

TITLE OF THE PAPER:

- **PROTECTION AND ENTITLEMENT AS REFUGEES : THE NEW PROTECTION**

NAME OF THE AUTHORS:

- **Mr. ABINASH BARIK** QUEEN MARY UNIVERSITY OF LONDON [LLM Candidate in International Dispute Resolution]
- **Ms. MRINALINI BANERJEE** KIIT SCHOOL OF LAW [4th Year, B.A. LLB]

ABSTRACT

The essence of Refugee Law is entitled to claims for its nationals of any country of currently detained as illegal migrants in Second State. It is necessary that if the State has taken all affirmative actions to protect the migrants from environment disaster. Its inability cannot be attributed as international wrong due to force majeure. Customary International law, Diplomatic Protection and 1951 Convention on Status and Rights of Refugee, protects this right of Sovereign States to claim on behalf of its nationals.

The migrants consist of Tribal people and other general citizens. They fulfill the requirements of Article I of the Convention on Status and Rights of Refugees. The migrants are outside their country of origin with well-founded fear of persecution on the ground of 'race' and 'membership to a particular social group'. Persecution under the convention and United Nation High

Commissioner for Refugee recognizes environment as an actor of persecution due to inability of the state to protect its nationals.

The migrants are nevertheless recognized under the complementary protection under Customary International law. Complementary protection is a pre-emptory norm and its scope is also provided under the refugee convention, human rights instruments and various general assembly resolutions.

Keywords: - Refugee, Race, Membership, Complementary Protection, Migrants, Customary International Law, UNHC

PART 1: A SOVEREIGN STATE IS ENTITLED TO CLAIMS FOR ITS NATIONALS IN ANY 2ND COUNTRY IN CONTEXT TO THE FAILURE BY RUTASIA TO ACCORD THE MIGRANTS STATUS CONSISTENT WITH INTERNATIONAL LAW.

A. A SOVEREIGN STATE IS ENTITLED TO MAKE CLAIMS IN RELATION TO THE MIGRANTS IN RUTASIA.

1]. The state is exempted from its International obligation due to fortuitous event

1. The author would like to introduce that Article 23 of ‘Responsibility of States’¹ exempts acts/omissions of state due to *force majeure*. Therefore a Persecuted State’s inability to protect its Migrants is not international wrong as it had no control² over the natural

¹ Art. 23, Responsibility of States for Internationally Wrongful Acts, 2001; Shaw, *supra* note 4 at 796.

² Shaw, *supra* note 4 at 796.

disaster caused by rising sea level.³ Alternatively, the State should affirmatively take all appropriate measures for relocation of the people and has searched a new homeland for its people.⁴

2]. International law protects state's claim over its nationals abroad.

2. Art. 42 of ROS entitle an injured state to claim protection against a wrongful act done by another state.⁵ The Second state has an obligation to provide standard treatment to the first States' migrants consistent with International law⁶ Human Right treaties⁷ and Refugee Convention⁸ and such breach enables the State to appear before the International Court of Justice. As the ICJ has pointed out the right of any national of a state, if infringed is understood as the violation of the right of the state.⁹

³ ILC Commentary, *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), Article 2 [ROS].

⁴ Ibid.

⁵ ROS, *supra* note 47, Article 42; Malgosia Fitzmaurice & Dan Sarooshi, eds, "Issue of State Responsibility before International Judicial Institutions" in *The Clifford Chance Lectures*, Vol. 7 (New York: Oxford and Oregon Publications, 2004) at 83 [Fitzmaurice]; L.A. Sicilianos, "The Classification Of Obligations And The Multilateral Dimension Of The Relations Of International Responsibility" (2002) 13: 5 EJIL 1127 at 1140.

⁶ Oppenheim, *supra* note 16 at 903-904, 931.

⁷ Brownlie, *supra* note 4 at 525; Shaw, *supra* note 4 at 824; Oppenheim, *supra* note 16 at 909.

⁸ Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford: Oxford University Press, 2011) at 1547 [Zimmerman]; J.C. Hathaway, *The Rights of the Refugees under International law* (Cambridge: Cambridge University Press, 2005) at 994 [Hathaway].

⁹ *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)* (1939), P.C.I.J. (Ser. A/B) No. 76 at 4-5, 9.

