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RIGHTS OF LGBT IN ARMED CONFLICTS: A LOOMING UNCERTAINTY

Aakash Laad[*]

Alok Kumar Chaurasia[**]

1. Introduction

"*Discrimination of all kinds lead to fear, and fear breeds hatred that ultimately results in the destabilisation and disorder in a society*"

Sexual violence under the aegis of chaos engendered by war is one of the most inhumane crimes that has plagued mankind. Sexual violence in conflict-prone areas has long been known to contribute to the existing state of despair for sexual minorities such as lesbian, gay, bisexual, and transgender (LGBT). The stigmatisation and marginalisation of these minority groups have had a negative impact on the community at large, which has led to them being highly vulnerable targets in war and post-conflict situations. LGBT community has known the world to be a cruel place even as efforts to disseminate and advocate for rights and protection of minorities has gained traction worldwide. Sexual violence is a major contributor to civilian causalities but the world only came to know of this horrendous crime after the atrocious events during the disintegration of Yugoslavia, the genocide in Rwanda, the state of affairs in Syria and Iraq, and the activities in Congo.[1] The UN in accepting sexual violence as spoils of war passed several resolutions to combat the situation and at the same time acknowledged the fact that there is a dire need to address the precarious situation pertaining to a

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[1] Rosanne Marrit Anholt, "Understanding sexual violence in armed conflict: cutting ourselves with Occam's razor", *Journal of International Humanitarian Action*, 6(1), 2016.

vulnerability of minority communities with respect to armed conflicts.[2] Reasons for the commission of such heinous acts range from ideological to tactical; *firstly*, perpetrators commit such acts against minorities to garner support from general masses when the society considers these groups to be outcasts and considers acts against them to be legitimate. *Secondly*, in order to demonstrate their power and deter people from betraying or defecting, perpetrators identify and punish these minorities to set an example. *Thirdly*, miscreants with revolutionary ideologies tend to make it their aim to cleanse the society of such minorities who are considered by them as against the natural course of man and god, and hence a justified social purge.[3]

When it comes to protecting these communities, states have largely been irresponsible while some have out-rightly rejected the framework of such mechanisms. Iraq, for one, has been known to express homophobic overtones through its action in the world arena. It was one of the four states who opposed the formation of the International Lesbian and Gay Association that would work in consultation with the UN[4] and further envisaged death penalty for sodomy[5]. During the war, atrocities were committed in the name of religion by torture groups and death squads against minority groups.[6] At the height of war, when homophobic violence was at its extreme, various jihadi groups were, "competing to show their moral credentials" by indulging in identifying, abducting, and

[2] Dianne Otto, Gina Heathcote, "Rethinking Peacekeeping,Gender Equality and Collective Security: An Introduction", Heathcote G &OttoD eds., Palgrave Macmillan, London 2014.
[3]Joshua Tschantret, "Cleansing the Caliphate: Insurgent Violence against Sexual Minorities", *International Studies Quarterly,* 62(2), 2018, pp. 260, 273.
[4]Sanders & Douglas, "Getting Lesbian and Gay Issues on the International Humans Rights Agenda*"*, *Human Rights Quarterly*, 18(1), 1996, pp. 67, 106.
[5]Iraq Revo, Comm. Council Res. NO. 234/ 2001, OFFICIAL GAZETTE NO. 9, (Feb.27, 2002) available at http://gjpi.org/wp-content/uploads/rcc-resolution-234-of-2001.pdf.
[6]Copestake & Jennifer, 'Gays Flee Iraq as Shia Death Squads Find a New Target',(2006) *THE GUARDIAN* available at https://www.theguardian.com/world/ 2006/aug/06/gayrights.iraq.

torturing before ultimately killing minority groups. In Syria, IS executed two individuals for being homosexual by stoning them to death.[7] This was just the start, after strengthening its hold over territories in Syria; the group threw off individuals from a high building and crucified various others for being homosexuals.[8] Countries such as Yemen, Saudi Arabia, Sudan, among others, have made homosexuality punishable with death[9] further strengthening the dogma pertaining to it. Despite appreciable advances in the field of international law, little has been done to address the plight of these marginalized communities. Both International Criminal Law (ICL) and International Humanitarian Law (IHL) provide a comprehensive approach to combating such activities but they have largely failed in reducing crimes based on gender identity and sexual orientation. The first part of the paper deals with the international framework pertaining to armed conflict envisaged in the Rome Statute and the Geneva Conventions. The second part deals with a case study of real-life incidents. Lastly, the authors conclude by providing possible solutions to the existing dilemma.

2. The Legal Framework

Before we delve into the intricacies of the framework pertaining to the LGBT community, the terminology surrounding them needs to be properly discussed. The term 'sex' denotes the genital anatomy of a human being, which is his physical

[7]Variyar & Mugdha, 'Islamic State Stones Two 'Gay' Youths to Death in First Execution Over Homosexuality', *IBT*" (Nov. 26, 2014) available at http://www.ibtimes.co.in/islamic-state-stones-two-gay-youths-deathfirst-execution-over-homosexuality-615199.

[8]Withnall & Adam, IS Throws 'Gay' Men off Tower, Stones Woman Accused of Adultery and Crucifies 17 Young Men in 'Retaliatory' Wave of Executions, *Independent* (Jan. 18, 2015) available at http://www. independent.co.uk/news/world/middle-east/IS-throws-gay-men-offtower-stones-woman-accused-of-adultery-and-crucifies-17-young-menin-9986410.html.

[9]Brian Whitaker, 'Everything you need to know about being gay in Muslin Countries', *The Guardian* (Jun. 21, 2016) available at https://www.theguardian.com/world/2016/jun/21/gay-lgbt-muslim-countries-middle-east.

attribute bestowed upon him by birth.[10] The term 'gender' is a societal construct created over the course of time by the common masses after they ascertained the roles that are to be adhered to by individuals by virtue of their role as male or female in the society[11]. Finally, sexual orientation is the inclination or predisposition of an individual towards a certain gender construct be it male, female or both.[12] Article 5 of the Rome statute provides for jurisdiction of the court over four crimes out of which, two, namely, a crime against humanity and genocide, that deal with crimes with discriminatory intent that are directed towards a specific group of individuals. Article 6 of the Rome Statute and Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) provide for the protection of individuals who are persecuted based on their nationality, ethnicity, race or religion. However, by not incorporating a ground for genocide based on sex or sexual orientation, it fails to recognize the LGBT community as a group that is under a threat of complete eradication or at least constant persecution. Further, Article 7 of the Rome Statute, which recognizes crime against humanity, penalizes crimes such as murder, enslavement, torture, rape etc. of individuals or groups because of their race, nationality, gender or ethnicity. Article 7(3) provides that gender may be construed to mean two sexes male and female only, thereby, depriving the LGBT community of their right to be recognized and it further makes them susceptible to persecution by homophobic militants. As one author so eloquently put it:

"This may represent substantial lack of protection for a group of people, who in many countries, are subject to discriminatory practices. Unlike the argument made for sexual orientation to be subsumed as "other grounds" in Art. 7(1)(h), it is

[10]Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation', *Euro-American Law and Society*, 83(1), 1995.
[11]Copestake & Jennifer, *supra* note 6.
[12]*Id.*

uncertain if gender identity has reached the "wide recognition" threshold necessary for protection under the Statute. What can be concluded with certainty is that the criticisms of the Statute's definition of gender highlight the fact that the term "gender" is under-theorized in international law."[13]

IHL works with the mandate of minimizing civilian casualties during armed conflict by providing strict rules that are to be followed at all times during warfare. Common article 3 of the Geneva Conventions prohibits persecution or targeting of individuals on the grounds of "race, colour, religion or faith, sex, birth or wealth, or any other similar criteria". Further, it prohibits violating the dignity of an individual by making him undergo humiliating and degrading treatment. However, the convention fails to expressly provide the inclusion of sexual orientation or gender identity as the prohibited ground based on which individuals can be persecuted. The occurrence of armed conflict, whether of international or non-international nature, always results in the bloodshed and the common masses often experience gross violations of human rights including instances of mass extra-judicial killings, ill-treatment, torture, arbitrary detention etc. The helpless masses become the victim of the aggressors and most of the human rights violations are hatred borne.

