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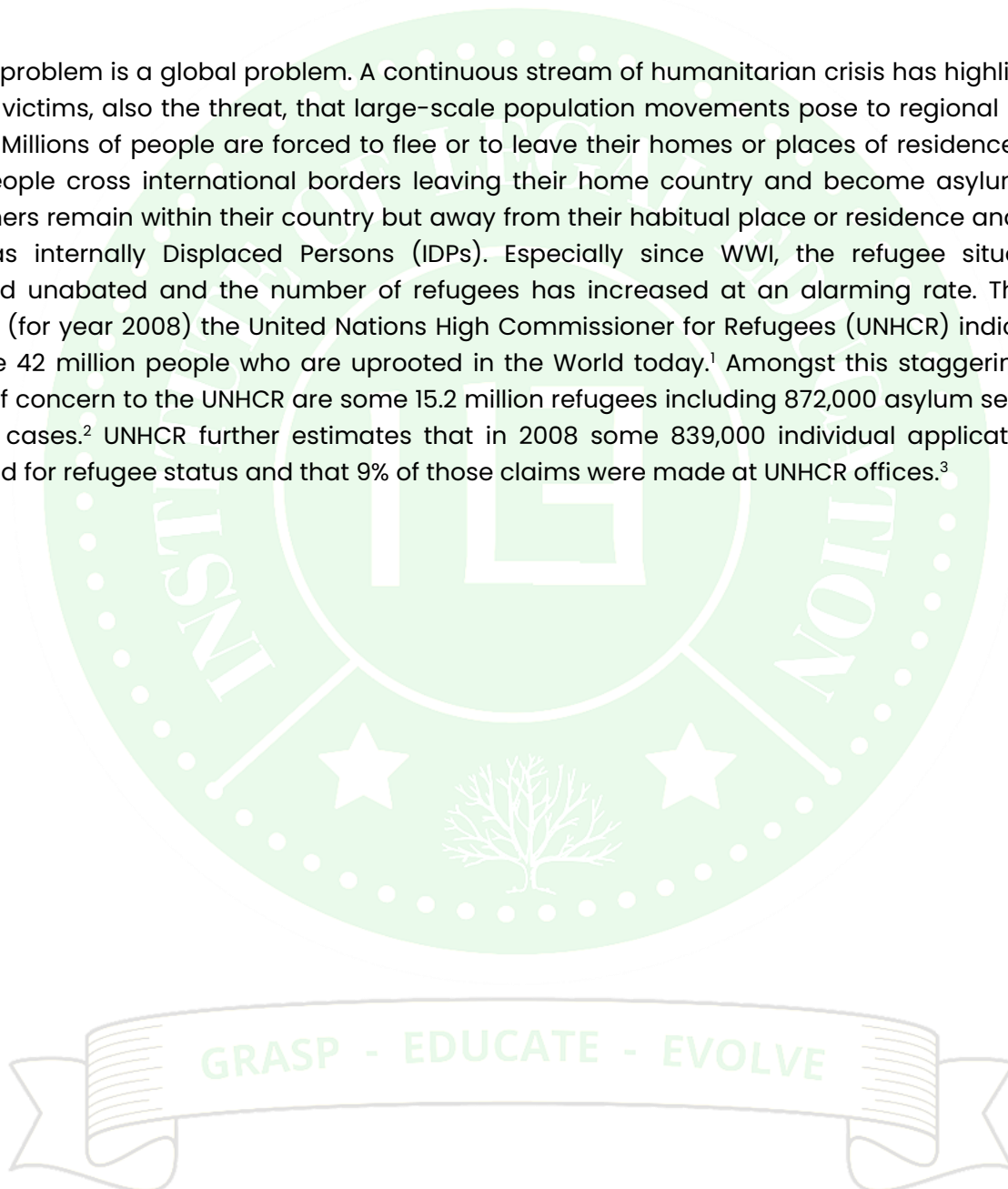


ANALYSIS OF REFUGEE LAWS WITH REFERENCE TO INTERNATIONAL CONVENTIONS

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Refugee problem is a global problem. A continuous stream of humanitarian crisis has highlighted the plight of victims, also the threat, that large-scale population movements pose to regional security & stability. Millions of people are forced to flee or to leave their homes or places of residence. Many of these people cross international borders leaving their home country and become asylum seekers while others remain within their country but away from their habitual place or residence and become known as internally Displaced Persons (IDPs). Especially since WWI, the refugee situation has continued unabated and the number of refugees has increased at an alarming rate. The annual report of (for year 2008) the United Nations High Commissioner for Refugees (UNHCR) indicates that there are 42 million people who are uprooted in the World today.¹ Amongst this staggering total of people of concern to the UNHCR are some 15.2 million refugees including 872,000 asylum seekers with pending cases.² UNHCR further estimates that in 2008 some 839,000 individual applications were submitted for refugee status and that 9% of those claims were made at UNHCR offices.³



