yet no organization or country has been successful in solving the issue. While the Arakan Rohingya Salvation Army is succeeding in its ethnic cleansing process, the world stands as a silent spectator as the minority Rohingyas have nowhere to go.

With a future in limbo, Rohingyas find no other place to go than Bangladesh, as the country has hosted many Rohingyas even in the past. However, with the country itself in shambles from the expulsion of refugees from India, the future remains uncertain as the massive population explosion may devastate Bangladesh. If the NRC in Assam is successful, we can only imagine the number of persons who will seek shelter back in Bangladesh. While the Country itself is not in an economically strong position, the situation will worsen with the on-going refugee status.

⁴² Hasmi, Afreen, Do Rohingya Refugees in India have Constitutional Rights?, OxHRH Blog, 29 September 2017, URL: www.ohrh.law.ox.ac.uk/do-rohingya-refugees-in-india-have-constitutional-rights/

CONCLUSION

India has a large number of refugees, especially from neighbouring countries like Bangladesh, Myanmar, Afghanistan, etc. India is known as the largest democracy in the world and expressly elucidates the fundamental rights given to all citizens, some of which are extended to the refugees.

India is not bound by the primary international legal document on refugee law which is the Convention Relating to the Status of the Refugees, 1951. Yet, India maintains its obligations under all other international treaties and conventions. Even though the nature of the laws is accommodating in this sense, the stance being taken by the State is gradually shifting. With the Citizenship (Amendment) Bill, 2016 to the Supreme Court rejecting the plea of the Rohingya Muslims, India has only violated the non-refoulement principle which is *jus cogens* in nature.

India has many reasons to do so like population explosion, too much expenditure, the strain on the economy, depletion of resources, etc. In contrast to this, Canada has welcomed many Syrian refugees as it is in need of a young population that can rejuvenate its economy. The same cannot be said about India, as the largest proportion of its population consists of the youth.

In the light of the same, the Supreme Court has time and again successfully acted as the guardian of the State. It has time and again protected the rights of the refugees when it has been required. But whenever a question came in front of the Judiciary where there has been a clash between the rights of these refugees and the citizens, the latter has been given more importance.

THE STATUS OF WOMEN REFUGEES AND GENDER DISCRIMINATION UNDER HUMAN RIGHTS LAW

- Janvi Ahuja* and Anwasha**

ABSTRACT

Human rights violation of weaker section has been a universal problem. Its causes, forms and impacts are diverse and multi-faceted. Women have been subjected to gender based violence, and are extremely vulnerable to sexual exploitation, including assault and rape, they are also at the risk of being brutalized by human traffickers or even border security forces.

This paper attempts to emulate the living conditions and wellbeing of female refugees by making an assessment of refugees. The living conditions can be discussed in two manifolds: first it analyses the gap in providing the basic standards of protection and secondly, the difference in their living condition with the host populations in the country. Further this paper aims to discuss the constant threat to women's life and right to live. The main aim of this paper is to find the challenges faced by female refugees and the way they revert back to it. This research paper advocates the gender discrimination among refugees and measures to protect females and ensure survivors to no further discrimination. Laws have been made for protection of these female refugees but there needs to be proper implementation of such laws.

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Further, this paper attempts to deal with some refugee targeted countries and the situations in which females survivors protracted with refugee conditions in various countries. Thematic areas covered in the paper include gender-related issues and coping strategies. Further it concludes with giving the ways to sort out the issue of gender discrimination, and general recommendations are put forth to provide justice to women refugees.

Keywords: *female Refugees, vulnerable, displacement, livelihoods, protection, UNHCR.*

INTRODUCTION

“All human beings are born free and equal in dignity and rights”. - UDHR¹

War has forced people to flee from their country to another country; history is the proof that refugees and asylum seekers are the product of war. Despite the fact that women makes slightly less than worlds half 258² million international migrants, they are the least attended people. In today's increasingly war related situations, international migration has observed a growth where migrants have touched nearly all corners of the globe, somewhere or the other migration has supported the growth of the world's economy, but they have always faced vulnerability.

Article 14 of the Universal Declaration of Human Rights 1948, gives people the right to seek asylum in other countries.

BACKGROUND

According to Article 1 (A)(2) of UN Refugee, 1951³ *refugee convention refugee is defined as a person who has well-founded fear of being prosecuted for a reason of race, religion, nationality, membership of a*

¹ Art 1 of the Universal Declaration of Human Rights passed by the *UN General Assembly on the 10th of December 1948.*

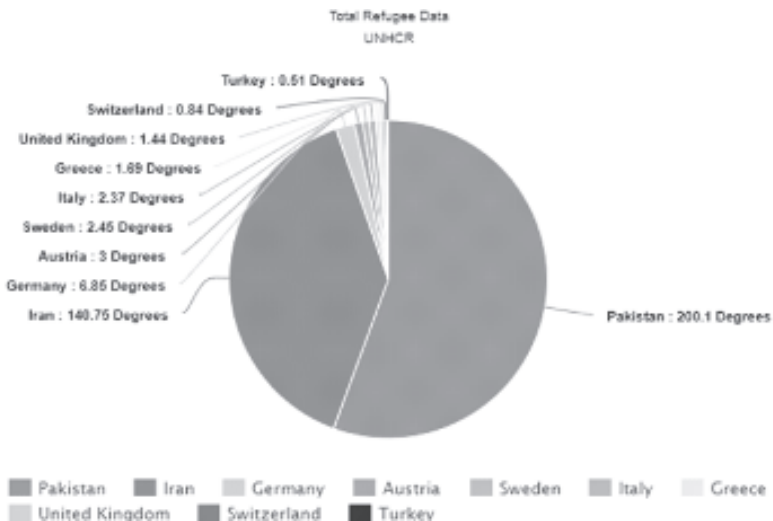
² Figures at a Glance, UNHCR, (June 20, 2018) , <http://www.unhcr.org/figures-at-a-glance.html>

³ 1951 convention relating to the status of refugees and its 1967 protocol (June 20, 2018), <http://www.refugeelgalaidinformation.org/1951-convention>

particular social group or political opinion and is not willing to go to his home country. “A refugee is different from Internally Displaced Persons and asylum seekers as internationally displace person is one who had to flee from their homes, and have crossed their country border, and asylum seekers are those who have a pending claim, they need a status of refugee to stay in the country and work.

DATA REGARDING REFUGEES:

This data has been collected over various sites namely UNHCR (uptill 2015)⁴:



TYPES OF GENDER VIOLENCE:

There are five types of Gender-Violence that has been commonly recognized by UNICEF:

- **Sexual Violence:** It mainly includes Rape, Sodom, Attempted Rape, Child sexual abuse, Forced prostitution, genital mutilation.
- **Physical Violence:** It includes Physical assault, Trafficking and Slavery.

⁴ Questions about global refugee crisis you are going to ask, VOX (July 12 , 2018), <https://www.vox.com/world/2017/1/30/14432650/global-refugee-crisis-refugee-ban-trump-9-questions>

- Emotional and Psychological Violence: It includes Degrading and Humiliation, confinement.
- Harmful Traditional Practices: It includes Female genital mutilation, child marriage, forced marriage, honor killing, maiming, infanticide, denial of education.
- Socio-economic Violence: It includes denial of education, discrimination regarding opportunities, social exclusion.

War completely destroys social structure. Women and children become extremely vulnerable as most of the families are uprooted during war; the Men are forced to go to war, leaving the women and children unprotected.

The following chart describes the Refugee Cycle Violence –

PHASE	TYPE AND NATURE OF VIOLENCE
1. During War and before Fleeing.	Abuse by people in control; sexual trafficking of women; sexual strike, assault, kidnapping by conflicting parties, including military; mass assault.
2. During Flight.	Sexual assault by crooks, border guard; sex traffickers.
3. In Asylum Country.	Sexual assault, coercion by people in position; sexual abuse of separated children in foster care; abusive behavior at home; sexual attack when in transit, gathering wood, water, and so forth.; sex for survival/forced prostitution; sexual misuse of people looking for legitimate status in refuge nation or access to help and assets, resumption of unsafe traditional practices.

4. Repatriation Time. Sexual abuse of women and children who have been isolated from their families; sexual abuse by people in control; sexual assaults, assault by Brigands, constrained/pressured repatriation.
5. Reintegration Time. Sexual abuse against refugees as a type of requital; sexual blackmail in request to regularize lawful status, rejection from basic leadership forms.

CONSEQUENCES OF GENDER VIOLENCE:

Casualties/survivors of sexual and gender-based violence are exposed to various ill-fated consequences. The potential for weakening long haul impacts of emotional and physical injury ought to never be underestimated.

Understanding the potential results of sexual and gender-based violence will assist to develop suitable solutions to overcome the problems

CONSEQUENCES ON HEALTH:⁵

Non-fatal consequences:

1. ACUTE PHYSICAL: Infection, Shock, Diseases.
2. CHRONIC PHYSICAL: Sleeping and Eating Disorders, Chronic pain etc.
3. REPRODUCTIVE PROBLEMS: Miscarriage, HIV/AIDS etc.

Mental-social consequences:

From the tongue of a victim:

“Hitting is better than talking. What he said hurt me more than getting slapped. Sometimes being hit is easier to cope with than psychological torture.- Esrin, 26, Kurdish asylum seeker”⁶

⁵ Sexual and gender based violence against refugees returnees and internally displaced persons, UNICEF (2July 2018) https://www.unicef.org/emerg/files/gl_sgbvo3.pdf

⁶ Hidden violence is silent rape: sexual and gender based violence in refugees, asylum seekers and undocumented migrants in Belgium and Netherlands, Taylor and Francis online, (July 8, 2018), <https://www.tandfonline.com/doi/full/10.1080/13691058.2012.671961?src=recsys>

1. **PSYCHOLOGICAL:** Depression, Anxiety, and Mental Illness.
2. **SOCIAL:** Social rejection, Isolation, gender inequalities.

UNITED NATIONS CONVENTION 1951:

It is this UN Convention of 1951 which works as the parent legislation to Refugee rights. This Convention was amended only once in 1967 which had removed geographical limits as mentioned in 1951 Convention.

The Convention lays down certain principles for the treatment of refugees to grant them favorable living conditions in the host countries. This shall always include the right to access court, to education, right to work and travel freely. The States issue a document named “Nansen Passport”, an identity document, to recognize the refugees.

The Convention does not have any significant bearing to those for whom there are purposes behind considering that they have carried out atrocities or violations against humanity, genuine non-political crimes, or are liable of acts in opposition to the reasons and standards of the United Nations. The Convention likewise does not apply to those refugee who advantage from the protection or help of a United Nations agency other than UNHCR, for example, refugee from Palestine who fall under the sponsorship of the United Nations Relief and Works Agency for Palestine Refugee in the Near East (UNRWA).⁷

UNITED NATION HIGH COMMISSION ON REFUGEE COMMITMENTS:

Under this Convention and the 1967 Protocol, herein UNHCR has specific functions. Hereby, the main focus shall be on refugee women. UNHCR has conferred itself to executing five key duties that will propel the rights of refugee women and help avert and guarantee humane responses to sexual

⁷ Convention and Protocol Relating to The Status of Refugee, (June 27,2018), <https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Stat+us+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/obf3248a-cfa8-4a60-864d-65cdfece1d47>

and gender-based violence⁸. While these five responsibilities does not constitute a thorough rundown of needs for refugee women, they are still small steps towards the elimination of these gender based violence. The responsibilities are:

1. Create integrated nation level procedures to address sexual violence, including domestic violence in host country, against refugee women.
2. Enlist refugee women exclusively and furnish them with significant documentation to guarantee their individual security, freedom of movement and access to necessities. Refugee women and men are to partake equally in the registration procedure.
3. Guarantee that 50% of delegates in all administrative bodies and bodies representing refugees to UNHCR in urban, rustic and camp settings are women.
4. Guarantee refugee women direct and indirect participation in the administration of food and non-food things distribution so that these goods are specifically controlled by adult female family household members.⁹
5. The arrangement of sanitary napkins to all women and girls is a standard procedure of the UNHCR and shall be properly implemented.