This paper has talked about the uncertainty revolving around the rights of the LGBT community in the times of an armed conflict, as, an armed conflict adds to the socio-political pressure upon the society and since the LGBT community fights for their rights in the peace-time itself, the added pressure of an armed conflict aids the amplification of homophobia and the social stigma attached to this community. In such horrible times, it becomes imperative to save the discrimination based on sexual orientation and to prevent the inherent and basic rights of the LGBT people

[13]Nevenka Durić et al., 'Legal Protection of Sexual Minorities in International Criminal Law', *Russian Law Journal* 6(1) 2018, pp. 28, 57.

just like any other individual. An armed conflict occurs on the premise of the aggressor proving its dominance, authority and abuse of power over the other and therefore, the occurrences of discrimination and sexual violence are ubiquitous during an armed conflict. Now, the authors have tried to bring the fact into light that the LGBT Community including the newly added Queers are facing a worldwide crisis due to their sexual orientation and only a handful number of progressive civilisations and societies have accepted them willfully and have started treating them similar to other individuals. In such a scenario, what could possibly be their situation in an armed conflict, wherein, the government machinery has failed, the element of justice is nowhere to be seen, and there are gross violations of human rights just to justify the dominance and authority of the aggressor. Various human rights organisations work for the restoration of human rights in the post-conflict period, however, the people have been provided with certain inalienable rights of themselves by the regime of IHL that protects them in the time of adversities. The same law has remained comparatively silent on the issue of discrimination based on sexual orientation in the times of armed conflict and adding to this misery, the UN itself has recognized the fact that the instances of violence against the LGBT are likely to increase during an armed conflict due to the added socio-economic pressure and the unnecessary stigma attached to it.[14]

3. Deconstructing the Fabric of Society

The intertwined relationship of law and society has been a topic of discussion since the inception of society, and it is mostly accepted that legal rules base themselves on societal values. Despite this overlap, the societal flaws, which are entrenched deep into the society, are dealt with reluctantly in the legal realm. The

[14]UNHRC Rep. on Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity, ¶ 42, O.H.C.H.R., U.N. DOC. A/HRC/29/23, May 4, 2015.

primary reason for this reluctance is the radical nature of these flaws, which often emanate from age-old beliefs of society. Due to this quandary, the progressive faction of society suffers and the issues like homosexuality remain a taboo. The supposed feature of a law is to remove these fallacies around such issues and to grant equal rights to everyone in society. However, the underdeveloped jurisprudence on the issue and the limitation of the law to deal with such issues result in the massive violation of the basic human rights of such people. It is high time for the upholders of law to break free of constraints and to come out of the clutches of statute books and grant suitable protection to the unprotected minorities not only on an economic, social and racial basis but also based on the sexual orientation of an individual.

3.1 Uganda v. Scott Lively[15]

In this case, the plaintiff was an organisation advocating for the rights of LGBT in Uganda and in 2012, it filed a case against the defendant for persecution against the LGBT, which amounts to a crime against humanity under the realm of ICL. The allegations against Lively was his, "active involvement in initiatives with legislative and executive branch officials and private parties, including holding lectures at universities and high schools, to intimidate LGBT people, undermine their rights in Uganda and deprive them of their fundamental human rights, such as the right to life, liberty and freedom of expression."[16] The Court initially dismissed the petition, however, in appeal when Uganda claimed that such a systematic approach towards intimidating the LGBT and facilitating a crime against humanity as grave as persecution against them is against the international norms and the Court accepted it. While stating that the act of persecution may not always amount to a crime against humanity, it differentiated this case and brought the particular

[15]*Sexual Minorities Uganda* v. *Scott Lively*, 960 F.Supp.2d 304.
[16]Nevenka Đurić, *supra* note 13.

act under the ambit of crime against humanity, as it was a widespread and a systematic attack against a group of civilian population, thereby playing it safe by not mentioning the term 'LGBT' anywhere.

It relied on "Art.7(1)(h) in conjunction with Art. 7(2)(g) of the ICC Statute in which persecution is defined as "*the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively"*."[17] Interestingly, the Court "*has completely disregarded the most contentious argument of gender as defined in Art. 7(3) and decided for a more clear-cut option in order to grant protection – an open, savings clause of "other grounds" under Art. 7(1)(h).*"[18] This conclusion by the court can be understood in a manner where it may be contended that the Court did not want to provide an explicit mention to LGBT community and to play the safe card, it used the clause of 'other grounds'. Though the Court was generous enough to provide such ruling, however, it is to be noted that the act of not making express mention of LGBT may have been because of its reluctance to enter the arena of radical social issues. The Courts need to understand that by doing this, they are providing momentary relief to the community, but in long run, such inconsistent developments in jurisprudence may deprive the LGBT community to seek protection under the law on grounds of their sexual orientation.

3.2 Heteronormative Chechnya

Chechnya is a semi-autonomous republic under Russia that despite enjoying a legislative autonomy, is bound by the Russian Constitution. The society is 'heteronormative' in nature, which in essence means that the *only expression of normal sexuality is heterosexuality*. In this sense, it is highly orthodox and

[17] *Id.*
[18] *Id.*

conservative. The allegations against Chechnya is that there have been three separate waves of persecution against LGBT and that the third one is still in operation.[19] The horrible circumstances in Chechnya were revealed to the global community after a report stated that as much as 33 victims fell in the clutches of Chechen authorities and were tortured for their perceived homosexuality.[20] The concern was grave as unlike other nations, here the crimes were state-sponsored and instead of providing them adequate protection; the state authorities were facilitating their killings. It was also revealed that apart from this, they were also victims of 'honour killings'. This prompted EU into motion that subsequently passed a joint resolution to apply the European Council's LGBTI guidelines[21] to Chechnya and asked the Russian Federation to regulate its proper implementation and to punish the perpetrators as per its Criminal Procedure Code.

These examples may not be directly related to the main issue of uncertainty over the rights of LGBT in armed conflicts, however, it gives a clearer picture with respect to how the rights of LGBT are perceived and how are they diminished in orthodox societies like the one in Chechnya. This also provides a rather worrisome picture of the rights of LGBT. In a society, where such minorities are killed for honour and are not accepted at all, how can it be expected that their rights shall be protected in an armed conflict, where even a stable society is forced into chaos and even children are not spared. This needs legal attention but more than that, there is a need to change the fundamental stereotypes plaguing the society and enlighten

[19]Russian LGBT Network & Elena Milashina, 'They Said That I'm Not a Human, That I Am Nothing, That I Should Rather Be a Terrorist, than a Faggot LGBT', *PERSECUTION IN THE NORTH CAUCASUS* 3-4 (July 31, 2017) available at https://www.ilga-europe.org/sites/default/files/chechnya_report_by_rus_lgbt_n_31_july_2017.pdf.
[20]Tanya Lokshina, "Anti-LGBT Violence in Chechnya: When Filing "Official Complaints" Isn't an Option', *Human Rights Watch* (Apr. 4, 2017) available at https://www.hrw.org/news/2017/04/04/ anti-lgbt-violence-chechnya.
[21]Council of the European Union, 'Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons'(June 24,2013) available at https://eeas.europa.eu/sites/eeas/files/137584.pdf.

people with regards the need to understand the right to freedom of sexual orientation and with the right to exist.