3. Even if the State is 'indirectly injured' it can claim Diplomatic protection for its nationals without exhausting local remedy,¹⁰ as it is a claim for a declaration by the court and not for damages.¹¹

3]. The Persecuted State can approach this court under Article 38 of Convention on Status and Rights of Refugee

4. Art. 38 of The 1951 Convention Relating to the status of Refugees [*hereafter referred as CSR51*] gives any State the right to refer the matter to ICJ regarding the Second State's non-compliance of the Convention¹² after the dispute is not settled by peaceful means.¹³ In the many cases both parties fail to settle the matter peacefully, and thereafter the Secretary General has encouraged the parties to bring it to ICJ.¹⁴

B. THE MIGRANTS ARE ENTITLED TO PROTECTION AS "REFUGEES" UNDER THE REFUGEE CONVENTION AND PROTOCOL.

5. The Author would like to further enumerate upon the migrants as refugees under Article 1(A) (2) of *CSR51* and 1968 Refugee protocol [*hereafter referred as RP68*]. First the migrants have well-founded fear of being persecuted for reasons of 'race' and

¹⁰ *Ibid* at 16; *The Mavrommatis Palestine Concessions (Greece v. U.K.)* (1924) P.C.I.J. (Ser. A) No. 2 at 12 [*Palestine Case*].

¹¹ *Case concerning the Air Services Agreement (U.S.A. v. France)* (1978), vol. XVIII, UNRIAA, at 415; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, Advisory Opinion [1988] ICJ Rep 11 at 29, ¶ 41.

¹² Zimmermann, *supra* note 52; Hathaway, *supra* note 52 at 994.

¹³ *Palestine Case*, *supra* note 54 at 13-15; *Norwegian Loans Case*, *supra* note 56; Fitzmaurice, *supra* note 49 at 81.

¹⁴ *Ibid*.

‘membership of particular social group’ [hereinafter referred as MPSG].” Second, they are “outside the country of Inhabitation.”¹⁵ Third, they are “unable or, owing to such fear, unwilling to avail the protection of the Second State”.¹⁶

1]. CSR51 recognizes persecution by the environment

6. CSR51 recognizes persecution by third party,¹⁷ affirming the dual nature of refugee rights which considers *act of persecution* wherein the state fails or is unable to provide protection against third party.¹⁸ This also includes inability of the government to protect its nationals from environmental degradation.¹⁹ Hence, the inability of certain states to protect its nationals from the serious harm caused by permanent territorial inundation, leads to an act of persecution.

2]. The Migrants have well-founded fear of being persecuted and are not willing to return to the Home State

¹⁵ Ibid.

¹⁶ Article 1 A (2) of The 1951 Convention Relating to the Status of Refugees.

¹⁷ Guy S. Goodwin Gill, “The Language of Protection” (1989) 1 Int’l J. Refugee L. 6 at 98 [Gill]; Zimmermann, *supra* note 52 at 374; Jane McAdam, *Climate Change, Forced Migration, and International Law* (New York: Oxford University Press, 2012) at 198 [McAdam].

¹⁸ Gill, *ibid* at 99; Zimmermann, *supra* note 52 at 374.

¹⁹ McAdam, *supra* note 62; Dieter Kugelman, “Refugees”, in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at 708 see ¶¶ 8,9 & 12[Max Planck]; Office of the U.N. High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, ¶.39, U.N.Doc. HCR/IP/4/Eng/REV.1 (1992) [UNHCR, Handbook].

7. “Well founded fear” means a “*person has either been actually a victim of persecution or can show good reasons why he fears persecution*”.²⁰ The tribal migrants have been a victim of persecution due to the continuous degrading environment and lack of effective governmental protection.²¹
8. Moreover, their wavier of protection afforded by government cannot defeat their well-founded fear of persecution. Contextually, Tribal migrants live in isolation from other people²², thus even if they consented to their stay in the territory²³, it was not an informed consent²⁴ due to lack of knowledge of science and modern technology. Hence, it is hereby concluded that the fear is evident form the Indigenous Tribal migrants. The inevitable failure by the state authorities to protect former territories (now non-existent) from inundation establishes real fear, and unwillingness by the migrants to not return or seek protection from other States.