REFUGEE WOMEN AND INTERNATIONAL PROTECTION, 1990, RESOLUTION:

After discussions in the Sub-Committee of the Whole on International Protection in 1985¹⁰, the Executive Committee embraced a conclusion in which it noticed that refugee women and young girls constitute most of the world refugee population and that a large number of them are exposed to violations and atrocities.. The Committee focused on the requirement for

⁸ See supra 4.

⁹ See supra 6

¹⁰ Executive Committee Conclusion No. 39 (XXXVI) on Refugee Women and International Protection, UNHCR the UN refugee agency (July 2, 2018), <http://www.unhcr.org/excom/exconc/3ae68c43a8/refugee-women-international-protection.html>

such issues to get the dire consideration of governments and UNHCR, and for every single suitable measure to be taken to ensure that women are shielded from brutality.

Following this, in 1990, the Economic and Social Council implemented resolution 34/2, in which United Nations agencies, and concerned non-governmental organizations have been asked to *“increase their efforts to respond to the specific needs of refugee women, in particular those long-term refugees, as well as displaced women, in the areas of education, health, physical safety, social services, skills training, employment and income-generating activities, and to involve refugee women in the planning and implementation of such programs.”*¹¹

OVERVIEW:

*“Gender-based violence is violence that is directed against a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.... While women, men, boys and girls can be victims of gender-based violence, women and girls are the main victims.”*¹²

The problem of Refugees is the most complicated issues before the world community today. While some call it increased corporation and co-ordination among relief agency, others point out the gaps in international legislation and appeal for further improving of standards. In this debate the facts remain beyond the disputes. In the study of international mobility, refugees make up a very specific population. In contrast to most forcibly displaced persons have little opportunity for expanding livelihoods, they are restricted because they are not the lawful immigrants or citizens of that country, and they usually faced with realities that deny them a dignified life

¹¹ Note on refugee women and international protection note on refugee women and international protection EC/SCP/59, UNHCR the UN refugee agency (July 3,1018), http://www.unhcr.org/excom/scip/3ae68ccd0/note-refugee-women-international-protection.html#_ftnref2

¹² Convention on the elimination of all kinds of discrimination against women, united nations entity for gender equality and empowerment of women, Based on Articles 1 and 2 of the UN General Assembly Declaration on the Elimination of Violence against Women (1993) and Recommendation 19, paragraph 6 of the 11th Session of the CEDAW Committee (July 6,2018), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

and fulfillment of their capabilities. In many situations, people who left their homes to escape from armed conflict or violence face restrictive policies of the countries in which they found refuge and become critically dependent on humanitarian assistance. Women refugees have been the victims of rape, molestation, sexual abuse. Women refugees had no choice but to face the vulnerable situation themselves, resulting of which they were depressed, psychological wreck, insecure or dispirited.

Sexual and gender-based violence is an infringement of human rights. The greater part of the casualties/survivors of sexual and gender-based violence are women. It incorporates considerably more than sexual harassment and rape. UNHCR is obliged to give international protection to refugees. UNHCR, together with States, shares the obligation to guarantee the protection of refugees from such atrocities.

Documentation of mass rape in Bosnia, Cambodia, Liberia, Peru, Somalia and Uganda during the war has been done. 94% of the displaced people in Sierra Leone were reported to have been assaulted and raped. About 2,50,000 perhaps even 5,00,000 were documented to have been raped in 1994 genocide in Rwanda.¹³ By this it can be deduced that displaced women and girls are most vulnerable to sexual violence including rape, sexual abuse, and coerced sex.

INTERNATIONAL DATA IN RECENT YEARS (2015 onwards)¹⁴:

The enormous surge in the number of refugees in 2015 was an aftereffect of the Arab Spring and its outcome. The Arab Spring was a progression of prevalent, pro-democracy uprisings in the Middle East and North Africa that started in mid-2011 and in the end plunged countries into complete chaos. Two specifically, Syria and Libya, assumed basic parts in the refugee crisis.

In Syria, President Bashar al-Assad reacted to peaceful uprisings with fierce viciousness, propelling a war that has killed more than 470,000 individuals and uprooted more than 11 million since 2011.

¹³ See supra note 4.

¹⁴ Questions about global refugee crisis you are going to ask, VOX (July 12, 2018), <https://www.vox.com/world/2017/1/30/14432650/global-refugee-crisis-refugee-ban-trump-9-questions>

Libya's long-lasting despot Muammar Qaddafi was at last toppled in October 2011 (he initially seized control in 1969) with assistance from the US and NATO.. Since Qaddafi's demise, in excess of 5,000 individuals have been slaughtered, and Libya, which had for a considerable length of time filled in as a kind of cradle warding off transients and refugees from European countries, ended up one of the fundamental travel focuses for displaced people.

1.5 million Somalis are refugees and 3.1 million Iraqis are displaced making Iraq the leading country in the UNHCR Refugee list.

PRINCIPLES THAT CAN BE APPLIED TO AID THE REFUGEE COMMUNITY:

Sexual and gender-based brutality is an issue that affects people, networks, and organizations. Given its complexities, sexual and gender-based brutality is best tended to when numerous associations, and centers come together to develop procedures to address this human rights infringement. Every host country strives to provide certain activities to aid the strata of the refugees and to prevent violence against them. Mainly Associations should come together and give way to certain activities which can guarantee the same.

These Associations should come together and lay down certain principles they can abide by and implement which can help to improve the conditions of these women refugees.¹⁵

SPREAD AWARENESS FOR THEIR RIGHTS: The rights and benefits to which every refuge is entitled to should be informed to these individuals. Every legal procedure in case of infringement of these rights should also be specifically told to them through seminars printed materials and meetings.

ENGAGE THE REFUGEES COMPLETELY: The refugees ought to be a key to all program and exercises that address sexual and gender-based brutality. Community contribution in basic decision-making is necessary. It is needed to better comprehend the dynamics in play in the society.

¹⁵ See supra note 2.

GUARANTEEING EQUAL INVOLVEMENT OF MEN, WOMEN AND CHILDREN IN THE PLANNING AND IMPLEMENTATION OF EVERY PROGRAMME: An extensive range of people in the network ought to take an interest in all phases of programming for counteractive action in the prevention of gender based brutality. Though, UNHCR's Policy on Refugee Women¹⁶ states that UNHCR is obligated to implement Nairobi Forward Looking Strategies on the Status of Women i.e. employing women in every strategy they use but it needs to have proper implementation at the foundation level.

ENDEAVOR TO INCORPORATE CERTAIN ACTIVITIES: Activities to prevent and respond to sexual and gender-based brutality ought to be mainstreamed and incorporated into existing projects and divisions. They ought not to be set up as exceptional projects or activities, as this undermines their sustainability over the long haul.

GUARANTEEING CO-ORDINATE MULTI-SECTORED ACTIVITY BY ALL: Contribution of key divisions (community service, health, insurance, security) is pivotal on the off chance that projects focusing on sexual and gender-based violence are to succeed. Actors (governments, NGOs and UNHCR) must be willing to co-ordinate, co-work and team up.

GUARANTEE RESPONSIBILITY AT ALL LEVELS: Every one of those associated with programs focusing on sexual and gender-based violence ought to be held responsible for their activities and for achieving tasks and duties. Sharing of burdens and responsibilities more equitably and building of capacities to receive and protect refugees.

MONITORING INCIDENTS: Every month a compilation of data on sexual and gender based violence should be thoroughly done. Multi-sectorial meetings (attended by refugees) should be held to review the collected data. Proper steps to be implemented for curtailing any incident reported.

¹⁶ Action taken on decision of the forty-third session of the executive committee, Executive Committee in document A/AC.96/754, (July 18, 2018), <http://www.unhcr.org/afr/3ae68d3c18.pdf>

CONCLUSION

Only few countries have consented to the 1951 Convention as well as its 1967 Protocol. In talking about universal solidarity and refugee protection, the Sub-Committee directed its attention towards the requirement for cooperation and solidarity with global security endeavors for the benefit of refugees even with prohibitive national approaches and practices which debilitate the establishments of the normal reason whereupon the compelling usage of the 1951 Convention and its 1967 Protocol depend. On thorough analysis, it can be safely concluded that most of the required laws needed for the protection of women refugees is already existing but the implementation has not been done correctly. With certain other principles inculcated like: Guaranteeing equal involvement of men, women and children in the planning and implementation of every programme, guarantee responsibility at all levels and Monitoring incidents and the status of the women refugees can be considerably improved. Once all the set objectives can be met, the world can definitely be made a safer place for these women.

WRONGS OF IGNORANCE AND AMBIGUITY: HUMAN TRAFFICKING IN NEED OF TALISMAN

- Kartikey Pandey* & Chitresh Baheti**

ABSTRACT

The crime of Human Trafficking is embedded under both International Humanitarian Law and International Criminal Law. With the surge in occurrences of armed conflict in contemporary world, the crime of Human Trafficking finds itself in a state of flux. There can be little uncertainty that a large number of the exceedingly awful practices related with armed conflict would today fall inside the concurred global lawful meaning of trafficking. The crimes like forceful recruitment of child soldiers, sexual slavery, forced prostitution, other form of enslavement, forced military services etc. are crimes which mostly occur in conflict zone. The recent example of Boko Haram, ISIL, Kosovo, Hezbollah and Naxalites depict the situation of armed conflict in which trafficking in multiple form takes place. All things considered, trafficking and the gender based crimes (with a couple of exemptions) with which it is related have never been expressly denied or even controlled by International Humanitarian Law. The Humanitarian Law traditions contain no reference to trafficking, and even contemporary investigations of applicable customs are likewise silent. The paper is divided into two parts. The first part addresses the existing nexus between Human Trafficking and Armed Conflict. Along with this, the

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existing ambiguities in the definition of Human Trafficking and failure of Rome Statute to present Human Trafficking as separate crime has been highlighted. The second part deals with the obligation imposed on state and non-state actors by International instruments regarding the violation of human rights in Armed Conflict. Along with this, the paper deals with the failure of International instruments in binding non-state actors for the serious violation of the human rights and specifically human trafficking.

PART - I

DEFINING HUMAN TRAFFICKING AS PER INTERNATIONAL INSTRUMENTS

Human Trafficking is global political agenda, debilitating national security and harming domestic human rights notoriety of a nation. Over the last 120 years, six international instruments have been enacted to address the issue of Human Trafficking¹ but the present human trafficking law incepts from two instruments: the UN Protocol to Prevent, Punish and Suppress Trafficking in Person (Hereinafter Palermo Protocol)² and the US Trafficking Victims Protection Act (Hereinafter TVPA).³ They provide for tripartite characterisation of Human Trafficking i.e. they both require an *act*(recruitment, transportation, harbouring, or receipt of persons) to be accomplished by a *means*(of threat or use of force, coercion, abduction, fraud, deception, or the abuse of power or vulnerability) for a *purpose* of exploitation.

DEFINING ARMED CONFLICT AS PER ROME STATUTE

The international platform including Geneva Convention and the Additional Protocols freely uses the term “armed conflict” but left undefined in both.⁴ The ICTY Tribunal in the judgement of *Tadic*⁵ proposed a definition as “An

¹ Siller, *Human Trafficking in International Law before Palermo Protocol* 64 N.I.L.R. 407 (2017).

² Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United National Convention against Transnational Organized Crime, Nov. 15, 2000 [hereinafter *Palermo*].

³ Trafficking Victims Protection Act, Oct. 28, 2000.

⁴ Natasha Balendra, *Defining Armed Conflict* 7 C.L.R. (2008) [hereinafter *Natasha*].