¹ UNHCR 2008 Global Trends : Refugees, Asylum seekers, Returnees, Internally Displaced and Stateless Persons, 16 June, 2009, p. 2, "2008 in Review - Statistics at a Glance", www.unhcr.org/4a375c426.pdf.(accessed August 10, 2009) UNHCR.

² Ibid. Of the 15.2 million fall under the UNHCR's mandate and some 4.7 million Palestinian refugees are the responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

³ UNHCR 2008 Global Trends, op. cit. Of the 15.2 million fall under the UNHCR's mandate and some 4.7 million Palestinian refugees are the responsibility of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).

It is worth noting that the number of asylum seekers making individual claims for refugee status in 2008 rose for a 2nd year in row, up by 28%, and that the Republic of South Africa was the largest single recipient of individual refugee status claims estimated at an incredible number of about 207,200 applications. The United States of America came in a distant second, with 49,600 refugee status claims, a mere quarter of the number that were received by South Africa. France, with 35,400 claims, and Sudan, with 35,100 claims, came in third and fourth respectively.⁴ It is also interesting to point out that the Federal Republic of Germany was the only country in the Global North to be listed as a major refugee - hosting country in 2008 with 582,700 refugees.⁵ The number of refugees in the world today is truly astounding⁶ as are challenges for those who are seeking to address the plight of all persons who are fleeing severe affronts to their most fundamental human right and dignity as human beings.

Throughout the World & over the centuries, societies have welcomed frightened, weary strangers, the victims of persecution and violence. At the start of the 21st century, protecting refugees means maintaining international solidarity in the spirit of Global Village Doctrine, while finding answers to the challenges confronting the international system that was created to do just that. Refugee protection is an international obligation of States in International law on account of their membership to the United Nations and signature or accession to Refugees Instruments. Refugee law grants protection to a subset of persons who have fled on account of series of,

and continued, human rights abuses. This way, Refugee law provides surrogate national protection to individuals when their own States have failed to fulfil fundamental obligations.

Refugee protection in international laws is provided by a complex network of national, regional and international laws. The principal legal instruments at the international level are the 1951 United Nations Convention on the Status of Refugees (1951 Convention) and the 1967 Protocol relating to the Status of Refugees (1967 Protocol). These instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of refugees. The 1951 Convention contains the most widely accepted definition of the term 'refugee'. It also incorporates the principle of non-refoulement as a cardinal principle of international law and outlines the minimum standard of treatment of refugees.

The key feature of the 1967 Protocol relating to the Status of Refugees was that it removed the temporal and geographical limitations of the 1951 Convention and made it truly universal.

For more than half a century it has clearly showed its adaptability to changing factual circumstances. Beginning with the European refugees from World War II, the Convention has successfully created the framework for the protection of refugees from persecution whether from repressive regimes, or from upheaval caused by wars, or the number of ethnic conflicts of the post - Cold War era.⁷

There are many long-standing refugee situations resulting from conflicts which have not been solved with the end of the Cold War and have taken on a life of their own, often fuelled by the plunder of valuable natural resources and/or illicit trade in small arms.⁸

⁴ UNHCR, "UNHCR annual report shows 42 million people uprooted worldwide," Press Release June 16, 2009, [www.unhcr.org/egi-bin/textis/vtx/search?page=search&docid=4a2fd52412d&query=42 Million Uprooted # hit 2](http://www.unhcr.org/egi-bin/textis/vtx/search?page=search&docid=4a2fd52412d&query=42%20Million%20Uprooted%20#hit2). (accessed August 10, 2009).

⁵ Ibid. The others listed by the UNHCR are Pakistan (1.8 million); Syria (1.1 million); Iran (980,000); Jordan (500,400); Chad (330,500); Tanzania (321,900) and Kenya (320,600).

