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CONVENTION ON THE STATUS OF REFUGEES 1951: MORE EUROCENTRIC THAN UNIVERSAL

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Abstract

The Refugee Convention 1951 is supposed to be a mechanism through which certain Human Rights of all persecuted people are ensured. But, scholarships available on the subject reveals how European states drafted the Convention in order to deal with the refugee crisis exited at that time in Europe. They left behind all other refugee crisis happening at that time around the globe. It is extremely surprising that European refugees were considered fundamentally different from Asian Refugees and solution for the refugee crisis beyond Europe required outside of the Refugee Convention 1951. The Definition of Refugee had specific link with WWII European crisis which was later changed. In this backdrop, firstly this article explores the context of the Refugee Convention. It will dig out how this convention aid the sustenance of the racial segregation. This racially biased approach led a peculiar wording of the definition of Refugee in the convention. In addition, the article discusses the balance between State sovereignty and obligation under the Refugee Convention. This part also highlights the States obligation under Human Rights law. Thirdly, this research explains how the refugee Convention intentionally excluded certain factors out of the purview of the convention. These factors are so vital that without these the convention became incomplete and obsolete. Finally, this article ponders upon the judicial interpretation of the different terms of the Refugee convention. Unless the convention includes the contemporary reasons, which can lead a person into persecution, the judiciary has a role to play. This research highlights how judiciary

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around the globe are interpreting the various terms of the convention. The courts of different jurisdictions are sometimes inconsistent in interpreting the Refugee Convention. This article also argues that in order to make an effective refugee regime we need principles like Common but differentiate responsibility in refugee law.

Keywords: *Refugees, European crisis, Human Rights, Common but differentiate responsibility*

I. Introduction

The 1951 Refugee Convention of the Status of Refugees is one of the most talked international laws and one of the most important political agreements between States after World War II. Defining who is a refugee is not only deciding about the Status of person who is in desperate need of help, it about the responsibilities of a State agreed under the 1951 Refugee Convention. Initially 1951 Refugee Convention had words having special focus to the European Context. With the passage of time some changes were introduced in the 1967 protocol in order to take as many states as possible on board. Despite few fundamental changes in the convention there are certain grey area which still remain unanswered. Scholarship on International Refugee law reveals the international politics behind the 1951 Convention.

Theoretically, 1951 Refugee Convention is a depository of a portion of State Sovereignty, but in practice it is a compromise between the States Sovereignty and access to the foreigners inside the territory. States never wished to give an unfettered right to access inside to any one, this intention resulted the debated provision of the Refugee Convention. That is why the definition of Refugee was engineered in the 1951 Refugee Convention. This provision has put forth a restrictive definition of Refugee. It has failed to include persons who face displacement internally or externally due to an armed conflict, climate change, food security or epidemic.

This article will first explore the context of the Refugee Convention 1951. It will unfold the behind the scenes of the drafting process of the convention. As it has been already mentioned that convention was an effort to tackle the then Refugee crisis in Europe, therefore the voices of the global crisis were completely ignored. On the face of it Refugee Convention appears to be the last resort to people flew from their home land due to all kind persecution. But in reality, it is just opposite. Persecution is just not enough to be a Refugee if it has not done in way explained in the Refugee Convention. The sheer political concern of

Europe led the definition in this fashion. First part of the article will highlight this political backdrop along. It also unlocks how the Convention helps to sustain racial segregation. This racially biased approach was taken in the drafting process of the convention.

Secondly, this article connects the States obligation under Refugee Convention with States Sovereignty. The State parties of the Convention never wanted to open a floodgate to the foreigners. They always wanted to receive a criteria-based people which States decided in 1951 based on the European crisis. Although Human Rights and Refugee law are two different branches of Public International law but violation of the premier led to the rise of later. Denial of human rights leads to the creation of refugees. This part will also underline the obligation of States under other Human rights convention.