⁵ Prosecutor v. Tadic, IT-94-1-A (1995).

armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state". It requires a conflict to be 'protracted' and a degree of 'organisation between the parties' to be regarded as armed conflict.⁶ The Geneva Convention recognises two category of armed conflict- International armed conflict (conflict between two or more contracting parties)⁷ and Non-International armed conflict (conflict occurring in territory of one High Contacting party)⁸.

Nexus Between Human Trafficking and Armed Conflict

Armed conflict opens up the danger of Human Trafficking for defenceless populace by expanding financial frantiness, debilitating principle of law, diminishing the accessibility of social administrations, and driving individuals to escape for their wellbeing.⁹ Numerous contributing component like high joblessness rates, vagrancy, constrained social administrations, and frail law implementation oversight, are increased in conflict zones and thereafter misused by traffickers. Amid armed conflicts, governments redirect existing assets to react to the approaching emergency. This intensifies existing confinements and makes new loopholes in an administration's structures to ensure protection to its nationals. The convergence of powerless, uprooted individuals, corroborated with an absence of security, administrations, and oversight regularly found in such camps, make them perfect areas for traffickers to work.

In spite of wide commonness and large number of structures, the International Tribunals and Councils failed to eradicate the ambiguities in existing definitions alongside its failure to constrain obligations on specific participants.

⁶ Prosecutor v. Akaseyu, ICTR-96-4 (2001).

⁷ Protocol Addition to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 1(4), Dec. 07, 1978, 1125 U.N.T.S. 3.

⁸ Pictet, *Commentary on Geneva Convention for the Amelioration of Condition of the Wounded and Sick in Armed Forces in the Field* (I.C.R.C. 1952).

⁹ *Natasha supra note 4 at 10.*

AMBIGUITIES IN PALERMO PROTOCOL

Despite the definition provided by Palermo Protocol has been regarded as a landmark achievement in providing legal standard to combat Human Trafficking and providing impetus to facilitate further research,¹⁰ the definition is fairly unsettled and a controversial step in defining Human Trafficking legally.¹¹ The innate ambiguities in definition as well as in the protocol can be characterised as:

1. IMMENSE INDEPENDENCE TO STATE

Successful combat against the Human Trafficking in transit state depends on the countermeasures adopted by origin state who is accountable for most of the trafficking inflow.¹² Still, the protocol is silent on direct sanctions against the non-compliant state.¹³ Further, the protocol strategies to protect, prevent and prosecute the trafficker. This again imposes problem as the cost and effort vary when it comes to compliance. Prevention only require awareness which is less costly than prosecution as it involves amending the State's Criminal Law. Therefore, State might prefer prosecution over protection pushing immigrants in hands of traffickers.

Similarly, the meaning of trafficking in people as set out in the Palermo Protocol is an implicit welcome to officials around the globe to change its arrangements.¹⁴ The Trafficking Protocol neglects to expressly characterize convoluted terms, for example, 'exploitation', 'coercion' and 'vulnerability'. This has prompt the circumstance where only the most exasperated types of mishandle appear to satisfy the meaning of trafficking.

2. ISSUE OF CONSENT

Palermo Protocol adds a caveat that the consent of victim of trafficking shall be irrelevant where any of the *means* have been used.¹⁵ The inclusion of 'lack

¹⁰ Tyldum et al, *Describing the Unobserved: Methodological challenge in empirical studies on Human Trafficking* 43 I.M. 20 (2005).

¹¹ Gallagher, *The International law of Human Trafficking* (C.U.P. 2010).

¹² Cho & Vadlamannati, *Compliance with the Anti-trafficking Protocol* 28 E.J.P.E. 251 (2011).

¹³ Scapra, *Trafficking in Human Being: Modern Slavery*(O.U.P. 2008).

¹⁴ Allian, *No Effective Trafficking Definition Exist* 14 A.G.L.R. (2014) [hereinafter *Allian*].

¹⁵ *Palermo*, supra note 2, art. 3(b).

of consent' have been a subject of much debate.¹⁶ Through the incorporation of consent component, what we are left with is a class of individual who by giving consent have not been exactly trafficked, yet more than smuggled. These individuals may have remedy in International Human Rights Law and Domestic Criminal Law for security and principle treatment, however, at present, they are not qualified for any particular arrangement under the Anti-trafficking administration. The victims who have willingly consented to all the stages of trafficking and on whom no 'means' were employed are left unaddressed between the conundrums of Human Trafficking and Human Smuggling.¹⁷

3. ABSENCE OF VICTIM PARADIGM

The present definition provided under Palermo Protocol has been highly criticised and has been characterised as poorly worded¹⁸ as it fails to take into account the victim based approach. The definition only consider the three stage process without considering other factors. On the other hand, the victim based approach develops a legal manner which eradicate the limbo between Human Trafficking and Smuggling.¹⁹ It will cover the offences proscribes by Human Trafficking Law, including slavery, forced labour and crimes involving less exploitation.²⁰ It will also help in emphasizing how cumulative labour condition involving coercion and deceptive practices can be under the threshold of Human Trafficking.²¹ The Victim Based Approach will eventually help in checking not only Human Trafficking but also continuation of exploitation of the victims.²²

¹⁶ K. Abramson, *Beyond Consent, Towards Safeguarding Human Rights: Implementing the UN Protocol 44 H.I.L.J.* 473 (2003) [hereinafter Abramson].

¹⁷ Jessica Elliot, *Role of Consent* (Routledge 2014).

¹⁸ Abramson, *supra* note 16 at 475.

¹⁹ Allian, *supra* note 14 at 52..

²⁰ Jonathan Todres, *Human Right, Labour, and the Prevention of Human Trafficking: A Response to a Labour Paradigm for Human Trafficking* 60 U.C.L.A.L.R. 142 (2013).

²¹ Hila Shamir, *A Labour Paradigm for Human Trafficking* 60 U.C.L.A.L.R. 86 (2012).

²² Jaleel, *The Wages of Human Trafficking* 81 B.L.R. 1 (2016).

ISSUES IN PROSECUTING HUMAN TRAFFICKING UNDER ROME STATUTE

Despite its characterisation as Crime against Humanity,²³ Trafficking do not find its place as a separate crime under Rome Statute. Rome Statute punishes Human Trafficking in form of enslavement,²⁴ deportation and forcible transfer of population,²⁵ rape, sexual slavery and enforced prosecution²⁶ all of which require certain elements of crime beyond the triplicate constituents of Human Trafficking.

For present paper, the crime of Human Trafficking with respect to crime of Enslavement is relevant as there are diverging camps of interpretation. One branch of scholars contends the amalgamation of substantive concept of enslavement with trafficking within international sphere.²⁷ Whereas, other branch scholars reject this assimilatory practice.²⁸

The crime of Enslavement requires 'ownership' in course of Human Trafficking. The term 'ownership' hadn't been described by legislator which lie at the heart of internationally accepted definition of enslavement.²⁹ For many years, the property model was used to interpret the concept of ownership i.e. commodification of person as an object. But, in the judgement of *Kunarac*,³⁰ the Trial Chamber considered certain indicia of enslavement.³¹ While some of factors do fit in the power of ownership, a tangible overlap with trafficking exist.³² As described in words of Van der Wilt, it has

²³ Obokata, *Trafficking of Human Being as a Crime against Humanity: Some implications for the International Legal System* 54 I.C.L.R. 445 (2005).

²⁴ Rome Statute, Jul. 1, 2002, 2187 U.N.T.S. 90, art. 7(1)(c).

²⁵ Id. art. 7(1)(d).

²⁶ Id. art. 7(1)(g).

²⁷ Bales, *Ending Slavery: How we Free Today's Slave*(C.U.P. 2007).

²⁸ Van Der Wilt, *Trafficking in Human Being, Enslavement, Crimes against Humanity: Unravelling the Concepts* 13 C.J.I.L. (2014) [hereinafter *Van*].

²⁹ Honore, *Ownership* O.U.P. 107 (1961).

³⁰ Prosecutor v. Kunarac, IT-96-23 & 23/1 (2002).

³¹ "Control of someone's movement, Control of physical environment, Psychological control, Measures taken to prevent or deter escape, Force, Threat of force or coercion, Duration, Assertion of exclusivity, Subjection to cruel treatment and Abuse, Control of sexuality and Forced labour".

³² Siller, *Modern Slavery* 14 J.I.C.J. 405 (2016).

“undeniably blurred the conceptual borders between enslavement and trafficking in human beings.”³³ Moreover, the evolvement of the concept of ‘genuine right of ownership’³⁴ or consideration of ‘gravity of control and restriction on movement’³⁵ as a criteria to determine the level of ownership has corroborated in blurring the thin line between enslavement and trafficking.

PART - II

In every system of law, allocation of responsibility as a legal institution plays a leading part to system’s effectiveness and credibility. It reveals prevailing conception in relation to nature of rights and obligation. This in turn specifies the consequences of their infringement and, perhaps more deeply, the moral foundations of the whole. To establish a certain type of responsibility requires study of the relationship it defines between the subjects of law, their acts and the community to which they belong.³⁶

RESPONSIBILITY OF STATE

States’ responsibility under International Law arise from the predetermined States’ obligation under International Law doctrine³⁷ and are reflective from State practices³⁸. When an act or omission which is attributable to the State leads to breach of an international obligation, this invokes State’s responsibility towards the particular act or omission.³⁹ States ensure these obligation by enacting policies⁴⁰ to develop a practice in consonance with the treatise and its standards.⁴¹ Obligations on a particular state have been

³³ Van, *supranote* 28 at 15.

³⁴ Siliadin v. France, Application No. 73316/01 (2005).

³⁵ R v. Tang, (2008) 237 C.L.R. 1.

³⁶ Dupuy, “The International Law of State Responsibility: Revolution or Evolution?” (1989) 11 Michigan Journal of International Law 105.

³⁷ Anne T. Gallagher, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 219 (2010) [hereinafter Gallagher].

³⁸ Id, at 220.

³⁹ *Draft Articles on Responsibility of States Internationally Wrongful Acts*, 2001, UN DOC. A/56/10, Article 2 and accompanied commentary, at para 4.

⁴⁰ Involve providing facilities, taking precautions or enforcing a prohibition.

⁴¹ Office of the High Commissioner for Human Rights, “Human Rights and Human Trafficking” Fact Sheet No. 36.

methodologically distinguished into primary⁴² and secondary rule⁴³ in International Law. This distinction is important to understand as International Law Commission (Hereinafter as ILC) while codifying the existing customary rules on State responsibility⁴⁴ relied primarily on secondary rule. Although draft rules by ILC is authoritative work on specifying the State's responsibility to almost all areas of International Law, it is yet considered as "progressive development"⁴⁵ and hence not universally accepted as source of International Law.

RESPONSIBILITY OF NON-STATE ACTORS

Individuals are the holders of rights, while States are the holders of duties to protect and promote their rights.⁴⁶ This infers that the States being subject of International Law are under an obligation. Therefore there is enforceable rights and responsibility against a state for a violation of international obligation⁴⁷ but Non-state actors are absolved from any obligation. This orthodox view has called for a debate to bring in much needed changes in light of recent developments.⁴⁸ Non-state actors' responsibility from being just holders of rights is changed to promoter and protector of human rights.⁴⁹ Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography has already declared that "International Human Rights Law has long imposed direct obligations on the private sector."⁵⁰

⁴² "Primary rules" defines the content of legal obligation.

⁴³ "Secondary rules" determine by whom an obligation has been violated and the consequences of that violation.

⁴⁴ Draft Articles on the Responsibility of States for Internationally Wrongful Acts , UN DOC. A/56/10.

⁴⁵ *Gallagher, supra note 37*, at 222.

⁴⁶ Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights* Human Rts. Q. at 59 (1999).

⁴⁷ McCorquodale, THE INDIVIDUAL AND THE INTERNATIONAL LEGAL SYSTEM 301 (2003).