⁶ Gil Loescher, writing in the early 1950s, observed that : "Over the past decade and a half, the number of refugees in the world has increased alarmingly. The total rose from 2.8 million in 1976 to 8.2 million in 1980 to nearly 18 million at the end of 1992. It is likely that the number will exceed 20 million during this decade. In addition, at least another 20 million people are displaced inside their own country." Beyond Charity : International Cooperation and the Global Refugee Crisis. (Oxford University Press, 1993), p. 5.

⁷ UNHCR, The State of the World's Refugees (Oxford University Press, 2000), p. 10.

⁸ UN General Assembly Resolution on the role of diamonds in fuelling conflict, UN doc. A/RES/55/56, 1 Dec. 2000; also <http://www.un.org/peace/africa/Diamond.html>.

Endemic instability and insecurity often accompany displacement within and from failed States or States where Central Government only controls part of the territory hardly offering conditions for safe return. The displacement resulting from such situations can pose particular problems to host States, especially if they provide asylum to large refugee communities, sometimes for decades. There is thus a real challenge as to how best to share responsibilities so as to ease the burden on any one State unable to shoulder it entirely. There is also a need to put in place a burden sharing - not burden shifting, mechanism which can trigger timely responsibility sharing in any given situation.

The degree of collaboration between immigration and asylum authorities and the intelligence and criminal law enforcement branches has also been stepped up.

The growth of irregular migration, including smuggling and trafficking of people, presents a further challenge. These developments are in part a consequence of globalization, which has facilitated and strengthened transport and communication network and raised expectations. In part, the increase in irregular migration can also be viewed as a result of restrictive immigration policies in many industrialized States, which oblige economic migrants and refugees alike to use irregular channels, whether they are in search of a better life or, more fundamentally, freedom from persecution, Visa requirements, carrier sanctions, readmission agreements, the posting of immigration officers abroad and other similar measures are all migration control tools which require proper protection safeguards and procedures if refugees are to be able to reach safely.

More specifically, in terms of the interpretation of 1951 Convention itself, some States use various complementary forms of protection, which have had the effect in some instances of diverting Convention refugees to lesser forms of protection.

This in turn raises questions concerning the interrelationship between international refugee law on the one hand and international humanitarian and human rights law on the other. Asylum systems of many States face significant challenges in ensuring proper balance between the need for fairness and for efficiency. Dilemmas abound. How can notions such as safe third countries, and safe countries of origin, which have been introduced in many jurisdictions, be implemented both efficiently and in a protection sensitive manner? Are the victims of violence and persecution by non-State actors - militias, paramilitary groups separatist rebels, mafia, violent husbands - entitled to protection to another State as a refugee? To what extent can the notion of 'persecution' and the 'particular social group' ground in 1951 Convention refugee definition reasonably be extended to protect women from gender related violence, not least rape, and other harmful traditional practices, trafficking or domestic violence? If only part of the State of origin is affected by conflict, to what extent are individuals able to relocate to other areas inside that State and how does it affect their claim for refugee protection? What bearing do other Conventions such as 1989 Convention on the Rights of Child have on asylum procedures and treatment of refugee children?

Differing approaches within regions have also led States to develop regionally specific legal frameworks for handling refugee claims. Such endeavours can strengthen refugee protection but need at the same time to ensure consistency with the 1951 Convention regime and thereby promote its 'full and inclusive application'. Concepts, such as the safe country of origin or safe third country notions, developed in some regions are sometimes also exported to other parts of the world, which may receive far fewer claims or have less well-developed protection capacities.

Ultimately, the full realisation of the international protection regime with the 1951 Convention at its heart hinges on the ability of the international community to find durable

solutions to forced displacement situations, whether these be voluntary repatriation, resettlement in third country, local integration, or combination thereof. The challenge is how to realize solutions for individuals, as well as for refugee groups which are both lasting and protection based.

In short, the 1951 Convention and the 1967 Protocol are global instruments setting out the core principles on which the international protection of refugees is built. They have a legal, political and ethical significance that goes well beyond their specific terms. Reinforcing the Convention as the foundation of the refugee protection regime is a common concern. The Office of the United Nations High Commissioner for Refugees (UNHCR), as the guardian of the Convention, has a particular role to play, but this is task which requires the commitment of all actors concerned.

One of the main goals of this thesis is not only to find and explain, from various perspectives and theoretical perspectives, a number of important issues in international refugee law, but also to identify key principles or areas in international refugee law that need further development. The existing vacuum between international refugee protection regime and ground realities has tempted the researcher to opt for this topic. Materials for the study have been collected from the primary sources where available, and some secondary sources. Research methods employed here are basically descriptive, analytical and evaluative and a sincere attempt has been made to suggest the ways and means to fill the gap.