3]. The ground for persecution is based on ‘Race’ and ‘MPSG’

a]. *Indigenous Tribals Persecuted on the Ground of Race*

²⁰ *R. v Secretary* [1988] 1 All E R 193.

²¹ *Ibid.*

²² *Supra* Note 9.

²³ Edward Cameron, “Human Rights and Climate Change: Moving from an Intrinsic to an Instrumental Approach”, 38 *Ga. J. Int'l & Comp. L.* 673 at 688.

²⁴ Frank Biermann & Ingrid Boas, “Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees” (2010) 10 *Global Env'tl. Pol.* 60 at 68; Jessica B. Cooper, Note, “Environmental Refugees: Meeting the Requirements of the Refugee Definition” (1997-1998) 6 *N.Y.U. Env'tl. L.J.* 480 at 485.

9. The author further elaborates that due to the inability of certain government's to protect the Tribal migrants from being persecuted collectively, against environmental disaster, directed persecution towards a particular race, i.e. persecution on the ground of "Race". Race in this context refers to Indigenous Tribals as persons with physical or cultural distinctiveness including common history or similar identities or philosophy that has caused them to suffer social prejudice²⁵ or has become a ground for persecution.²⁶

b]. Indigenous Tribals Persecuted on the Grounds of MSPG

10. The Indigenous migrants' are 'joined together with some degree of cohesiveness and co-operation',²⁷ which collectively establishes MSPG. This is based on the isolated identification of the Indigenous Tribals and the subsistence lifestyle maintained by them.²⁸ This collectively, establishes the vulnerability²⁹ of the Indigenous Tribals to signify their affiliation to MSPG.

C. THE REFUGEES ARE ALSO RECOGNIZED UNDER THE COMPLIMENTARY PROTECTION AND CUSTOMARY INTERNATIONAL LAW .

²⁵ A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1 (Leyden, Netherlands: A.W. Sijthoff-Leyden, 1966) at 217-218; J.C. Hathaway, *The Law of Refugee Status* (Toronto: Buttersworth, 1991) at 141 [*Hathaway, Refugee Status*]; *Horvarth v SSHD* [2000] 3 WLR 370.

²⁶ John Vrachnas, *Migration and Refugee Law: Principles and Practice in Australia*, 3rd ed. (Melbourne, Australia: Cambridge University Press, 2012) at 192; Hathaway *Refugee Status*, *ibid.*

²⁷ *Shah and Islam v SSHD* [1998] 1 W.L.R. 74.

²⁸ *Ibid.*

²⁹ Dawne Moon, "Who Am I and Who Are We? Conflicting Narratives of Collective Selfhood in Stigmatized Groups" (2012) 117: 5 *American Journal of Sociology* 1336 at 1340, 1341.

1]. **Complementary Protection under International Customary Law.**

11. The author also submits that the *state practice* and *opinio juris*³⁰ favors complementary protection³¹ and establishes it as a peremptory norm of customary International law.³² There has been consistent State Practice's, which has expanded the status of refugees beyond the strict regime of the convention.³³ Further, re-establishing 'Refugee' as a person outside the state of origin and is unable or unwilling to avail himself the protection of host State.³⁴ The Organization of African Unity Convention [OAU], Asian African Legal Consultative Organization, the Cartagena Declaration and Bangkok Principles have expanded the definition, by including those fleeing due to '*external aggression, occupation, foreign domination or events seriously disturbing public order*.'³⁵ These instruments are also signed by the highest refugee recipients in the world.³⁶ Moreover, Finland, Sweden and Argentina have adopted legislation granting

³⁰ William Thomas Worster, "The Evolving Definition of the Refugee In Contemporary International Law" (2012) 30 Berkeley J. Int'l L. 94 [*Worster, Refugee*]; Report of the High Commissioner, "Note on International Protection-UNHCR" (2012) 24 (1) Int'l J. Refugee L. 130 at 136, 137.

³¹ Stephanie E Berry, "Integrating Refugees: The Case for a Minority Rights Based Approach" (2012) 24:1 Int'l J. Refugee L. 1 at 27-28, 30 & 34.

³² Gill, *supra* note 24.

³³ Worster, Refugee, *supra* note 75 at 112.