⁴⁸ Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society* 14 American Univ. I.L.R. 1335 (1999).

⁴⁹ Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE Sphere 93-95 (1993).

⁵⁰ *Report of the Special Rapporteur on Sales of Children Child Prostitution and Child Pornography*, E/CN.4/ 2001/78, para 52.

CRIMINAL LIABILITY OF LEGAL PERSON FOR HUMAN TRAFFICKING OFFENCE

Societas delinquere non potest,⁵¹ raised a common assumption that only states who are subject of International Law are bound by international obligation and ‘companies cannot commit an offence’.⁵² But, recent disclosure of multinational companies engaging in behavior which are exploitative in nature is a matter of growing concern. Parente’s statement that “*the trafficking industry is consistently growing due to its prevalence in the corporate world*”⁵³ has left many raised eyebrows.

International Treatise like UNTOC and other supplementing protocol⁵⁴ impose a positive obligation on state to curb such criminal behavior of legal entities. But this obligation only extends till it is in consonance with its legal principles. Corporate complicity when considered as an organized crime not specifically refer to Human Trafficking but also includes other crimes like terrorism, corruption etc.⁵⁵ If we try to categorize the situations in which State is obliged under UNTOC to create a liability on a corporation⁵⁶ we will have five situations (Being part of organized criminal group⁵⁷, Being part of an organized criminal group where there is commission of serious crime⁵⁸, Corruption⁵⁹, Obstruction of Justice⁶⁰ and Violation of any protocol to which state is party of or intend to be a part of. Therefore, it will be wrong to contend that there is no obligation upon legal entity.

⁵¹ Prevalence of this doctrine in different country.

⁵² Graven & Junod, *SOCIETAS DELINQUERE POTEST*” IN MELANGES ROBERT PATRY 351-365 (1988).

⁵³ Parente, *Human Trafficking: identifying forced labour in multinational corporations and the implications of liability* 11 Braz. J.I.L. 148 (2014).

⁵⁴ G.A. Res. 55/383 (Nov. 15, 2000), *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Palermo Protocol).

⁵⁵ Mattar, *Corporate Criminal Liability: Article 10 of the Convention against Transnational Organized Crime* 66 J. Intl Aff. 108-109 (2012).

⁵⁶ United Nations Convention against Transnational Organized Crime art. 10 (1).

⁵⁷ United Nations Convention against Transnational Organized Crime art. 5.

⁵⁸ Id.

⁵⁹ United Nations Convention against Transnational Organized Crime art. 8.

⁶⁰ United Nations Convention against Transnational Organized Crime art. 23.

The ILO Convention regarding Private Employment Agencies⁶¹ is an authoritative piece for states to create legal framework to avoid trafficking in person.⁶² It compels Member States to adopt protective and preventive measures against ill-use of recruited migrant workers on their land.⁶³

Finding a corporation being held liable or prosecuted for such crimes is rare to find.⁶⁴ This is due to wide range of difficulties/obstacles.

1. SUBCONTRACTING AND COMPLEX CORPORATE STRUCTURES

Companies desire to enlarge their profits look for cheaper products for which they resort to “outsourcing, offshoring and subcontracting practices both nationally and abroad”.⁶⁵ These companies operate through chain of companies which is not easily traceable and hence difficult to demonstrate element of control of Parent Corporation on their agents who committed the crime.

2. EXTRATERRITORIAL APPLICATION

Complex corporate structure usually function in more than one nation which opens escape route from not getting bind by particular national jurisdictions. International Corporate Accountability Roundtable (ICAR) has named this as ‘governance gap’ as it create perfect domain for these traffickers to operate with little or no accountability.

3. EVIDENTIARY ISSUES AND SANCTIONS

Gathering evidence and investigating these crimes poses difficulty as role of legal person is limited till the stage when exploitation does not occur.

⁶¹ Geneva, 85th ILC session (19 June 1997).

⁶² *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement*, (Geneva, 2005), at 33.

⁶³ Private Employment Agencies Convention art. 8.

⁶⁴ Feasley, *Eliminating Corporate Exploitation: Examining Accountability 5 Regimes as Means to Eradicate Forced Labour from Supply Chains*, 2 J.H. Traff. 16 (2016).

⁶⁵ Bang, *Unmasking the Charade of the Global Supply Contract: A novel Theory of Corporate Liability in Human Trafficking and Forced Labour Cases* 35 Houston J.I.L. 286 (2013).

Therefore, intention of agent to exploit is very difficult to establish. Also lack of inter-governmental support and cross-border co-ordination and corruption are some other factor which obstruct evidence gathering.

CONCLUSION

Human Trafficking by its very nature is a complex crime that has no definite way of occurrence. In the same way involvement of State and Non-State actors in the process exploitation can be diverse. There is no denial of the fact that most egregious crimes have been committed by this non-state actors. Being aware of this fact we still lack an international instrument which can impose a strict liability upon these non-state actors and make them responsible for their acts. Provision of various instruments might look simple on first glance but complexities starts when these provisions are tested in courts of law. Even the conceptualization of this crime in most recognized protocol is flawed and full of ambiguities. With the failure of International community to define human trafficking in these evolving circumstances it is true that no effective trafficking definition exists. And this explains the reason for far too less prosecution of non-state actors before international forum even when news of their involvement in such crimes is not rare. Despite being the third largest crime, the draftsmen of Rome Statute failed to define Human Trafficking as a separate crime. This article has presented that the way in which Rome Statute has incorporated the crime of trafficking that impedes the ICC to prosecute the traffickers.

CLIMATE REFUGEE: THE GREY AREA

-Manjusha Tiwari* & Ved Vyas**

ABSTRACT

The latest World Bank report concludes that around 143 million people would become 'climate migrants' by 2050 but there is no accepted definition of the term 'climate refugee' in international law. It is to be noted that displacement and migration due to climate change happens even within the country and the same must be recognized. The paper discusses whether 'refugees' defined in law should be expanded to include 'climate refugees' and seeks to answer who is to be held responsible for protection and rehabilitation of such migrants. Even developed countries are at risk but it cannot be denied that the Least Developed Countries, whose contribution in global emissions is almost negligible, are the ones hardest hit by climate related disasters and are also mistreated by liable countries. The paper briefly looks at India's position in relation to climate refugee. Even after many talks and steps taken, there is still a lot to be done keeping in mind the critical links between climate, poverty and migration. The paper tries to explore other alternatives, helpful in the long run, to tackle the issues of climate refugees.

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INTRODUCTION

*“Climate change will not wait. Neither can we. For climate refugees, tomorrow is too late.”*¹

It is alarming to know that 21.5 million people were displaced due to natural disasters between 2008-2016.² It is estimated by the UN International Organisation for Migration that there will be 200 million environmental refugees by 2050.³ These figures are daunting ‘environmental refugee’ is not legally defined and recognised in law. ‘*Environmental refugee*’ is broadly understood as defined in UNEP report to be ‘people who have been forced to leave their habitat, because of environmental disruption that jeopardized their existence and/or seriously affected the quality of their life.’⁴ They are not entitled to protection and assistance as ‘refugees’ as defined in Article 1A(2) of the 1951 Refugee Convention⁵ and The Protocol Relating to Status of Refugees, 1967⁶ because it includes only those fleeing persecution from their country on the basis of religion, race, nationality, etc. The treaty was drafted right after World War II primarily for refugees fleeing into Europe⁷ and therefore displacement due to climate change was not at all contemplated by the drafters back then.⁸ But Climate change is real⁹ and so are the risks associated with it.

¹ Greenpeace (@Greenpeace), TWITTER (Nov. 2, 2017, 3:54 AM), <https://twitter.com/greenpeace/status/926039716696350726>.

² I.D.M.C., *Global Report on Internal Displacement* (May, 2016), <http://www.internal-displacement.org/sites/default/files/inline-files/2016-global-report-internal-displacement-IDMC.pdf>.

³ I.O.M., *Migration and Climate Change*, <https://www.iom.int/migration-and-climate-change-0>.

⁴ FRANK BIERMAN & INGRID BOAS, *PREPARING FOR A WARMER WORLD TOWARDS A GLOBAL GOVERNANCE SYSTEM TO PROTECT CLIMATE REFUGEE* http://www.sarpn.org.za/documents/do2952/Climate-refugees-globalgovernance_-_Nov2007.pdf [hereinafter Bierman & Boas].

⁵ United Nations Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150.

⁶ United Nations Protocol Relating to Status of Refugees, Jan. 31, 1967 606 U.N.T.S. 267.

⁷ U.N.H.C.R., *Introductory Note to the Convention and Protocol Related to the Status of Refugees* 1, 2 (Dec. 2010), <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf%20http://perma.cc%20/7HMH-4RTF>.

⁸ WALLACE S. BROECKER, *CLIMATIC CHANGE: ARE WE ON THE BRINK OF A PRONOUNCED GLOBAL WARMING?*, 189 Science 460, 460 (1975), <http://www.jstor.org/stable/1740491>.

⁹ U.N.H.C.R., Human Rights and Climate Change, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> [hereinafter Climate Change].

REFUGEE AS ‘REFUGEE’ OR NOT?

Migration and legal expert at UNU, stated that “For successful implementation, the concept should be well defined and commonly accepted.”¹⁰ The term, environmental refugee, was coined by Lester Brown in 1970.¹¹ But even today ‘climate refugees’ do not get the requisite attention as there is still no commonly accepted definition of the same and some say the term itself is a myth.¹² The term ‘climate refugee’ is contested and usually categorised in different legal statuses.¹³ However, the idea of ‘environmentally internally displaced person’ serves only ‘as a descriptive term, not as a status that confers obligations’.¹⁴

Some demand expansion of the term ‘refugee’ in law to include ‘climate refugee’. This proposition has received some criticism and the same have been discussed below along with their counter-arguments.

A. NATURE OF MIGRATION: Climate refugee are not completely covered for protection¹⁵ under the present regime because it also includes those migrating *within the country* due to a natural disaster and facing human rights violation whereas according to the statute of the UNHCR, a ‘refugee’ is an individual who has *crossed an international border*.¹⁶ However, the plight of environmental refugees is similar to or even worse than Convention refugees¹⁷ even though the reason of displacement are different.

¹⁰ Cosmin Corendea, *Migration And Human Rights In The Wake Of Climate Change, A Policy Perspective Over the Pacific*, https://collections.unu.edu/eserv/UNU:6305/PolicyReport_No2_171113_online_revised_meta.pdf.

¹¹ LESTER R. BROWN, TWENTY-TWO DIMENSIONS OF THE POPULATION PROBLEM, 102 (1976), https://www.globalgovernancewatch.org/library/doclib/20160205_ClimateChangeandHumanMigration.pdf.

¹² U.N.H.C.R., Environmental Refugees: Myth or Reality?, <http://www.unhcr.org/research/working/3ae6a0d00/environmental-refugees-myth-reality-richard-black.html>.

¹³ LOTTE GEBOERS & MAATJIN STRAATSMA, *PROTECTING AND PREVENTING CLIMATE REFUGEES: AN INTER-DISCIPLINARY STUDY ON CLIMATE REFUGEE ISSUES AND THE UNITED NATIONS* (Jan. 2017), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI\(2018\)621893_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Statute of the Office of the United Nations High Commissioner for Refugees, G.A.R. 428(V) of Dec. 14, 1950 <http://www.unhcr.org/4d944e589.pdf>.