4. Heart-Wrenching Instances from Contemporary Society

In Columbia, the threat of attack on the LGBT community looms large due to their sexual orientation as well as due to the long drawn armed conflict in the country. The disturbing fact here is that the threat to the LGBT Community is posed by the armed forces of Columbia itself. The authors would like to share two of the most prominent examples of Mr. Jhon Restrepo (LGBT Activist) and Ms. Aura Hinestroza (victim), as their examples show how the LGBT are made subjects to the violence in armed conflict.

Jhon Restrepo is an LGBT rights' activist and had planned a pride march along with his colleagues in Columbia, despite being threatened by the forces not to do so. The march was conducted peacefully; however, post the march, there started a 2-year campaign by the forces, wherein, atrocities and violence were inflicted upon the LGBT activists and the community as a whole. Gradually, the disbanding of LGBT groups and their banishment became a 'military objective' and Jhon Restrepo was forced to flee. However, Restrepo did not lose hope and the group was restarted in 2014, though with lesser members. The group helped the victims to register themselves as war victims and sought aid from the government after the peace agreement being signed post the conflict in Columbia. As was mentioned here:

"*with Colombia on the brink of signing off a landmark peace agreement between the government and the country's largest left-wing guerrilla group, the Revolutionary Armed Forces of Colombia (FARC), and the prospect of other armed groups agreeing to lay down their arms, campaigners hope more LGBTQ*

victims of the fighting will come forward and give detailed testimony of their experiences."[22]

This conflict exposes the social regression still entrenched in the society to the extent that respect for human lives does not matter when it comes to discrimination based on sexual orientation. The records said that out of 8 million individuals listed on the victim's register, 1,709 officially identified themselves as LGBTQ[23] and more than 50,000 did not admit their homosexuality due to the fear of their experiences and the fear of persecution by the government.[24] Most of the violence inflicted upon LGBT were not based on the military objective or due to any health or social reasons but was the result of the personal prejudice, which the military forces had against the LGBT community. [25]

Another survivor story is that of Ms. Aura Hinestroza, who was a victim of homophobic violence in Columbia. She dates back the incident around the year 2000, when she worked as a reporter in the country. She had been informed about a group of people of FARC by a credible source and that source sneaked her into their camps, where, she was brutally tortured and raped and was "left for dead."[26] She was of homosexual orientation and that is why she was subjected to such

[22]Simon West, "Columbia's LGBTQ Community: Victims of Armed Conflict"*, NBC NEWS*, 7 September 2016 available at https://www.nbcnews.com/feature/nbc-out/colombia-s-lgbt-population-victims-armed-conflict-n643861.
[23]*Id.*
[24]*Id.*
[25]Maria Cecilia Zea, Carol A. Reisen, Fernanda T. Bianchi, Felisa A. Gonzales, Fabián Betancourt, Marcela Aguilar & Paul J. Poppen, 'Armed conflict, homonegativity and forced internal displacement: implications for HIV among Colombian gay, bisexual and transgender individuals, Culture, Health & Sexuality', 15(7) *Culture Health and Sexuality*, 2013, pp.788,803.

[26]Sarah Hayley Barrett, "LGBT Community: the forgotten targets of Columbia's Civil War"*, Newsdeeply: WomenandGirls*,27November2017availableat

https://www.newsdeeply.com/womenandgirls/articles/2017/11/27/lgbt-community-the-forgotten-targets-of-colombias-civil-war.

brutal practices. This incident pushed her into depression, she lost her job and in essence, her usual way of living.

The inclusion of LGBT community in the peace accords signed by Columbia with its rebel forces is a positive sign towards their acceptance; however, the ongoing struggle by the community to enforce their rights and to get reparations for the violence they faced during the conflict portrays a disturbing picture of the country. There has to be a mechanism in place and a platform for them to raise their voices effectively with a guaranteed redressal of genuine concerns.

These are very few examples of the sexual violence based on sexual orientation of an individual and the trends hint at a plethora of such cases, which could not have been reported due to the constant fear in victims of societal persecution. The LGBT activists working in restoring their community in war-torn Columbia claim that the law though has afforded them protection, it has failed to provide a mechanism through which they can enforce it and mostly the law of armed conflict runs in the realm of common law and uncodified principles of humanity. The activists substantiated this by claiming, "In past 12 years of prosecuting former paramilitary fighters, which comes around at 10 percent of the 30,000 demobilized fighters, the courts have only ever handed down one sentence for crimes against LGBT people."[27]

The courts, contrary to the above-mentioned behaviour, has held in principle regarding the LGBT rights that they deserve special protection of constitutional, economic and political nature and that to create an equal footing for them, it is necessary to soak out the prejudicial mindset of general public first and then the

[27] *Id.*

radical individuals.[28] The law can provide them with protection and enforcement; however, it is upon the general populationto recognize their rights and to recognize them not as a community but on an individual basis to rule out the element of stereotyping from the society against the LGBT. As the historical school of jurisprudence propagates that a law can only act as a deterrent for an unlawful act and that too if implemented effectively, but it is people's will or *Volksgeist* that influences a fundamental change in the mindset of the society. It is noticeable that the violence and the hatred faced by the LGBT society resulted in them becoming a more politically and socially ostracised, which implies that violence will result in dissent and a chaotic societal order instead of a well-settled peaceful society. The dream of a perfect utopian society is not feasible however a society where every individual's rights and interests are protected is achievable.

A similar problem, as mentioned above, has been evidenced in Kashmir and Peru. The former is a conflict-torn area, wherein, armed conflicts have led to the application of certain prohibitive and preventive acts of law. This particularly can affect the rights of LGBT as, firstly, in Kashmir, any peaceful dissent through exercising the right to freedom of speech ends up mostly in a violent reaction and LGBT rights are entirely untouched uponin developed areas, let alone its reception in unstable areas of Kashmir. Aarti Tikoo Singh, a pioneer and a lone crusader of LGBT rights in Kashmir hinted at the above-mentioned notion.[29]

In Peru, in the decade of 1980s, amidst an internal armed conflict, the LGBT community was facing widespread persecution. However, as it ended, it was

[28]Espitia & Monica, 'LGBT in Colombia:A War Within',*Cuny Academic Works,* 2016 available at https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1156&context=gj_etds.

[29]Ajaz Ahmad Bund, 'Kashmiri LGBT Movement is Nascent…homophobia in Islamic Society is more cultural and less religious', *THE TIMES OF INDIA*,12 September 2018 available at https://timesofindia.indiatimes.com/blogs/the-interviews-blog/kashmiri-lgbt-movement-is-nascent-homophobia-in-islamic-society-is-more-cultural-and-less-religious/.

presumed that Peru's national laws would be amended as to grant the protection to LGBT. Contrary to this presumption, a recent report submitted to Committee on Torture, OHCHR, stated, "Peru's legal system provides inadequate protection against torture of members of the LGBT community as it lacks adequate safeguards and protection mechanisms, as well as monitoring and training on the prevention of torture."[30] The report recommended certain changes to Peru's domestic laws to formulate such a policy that would make an enforcing mechanism, "which requires recording the number, nature, and context of cases of violations committed against members of the LGBT community."[31]

The UNHRC has been termed as a forerunner when it comes to preventing Human Rights violations and upholding their value; however, their track record has been generally low in cases of extending protection to LGBT.[32] A bare examination of the general comments and periodical reports of UNHRC reveals that a considerable yet insufficient work has been done in the realm of rights of LGBT; however, considering the nature of UNHRC and its objective of extending the protection of ICCPR to every individual, it is expected that the UNHRC has been taking a note of the above-mentioned instances of violations of LGBT rights and must have committed itself in formulating a policy to be implemented across jurisdictions with a strict enforcement regime, to recognise and realise the rights of LGBT, before their violation and not after and also to identify the challenges to LGBT in an armed conflict and deal with their distinctive nature of problem distinctively and not generally.