A short list of bibliography has been mentioned at the end of the thesis. Presently, refugees are one of the most vulnerable groups in the World community. The United Nations is continuously searching for more effective ways to address the refugee situation. The term 'refugee' demands an assumption that the person concerned is worthy of protection and assistance. For providing effective protection, terms must be specifically defined. In regular

meaning, the term refugee may mean a person who seeks to escape his home for which he himself is not responsible. The reasons for fleeing of a person may be many, such as, fleeing from oppression, threat to life, persecution, abysmal poverty, war or civil unrest, natural disasters such as floods, draughts, earthquakes et cetera.

Since refugees have no support from their country of origin, the international community must step in to provide support and assistance.

The 1951 Convention was drawn up in parallel with the creation of United Nations High Commissioner for Refugees (UNHCR) and was originally conferred to people who had become refugees as result of events that took place before January 1, 1951 and signatories States were given the option of limiting its geographical application to Europe. The movement of refugees following events after 1951 reflected that refugee problem was not confined to only the World War II and its aftermath. It was felt necessary that the Convention may be adopted and made applicable to new refugee situations. In order to widen the scope of the 1951 Convention a Protocol Relating to the Status of Refugees was concluded in 1967 which under para 2 of Article 1 omitted the expression 'as a result of events occurring before January 1, 1951' and added the words 'as a result of such events'. It has updated the 1951 Convention by removing the temporal and geographical limitations, thus making the Convention truly universal.

The criterion for the definition of a refugee in 1951 Convention are too restrictive and product of Cold War and Euro-Centric. Although a Protocol was adopted in 1967 which updated the Convention by removing the temporal and geographical limitations but Protocol failed to review the substantive content of the definition it embraced. The internationally accepted refugee definition has proven inadequate to deal with the problems posed by the millions of externally displaced persons in the Third World.

There was consensus that the definition in the

1951 Convention was not sufficiently broad to cover all situations of African refugees. But this is a Declaration and has only persuasive value at international level. In so far as Asian countries are concerned, mention may be made of principles adopted by Asian-African Legal Consultative Committee (AALCC) in 1966. These principles are also not binding and showed a little impact in the region.

Arab expert meeting in Cairo in November 1992 adopted a Declaration on the Protection of Refugees and Displaced Persons in the Arab World.

There is another plight of the refugee. Statelessness is a condition in which a person cannot claim citizenship and live productively without legal protection in a country. Initially, there was no distinction between refugees and stateless persons, and international protection could only be provided if they met definition of a refugee. No doubt, there is a Convention on the Reduction of Statelessness adopted in 1961, but many countries are not co-operating, resulting in frustration at international level.

Internally Displaced Persons (IDPs) are another group which is different from refugees as they are displaced from one area to another within borders of their own country. As IDPs do not cross an international border, refugee law is not applicable to them but refugee law principles may be applied by analogy in favour of IDPs.

In general, economic migrants are not considered refugees because they do not meet the definition of a refugee under the 1951 Convention. But in some cases, the distinction is not clear. If a country adopts economic measures that affect the life of a person because of his race, religion or a political cause, and destroys the economic life of a social group, including these people that can be considered as a 'flight' when leaving the country.

The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists,

both elements should be taken into account. Fear must be reasonable. The House of Lords decision in *R.V. Secretary of State ex-parte Sivakumaran* (1988) was one of a number of landmark decisions within jurisdiction of Western States which clearly favours evidence extraneous to the refugee and established that whether a fear was well-founded was to be determined largely on the basis of the objective circumstances relevant to the refugee's claim.

The use of human rights standard for determining the existence of persecution is not accepted by all. The most conservative view adopted by Karl Zink is that only a narrow subset of human rights violations can constitute persecution, namely, deprivation of life or physical freedom. This position is illogically tied to a narrow and literal reading of Article 33 of the Convention, which prohibits the return of a refugee to 'the frontier of territories where his life or freedom would be threatened ...'. Atle Grahl-Madsen adopts only a slightly more liberal view, arguing without explanation that restriction or denial of such rights as freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and association are outside the ambit of persecution.

It is submitted that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard.

The term 'race' in context of 1951 Convention definition of refugee should be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage. The term 'religion' should be taken in various forms, eg. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belonging to a particular religious community.