- B. NATIONAL PROTECTION:** The loss of national protection is a key element of the 'refugee' definition, and it is argued that EDPs might still be protected by their national government. However, this is the biggest refugee crisis in human history¹⁸ and it needs global recognition. By using the term 'climate refugee', they will receive the legitimacy and urgency it deserves because the term 'refugee' carries strong moral connotations.¹⁹
- C. REFUGEE FLOODGATE:** States are afraid that it will open the floodgates to many people facing similar plight and it won't be economically feasible for the State.²⁰ This is a cogent argument. But under the UNFCCC, developed states have an obligation to assist developing states "that are particularly vulnerable to adverse effects of climate change in meeting costs of adaptation to those adverse effects."²¹ Moreover, UNHCR has pledged to give funds to nations that accept climate refugees.²²
- D. DILUTION OF PROTECTION:** It is argued that the protection of climate refugees under the Convention could also undermine the protection of political refugees.²³ But not categorizing them as 'refugees' and reducing them to 'migrants' implies that these people are in less need of international protection²⁴ which is not justified considering the human rights violation they face.
- E. SOVEREIGNTY:** UN Charter allows the member States the 'right of self-defence' in case of an armed attack. States argue that the act of not

¹⁷ Architesh Panda, *Climate Refugees Implication for India*, 45 E.P.W. (2010), <http://www.jstor.org/stable/27807029> [hereinafter Panda].

¹⁸ U.N.H.C.R., *Climate Change and Disasters*, (Dec. 14, 2009) <http://www.unhcr.org/climate-change-and-disasters.html> [Climate and Disaster].

¹⁹ Biermann & Boas, *supra* note 4.

²⁰ Docherty, B. & Giannini, *Confronting A Rising Tide: A Proposal For A Convention On Climate Change Refugees*, 33 HARV. ENVIRONMENTAL LAW REVIEW 349-403.

²¹ U.N.F.C.C. art. 4(4).

²² *Resettlement*, U.N.H.C.R., <http://www.unhcr.org/resettlement.html>.

²³ B.Hartmann, *Rethinking Climate Refugees And Climate Conflict: Rhetoric, Reality And The Politics Of Policy Discourse*, 22J. INT. DEV. 233-246 (2010), <https://onlinelibrary.wiley.com/doi/10.1002/jid.1676>

²⁴ Kolmannskog, *Climate Change, Environmental Displacement And International Law*, 24 JOURNAL OF INTERNATIONAL DEVELOPMENT 1071-1081 (2012).

granting entry to climate refugees in the country is an exercise of their sovereignty²⁵ as the right of self-defence is not just restricted to armed attacks but also include mass exodus of refugees as it is a threat too²⁶ considering it has the capability of risking the stability of the receiving country²⁷. This is a sound argument but it overlooks fundamental human right to live one's life with dignity. The basic human rights are not subordinate to peace and security.²⁸

Arguments in favour of environmental refugees:

- A. HUMAN RIGHTS:** “Man has the fundamental right to freedom, adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*”.²⁹ The disastrous impacts of climate change are disproportionately borne by individuals and communities, already in disadvantageous situations, despite contributing the least to greenhouse gas emissions.³⁰ UNHCR has undertaken steps to help them.³¹ Therefore, in cases of mass influx, the States have a minimum obligation to ensure admission for safety and security.³²
- B. THE REFOULEMENT PRINCIPLE:** This principle provides for the protection of refugees from being returned to the place where their lives are at risk.³³ It is not just recognised as customary international law³⁴ but is also a *jus-cogens* norm.³⁵ Therefore, States are bound to allow entry of environmental refugee in their territory.

²⁵ Michelle Leighton, *O.H.C.R., Forced Displacement in the Context of Climate Change: Key Issues For Legal Protection Of Migrants And Displaced Person Climate Change And Displaced Person*, 55 JOURNAL OF I.L.I. 45-58, <https://www.jstor.org/stable/43953626>.

²⁶ U.N.S.C, SECURITY COUNCIL RESOLUTION 688 (1991) [Iraq], 5 April 1991, S/RES/688 (1991).

²⁷ Charles B. Keely, *How Nation States Create and Respond to Refugee Inflows*, 30 INT'L MIGRATION REVIEW 1046 (1996).

²⁸ ANTHONY C., INTERNATIONAL LAW AND THE USE OF FORCE, 118 (1993).

²⁹ Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972) art. 1.

³⁰ Climate Change, *supra* note 9.

³¹ Climate and Disaster, *supra* note 18..

³² Jessica Rodger, *Defining the Parameters of the Non-Refoulement*, <http://www.refugee.org.nz/JessicaR.html>.

³³ GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL, 117 (2nd ed., 1996).

³⁴ *Id.*

³⁵ E. LAUTERPACHT & DANIEL BETHLEHEM, THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION, <http://www.unhcr.org/419c75ce4.pdf>.

While rejecting an application for refugee status, the court observed that its decision does not mean climate change could never “create pathways into the Refugee Convention or protected person jurisdiction.”³⁶ The court acknowledged the risk of human rights violation that climate refugees face.

According to UN Secretary-General, António Guterres, Environmental refugees find themselves in a legal void ³⁷ as there is a protection gap with regard to ‘climate refugees’. It is widely accepted that environmental refugees need recognition, protection and resettlement. Keeping in mind the above arguments and, the author believes that the term Refugee under the Convention should not be expanded to include environmental refugees rather a new category or regime must be established for ‘environmental refugee’. In no way it implies that ‘climate refugees’ deserve any less protection. Therefore, a new category must be created and tailored as per the needs of climate refugees for the specific problem, including its legal, political, and ethical dimensions, and it must be appropriately financed and supported by the international community.³⁸

THE INTERNATIONAL REGIME

Several steps have been taken in furtherance of this issue but still there are some gaps that need to be addressed. Some are being discussed hereunder:

- I. The 1998 UN Guiding Principles on Internal Displacement provide a framework for protecting victims of natural disasters who *do not cross an international border*. They provide a set of legal standards for protection and also allows governments a decent margin of discretion regarding its implementation but they are *not legally binding*.³⁹

³⁶ *Teitiota v. Chief Executive Ministry of Business, Innovation and Employment* [2014] N.Z.C.A. 173.

³⁷ Mr. António Guterres, *United Nations High Commissioner for Refugees, Intergovernmental Meeting at Ministerial Level to mark the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness 07 December 2011*, <http://www.unhcr.org/afr/admin/hcspeeches/4ecd0cde9/statement-mr-antonio-guterres-united-nations-high-commissioner-refugees.html> .

³⁸ Bierman and Boas, *supra* note 4.

³⁹ Joanna, *supra* note 39.

- II. The World Commission on Environment and Development had the predicted the need for mitigation and adaptation two decades before⁴⁰ and yet the present regime does not provide a sufficient institutional infrastructure for managing the expected increase in climate-induced displacement and flight.⁴¹ There is no single institution that could be held responsible⁴²
- III. The UN General Assembly in 2016, adopted the New York Declaration for Refugees and Migrants creating a global ‘responsibility-sharing’ deal which would take into consideration migrants and refugees’ rights and needs as well as States’ capacities and challenges⁴³. Some key elements:
- A. “Comprehensive Refugee Response Framework (CRRF)
- i. Easing pressures on countries that host refugee
 - ii. Enhance refugee self-reliance
 - iii. expand third-country solutions; and
 - iv. Support conditions in countries of origin for return in safety and dignity
- B. expressed profound solidarity with those who are forced to flee
- C. agreed to work towards the adoption of a global compact on refugees and a global compact for safe, orderly and regular migration
- D. agreed that protecting refugees and supporting the countries that shelter them are shared international responsibilities and must be borne more equitably and predictably”⁴⁴

⁴⁰Report of the World Commission on Environment and Development: Our Common Future, <http://www.un-documents.net/our-common-future.pdf> .

⁴¹Aarsi Sagar et. al, *Building Global Governance for ‘Climate Refugees, G20* (March. 18, 2017), http://www.g20-insights.org/policy_briefs/building-global-governance-climate-refugees/ .

⁴²*Id.*

⁴³G.A. Res. A/RES/71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016)1. http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_71_1.pdf

⁴⁴U.N.H.C.R., *New York Declaration For Refugees and Migrants*, <http://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html> .

This is a step forward but still the Declaration gives leeway for continuation of child detention and excludes internally displaced people from the agenda.⁴⁵ It is also criticised for being “thin on content and connections to practice” that fails in providing the much needed reform but rather reflects the interests of the States more than that of refugees.⁴⁶ Currently regular refugee assistance programs are already underfunded⁴⁷ so measures need to be taken for the same. Salil Shetty, Secretary General of Amnesty International, says “instead of sharing responsibility, world leaders shirked it but UN member states have both a moral and a legal duty to welcome the refugees who need help today.”⁴⁸

UN Secretary General's report, “*One Humanity, Shared Responsibility*” proposing that governments commit to a comprehensive global plan for reducing the number of IDPs by at least 50% by 2030.⁴⁹ The aim is to “*leave no one behind*”.

IMPLICATIONS FOR INDIA

India is vulnerable to a wide variety of natural disasters and is the destination for people displaced in neighbouring nations.⁵⁰ It is estimated in a study by Greenpeace that around 120 million people could be rendered homeless both in Bangladesh and India by 2100 due to rising sea level rise⁵¹

⁴⁵ E.C.R.E, *The United Nations Summit for Refugees and Migrants – A Failed Opportunity for Much Needed Reform?* (Sep. 23, 2016), <https://www.ecre.org/the-united-nations-summit-for-refugees-and-migrants-a-failed-opportunity-for-much-needed-reform/>.

⁴⁶ *Id.*

⁴⁷ U.N.H.C.R., *Highlighted Under-Funded Situations in 2017*, <http://reporting.unhcr.org/sites/default/files/UNHCR%20Brochure%20oon%20Underfunded%20Situations%20in%202017%20-%20October%202017.pdf>.

⁴⁸ Salil Shetty, *World leaders have ‘shirked, not shared’ responsibility on refugee crisis*, AMNESTY (Sep. 29, 2016, 03:51 PM), <https://www.amnesty.org/en/latest/news/2016/09/world-leaders-have-shirked-responsibility-on-refugee-crisis/>.

⁴⁹ U.N. Secretary-General, *One Humanity: Shared Responsibility - Report of the Secretary-General for the World Humanitarian Summit*, U.N. Doc. A/70/709 (Feb 09, 2016), <https://www.unocha.org/publication/one-humanity-shared-responsibility-report-secretary-general-world-humanitarian-summit>.

⁵⁰ Hamsa Vijayaraghavan & Deepti Somani, *As Climate Change Worsens, India Must Consider a Policy on Environmental Migration*, THE WIRE (Oct. 26, 2016), <https://thewire.in/environment/environmental-migration-india-need-policy>.

⁵¹ Dr. Hildegard Bedarff & Prof. Dr. Cord Jakobeit, *Climate Change, Migration, and Displacement The Underestimated Disaster*, GREENPEACE, <https://www.greenpeace.de/sites/www.greenpeace.de/files/20170524-greenpeace-studie-climate-change-migration-displacement-engl.pdf>.

and considering the proximity of Bangladesh to India, it is certain that many people will end up in Indian cities as migrants.⁵² India is suffering because it is already such a populated nation facing internal migration, and then influx from neighbouring countries adds more burden on the scarce resources. It increases competition for resources between groups and hence, increases the potential for violent conflicts and refugee movements.⁵³ Example, in West Bengal, the continuous massive influx from Bangladesh has become a political issue triggering clashes between local residents and the migrant Bangladeshis.⁵⁴ The Indian government largely abides by the principle of non-refoulment⁵⁵ and has liberal refugee approach even though it is a developing country. It is high time a proper mechanism for climate refugees is set up and concept of shared responsibility is adopted.

CONCLUSION

*“We must accept the reality that climate change is accelerating more quickly than climate change negotiations.”*⁵⁶ It is now accepted that climate change, migration, and human rights is one concept, not exclusive of each other. The need of the hour is to understand the gravity of the issue at hand and take concrete steps to address the same. Many steps have already been taken but, the current regime has some lacunas and the same need to be rectified.