The definition of the Refugee in the Refugee Convention is incomplete in various way. This definition has always been the main focus of criticism. It has left behind the struggle, sufferings, sacrifices and plight of millions of people, their It has failed to include many other situations which may cause persecution and force a person to take refuge of flee. Hence is incomplete hence to greater extent frustrate the main objective. The third part of the article discusses the different other criteria of persecution and how the convention is frustrating its own object and purpose.

Lastly, the article will ponder upon the judicial interpretation of the different terms of the Refugee convention. This highlights the inconsistency of interpretation of the Refugee Convention by the judiciary. Many judiciaries of the States around the globe interpreting terms like “well-founded Fear”, “persecution”. Principle non-refoulment is a significant provision to the Convention. Despite of many political concerns, one right has been established by the 1951 Convention and 1967 Protocol is the non-refoulment. This obligates to every state party not to return any refugee to their home country where they could be persecuted. The article highlights meaning of these terms and synchronize jurisprudence set by different judiciary.

From the beginning of the 1951 Convention relating to the Status of Refugees has excluded women from their right to get protected from persecution. The Convention has set a gender-blind criteria exacerbated by the same qualities in the international legal system of which it is a part. The article has highlighted how women are being subject to persecution for homosexuality and for giving birth to more than one child. Although the decisions of the regarding these issues are divergent. Courts of different jurisdictions are divergent in these issues.

The preamble of the Convention set very high ideals for the mankind. It talks about fundamental rights and freedoms; it says States will do everything within their power to prevent this problem from becoming a cause of tension between States. These objectives of the convention are still a distant dream for the Human being. The article concludes how convention was projected during the drafting, what could have been achieved through this Convention and its present scenario. The article concludes with some recommendations as to how the definition of the term "Refugee" can be made more accommodative in order to meet the needs of the current refugee crisis of the world.

II. Refugee Convention was a Response to The Refugee Crisis of Europe after WWII

The Convention relating to the Status of Refugees 1951 appear to be a universal law by its name but this particular law was drafted in order to address the refugee crisis occurred in Europe after the Second World War.[1] The process of drafting the Refugee Convention started with the 8(1) resolutions of the United Nation General Assembly in 1946.[2] It is true that during this discourse there were a considerable representation of global south, but their voices remain unheard. For example, from Statement made by Brohi (Pakistan), it is clear that multiple States of global south raised their concern as to the Convention's lack of world-wide application.[3] They pointed out, how the applicability of the convention was about fail beyond Europe, which have been proved by many later scholarships.[4]

Hathaway viewed that the Convention was only made to serve the European refugee crisis. This law was never equipped to meet the global need[5] and it is structured according to the interests of the powerful European States.[6] This notion has been substantiated by the fact

1 Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, Jus Cogens 75–100 (2020).

2 Terje Einarsen 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* OUP (2011)

3 Statement by Brohi (Pakistan), UN ECOSOCOR, 11th Sess., SR 399 (1950) paras 29–30. See also Einarsen (n 15) 57.

4 Maja Janmyr, *the 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda,* Volume 33, Issue 2 *International Journal of Refugee Law*, 188–213, (2021), https://doi.org/10.1093/ijrl/eeab043

5 James C Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law,* 31 Harvard International Law Journal (1990). Lucy Mayblin, *Asylum after Empire: Postcolonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield 2017); Ulrike Krause, *Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime,* 24 Journal of International Relations and Development (2021).

6 Ibid

that the Refugee crisis existed outside the Europe while the Convention being drafted and after 1951, but the plight of those refugees and the burden of the host countries have not been recognized by the Convention.