[30]Torture and the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Peru (Oct. 12, 2018), https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/PER/INT_CAT_NGO_PER_12983_E.pdf.
[31]*Id.*
[32]Paul Gerber & Joel Gory, 'The Human Rights Committee and LGBT Rights: What is it doing? What could it be doing?', *Nottingham UniversityHuman Review,*14(3) 2014, pp. 403, 439.

5. The Way Forward

Repression of sexual minorities and their persecution reveals the untidy truth that despite how far we have come as a society and all the advances we have made in various fields, we have failed to provide the most basic right that has been inherent to us since the inception of mankind, "the right to exist". Individuals belonging to such sexual minorities have been treated as if it is a crime for them to exist. Mankind owes an apology to the LGBT community for their continued persecution since time immemorial and for the failure of our society to provide them their rightful position on the world stage. It is upon the international targeted on prohibited grounds during armed conflicts and that respect is being accorded to the norms of warfare. But before all that, it is upon us, as members of society to work upon the removal of stigmatisation and the taboo culture attached to their existence otherwise acts against these individuals will continue to exist with impunity. Further, the international community should work upon amending the perceived gaps in ICL and IHL because in the current scenario the states will not find it difficult to derogate and take advantage of these loopholes at the outbreak of a conflict.[33] Small but substantial steps have been undertaken, like the UN Security Council meeting on the violent treatment meted out by ISIS to LGBT minorities.[34] The UN for the first time recognized that the rights of these minorities have a place at the UN Security Council. Cue can be taken from UNHCR that has worked and evolved guidelines for the protection of LGBT refugees in the world arena.[35] This

[33]Laurence R. Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', *International Organisation,*68(1), Winter 2014, pp.77,110.

[34]U.S. State Department, UN Security Council Holds Inaugural Meeting on LGBT Issues, 24 August, 2015, available at http://www.state.gov/r/pa/prs/ps/2015/08/246296.htm.

[35]UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 2-3, U.N.

has led to worldwide recognition of LGBT in the realm of refugee law, the same approach should be undertaken by other agencies to mainstream the process of protection of LGBT and remove the stigma attached to them.

DOC. HCR/GIP/12/09,23 October 2012 , available at http://www.unhcr.org/50ae466f9.html.

AN ANALYSIS OF POLICE ATROCITIES IN INDIA FROM 2001-2016

Karan Singh Chouhan*

1. Introduction: Police Atrocities

The duty of the police is to protect citizen and provide them crime-free society. They are public servants, and are tasked to work for the public. However, power corrupts and absolute power corrupts absolutely and similarly the corruption of police powers leads to police atrocities. Police atrocities are a reality of the Indian police system. Police atrocities represent a black mark on the democratic society of India. It is important to understand how and in what ways police atrocities happen to remove its impact.

1.1 What are Police Atrocities

According to the Cambridge Dictionary, atrocity means "an extremely cruel, violent or shocking act".[1] Oxford Dictionary defines it as "an extremely wicked or cruel act, typically one involving physical violence or injury".[2] So, any atrocious act committed by the police is police atrocities. "Police atrocities" is a very broad term, and it includes all kinds of cruel, violent acts committed by the police. Some examples of police atrocities are torture, custodial violence, fake encounters, police brutality etc. A police atrocity is not just limited to act done

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[1]Atrocity, The Cambridge English Dictionary ,2018, available at https://dictionary.cambridge.org/dictionary/english/atrocity. (Last visited 18 August 2018).
[2]Atrocity, The Oxford Dictionaries, 2018 , available at https://en.oxforddictionaries.com/definition/atrocity. (Last visited 18 August 2018).

in a police station, but also includes acts which are outside it. So, for example, fake encounters or police brutality which is usually done outside the police station will also be considered as police atrocities. Police atrocities are always violating the human rights of the victims. There can be no justification for police atrocities, considering the international human rights law and constitution of India. According to NHRC data, there were 568845 complaints which were registered against the police during the year 2000-2017.[3]

Police atrocities can be divided into two broad categories:

1. Custodial Police Atrocities

2. Non-Custodial Police Atrocities

1.2 Custodial Police Atrocities

There is no exact definition provided for "Custodial Atrocities" under any Indian law. Custodial Atrocities can also be called as custodial violence and they are committed by the police. So, any violence committed by the police on any person in custody will be a custodial atrocity or violence. Oxford dictionary defines custody as "The protective care or guardianship of someone or something or imprisonment."[4] Custody is taking care or a control of a thing or a person for safe keeping.[5] Custody also implies imprisonment or detention of a person by a lawful authority.[6]

[3]RTI By Karan, R.C. No16(1)/PIO/2005/RTI/2018/50236.
[4]Custody, The Oxford Dictionaries, 2018 , available at https://en.oxforddictionaries.com/definition/custody (Last visited 18 August 2018.
[5]Custody, The Free Dictionary, available at https://legal - dictionary.thefreedictionary.com/custody (Last visited 18 August 2018).
[6]Legal Glossary, *Ministry of Law and Justice*, Govt. of India (1988).

There are two types of custody provided under Section 167 of the CrPC, Police custody and judicial custody. Police can take any person into the custody according to law for only 24 hours, after that police have to present the detained/arrested person in front of the magistrate, as according to section 167(1) of CrPC, who can authorize the detention of the accused person for a maximum of 15 days of police custody, considering the jurisdiction, adequate grounds, and his own discretion. The purpose of the police custody is providing the time for police to do an interrogation of the accused. Police have time to interrogate a person in the first instance when they arrest an accused, and then again when they get the remand of the accused from a magistrate. Legally a person is said to be in custody after the arrest happens, but all detentions are not arrests, however, all arrests can be called as detentions. Sending a person to any type of custody is not a mechanical procedure, and adequate grounds should be considered and the application of the mind should be evident.[7] The second type of custody is judicial custody which is essentially means sending a person to a jail or a prison.

Custodial atrocities are committed by police by way of violence on the accused. Custodial violence is thus just another name of custodial atrocities by police. Law Commission of India defines custodial violence as a crime committed by a public servant against the arrested or detained person who is in custody.[8] Justice B.P. Jeevan Reddy describes the custodial violence as something which includes torture, death, rape, and excessive beating in police custody.[9] Custodial Crime is "an offence caused against any arrested person or a person in custody when that person was in the custody of a police officer or a public servant who has power under any law to arrest and detain a person in custody during that period" as

[7] *Raj Pal Singh* v. *State of U.P*, 1983 Cri.LJ. 1009.
[8] S.K. GHOSH, *Politics Of Violence*, 1992.
[9] Justice B.P. Jeevan Reddy, *Custodial Crime, An Affront to Human Dignity,* Human Right Year Book 2001, Universal Law Publication Pvt. Ltd., New Delhi, India.

according to Custodial Crimes(Prevention, Protection, and Compensation) Bill, 2006.[10] So, custodial violence is any use of force, threat, psychological pressure by a public servant on an accused in custody.[11]

Custodial violence is prevalent in the Indian police force and oftentimes it is used as a punitive measure or as an interrogation tool. Custodial violence is being given the pseudo-name of third-degree interrogation. This vile disease of custodial violence manifests itself into various forms, which ranges from custodial torture, custodial rape, illegal detention, and sometimes even custodial deaths. Custodial violence is not just an affront to the dignity of the individual, but it is also an affront to the concept of the rule of law. Police are the one who is the defender of the law, and police station is the temples of justice where a common man goes to protect himself from the vile elements of the society, but if in those places also the defender of the law will violate the law, then there will be a great damage to the "rule of law".