- Recognition should be given to climate refugees and a separate category including IDPs should be established that grants them legal status and entitles them rights and obligations. Attempt to understand causes of internal displacement and preparing long term plans to tackle the same should be made.

⁵² Panda, *supra* note 18.

⁵³ Thomas F. Homer-Dixon, *Environment, Scarcity, and Violence*, Thomas F. Homer-Dixon, *Environment, Scarcity, and Violence* (Princeton NJ: Princeton University Press, 1999).

⁵⁴ Neeta Lal, *A precarious fate for climate migrants in India*, RELIEFWEB (May 19, 2016), <https://reliefweb.int/report/india/precarious-fate-climate-migrants-india>.

⁵⁵ Megha Purohit & Mayank Purohit, *An Analysis of Non-Refoulement in Indian Legal Framework*, 2JAMIA LAW JOURNAL (2017).

⁵⁶ Reuters Staff, *HIGHLIGHTS-World leaders open Paris climate change talks*, UKREUTERS (Nov. 30, 2015, 6:10 PM), <https://uk.reuters.com/article/climatechange-summit-highlights-idUKL1N13PoFE20151130> [hereinafter UKReuters].

- A review mechanism, like Montreal Protocol, should be established to hold countries accountable for their actions and provide technical, scientific, and financial support to refugee-receiving country in need. Awareness and sensitisation regarding the issue is must at the root level so everyone does his bit for sustainable development. Adaptation and migration strategies should be adopted.
- Co-operation at global and domestic level is necessary as a system of multilevel governance is required, with a global framework providing support to national and local efforts. Principle of 'common but differentiated responsibilities' should be adopted. International assistance and funding for resettlement programme should be done for long-term purpose. The demand for alliance has been made before by the UN Office for the Coordination of Humanitarian Affairs.⁵⁷

The issue of climate refugee that was once alien to us is now acknowledged by the world. Multiple initiatives to protect refugees have been taken by The UNHCR. "Nansen initiative" was one of them wherein the aim was to protect the people who were displaced across borders due to disasters induced by virtue of climate change.⁵⁸ The steps taken to address this issue are appreciated but are not enough since the crisis is so grave. It is time global community and individual States come together to uphold the basic tenets of human rights. The Chinese President, XI Jinping, rightly said "Tackling climate change is a shared mission for mankind; establishing of an equitable and effective global mechanism on climate change to bring about new international relations featuring win-win cooperation."⁵⁹

⁵⁷ SUSAN F. MARTIN, INTERNATIONAL MIGRATION: EVOLVING TRENDS FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT, 214 (2014).

⁵⁸ Nansen Initiative, *Disaster Induced Cross-Border Displacement*, <https://www.nanseninitiative.org/whatwe-are-learning/>.

⁵⁹ UKReuters, *supra* note 56.

ADDRESSING THE REFUGEE CRISIS WITH THE INTERVENTION OF INTERNATIONAL HUMANITARIAN LAW

- Prutha Bhavsar*

INTRODUCTION

The United Nations High Commissioner for Refugees defines a refugee as “someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group”.¹ Giving credit to this definition, hardly about ten to twenty percent qualify as convention refugees. Others are merely internally displaced persons, economic migrants, etc and thus are compelled to seek refuge elsewhere.²² They cannot be denied of their rights merely on this classification and treated inhumanly. Towards the end of 2017, 68.5 million individuals were forcibly displaced worldwide as a result of persecution, conflict, violence or human rights violations. With an increase of 2.9 million people over the previous year, and the world’s forcibly displaced population remained at a record high including 25.4 million refugees in the world—the highest ever seen; 40 million internally displaced people; and 3.1 million asylum-seekers.³ The reasons for voluntary movement and forced displacement as stated by the United Nations General

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¹ What is a Refugee? Definition and Meaning | USA for UNHCR <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>

² Alfred de Zayas, *Human Rights and Refugees*, 61 *Nordic J. Int'l L.* 253 (1992-1993).

³ Refugee Statistics | USA for UNHCR <https://www.unrefugees.org/refugee-facts/statistics/>

Assembly on September 19, 2016 were that some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses while others do so in response to the adverse effects of climate change or other environmental factors. Most of them migrate or move for a mixture of these reasons.⁴ A substantial number of refugees and migrants lose their lives every year, either by natural hazards or by the use of illegal force. The International Organization for Migration discloses that determining how many die or are killed is a difficult task and further brings to our notice that, at a minimum, 46,000 migrants have lost their lives or have gone missing worldwide since 2000,⁵ and that the: “true number of migrant deaths around the world is surely greater, however. Countless bodies are never found, countless missing persons are never reported; fatal journeys lost from all record”.⁶ No sufficient information regarding the same is procured on the African routes,⁷ and that on the Central American routes is not known either.

The international law necessitates State agents to take “all reasonable precautionary steps to protect life and prevent excessive violence”. States have the responsibility to protect and fulfil the right to life, by exercising due diligence to prevent arbitrary deprivations of life by private actors. Individuals are entitled not to be, under no circumstances be deprived of their life on grounds “impermissible under international law, or under more protective domestic law provisions while ‘deliberate intent’ on the part of the State is not required for a killing or a deprivation of life to be deemed ‘arbitrary’” There have been reports stating that the State agents might be responsible, directly or by means of armed groups or criminal networks, for human rights violations against migrants, including violations of the right to

⁴ UN General Assembly, *New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html> [accessed 16 July 2018].

⁵ IOM, *Behind the Numbers*, 17 December 2013.

⁶ Tara Brian and Frank Laczko, *Fatal Journeys: Identification and Tracing of Dead and Missing Migrants*, vol. 2 (IOM, Geneva, 2016).

⁷ Colin Sollitt, *Forgotten fatalities: the number of migrant deaths before reaching the Mediterranean*, 27 June 2016; Hassène Kassar and Paul Dourgnon, *The big crossing: illegal boat migrants in the Mediterranean*, *European Journal of Public Health*, vol. 24, No. 1 (August 2014).

life. A number of cases will be elaborated further on this situation which clearly indicate how some states and their agents have failed to comply with the international rules and regulations and have gone beyond humane treatment of the migrants.

STATE AND NON - STATE ACTORS CONTRIBUTION TO THE MASS SCALE DEATH OF REFUGEES AND MIGRANTS

States apply certain strong measures to prevent mass migration. They are applying strategy of ‘extraterritoriality’ to prevent migrants from reaching their territory. This includes a number of techniques such as “assisting, funding or training agencies in other countries to arrest, detain, process, rescue or disembark and return refugees or migrants. These policies raise serious concerns when the recipient agencies or States are alleged to be responsible for serious humanrights violations, including violations of the right to life”.⁸ Fatalities as an outcome of excessive use of force by border guards appointed by the state to restrict the inflow of migrants have been said to be taken place in Egypt, Spain, Turkey, Yemen and other countries. Between 2007 and 2010, Egyptian border guards purportedly shot and killed people attempting to leave Egypt in order to reach Israel, and military forces reportedly shot at a boat attempting to leave Yemen, leading to the deaths of a great number of people.⁹ In another scenario, around 15 migrants suffered as a result of firing of rubber bullets and usage of tear gas by the Spanish Guardia Civil in North Africa on 6 February while the migrants were attempting to swim to Ceuta from Morocco. In January 2017, a higher court in Ceuta, due to pressures from the side of the deceased’s families decided to reopen the investigation into the losses of lives, which was closed in 2015.¹⁰

⁸ United Nations, General Assembly, *Unlawful death of Refugees and Migrants : report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions*, A/72/335(15 August 2017).

⁹ See for example: UNHCR, *UNHCR condemns refugee deaths off Yemen, calls for inquiry*, press release, 20 March 2017; *Human Rights Watch, Turkey: border guards kill and injure asylum seekers*, 10 May 2016; UNMSIL and OHCHR, *Detained and dehumanized*; Gramer, R., *Apache Helicopter Guns Down Boat Full of Somali Refugees Fleeing Yemen*, Foreign Policy (The Cable), 17 March 2017.

¹⁰ Juzgado de Primera, Instancia e Instrucción nº 6 (Ceuta), No. 0000123 /2014, 15 October 2016.

Another case is that of the incident that took place in Libya,¹¹ in which the United Nations Support Mission in Libya (UNSMIL) described widespread, gross human rights violations against migrants by armed groups, smugglers and traffickers, private employers, police, the Libyan Coast Guard. The Department for Combating Illegal Migration. UNSMIL had also reported that interceptions of migrant boats by Libyan coast guards have involved actions that may have constituted arbitrary killings.

Some of the incidents get reported like the above ones, some, unfortunately fail to do so due to a wide number of reasons. Even when such incidents are reported, the states justify their usage of power by taking a number of defences such as that of self-defence, protection of their citizens, etc. The states ought to recognise their duties and obligations binding on them and apply them effectively on their border security mechanisms so as to avoid arbitrary killings and further protect the lives of refugees. Guidelines impose that lethal force is only legitimate “to save the life of a person or to protect a person from serious injury” and that such force must be necessary and proportionate and that it cannot be used in a discriminatory manner. Acts such as throwing of stones, running away from capture etc by the refugees should not be reverted with that of killing of the refugees.

INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICATION

There exists a universal obligation to protect life without discrimination. This right exists at all times, irrespective of an armed conflict or any public emergency. The right to life —a norm of *jus cogens*—is protected by international and regional treaties, customary international law and domestic legal systems.¹² Article 6 (1) of the International Covenant on Civil and Political Rights provides that “[e]very human being has the inherent right to

¹¹ United Nations Support Mission in Libya (UNSMIL) and Office of the United Nations High Commissioner for Human Rights (OHCHR), *Detained and dehumanized*, 13 December 2016; see also S/2017/466 (final report of the Panel of Experts on Libya established pursuant to resolution 1973).

¹² United Nations, General Assembly, *Unlawful death of Refugees and Migrants*: Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, A/72/335 (15 August 2017).

life” and that no one “shall be arbitrarily deprived of his life.” Article 26 entitles everyone to protection of this right “without any discrimination”. Owing to the attention to migrants and refugees is the right to freedom of movement. This right is guaranteed in a number of international instruments, namely article 13 of the Universal Declaration of Human Rights, article 12 of the International Covenant on Civil and Political Rights, and article 2 of Protocol 4 to the European Convention on Human Rights, subject to certain limitations on grounds of ordre public, health and morals (ICCPR Art. 12, paragraph 3). There, indubitably, is the Refugee Law which originated in the twentieth century. However, it has a number of limitations which are corrected by the application of International Humanitarian Law like, for example during an armed conflict.¹³ Article 9 of the 1951 Convention concerning to the Status of Refugees permits a Contracting State to take “provisionally measures” against asylum-seekers or refugees “in time of war or other grave and exceptional circumstances”. Unlike other human rights treaties, the 1951 Convention does not contain a set of core rights which cannot be waived in any circumstances leading to a risk of refugee rights being suspended in time of war. Fortunately, international humanitarian law contains important complementary safeguards one of which is that it urges States to show the maximum restraint in application of special measures to protected persons.¹⁴ Also, Article 7 of the 191 convention assumes the status of refugees same as that of an alien. Aliens are the first ones to lose their rights during the time of a war or have their rights reduced. To this contravention is the Article 44 of the Geneva convention, which when interpreted states that the position of a refugee as an alien is largely artificial and ideally should not lead to automatic non-applicability of his or her rights in order for their protection. It is largely known that refugees belonging to a dissident group are not protected by the refugee law or the human rights. There have been convincing arguments that these groups are well protected by the international humanitarian law. One of the main reasons for this is that the international humanitarian law is not treated as a treaty and rather

¹³ Stephane Jaquemet, *The cross-fertilization of international humanitarian law and international refugee law*, IRRC September 2001 Vol. 83

¹⁴ See in particular Part III of the (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

accepted as a customary law having its applicability irrespective of whether the state is a party to any agreement or not. Furthermore, through the application of the international humanitarian law, even an individual can be held liable for violation of rights of refugees. Any breach of this attracts the provisions of the various International statutes and can be addressed as International Tribunals such as the International Criminal Court. These are just a few aspects in which it can be clearly seen how the international humanitarian law acts as a backbone to the refugee law and the human rights.