After the creation of Israel in May 1948, many Jewish Refugees from Europe were trying to settle down in Israel, led to great anarchy and created 6,50,000 Palestinian Refugee.[7] The partition of India and Pakistan in 1947, exodus in China between1949-50 and Korean War between 1950- 53 led a huge refugee crisis.[8] These situations occurred immediately after World War II and these were very rarely taken into account. Surprisingly, as Chimni points out, at the time of drafting of the Refugee convention 1951, it has been told that European refugees are fundamentally different from Asian Refugees[9] and solution for the refugee crisis beyond Europe required outside of the Refugee Convention 1951.[10] This racially biased approach aided the drafting of the 1951 convention in the following wording in article 1A (2) "for the purposes of the present Convention, the term "refugee" shall apply to any person who *as a result of events occurring before 1 January 1951.*" Later the convention further clarifies the above-mentioned provisions that mentioned event is the event occurred in Europe or elsewhere. This particular line made the entire convention more Eurocentric and less universal.

Hence, from the remarks of the Hathaway[11] and Chimni[12] it can be concluded that the Refugee Convention 1951 was mainly drafted in order to address a regional crisis, more specifically the refugee crisis took place post to World War II in Europe. Later, in 1967 a protocol to the convention got adopted. This later law was supposed to outweigh the loopholes of 1951 Refugee Convention and made the convention more inclusive. Although the protocol made the convention universal but it failed to set a progressive and humane criterion for being a refugee and it has also failed of appreciate the concerns of different

7 James L. Carlin, Significant Refugee Crises Since World War II and the Response of the International Community, 3 MICH. J. INT'L L. 3 (1982) https://repository.law.umich.edu/mjil/vol3/iss1/1

8 Lucy Mayblin, *Asylum after Empire: Postcolonial Legacies in the Politics of Asylum Seeking (*2017) (Rowman & Littlefield, Ulrike Krause, *Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime,* 24 Journal of International Relations and Development (2021).
Ibid

9 BS Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 Journal of Refugee Studies 350, 351(1998). Glen Peterson, *Sovereignty, International Law, and the Uneven Development of the International Refugee Regime,* 49 Modern Asian Studies 439 (2015).

10 Ibid

11 James C Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harvard International Law Journal 129 (1990).

12 Supra 9.

countries and regions.[13]

III. Granting Refugee Status is a Sovereign Right

State sovereignty is one of the core principles of international law. It implies that a State has the absolute control inside its boarder and it is free from all alien interference. The State sovereignty also involves absolute right of the States to allow person inside and exclude people from crossing borders.[14] Apart from the principle State Sovereignty under International law, A State also has the duty to comply the norms UN Charter, UDHR and other international laws to which it is party or the applicable customary international law.

The Article 14.1 of Universal Declaration of Human Rights (UDHR) gives right to seek and enjoy asylum from persecution in other countries to everyone in the world.[15] Despite this universal right to asylum the Refugee Convention 1951 kept this prerogative with the State. After the adoption of the Refugee Convention the status of refugees fell within absolutely the domain of the respective States e.g., whether Bangladesh will allow Rohingyas inside, can Hungary allow the asylum seekers, is Slovakia's decision to only accept Christian refugees[16] are the decisions of these States.

States are barred from interfering within its sovereign jurisdiction of other States; therefore no one can challenge any State as to why or why not a person or group of have not been given refugee status. Arguably, principle of non-refoulment has become customary international law so the refugee convention has established a reign of surrogate protection.

International Law has imposed a limitation on State's prerogative to control entry into its land, is arguably well settled, at least in theory. But visa systems are often criticized as unfettered power of States'. The State can decide how long a foreigner can stay inside and under what condition.[17]

13 Sara Ellen Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia,* Brill 14, 225, (2008). Nikolas Feith Tan, *The Status of Asylum Seekers and Refugees in Indonesia*, 28 International Journal of Refugee Law 365 (2016).

14 P. Weis, *the right of asylum in the context of the protection of human rights in regional and municipal law* 2nd international colloquy on the European Convention of Human Rights, Vienna (1965).

15 Nobel, P., *Refugees and Other Migrants Viewed with a Legal Eye -or How to Fight Confusion*, Sydney: Dangaroo Press (1988).