1.3 Type of Custodial Atrocities

1.3.1 Illegal Detention

Dictionary meaning of detaining someone means "to force someone officially to stay in a place".[12] Legally speaking, detention means "to hold a person in custody, often for purposes of questioning. A law enforcement officer needs to have a reasonable suspicion of unlawful activity to detain a person."[13] Police are empowered to detain any person but it has to be lawful, with a reasonable

[10]Custodial Crimes (Prevention, Protection and Compensation) Bill, 2006.
[11]DR. S. SUBRAMANIAM, *Human Rights International Challenges*, 2004.
[12]*Detain*, Cambridge English Dictionary, available at https://dictionary.cambridge.org/dictionary/english/detain (last visited 18 August 2018).
[13]US Legal, Inc. "*Detain Law And Legal Definition*, Definitions.Uslegal.Com, 2018, available at https://definitions.uslegal.com/d/detain/.(last visited 18August 2018).

justification and not arbitrary. So, detention is the deprivation of liberty of an individual without him being convicted for an offense.[14] Arrest and detention are different concepts, as detentions are usually for a shorter duration and the purpose of the detention is to provide police officer some time to investigate a matter. If the police officer has a probable cause against a person then the police officer can arrest the person in accordance with the law. However illegal detention or arbitrary arrest are prohibited under the domestic law as well as international human right law and detentions are not permitted unless there is a legal sanction.[15] The Criminal Procedure Code provides under section 50, 57, and 56 that when a police officer arrests or detain someone then such police officer must provide the grounds of arrest to the accused. Arbitrary arrest leads to violation of not only the fundamental right to liberty but also violates international human rights law such as Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[16] and Code of Conduct for Law Enforcement Officials.[17]

It is also interesting to note that illegal detention is often times the first step towards custodial violence, which leads to greater consequences. Thus, courts have provided a remedy to the accused to seek judicial intervention in case of unlawful and arbitrary detention by invoking the writ of "Habeas corpus". Supreme court has also emphasized on a need for a caution while arresting someone, no accused should be arrested unnecessarily, and suggested that without a reasonable ground

[14]Ponnain.M, Ramalingam Et Al, *Glimpses Of Human Rights*,1999, pp.252.
[15](1997) I SCC 1416.
[16]Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 Dec. 1984) 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified by 24 I.L.M. 535 (1985), entered into force 26 June 1987. (hereinafter known as CAT).
[17]UN General Assembly Resolution No.34/169 of 17 Dec. 1979.

of the genuineness of the allegation, no arrest or detention should be made by a police officer.[18]

1.3.2 Torture

According to Cambridge Dictionary "torture" means "the act of causing great physical or mental pain in order to persuade someone to do something or to give information, or to be cruel to a person or animal".[19] United Nation Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 1984[20] defines torture

> *"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."*[21]

So, torture is any physical or mental infliction of severe pain and suffering intentionally on any person by or at the instigation of a public servant for interrogation, punishment, intimidation, or based on any discrimination. There is no domestic legislation which defines torture in police custody. In a bill tabled before Rajya Sabha on 15th December 2017 called The Prevention of Torture Bill,

[18] *Arnesh Kumar* v. *State of Bihar* (2014) 8 SCC 273.
[19] *Torture*,The Cambridge English Dictionary, available at https://dictionary.cambridge.org/dictionary/english/torture (last visited 18 August 2018).
[20] General Assembly resolution 39/46 of the 10 Dec. 1984.
[21] Article 1.1, *United Nation Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,* 1984.

2017[22], torture is defined under section 3 which provides that any act by a public servant or abetted by a public servant or with the consent of the public servant which inflicts grievous hurt to any person or danger to life, limb or health(including mental and physical) of any person, and such act is done intentionally for the purpose of obtaining information, notwithstanding whether in police custody or otherwise.[23]

Torture is a method of extracting information and it's often employed as a "third-degree torture" against the accused. Third degree was the term coined by Major Richard H. Sylvester which implied the use of physical force and torture method used by the police on a suspect to force him to tell the truth.[24] Torture is very widespread in India and used frequently with a deadly effect.[25] The purpose of the torture is to break the accused. There are various forms of torture which the police employ against the accused in custody which ranges from physical, sexual and mental for this purpose.[26] They are as follows;

1.3.2.1 Physical Torture

- The beating of accused in the custody.
- Stripping the accused naked, sometimes in front of other people and in public.
- Administrating electric shocks to the accused, and oftentimes on the sensitive parts of the body.

[22]The Prevention of Torture Bill, 2017, Bill No. XXIX of 2017.
[23]Section 3, The Prevention of Torture Bill, 2017, Bill No. XXIX of 2017.
[24]Darius Rejali, *Torture And Democracy*, (2009, p.73.
[25]Rama Lakshmi*, In India, Torture by Police Is Frequent and Often Deadly*, WASHINGTON POST, 2004 available at http://www.washingtonpost.com/wp-dyn/articles/A41162-2004Aug4.html?noredirect=on (last visited 18 August 2018).
[26]People's Watch ,Torture and Impunity In India, 2008, 1st edition p. 27.

- Slitting body parts, piercing nails and toes with a needle or a razor.
- Applying chili pepper on the injury, or open wound.
- Sodomizing victims by inserting various things in anus, or vagina.
- Administration of "waterboarding" method of torture on the accused etc.
- Various other sexual tortures on men and women, like electrocuting genitals, pinching or piercing breasts and other sensitive parts of the body.

1.3.2.2 Mental Torture

- Subjecting the accused to verbal abuses.
- Stripping the accused naked in front of others, and sometimes in public.
- Blindfolding the victim, keeping them in chains, any other such methods.
- Providing no water, or food, or administrating saline water.
- Not allowed to change clothes, or wash them.
- Forcing the accused to sleep on the floor.
- Not letting the accused meet with the family members.
- Subjecting the family of the accused to mental pain, abuses or even torture. Etc.

These types of torture and acts are violating of the human rights of the victims as provided by the constitution under Article 21.[27] No law in the time being sanctions torture of any kind on any person in India. It is mentioned by Justice V.R. Krishna Iyer that Custodial torture is worse than terrorism because the authority of the state is behind it.[28]

1.3.3 Custodial Rape

Custodial Rape is often timing the extension of custodial torture. Custodial rape can be defined as "rape perpetrated in any state-owned institution by a state agent.[29] According to A.R. Desai, rape committed by police or employees of the state which happens in the custody of police, or police station, jail etc. are custodial rape.[30] Rape in itself is a heinous and derogatory crime, but rape in custody is a monstrous act with no justification whatsoever. Such an act leaves a deep psychological scar, mental trauma along with the physical pain and suffering. Such a state is perfectly described in the case of *State of Punjab v. Gurmit Singh*:

"We must remember that a rapist not only violates the victim's privacy and personal integrity but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim. A murderer destroys the physical body of is victim, a rapist degrades the very soul of the helpless female"[31]

[27] *Kishore Singh* v. *State of Rajasthan,* 1981 SCR (1) 1995.
[28] The Hindu, *Custodial torture worse than terrorism*, available at , https://www.thehindu.com/2003/07/27/stories/2003072703510500.htm (last visited 18 August 2018).
[29] Dorothy Q. Thomas & Robin S. Levi, "Common Abuses Against Women", *Women and International Human Rights Law*,1, 1999 p. 139.
[30] A.R. Desai, *Expanding Governmental Lawlessness and Organized Struggles,* South Asia Books, 1991, p.107.
[31] AlR 1996 SC 1393.

The method of custodial atrocity in the form of rape is directed more against vulnerable women, and because of this many of the cases of custodial rapes go unnoticed or not reported. Sometimes raping any person doesn't have anything to do with the investigation, and is used only as a means to satisfy the lust of the police. Rape is also often times used as a weapon by the state authority to suppress people and such instances are not included in any state-sanctioned reports like NHRC or Crime in India.[32] Custodial Rape violates the fundamental right of right to dignity provided under Indian constitution[33], and several international human rights laws including UDHR and convention against torture.