DEVELOPMENTS TO IMPROVE THE STATUS OF THESE MIGRANTS

International entities have progressed towards working to resolve this issue of international migration since a number of years now. One of the major entity is the United Nations High Commissioner for Refugees. Others include United Nations and its various agencies, especially the Office of the UN High Commissioner for Human Rights,¹⁵ the Special Rapporteur on the Human Rights of Migrants,¹⁶ and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.¹⁷ Two noteworthy initiatives by the UN are the Global Forum on Migration and Development, a “voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations, to advance understanding and cooperation on the mutually reinforcing relationship between migration and development and to foster practical and action-oriented outcomes,”¹⁸ and the Global Migration Group, an UN interagency group currently comprising 21 entities, which was established by the Secretary-General in 2006, and which promotes the wider application of all pertinent norms relating to migration and encourages “the adoption of more coherent, comprehensive and better coordinated approaches to the

¹⁵ U.N., Office of the High Comm'n for Human Rights, <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>

¹⁶ U.N., Office of the U.N. High Comm'r for Human Rights, Special Rapporteur on the Human Rights of Migrants, <http://www2.ohchr.org/english/issues/migration/rapporteur>

¹⁷ U.N., Office of the U.N. High Comm'r for Human Rights, Comm. on Migrant Workers, <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>.

¹⁸ Glob. Forum on Migration and Dev., Background and Objectives, <http://gfmnd.org/process/background>.

issue of international migration.”¹⁹ Other organizations include the International Organization for Migration, which has now become a related organization to the United Nations,²⁰ and the Organization for Economic Cooperation and Development.²¹

In *New York Declaration for Refugees and Migrants*,²² the various member states came together and agreed that they would provide assistance to these migrants along with protection of their human rights whilst following the International Refugee law and International Humanitarian Law. Furthermore, in accordance with their obligations under international law, they are willing to recognise the peculiar needs of all people in vulnerable situations who are traveling within large movements of refugees and migrants such as women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants. They also agreed to “protect the human rights and fundamental freedoms of all refugees and the minor children of their fundamental freedoms of all refugee and migrant children, regardless of their status,” and, referring to Article 3(1) of the Convention on the Rights of the Child, they would “giv[e] primary consideration at all times to the best interest of the child.”²³

There was a situation in Europe in 2015 when the European countries struggled to cope with the influx of migrants. Furious efforts were made to stem the tide of migrants entering Europe which brought together European and African heads of state and government together in order to design and

¹⁹ U.N., Glob. Migration Grp., <http://www.globalmigrationgroup.org/>.

²⁰ INT’L ORG. ON MIGRATION, <http://www.iom.int>; Int’l Org. on Migration, IOM Becomes a Related Organization to the UN (Jul. 25, 2016), <https://www.iom.int/news/iom-becomes-relatedorganization-un>

²¹ ORG. FOR ECON. COOPERATION AND DEV. [OECD], <http://www.oecd.org>.

²² UN General Assembly, *New York Declaration for Refugees and Migrants : resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html> [accessed 16 July 2018].

²³ UNHCR deeply concerned by Hungary plans to detain all asylum seekers, UNHCR (Mar. 7, 2017), <http://www.tinhr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plansdetain-asylum-seekers.html>

build the cooperation to address the new challenges of this migration keeping reference as the earlier of the Rabat and Khartoum processes on migration. This resulted in an outcome of Political Declaration²⁴ and a Plan of Action.²⁵ Another great example is that of the EU-Turkey agreement which was considered a great success. The EU, in 2016 initiated a New Migration Partnership Framework (MPF) is intended at fully integrating migration in the its foreign policy, with the stated objective of “saving lives and breaking the business model of smugglers, preventing illegal migration and enhanc[ing] cooperation on returns and readmission of irregular migrants, as well as stepping up investments in partner countries.”²⁶ Long-term measures of the New MPF include resolving by focusing on sustainable development along looking into the root causes of irregular migration and forced displacement by supporting partner countries’ political, social and economic development. To implement it, the EU and member countries would strengthen the existing EU Emergency Trust Fund for Africa and provide eight billion euros over the period 2016-2020.²⁷

CONCLUSION

Even though there have been constant developments through decades to resolve the issues of migrants and their fatalities with the application of various international laws and treaties, we have seen the International Humanitarian Law make a difference due to its applicability in situations where the other laws have failed. It has become convenient to apply the International Humanitarian law to aid the sufferers and their family in terms of seeking justice and relief as well as giving clear guidelines to the states and the non-state actors which they ought to keep in mind before implementing any force to prevent the refugees from entering their territory. There still are a number of challenges ahead and a long way to go in order to curb the problem in its entirety. However, on the humanitarian basis, there is a hope of its end.

²⁴ Valletta Summit on Migration, Political Declaration (Nov. 11-12, 2015).

²⁵ Valletta Summit on Migration, Action Plan (Nov. 11-12, 2015).

²⁶ European Comm’n, Migration Partnership Framework: A New Approach to Better Manage Migration (June 6, 2016), https://eeas.europa.eu/sites/eeas/files/factsheet_ec_formatmigrationpartnershipframeworkupdate_2.pdf.

²⁷ *Id.*

THE REFUGEE CORRIDOR: AN INSIGHT INTO THE UNDERTAKINGS OF HUMAN SMUGGLING

- SP Shivani* & Sheeba Devi**

ABSTRACT

In Oct., 2013, a boat carrying refugees to Italy sank killing 368 refugees mid-sea. Mid- Apr., 2015, 800 people died in the largest refugee shipwreck on records in the Mediterranean. In Oct., 2015, 200 Asian refugees lost their lives mid- sea, travelling in terrible conditions upon unsafe boats and dinghies. These are people fleeing from war, conflict, persecutions, ethnic cleansing and violations of human rights in their countries. According to the UNHCR 2015 report, about 59,500,000 people were forcibly displaced from their host countries and were rendered stateless. The unfortunate fact remains that these people are guaranteed protection under International Law. The Refugee Convention 1951 and 1967 remains as the light bearer of refugees across the world, of which the core principle is the doctrine of non-refoulement which asserts that a refugee should not be returned to a country where they face serious threats to their life and freedom. But the buckling economies of refugee hosting countries have replaced stricter policies as a result. The lack of legal routes leave no choice for many people but to turn to smugglers at enormous cost and danger to their lives. Before arriving at their destinations, many suffer high levels of exploitation and abuse. These people today remain as mere documentations flashing across

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news channels or the big font headings of newspapers but the arduous and the laborious journey they undertake to the point of being voluntarily smuggled across borders is a story yet to mark the world, which raises the fundamental questions on; the accountability; the need for regulations and imperatively the legitimacy. And that is exactly what we hope to uncover and present in this paper; an insight into the undertakings of human smuggling across the world.

INTRODUCTION

If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica- to gross and systematic violations of human rights that offend every precept of our common humanity? -Kofi Annan.

This quote sparked a debate resulting in a unanimous adoption of a political commitment, the *R2P* at the 2005 World Summit. However, this was not the first attempt to reach a world consensus on solving the problem of refugee crisis. Nonetheless, the first International codification that acknowledged the existence of refugees was the 1951 Refugee Convention. This Convention hits home with the *Doctrine of non-refoulement*¹ which cements the right of the refugees. The rights have also been highlighted in International Covenants such as the UDHR,² ICCPR³ and ECHR⁴. The focal point of the refugee sea corridor remains the interception of national and humanitarian search and rescues in high seas. The International Customary law of the sea instills the obligation on the coastal states to receive such refugees rescued. This has been bonded further by the judgment of *Hisri Jaman vs. Italy*⁵ in which the Court upheld the doctrine of non-refoulement. Yet incidents like *Tampa* and *Pinar* occurs every day. The recent refusal of Italy to a rescue ship with 629 migrants and refugees on 13th Jun., 2018 urges the world on the need of immediate consensus. And that is what this paper will be, a study inclusive of

¹ Article 33(1) of The 1951 Refugee Convention.

² Article 13, Article 14 of The Universal Declaration of Human Rights, 1948.

³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 UNTS 171.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov., 1950, 213 UNTS 221.

⁵ ECHR, *Hisri Jamaa and others v. Italy*, (Appl.No.27765/09), Grand Chamber Judgment of 23 Feb., 2012.

a close examination of the sea routes used by refugees and migrants, the commercialisation of human smuggling, trafficking involved and conclusive suggestions to this catastrophe.

LEGAL FRAMEWORK

Smuggling and trafficking of humans via sea, a crime of transnational order has its legal provisions under the various laws of the sea and transnational crimes. However, they fall short of their legal obligation as they orient in the point of migrants only. The UNCLOS⁶ instils the obligation to render assistance to persons in distress, to proceed with the rescue of persons and also to provide assistance to all personnel in the ship after collision.⁷ It also advocates for the right to visit where there is reasonable ground of suspicion that the ship is engaged in organised crime.⁸

The Protocol against smuggling of migrants by land, sea, and air, catechizes the principle to acquire assistance and to suppress vessels of suspicious nature. If a vessel with the flag of a particular state is found, smuggling migrants, can with that state's permission, board and search the vessel with the evidence found.⁹ SAR is the poignant legal framework in maritime search and rescue. It provides the mandated meaning to rescue and divides the whole oceanic zone into 13 SAR areas which are controlled by the concerned countries. Here, SAR states that a place of safety is not the vessel carrying the SAR operations but that of the nearest stable port. It calls for coordinated search and rescue operations thus tightening the legal obligation of the states. Complementing these frameworks, more bilateral and multilateral treaties have been signed to monitor the crisis.

THE REFUGEE SEA CORRIDORS:

1. THE CENTRAL MEDITERRANEAN ROUTE

The central Mediterranean route is one of the most active and dangerous routes, accounting for the largest number of people crossing the

⁶ United Nations Convention on the Law of the Sea, 1982.

⁷ Article 98-UNCLOS,1982.

⁸ Article 110- UNCLOS ,1982.

⁹ Article 8(2) The Protocol against smuggling of migrants by land, sea, and air.

Mediterranean. It includes both refugees and migrants from West and North Africa, as well as the Middle Eastern countries. Nigeria tops the African countries with 18,370 accounted people and Morocco at the last with 6,128 people last year. Around 2,813 people died in 2017 due to capsizing of unseaworthy vessels. From January 2017 to March 2018, around 124,711 people have crossed the Mediterranean to Italy, of which 15,779 were unaccompanied and separated children.¹⁰ People fleeing the African countries first come under the smuggling networks, North of Nigeria as migrants after that are considered illegal. Thus people are subjected to exploitation of the highest order.¹¹ Libya remains the hotspot for smugglers operating the Central Mediterranean route. Ever since the tightening of the Libyan coast, Tunisia has also become a smuggling base of its own. Since 2015, 154,000 migrants and refugees have entered Europe via the central Mediterranean, an increase of 400% over 2014 and more than 1000% over 2012.¹²

2. THE WESTERN MEDITERRANEAN ROUTE

The western Mediterranean route connects Morocco to Spain. The trip to Spain takes place along two different routes i.e. from Tangier to Tarifa and from Melilla to Ceuta. To reach Morocco, the people have to go through the smuggling networks established in Agadez and Gao. And on arriving, they are cramped into small wooden or rubber floats and sent off to Spain.¹³ The traffic in this route reached its peak in 2016, after the other routes have been shut down. Before the EU-Turkey deal 7,043 people used this route approximately in the first five months of 2016 while the same period in 2017 saw around 156,267 people¹⁴. Another reason for the increase in traffic is the slave trade taking place in Libya currently. To take this year into account,

¹⁰ Reliefweb, <http://reliefweb.int/sites/reliefweb.int/files/resources/2018-03%2008%context20%15> July 15:32.