16 Lucas Bento, *Sovereignty Cannot Hold back the power of Humanity* , Harvard International Law Journal (April 27, 2022) https://harvardilj.org/2015/09/sovereignty-cannot-hold-back-the-power-of-humanity/

17 Francesca Pizzuteli, *The Human Rights of Migrants as limitations on state's control over entry and stay in their territory*, European Journal of International Law Blog (May 21, 2015) https://www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/

Hence, it is clear that claiming a refugee status is a right but ultimate decision lies in the whims and fancies of the State whether to grant the status or not. As per the provisions of the 1951 convention and 1967 protocol and available scholarship a state's action can be legally questioned anywhere. Many scholars argues that Refugee convention is intentionally kept restrictive and partial.[18] It is a compromise between unfettered State sovereignty and the access of foreigners.

IV. Refugee Criteria are Incomplete and Not Fit to Serve the Purpose of The Preamble of Refugee Convention:

The preamble of 1951 Refugee Convention expressed,

> *The wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.*[19]

One major objectives of the Refugee convention which States have expressed in the preamble that they will do everything within their capacity to prevent the problem so that refugee crisis shall not lead to tension between States. But this objective gets frustrated by the wording of the definition of Refugee in the Convention.

The Refugee Convention explains the term "refugee" is a person i) found outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or of his former habitual residence owing to ii) well-founded fear of being ii) persecuted for reasons of iv) race, v) religion, vi) nationality, vii) membership of a particular social group or political opinion.[20]

This definition has always been the crux of the entire Refugee regime.[21] A question may arise to the reader of the 1951 Refugee Convention that why only these criteria are placed in the convention. At the time of drafting the convention, representatives of, mostly European States, were not prepared to sign and assume an undefined and indefinite commitments in

18 J. Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete?*, Nicholson and Twomey 8, 57.

19 Convention relating to the status of refugees 1951, Preamble, Para 5.

20 Convention relating to the status of Refugees 1951, Art.1 A 2 .

21 K. Bem, *The Coming of a "Blank Cheque, Europe, the 1951 Convention, and the 1967 Protocol*, 16 International Journal of Refugee Law 609 (2004)

respect of all refugees.[22] This concern and tension of European States led the tailoring of the definition of Refugee. As a result of such anxiety the definition of Refugee was tailored and the prospective beneficiaries were almost fixed.[23] So, the Refugee convention frustrated to serve its actual purpose. It is because the definition has pick and choose the beneficiary of a group of people from the particular region of the world. The refugee law scholars around the world have been voicing for many other criteria which may very well persecute a person or she/he may have well-founded fear out of those criteria.

Extreme poverty or deprivation of mundane needs have never been recognized as the legitimate criteria of seeking refugee status.[24] There are many factors, like climate change, which making large number of people jobless.[25] Economic migrants are always considered making false claim.[26] These are some real time persecutions which people are facing around the globe, although not a valid argument under the Refugee law Jurisprudence. Hence the criteria of definition of Refugee are incomplete and it does not serve the purpose of the object of Refugee Convention. In order to make Refugee Convention more comprehensive few more contemporary factors such as persecution caused by Climate change and Global Warming, extreme economic hardship etc. which may threaten or endanger a human life needs to be included in the definition of the convention.

V. The Judicial Interpretation of the Criteria of Refugee

The Article 31(1) Vienna Convention on Law of Treaties (VCLT) 1969 enumerates that

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[27]

Hence according to the rules of interpretation a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As the article have already mentioned the criteria of being a Refugee under the Refugee Convention 1951. The Convention put forth certain

22 Mr Mostafa, UN Doc A/CONF.2/SR.20 (1951).

23 J. Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete?*', in Nicholson and Twomey

24 *Supra* 1

25 Sharan Burrow General Secretary, *How will climate change affect jobs?,* International Trade Union Confederation (ITUC)

26 *Supra 1*

27 Vienna Convention on Law of Treaties (VCLT) 1969, Art. 31.

criteria.[28] Several Court around the globe have embarked upon these criteria and made judicial interpretation. The first and foremost condition to Refugee status is to have a well-founded fear.