³⁴ T. Alexander Aleinikoff, "State-Centered Refugee Law: From Resettlement to Containment" (1992) 14 Mich. J. Int'l L 120 at 122-123.

³⁵ Organisation of African Unity (OAU), *Convention on the Specific Aspects of Refugee Problems in Africa*, Sept. 10' 1969; Gill, *supra* note 62 at 9-10; Hathaway, *supra* note 52 at 118.

³⁶ UNHCR, *Statistical Yearbook 2007* (Geneva: UNHCR, Dec. 2007); *See also*, Jane McAdam, "Status Anxiety: Complementary Protection and the Rights of Non-Convention Refugees" (2010) University of New South Wales Faculty of Law Research Series Paper 1.

subsidiary protection to persons unable to return to the country of origin because of environmental disaster,³⁷ and lastly the UN commission³⁸ has affirmed that International communities have secondary obligation to provide complementary protection to individuals of all nationalities, upon primary inability by their state of origin to provide protection.³⁹

2]. Scope of Complimentary Protection under the CSR51.

12. Art. 5 of CSR51 bar any impairment of rights granted other instrument.⁴⁰ The Convention recognizes the protection of migrants outside its scope. The conference which adopted the convention added a final act of urging the states to extend the protection to people not covered under the narrow definitions of convention.⁴¹

3]. Under Human Rights Instruments.

³⁷ Benoit Mayer, “The International Legal Challenges Of Climate-Induced Migration: Proposal For An International Legal Framework”, (2011) 22 *Colo. J. Int'l Env'tl. L. & Pol'y* 357 at 371.

³⁸ UN Docs. A/54/2000 & AJ55/1 (2000) “International Commission On Intervention And State Sovereignty, The Responsibility To Protect”, at VIII (2001), *available at* <<http://www.iciss.ca/report-en.asp>> Millennium Report and Annual Report on the Work of the Organization, at ¶48 & ¶37,).

³⁹ Carsten Stahn, “Responsibility To Protect: Political Rhetoric Or Emerging Legal Norm?” (2007) 101 *Am. J. Int'l L.* 99 at 99, 103, 118, 119.

⁴⁰ A. Edwards, “Human Rights, Refugees, and the Right of ‘To enjoy’ Asylum” (2005) 17 *IJRL* 293.

⁴¹ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1.

13. The narrow definition under the convention is now expanded by human rights instruments.⁴² The guarantee of right against non-refoulement, torture, cruel and inhuman treatment limits the discretion of the State in returning or treating the refugee.⁴³

4]. Under Resolutions of the General Assembly

14. The Millennium declaration by General Assembly requires the states to protect refugees and migrants suffering from the consequences of natural disasters, and gives assistance and protection till they resume normal life.⁴⁴

PART 2: CONCLUSION

The Author would conclude that the concept of Refugees and Complementary Protection as established in many cases has been a meaning of Protection to such individuals who are not recognized under normal state of affairs. The first question dealt with the impact of safe third country practices on interstate relations. One found that while there have been multiple international documents affirming the fundamental significance of the principle of burden-sharing, actual practice indicates that States are reluctant to commit to substantial obligations with respect to physical burden-sharing. There is, on the other hand, far more substantial practice in terms of financial burden-sharing, yet discussions on these questions have remained characteristically difficult, epitomizing the tension existing between developed and developing countries on the broader question of development aid. That said, even if it cannot be concluded that the principle of burden-sharing is a customary norm, its legal relevance as a soft law principle should not be underestimated. It is further suggested that the principle of good-

⁴² JC Hathaway, "What's in a Label?" (2003) 5 EJML 1.

⁴³ H Lambert, "Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue" (1999) 48 ICLQ 515 at 519; Guy S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement" (2011) 23:3 Int'l J. Refugee L. 443 at 444, 445[Gill, Non-Refoulement]; McAdam Refugee Law, *supra* note 18 at 20.

⁴⁴ Millennium Declaration, UN Document, A/RES/55/2.

neighbourliness could actually provide a valuable parameter in order to ensure that removals of asylum seekers are not carried out on a unilateral basis and on the basis of an individual's mere transit through a State's territory, improving thereby State relations strained by current approaches to secondary movements. This concludes the Refugee Law in Public International Law.