¹¹ UNHCR, the UN refugee agency, Libya: Refugees and migrants held captive by smugglers in deplorable conditions-15-07-2018-15:35AM. <http://www.unhcr.org/news/briefing/2017/10/59e5c7a24/libya-refugees-migrants-held-captive-smugglers-deplorable-conditions.html>.

¹² Eldis, Human Trafficking and smuggling on the Horn of Africa-Central Mediterranean-15-07-2018-15:19-www.eldis.org/document/A700266.

¹³ The Sydney morning Herald. African migrants brave new route to Europe via Morocco-. 2:06 AM July 18, 2018. www.smh.com.au/world/europe/african-migrants-brave-new-route-to-europe-via-morocco-20180607-p4zkoy.html.

¹⁴ Migrants' new route to Europe 2:10 PM July 18, 2018, <http://www.dailymail.co.uk/news/article-4561704/How-migrants-using-new-route-Morocco-Spain.html>.

240 people have died at sea till now trying to cross the Mediterranean, showing a 400% increase in refugee and migrant traffic.

3. THE EASTERN MEDITERRANEAN ROUTE

In 2015, more than a million refugees crossed into Europe. The volatile situations in the Middle-East and Africa and the promise of a safe life in Europe cemented this business. Bodrum, Izmir, Cesme, Dikilti and Ayvalik of Turkey served as the smuggling points from the middle-east from where they are shipped off to Greek Islands of Kos, Samos, Chios and Lesbos¹⁵. An unprecedented amount exceeding 857,000 undocumented migrants and refugees were detected along the route in 2013. Greece before the EU-turkey deal, granted indiscriminate transit permits, which allows their journey towards their desired destination. Moreover the journey across the Aegean which is the least serious of all sea routes amounting for 2 hours only making this the idea route. Under the weight of the new deal, arrivals plummeted from 885,400 to 182,834 from 2015 to 2016. Thus the closure of this route paved way for the most dangerous smuggling route via sea ever.¹⁶

4. THE BLACK SEA ROUTE

The Black Sea route connecting Turkey to Romania has proved more deadly than any of the sea crossings¹⁷. This has brought upon a new influx population of refugees into Romania which was isolated from the crisis than the rest of the European Coastal States. Zonguldak, a city in the northern coast of Turkey is the assimilation point of the refugees. This route was earlier used in Soviet time to ply illicit goods across countries. The infamously of this route is due to the severe bad condition of the weather which changes frequently. With the closure of the Aegean route, there was a sudden spurt of

¹⁵ Barillo centre for food and migration. Routes of trans- Mediterranean migration-1:35PM-17-07-2018. <https://www.foodandmigration.com/en/chapters/routes-of-trans-mediterranean-migration/>.

¹⁶ Vice channels. The Sophisticated Smuggling Routes Bringing Refugees into Europe -3:00AM-18-07-2018-www.vice.com/en_us/article/ae5n4/the-sophisticated-smuggling-routes-bringing-refugees-into-greece.html.

¹⁷ The guardian Smugglers make test runs with migrants across deadly Black Sea route-06:10AM-20-07-2017. <https://www.theguardian.com/global-development/2017/sep/12/smugglers-make-test-runs-with-migrants-across-even-more-deadly-black-sea-route-romania>.

refugees using the Black sea. In 2014, 430 people arrived via Black sea, in 2015, 68 people and in 2016, it was only one. However, in 2017, 4600 people tried to cross the sea.

5. THE SOUTH EAST ASIAN ROUTE

The once functioning south east Asian trade route has now been activated with the dissent of the Rohingya's from Myanmar. The most prominent route is that of the crossing of the Naf river between Myanmar and Bangladesh spanning across 5.7 kilometres. The Rohingyas from Arakon district, Myanmar had to go through an excruciating journey to reach the Naf. Mohammed Yusuf, a refugee in Chennai said, "The military had planted bombs across the jungle and the river banks. My relative had lost her legs after stepping on a mine when she was climbing the mountains to reach the river"¹⁸. The boats are set sail only at night. Once they reach Bangladesh, they are smuggled to various parts of India. With the crisis stirring in Bangladesh, the smugglers started landing boats at the Shah Porir Dip¹⁹, a remote island of Bangladesh which increased capsizing. The crisis has made the smuggling networks resort to the old south East Asian routes connecting Thailand, Malaysia, Indonesia and Australia.

THE SMUGGLING NETWORK

On 9th Apr., 2016, a fishing boat carrying hundreds of African refugees capsized off the coast of Europe killing 500 people. On May, 19, an Egyptian Air Flight MS804 crashed into the Mediterranean killing 66 people. Within hours of the crash, Egypt dispatched warships and planes to search for the survivors²⁰ but still today no such investigation has taken place for the sunk fishing boat. Today human smuggling is viewed as a business with an annual revenue of 26 billion\$, due to this very indifference, where the price per person ranges from 3,000 to 10,000€, depending upon the sophistication of

¹⁸ This was an exclusive interview done by us, for more information kindly contact us at sheebadevi13@gmail.com or spshivani98@gmail.com .

¹⁹ <https://thewire.in/external-affairs/rohingya-escape-myanmar-land-river-sea-6:14AM-20-07-2018>.

²⁰ <https://www.reuters.com/article/us-europe-migrants-egypt-ship-specialrep-idUSKBN13V1DE-5:36AM-20-07-2018>.

these networks. No matter the offensive tactics, these smugglers as well as their routes and operations remain anonymous across continents, always at a continuous revision. A report by MEDMIG²¹ study revealed, out of 500 migrants interviewed, everyone had hired a smuggler at some point in his or her journey to Europe. 1/10th participants applied for travel visas but was refused.²² Desperation being the utility aspect of this business must be understood to tackle this problem. In this paper, the four push factors of human smuggling have been recognized (i.e).

- A constant fear for death in their home countries.
- Lack of legal entities
- Lengthy relocation and asylum process.
- Deteriorating refugee camp conditions.

The Protocol against smuggling of migrants by Land, Sea and Air defines ‘*smuggling of migrants*’ as an act done to obtain material and financial benefits by illiciting illegal crossings of state borders²³. The smuggling chain is a long process beginning from the point of contact, called an agent working at grass root levels in the society. Once the point of contact recruits the person, he is then referred further up the network till the point of departure.

Moreover, nowadays, an entire route is operated by multiple networks at the same time.²⁴ Usually, once the point of departure is declared, those boarding the journey are hoarded in nearby lodgings of the port. The MEDMIG²⁵ also concluded that it is not just the criminal groups involved but that of border patrols, policemen and statesmen. A lady from Myanmar residing in Chennai’s refugee camp said , “The price for one person to cross the Naf river was between 8000 to 9000 rupees which varies based on the age and gender”²⁶. Only rarely are these boats set sail with a guide from the

²¹ <http://www.medmig.info-19:45AM-20-07-2018>.

²² <https://www.dw.com/en/refugees-forced-to-depend-on-human-smugglers-study/a-36266888-5:36AM-20-07-2018>.

²³ Article 3(a) Protocol smuggling of migrants by Land, Sea and Air, 2000.

²⁴ <https://www.cogitatiopress.com/socialinclusion/article/viewFile/917/917-5;48AM-20-07-2018>.

²⁵ <http://www.medmig.info-19:45AM-20-07-2018>.

²⁶ This was an exclusive interview done by us, for more information kindly contact us at sheebadevi13@gmail.com or spshivani98@gmail.com.

smuggling network. Sitna*, an Iraqi refugee who set sail from Turkey told, "The journey took three nights and two days because we went wrong. We were going to Russia."²⁷

The smuggling networks out of Yemen have now set the trend of dumping those on board into the sea for fear of getting caught. More than millions of people have died enroute in the last five years. In spite of all the tireless endeavours, we still are left with scattered and incompetent data. The indifference of all the state and non state actors working towards stability in the refugee world is obvious in the fact that rarely do these entities acknowledge the difference between the migrants and refugees smuggled. Migrant smuggling is quite a legal affair that needs an iron hand, but the lack of acquiescence in realising the desperate reality of the refugees is sadly a neglectful action on our part and cataloguing them under an umbrella term of migrants is unindustrious for strife towards international stability.

RISKS OF TRAFFICKING

Another collateral aspect of human smuggling is the underlined tone of trafficking. According to The Trafficking Protocol,²⁸ *Trafficking involves recruitment, transportation, transfer, harbouring or receipt of persons using threat coercion, fraud or exploitation of vulnerability*. The provision also points out the forms of exploitation as sexual, forced labour, slavery, servitude or removal of organs. The most vulnerable groups are refugees as a consequence of their stateless status among whom women, youth and elderly are more prone to exploitation. According to a UNICEF report in 2017, more than 3/4th of the youth travelling the central Mediterranean path reported, direct experiences of exploitation and abusive practices²⁹

The increasing instability in North and West Africa have only paved way for a strong trafficking establishment. The transit countries of Nigeria, Gao and especially that of Libya have become infamous for their barbarity.

²⁷ <https://www.theguardian.com/global-development/2017/sep/12/smugglers-make-test-runs-with-migrants-across-even-more-deadly-black-sea-route-romania06:08AM-20-07-2018>.

²⁸ Article 3(a) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Children, 2000.

²⁹ <https://news-decoder.com/2017/09/refugees-exploitation-trafficking/-6:00 AM-20-07-2018>.

Hundreds of African refugees are being sold in “slave market” across Libya. The town of Shebha in Libya holds one of the largest prostitution rings of refugees.³⁰ Bodies of dead refugees are dumped in hundreds nameless across the African desert. Sometimes trafficking becomes a choice of survival to those who are enveloped by economic vulnerability³¹ and the externalization policies of the countries only boosts the numbers for these trafficking rings. The year 2013-2014 saw a staggering number 15,846 victims of trafficking among which 2/3 were trafficked into sex work, 1/5 into forced labour and the rest faced an equally grim catalogue of exploitation³². And when such incidents come under the purview of concerned authorities, it is sad that it is not the persons that are recognized but the crime of “illegal migrants”.

CONCLUSION

Though Human Right remains the soul of International law, the world has witnessed repeated defiance by states on accounts of sovereignty and national security. However, it is imperative to understand that the refugee crisis is not only a cause of international instability but also a consequence of it. One of the main lacunas in the legislations enacted is that they are “migrant” oriented rather than refugee oriented. These laws immediately term them as “illegal migrants” and criminalise their very existence. It is accepted that to differentiate between migrants and refugees is quite an ill fated task but to completely forgo the refugee aspect is a legal injustice. Thus it is indispensable to enact laws that effectively reflect the situations of the refugees with the active participation of refugee agencies in their drafting. Another facet to solve this problem is for the United Nations to take a more proactive role with their peace keeping forces and agencies. The UN on its humanitarian and human rights stand can secure border passages with nations near the place of conflict of similar ethnicity so as to prevent later xenophobic reactions. If such channels come into operation with the help of the UN peace keeping forces, the smuggling network will see a considerable

³⁰ <https://mg.co.za/article/2017-11-29-a-tale-of-human-traffickers-and-libyan-slave-markets-06:05AM-20-07-2018>.

³¹ <https://www.theguardian.com/world/2015/apr/24/libyas-people-smugglers-how-will-they-catch-us-theyll-soon-move-on-05:43AM-20-07-2018>.

³² <https://www.theguardian.com/world/2016/may/19/human-traffickers-using-migration-crisis-to-force-more-people-into-slavery-06:07AM-20-07-2018>.

downfall. It is also time the UN takes a determined stand in the Security Council against the supply of arms and ammunitions to parties of civil wars. For any further inaction in addressing the core of the problem will only criminalise this as passive genocide on part of our ignorance and dissonance.