Well Founded fear: All forced migrants are not qualified to be a refugee. A subjective fear is an essential element of a Refugee Claim.[29] It is told that in the *Kamna*[30] and *Tabet-Zalta*[31] that both the elements of Refugee claim must be met, that subjective and objective and lack of evidence may frustrate the claim.*[32]*

The claimant needs to prove the subjective fear of persecution with credible evidence by being a credible witness.[33] The Canadian Court also mentioned that if children or persons are mentally disable then they might be incapable of feeling subjective fear.[34]

USA Supreme Court in Immigration *and Naturalization Service v. Cardoza-Fonseca* held that a person is not required to prove that he or she is more likely to be persecuted than not, in his/her home country.[35]

The UK House of Lords in R *v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] defined the well-founded fear. The court said that a reasonable degree of likelihood of fear have to be demonstrated to qualify a fear as well-founded. The court also said that the Secretary of state may take decision based on the fact known to him which may be unknown to the applicant if fear of the applicant justified.[36]

So, in order to prove well-founded fear, subjective and objective fear are essential elements. The subjective fear must be substantiated by evidence or credible witness. More likely to be persecuted than not is not a yardstick in US Supreme court. Most importantly, UK House of lords has required a demonstration of the reasonable degree of persecution.

28 Convention relating to the status of refugees 1951, Art. A 2.

29 Kamana, Jimmy v. M.C.I., 1999 (F.C.T.D., no. IMM-5998-98).

30 Ibid

31 Tabet-Zatla, Mohamed v. M.C.I. (1999) (F.C.T.D., no. IMM-6291-98), Tremblay-Lamer, November 2, 1999

32 Ibid

33 Chan v. Canada (Minister of Employment and Immigration), (1995) CanLII 71 (SCC), [1995] 3 SCR 593.

34 Yusuf v. Canada (Minister of Employment and Immigration) [1992] 1 F.C. 629; [1991] F.C.J. 1049; Canada (Minister of Citizenship and Immigration) v. Patel, Dhruv Navichandra F.C., no. IMM-2482-07.

35 Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421

36 R v. Secretary of State for the Home Department, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147.

VI. The Act of Persecution

Fear of persecution is also an important element to prove. Persecution has to qualify a certain standard. It has to be serious and imminent. In a Refugee Appeal, the New Zealand court relied on the provisions of the International Human Rights norms in order identify whether a serious harm qualify the scope of persecution or not.[37]

The US Court of Appeals have set out as to how an act or acts become persecution. In Korablina v. Immigration and Naturalization Services, the court held that when a person or his/her family suffers violence or harassments by series of acts, sporadic acts, is persecuted.[38]

A claimant's return to his homeland is always a very important question. If it is proved that claimant may re avail the home country, then it may frustrate his/her claim. The Claimant also need to prove that his/her well-founded fear of persecution occurred due to one of the grounds mentioned in the Refugee Convention 1951. The intention of the action, whether malafide or bonafide, is not important.[39]

VII. Principle of Non-refoulment

The Refugee Convention 1951 and 1967 Protocol makes one obligation to all the high contracting parties is non-refoulment. It implies a claimant cannot be returned to his home country or habitual residence where he has fear of persecution. In R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer, (2001) case the court opined that the Secretary of State is not entitled to deport asylum seekers to a third country. The court also said that interpreted Article 1 A (2) of the 1951 Convention should not interpret restrictively so that "persecution" only covered conduct attributable to a State.[40]

VIII. Particular Social Group

One of the criteria of successful claim of Refugee status is membership of particular social group. In the Matter of Acosta, the US Board of Immigration Appeals held that membership of social group implies that an individual is a member to a group, it shares a common