The term 'nationality' in this context is not to be

understood only as 'citizen'. It includes the persons of a particular ethnic, religious, cultural and linguistic communities. The term 'membership of a particular social group' is a group of persons who share a common characteristic other than their risk of being persecuted. The gender should be allowed to form a basis for the formation of a social group.

The 1951 Convention has defined the term 'refugee' but provided no guidance for determination of refugee status and left to the States as choice of means. Determination of refugee status is declaratory rather than constitutive. In case of large number of asylum seekers, establishing a well-founded fear of persecution on case-by-case basis can be impossible and impractical. A prima-facie or group determination may be called for in the initial stages of any movement and protection and material assistance should be made as a first priority. UNHCR Excom Conclusion No. 8 (XXVIII) of 1977 recommendations should be observed by States in determination of refugee status.

Determination of refugee status of unaccompanied children is very difficult. The 1951 Convention and 1967 Protocol relating to the Status of Refugees define a refugee regardless of age and made no special provision for the status of refugee children.

Determination of status of unaccompanied children should be guided by the following:

(a) The question of how to determine whether an unaccompanied refugee child qualifies for refugee status will depend on the child's degree of mental development and maturity. An expert with sufficient knowledge of the psychological, emotional and physical development and behaviour of children should be called upon to make necessary assessment.

(b) Where it is decided that child is mature enough to have and to express a well-founded fear of persecution, the case may be treated in a manner similar to that of an adult.

(c) The problem of 'proof' is great in every

refugee status determination. It is most complex in the case of children. For this reason, the decision on child's refugee status calls for a liberal application of the principle of the benefit of doubt.

Article 1(F) of the 1951 Convention includes a number of exclusion clauses. The exclusion clauses enumerated in Article 1(F) of the 1951 Convention operate to disqualify persons from the benefits of refugee status by reason of serious transgression committed, in principle, prior to seeking asylum. The idea of an individual not deserving protection as a refugee is related to the intrinsic links between idea of humanity, equity, and the concept of refugee. It is submitted that the exclusion clauses must be interpreted within narrow limits and in a manner which does not undermine the integrity of international protection. International instruments not only define refugee but also deal with the situations in which refugee status benefit shall be terminated on the grounds of voluntary acts of individual, protection accorded by other States or international agency and in case of criminals and terrorists. It is pertinent to mention here that the 1951 Convention did not explicitly mention 'terrorist' word under Article 1(F) but must be understood in the term 'a crime against humanity'.

The exclusion clauses apply in principle to minors, but only if they have reached the age of criminal responsibility and possess the mental capacity to be held responsible for the crime in question. Seeing the vulnerability of children, great care should be exercised in considering exclusion with respect to a minor and defences such as duress should in particular be examined carefully. Where UNHCR conducts refugee status determination under its mandate, all such cases should be referred to Headquarters before a final decision is made.

Refugees are helpless and do not find protection of their national State. So, there is urgent need to provide international protection and assistance to these people. The modern concept of protection to refugees at

international level dates back 1920s. The decision of International Committee of the Red Cross (ICRC) to address the refugee problem strictly on humanitarian grounds was accepted by Council of League of Nations and Council decided on 27th June 1921 to appoint a High Commissioner for Russian Refugees, whose duty would be to co-ordinate the assistance given to those refugees by various countries. Dr. Fridtjof Nansen was appointed High Commissioner and task entrusted was to define the legal status of refugees, to organize their repatriation or their allocation to the various countries and to take relief work amongst them with the aid of philanthropic societies.

After the Second World War the United Nations replaced the League of Nations, on October 24, 1945. The General Assembly, in a resolution adopted at its first session in the beginning of 1946 stressed that no refugee or displaced person who had expressed valid objection to returning to his country of origin should be compelled to do so. The United Nations Relief and Rehabilitation Agency (UNRAA) was established on November 9, 1943 to address the refugee problem. The UNRAA assisted 7 million people, both refugees and other groups to 'repatriate' to their homes. The International Refugee Organization (IRO) was established in 1946 in place of UNRAA by the Economic and Social Council of United Nations (ECOSOC). The IRO's main objective, like its predecessor UNRAA, was repatriation but due to Cold War it took different direction. Instead of repatriating the majority of civilians, the IRO resettled more than one million refugees in countries around the world. The Office of the United Nations High Commissioner for Refugees (UNHCR) replaced the IRO on January 1951. The Office was established as a humanitarian and non-political subsidiary organ of the General Assembly under Article 22 of the Charter.