The legal definition of rape is provided under section 375 of IPC, where its mentioned that rape is committed by man when there is a sexual intercourse and it's against the will of a women, or without her consent, or with consent but such a consent is obtained by coercion or consent given due to misunderstanding, or with consent but such a consent is due to the reason of unsoundness of mind, or intoxication or administration of any other such substance by the man which impairs the mind, or sex with a minor.[34] Although this provision included offenses of rape committed in the police custody, it was not implemented properly to punish the crimes of custodial rapes. There was a need to introduce a new law for the custodial rape after the judgment in *Tukaram v. State of Maharashtra*[35] more commonly known as the Mathura rape case. This was a case of custodial rape where an orphan named Mathura was subjected to custodial rape by the police constable. Supreme Court, however, held that the victim can't be said to be overawed by the police, considering that her brother was outside the police station

[32]Custodial Rape: The Global Persecution of Women, available at http://www.angelfire.com/space2/light11/women/custodial1.html.Accessed on 17 June 2018.
[33]Art 21 of *Constitution of India*.
[34] Section 375 of *Indian Penal Code*, 1860.
[35]AIR 1979 SC 185.

and she could have just shouted for help, this in the eyes of Supreme Court was consent and Supreme Court overturned the Bombay high court judgment which convicted the police constable. This judgment led to widespread protest and criticism by civil society, which resulted in the Criminal Law (Amendment) Act, 1983. This amendment widened the scope of the definition of "rape" and included the concept of "custodial rape". Following are the legal provision which criminalized and provides protection against custodial rape;

- Section 376(2): This section was inserted to deal with custodial rape cases. According to this section, a police officer commits rape if he commits the act of rape within the limit of the police station on a woman who is in the custody of police officers. This section also penalizes other public servants, management or staff of a jail, or management or staff of a hospital who takes advantage of their official position and commits rape on a woman under their custody or in the custody of their subordinates[36].

- Section 376 B, Section 376 C: If any public servant, superintend or manager of a jail takes advantage of his official position and induces or seduces any women in his custody or in the custody of his subordinates to have sexual intercourse with him then though it may not amount to rape it will be punishable with an imprisonment which may extend to five years and fine[37].

Other section of the Criminal Procedure Code, 1973 provides more protection to a woman like according to section 46(4) of CrPC[38], no women shall be arrested after sunset and before sunset, Section 164-A of CrPC provides for the medical

[36] Section 376(2) of The *Indian Penal Code*,1860.
[37]The *Indian Penal Code*, 1860, ss. 376 B and 376 C.
[38]Sub section (4) has been inserted by the Code of Criminal Procedure (Amendment) Act, 2005.

examination of the victim of rape, Section 176-1A provides that when a rape is alleged to be committed on any woman when such a person was in a police custody then an inquiry shall be held by the judicial magistrate.[39] Section 114-A of the Indian Evidence Act, 1872 further provided that in case of custodial rape, where the sexual intercourse is proved and it is alleged by the woman that she is raped by the police without her consent then it shall be presumed that such sexual intercourse was a rape.[40]

However even after providing such protection against custodial rape, the instances of custodial rape are growing because even though the letters of law have changed but the attitudes of the police and judicial authorities have remained the same.[41]

1.3.4 Custodial Death

Right to life is guaranteed by the Constitution of India under Article 21[42] and no one can take away the fundament right to life without the due process of law. Death of any person is a tragedy and any person causing death is dealt with the strictest punishment under Indian Penal Code causing life imprisonment or death.[43] This shows that causing death is a serious matter and requires the highest protection. Murder of any person is a tragedy, but the death of a person in police custody is the worst crime in any civilized society which believes in the rule of law.[44] The report of The Universal Periodic Review of UN on India makes an

[39]Section 176-1A of *Criminal Procedure Code,* 1973.
[40]Section 114-A of the *Indian Evidence Act* 1872.
[41]People's Union for Democratic Rights (India), *Custodial Rape: a report on the aftermath 1994* (1994), PUDR, available at http://www.worldcat.org/title/custodial-rape-a-report-on-the-aftermath/oclc/39903148 (last visited A 22 August 2018).
[42]Art. 21 of *Indian Constitution*.
[43]Section 302 of the *Indian Penal Code*,1860.
[44]*D.K. Basu* v. *State of WB*., AIR 1997 SC 610.

indictment on India on the issue of widespread cases of custodial deaths.[45] When the torture of a person becomes too extreme, and that leads to custodial deaths. Torture as a method of investigation is employed by the police and this is why custodial violence happens. Police also sometimes indulges in the elimination of the adversaries through illegal methods.[46] Custodial deaths in simple terms can be defined as the death of any person in a police custody. To hideaway their own implication in the crime of custodial death, police often times cites "suicide" as a cause of death in police custody.[47] Allahabad High Court has described the practice of custodial violence and death in its own words:

"Custodial death is perhaps one of the worst crimes in a civilized society governed by the Rule of Law. The rights inherent in Articles 21 and 22(1) of the Constitution required to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during the investigation, interrogation or otherwise. If the functionaries of the Government become lawbreakers, it is bound to breed contempt for law and would encourage lawlessness leading to anarchism. No civilized nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an emphatic 'No'."[48]

National Human Rights Commission has tried to take some steps to minimize the instances of Custodial Deaths by directing all the District Magistrates and

[45] Human Rights Council Working Group on the Universal Periodic Review Twenty-seventh session 1-12 May 2017, A/HRC/WG.6/27/IND/2, para 24.
[46] S. Subramanian, IPS (Retd.), *Human Rights and Police*,1992, p.21.
[47] Human Rights Watch, *Bound By Brotherhood*, 2016, p.1.
[48] *Gyanesh Rai* v. *State of UP,* 2015 (6) All LJ 499.

Superintendent of Police to report to the NHRC within twenty-four hours of any instances of Custodial Deaths happening in police custody.[49]

1.3.4.1 Data on Custodial Deaths

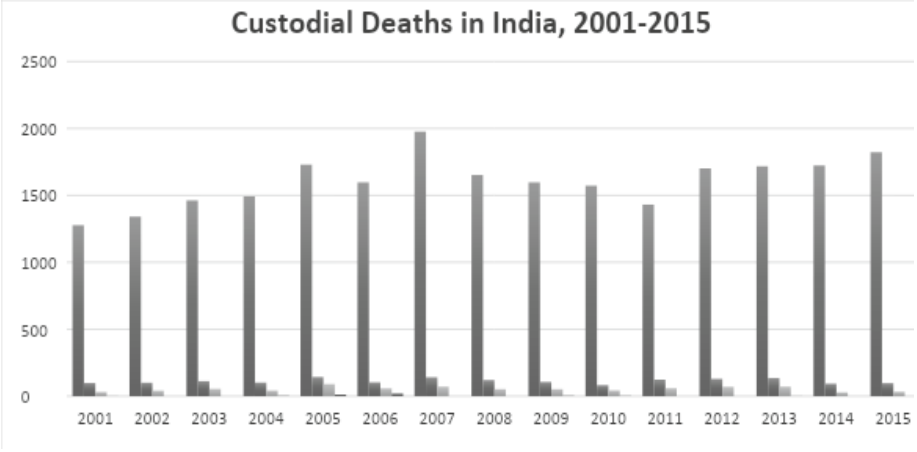


Table 1: Custodial Deaths in India 2001-2015

The data compiled on Custodial Deaths by NCRB is in the chart above. According to the NCRB data, there were 1683 reported cases of custodial deaths between the year 2001-2015 out of which in 795 a case was registered. In the other 892 instances of custodial deaths in total, no case was registered. However, the conviction rate is abysmally low with only 46 convictions during 2001-2015. This means that the rate of conviction, in instances where a case was registered, is 3.15%. Also, on an average, there are 112 cases of reported custodial deaths every year during 2001-2015, and only 53 cases on an average get registered.

[49]Letter No. 66/SG/NHRC/93, dated 14th December 1993, National Human Rights Commission, Annual Report 1993-94(1994).