37 Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7400

38 Korablina v. Immigration and Naturalization Services, 1998, 97-70361.

39 Danian v. Secretary of State for the Home Department, 2000 AR 96.

40 R v. Secretary of State for the Home Department, (2001) 2 WLR 143.

immutable characteristic. This characteristic cannot be changed by the individual member of the society. If any person suffers a well-founded fear of persecution for being a member of such group, he or she may qualify the term Persecution on account of membership in a particular social group.[41]

In Canada (Attorney general) v. Ward (1993) the court defined "Particular Social Group". It says that fundamental underpinnings of persecution comprise of three categories: (1) groups defined by an unaltered characteristic; (2) groups members of which associates for some basic reasons to their human dignity. These members of the group should not be forced to forsake".[42]

In *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL the court did not require a group to have cohesiveness, co-operation or interdependence. It may or may not form an organization and its question of human rights are irrelevant.[43]

The Refugee Convention is the extended part of the Human Rights laws. It has the potential to solve many significant crises of the humanity. The objectives of the UN Charter, CAT, UDHR other important Human rights conventions can only be fully realized when other supporting Conventions like 1951 Convention and 1967 Protocol are completely functional. The Refugee convention has many limitations. The Judiciaries can give us wonderful interpretation of different terms of the Convention in order to overcome limitations.

It has already mentioned that how USA, UK, Canada, New Zealand and others judiciaries are interpreting Refugee Convention. This endeavor hopefully one day creates a world where any genuine persecuted innocent person shall have the entry to any country in the world.

IX. Sexual Orientation

Persecution based on sexual orientation can be a ground for having successful Refugee Claim.

In a case, the New-Zealand Status Appeals Authority considered that in Iran homosexuals

41 Matter of Acosta, A-24159781, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6b910

42 In Canada (Attorney General) v. Ward (1993) 2 S.C.R. 689.

43 Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another (1999)

are a social group with particular internal characteristic, namely their sexual orientation. This kind of sexual orientation is a very inherent and unchangeable characteristic. The judgment also says that when a person's fundamental characteristic or identity or human dignity ought not to be required to be changed.[44]

In another case called *Hernandez-Montiel v. Immigration and Naturalization Service*, the US Court of Appeal for the 9th Circuit considered a "particular social group" comprised of Gay men with female sexual identities in Mexico. One cannot change a Female sexual orientation. It was unchangeable and was inherent in the claimant's identity. A person with this kind orientation should be required to change it, in any event.[45] The Courts mostly in US, UK and New Zealand already interpreting that persecution due to sexual orientation can be ground of being a Refugee. They have also considered that homosexuals can be called that people of particular group due to their sexual orientation.

X. Restrictive Family Planning Policy

Restrictive Family planning system can also be form of Persecution under the Refugee law Jurisprudence. In a Case of *Cheung v. Canada (Minister of Employment and Immigration),* The Canada Federal Court of Appeal regarded that due to Chinese government policy Women in China were facing forced sterilization in order preventing birth of more than one child. This, as court opined form a particular social group. So, any women escaping this kind forced sterilization shall come within the purview of the definition of a Convention refugee.[46]

The Supreme Court of Canada in *Chan v. Canada (Minister of Employment and Immigration)* decided that if a person is having a well-founded fear of sterilization, he/she must be demonstrated subjective and objective fear persecution and in order to substantiate that his/her fear is well-founded in the objective sense.[47] Claimant's credible witness and consistent testimony will be sufficient to meet the subjective aspect of the test.[48]

Unlike the Canada Supreme Court, in the case of A and Another v. minister for Immigration and Ethnic Affairs and Another, the High Court of Australia decided not to consider that

44 Refugee Appeal No. 1312/93, New Zealand Refugee Status Appeals Authority, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6938

45 Hernandez-Montiel v. Immigration and Naturalization Service, 225 F.3d 1084.

46 Cheung v. Canada (Minister of Employment and Immigration (1993) 2 F.C. 314.

47 Chan v. Canada (Minister of Employment and Immigration (1995) 3 S.C.R. 593.

48 Ibid

forced sterilization can form a people of particular social group. The Court viewed that evidence was insufficient to prove that the parents of one child, when denied to follow the restrictive family policy, were ousted from the society and formed a collection of persons.[49]" The Supreme Court have not considered that this could be a basis of persecution and form a particular social group.