However, when we look at the NHRC data about the registered custodial deaths then the water gets a little murky. According to the NHRC data during the same duration, there were a total of 25118 cases of custodial deaths which were registered in NHRC. On an average, during 2001-2015, NHRC received 1608 complaints of custodial death per year which it registered, and this data is excluding the Suo-moto cognizance which NHRC took on matters of custodial deaths. From the data, it can be observed that 87% of the deaths occurred in Judicial Custody, while the remaining happened in Police Custody or under Para-military. The total deaths under Police custody are 2184 during 2001-2015.

However, when we compare the complaints registered at NHRC and the NCRB data, then they both differ extremely. According to NCRB data, on an average 112 custodial deaths happened between 2001 and 2015 as against to 1608 complaints registered at NHRC every year in almost the same duration. It can be concluded from such a stark difference that a lot of complaints and cases of custodial deaths are not being registered or excused as something else.

1.3.5 Other Custodial Atrocities

Custodial atrocities by Police are in many forms, and some are less life-threatening but still violates the human rights of an individual. Due to the impunity of police and no accountability police sometimes keeps an accused in a prolonged detention, taking the person into custody even when it's not necessary for the investigation of the case so that the accused breaks down.[50] Police are very efficient and innovative when it comes to atrocities. Some of the following can be considered as custodial atrocities:

- Unnecessary Handcuffing

[50]Hanry Elmer et al, *New Horizons in Criminology*, 1951, p. 253.

- Manipulation of police record of detention, thus prolonging the detention period illegally.
- Not informing the grounds of the arrests
- Fabrications of evidence against the accused, or threat of such fabrication.
- Forcing the person to live in inhuman condition, and not providing medical care to the individual.
- Forcing the individual to stay with other hard-core criminal in a single police station lock-up, etc.

1.4 NON-CUSTODIAL ATROCITIES

Police atrocities which happen outside the police station or custody can be termed as Non-Custodial Police atrocities. As widespread as the custodial atrocities are, non-custodial atrocities are more so for there is almost no protection mechanism against non-custodial police atrocities. Police have a lot of power and a feudal mindset which didn't change even after India gained independence. Instances of non-custodial violence are hard to track down since they happen outside the government records and unless there is a tragic or big incident, such instances are never unearthed. Non-Custodial atrocities can range from Extra-Judicial Killings or Fake Encounters, Police brutality, other forms of harassment etc.

1.4.1 Extra-Judicial Killings

Indian Criminal Justice system believes in the principle of "innocent till proven guilty" and are numerous laws and mechanism to punish the guilty. The task to investigate and find evidence against an accused is the work of the police; however, when the police take the task of being the judicial authority and start

giving orders of punishment to the accused, then such a situation will lead to a breakdown of the "rule of law". Article 21 also provides the right to life which cannot be taken away except as according to the due process of law. Police are never authorized to kill people, as punishing according to the crime of the accused is the task of the judiciary. However, Police have encroached on this function on several occasions by staging encounters. Police also deny the responsibility of any killing.

Extra-Judicial is defined as something done in contravention of due process of law or delivered without legal authority.[51] Extra-Judicial killings thus mean that killing of someone without the sanction of the law or extra-judicial execution. In India police often, times employs the act of extra-judicial killing as a mean to combat crime and terrorism, but often times it leads to innocents being framed or killed.[52] It is generally alleged that Extra-Judicial killings are oftentimes cited as encounter killings.

The first instances of encounters killings were recorded in 1960 in Andhra Pradesh, which was directed against the individuals involved in the Telangana peasant movement. "Encounter Killings" term is used frequently by the official claims since then as a euphemism for extra-judicial killings.[53] Several media stories uncovered such encounters killings as staged, giving rise to the term "Fake-encounters". Fake encounters are not just one-off or sparse incidents but they happen throughout India, and oftentimes with the support and blessing of the state

[51]Available at https://www.merriam-webster.com/dictionary/extrajudicial (last visited 18 August 2018).
[52]A.G Noorani, *Challenges to Civil Rights Guarantees in India*, 2012.
[53]South Asian Documentation Centre, *India: Extra-judicial killings under the spotlight*, SAHRDC, 2003 available at http://www.hrdc.net/sahrdc/hrfeatures/HRF71.htm (last visited on 22nd August 2018).

machinery as a "deliberate and conscious State administrative practice".[54] The evidence to see the extrajudicial killings as a state policy is all over, and it has been employed against alleged Naxalites, gangsters, and terrorist. Media and state in cohorts with each have supported this policy of extra-judicial killing by projecting Naxalites as anti-nationals and Muslims as terrorists and then Muslims are being targeted in fake encounter killings in the name of terrorism while earlier Dalits and other have-nots were shot down in the name of Naxalites.[55] The recent killing of almost 433 alleged criminals in Uttar Pradesh by the police in "encounter killings" further proves the point.[56] In the 2017 Universal Periodic Report (UPR), the position of India was found to be unsatisfactory and the following was observed by the Special Rapporteur:

"The Special Rapporteur also took note of reports of "fake encounters", whereby suspected criminals or persons alleged to be terrorists or insurgents had been fatally shot by security officers. He indicated that justice for victims, accountability, and punishment of the perpetrators was essential and that specific attention should be given to challenging the general culture of impunity; eliminating the practice of "fake encounters"; and ensuring that swift, decisive action, with concrete outcomes, was taken in cases of large-scale killings"[57]

[54]K.C. Saleem, *The problem of "encounter deaths" - extra-judicial killings - in India*, Media Monitors Network (MMN) (2018), https://www.mediamonitors.net/the-problem-of-encounter-deaths-extra-judicial-killings-in-india/ (last visited 22 August 2018).
[55]National seminar on fake 'Encounter Killings' organized by National Confederation of Human Rights Organisations, (NCHRO) in July 2007 as reported by Pervez Bari, Milli Gazette, 3 July 2007. Available at: www.milligazette.com/dailyupdate/2007/200707031_India_Custodial_Deaths_Encounter_Killings_muslims_dalits.htm.
[56]BBC, *The story behind India police killings*, BBC NEWS, 2018, available at https://www.bbc.co.uk/news/world-asia-india-41480752 (last visited 22 August 2018).
[57]Human Rights Council Working Group on the Universal Periodic Review Twenty-seventh session, 1-12 May 2017, A/HRC/WG.6/27/IND/2, para 23.

Numerous heart-wrenching stories of "encounter killings" can be found in the report published by the Human Rights Law Network, Leading Human rights protection NGO in India.[58] Extra-Judicial are violative of not just international laws but also in the judgment of K.G. Kannabiran *vs.* Chief Secretary, the High court of Andhra Pradesh held that the killings in so-called encounters are homicides and must be investigated and prosecuted.[59] Supreme Court is not blind to the situation since extra judicial erodes the credibility of the Rule of Law and Criminal Justice System. In the case of *PUCL vs. Union of India*[60], on the issue of widespread cases of extra-judicial killings, Chief Justice expressed concern by observing that

"The guarantee by Article 21 is available to every person and even the state has no authority to violate that right. In line with the guarantee provided by article 21 and other provisions in the constitution of India, a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights. In spite of Constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, the case of death in police encounters continue to occur."[61] Supreme Court has also issued sixteen guidelines in matters of investigating police encounters which resulted in the death of any person.[62]

[58]Grace Pelly, State Terrorism: torture, *Extra-Judicial Killings, and Forced Disappearances in India,* 2009, pp. 200-202 .
[59]1997 (2), ALD 523 (DB).
[60]*PUCL* v. *Union of India and others*, 2014, Criminal Appeal No.1255 OF 1999.
[61]*PUCL* v. *Union of India and others*, 2014, Criminal Appeal No.1255 OF 1999.
[62]*Id.*

1.4.2 Police Brutality

According to Black's Law Dictionary, Police Brutality means the use of physical force against civilians, which is either excessive or unnecessary.[63] "Excessive use of force" is when a physical force is used which is beyond what would have been necessary or reasonable to handle the situation. Police Brutality is of two types; one is police brutality on individuals and second is police brutality against civilians/group of people/mob etc.