The definition of Particular Social group based on restrictive family policy has been found different in multiple jurisdictions. The Canadian Supreme Courts are considering that well-founded subjective persecution due to forced sterilization can make a particular social group. On the contrary the Australian Supreme Court are giving opposite view on this. The Australian Court is saying that there is no sufficient evidence to found to show that when parents were denying to follow the restrictive family policy, were persecuted, that too under the well-founded persecution.

XI. Conclusion

Movement of the people from one land to another is an ancient phenomenon. History reveals that this movement of people around the globe have been happening since the time immemorial from one land to another for various reasons, it ranges from religious, economic, trade, agriculture, war, epidemic etc. Surprisingly, the 1951 Convention has only mentioned four/ five criteria of forced migration, leaving the many others behind. Civil wars, cycles of poverty and corruption, domestic gang violence, climate change, and desertification[50] are some of the new reasons added with the old reasons.

The Study of the Refugee law jurisprudence and the current world affairs show a clear miss-match to a great extent and raise multiple questions. Some States from west, like USA, UK, Germany, France etc. pioneered the drafting or the adoption of Refugee convention. Despite the objections of the representatives of the Global South the mighty European States have designed the Refugee Convention in such a fashion that under the disguise of the United Nation and Universality, they actually made Convention for Europe. They pledged to comply many principles, like equality, Non-discrimination, non-refoulment. But surprisingly these States are abdicating their responsibilities time and again. Uncountable boats, such as from Libya, have been returned from the shores of Europe and America which caused thousands of deaths.

49 A and Another v Minister for Immigration and Ethnic Affairs and Another, (1997)

50 IOM UN Migrations Publications Platform, https://publications.iom.int/fr/books/global-migration-trends-factsheet-2015 (last visited June 29, 2016).

On the contrary there are some countries, like Bangladesh, Indonesia, not party to the convention even, have been complying with all the principles of Refugee Convention. This article has highlighted that the existing Refugee regime is inadequate, insufficient and jeopardizes the lives of millions of displaced people around the Globe.

The Refugee convention was drafted just three years after the UDHR, but still many scholars view that refugee regime excluded women from international right to protection from persecution. Refugee Women are often facing specific abuses, other than a man. Among the many kinds of abuses rape, sexual extortion, physical insecurity is very common. Refugee women face these abuses during their flight and in places of refuge. These problems with refugee women have no geographical limitation, it takes wherever crisis occurred. Women are often subject to sexual demand in exchange of Refugee Status, especially when not associated with father, brother or husband.

Economic migration is one most common type in the current world. Due to many reasons, like after the Arab Spring, USA invasion in Iraq, Afghanistan, recession of 2008, Corona pandemic forced people into untold hardship and marginalization. Thousands of people fled their land due this vulnerable situation. The article has mentioned several times that these hardships have not been framed within the contour of Refugee Convention.

Despite of the fact the preamble mentioned that State will do whatever they can to prevent this problem so that it does lead to a tension between States. Around 1.5 million of Rohingya population have migrated from Myanmar to Bangladesh. They are in Refuge of Bangladesh for more than decades. Due to geo-politics the tension is mounting between these two countries, Refugee convention is of very little help.

In my view, like environmental law, International Refugee Law should have the principles like Common but differentiated responsibilities. If we think about proportionately, Bangladesh, and many other, small, under-developed, and densely populated countries are sheltering Refugees, maintenance of which is beyond their capacity. Whereas, countries like Australia, Canada and many other States, in the world which have huge untouched area, but sheltering tiny number of Refugee population. Hence the Common but differentiated responsibilities in Refugee Law could be of great help. By this process burden could be shared equally by all the States.