Police brutality on an individual generally happens either during the arrest or detention. Instances of police brutality on a group of civilians happen when there is a rally, marches, riots, or any other collective action by the people. Police are entrusted with maintaining law and order, and sometimes there arise situations when civilians and police clashes creating a great danger to the law and order. Police sometimes use excessive force to control the situation in these circumstances. The police employ "lathi-charge", rubber-bullets, water-canons, tear gas shells, or sometimes even live ammunition and firearms against the civilian.

There are several instances where police brutality was evident, like the recent one in Thoothukudi, Tamil Nadu where police fired on protesting civilians resulting in the deaths of eleven people.[64] According to "Basic Principles on the Use of Firearms by Law Enforcement Officials" Rule no. 9, law enforcement officials should not use firearms against any person except in self-defense, or reasonable

[63]What Is Police Brutality?, LAW DICTIONARY , https://thelawdictionary.org/article/what-is-police-brutality/ (last visited 18 August 2018).
[64]Michael Safi, *Police in south India accused of mass murder after shooting dead protesters*, THE GUARDIAN, May 23, 2018, available at https://www.theguardian.com/world/2018/may/23/police-in-south-india-accused-of-mass-after-shooting-dead-protesters (last visited Aug 18, 2018).

circumstances can use firearms as according to the "principle of proportionality".[65] And rule no. 10 provides that warning should be given before using force on civilians.[66] Excessive use of force is even violates fundamental rights. However, Police brutality is widespread in India.

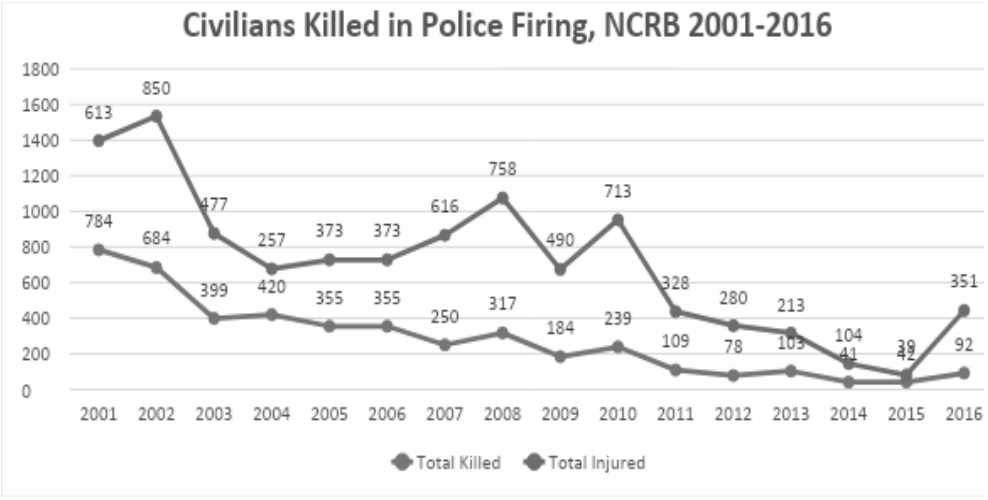


Table 2: Civilians Killed in Police Firing 2001-2016, NCRB

According to the NCRB data, 4452 civilians died in Police firings, and some 6835 were injured between 2001-2016. The incidence of police firings includes firing due to riot control, Anti-Dacoity operations, against Extremists or Terrorists, and any others person killed. Police can fire in self-defense and as according to the principles of proportionality, but such a large number of deaths by Police force may be due to excessive use of force. Death of a person is the ultimate tragedy, and other avenues should be explored before taking the life of any other. On an

[65]Basic Principles on the Use of Force and Firearms by Law Enforcement Officials Adopted by the *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,* Havana, Cuba, 7 September 1990.
[66]*Id.*

average, 523 civilians get killed, and some 804 gets injured every year due to the police firing.

1.4.3 Other Non-Custodial Atrocities

Other non-custodial atrocities are many but some of the major and relevant ones are the harassment by the police, and such harassment can be either physical or mental. Police forces also have been accused of "enforced disappearance" of individuals. Police take a person into custody, unlawfully, and then no information about those individuals can be found, this act of enforcing someone's disappearance is a police atrocity. There are several other non-custodial police atrocities like character assassination, blackmailing, demanding bribery, keeping under surveillance, extortions etc.

1.5 Human Rights Violation by Police: Data 2001-2016

The number of Human Rights Violations due to police atrocities is hard to gather since most of the cases aren't dealt with, and in lots of instances of police atrocities there is no complaint. However, the National Crime Record Bureau compiles the data collected from the various Law Enforcement agencies across the country.

Table 3: Human Rights Violation by Police, 2001-2016 NCRB.

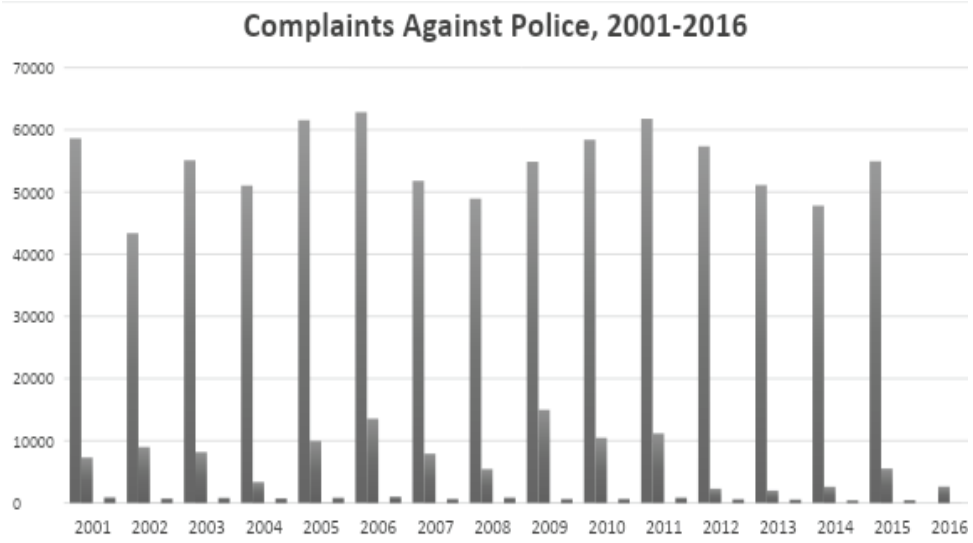
*The data on human rights violation of the police include the disappearance of persons, illegal detention or arrest, fake encounter, extortion, torture, false implication, failure in acting, indignity to women, atrocities on SC/ST, and all the other human rights violation. These, however, exclude violations such as custodial deaths, custodial rapes, police brutality etc.

NCRB data is what the law enforcement agencies themselves provide, thus they are not the exact instances of the human rights violation but the minimum amount that is accepted as Human Rights violation. These are instances of violations which police have recorded. According to this data, there were 1881 Human rights violations in total, 636 charge sheet, and mere 318 convictions. Every year there is 125 violations of human rights on an average, and 19.8 convictions per year. The year 2008 saw the most amount of reported with 253, and 2011 with the most amount of conviction with 205. The conviction in the year is an anomaly as can be seen from the trend, and it really skewed the data, because if the convictions of 2011 are removing the conviction rate will fall much lower. The rate of conviction is a measly 16.905 % for the year 2001-2016 in cases of human rights violations.

NHRC data, however, presents a different picture. According to NHRC data, the total number of complaints registered under various categories of Police atrocities stands at 568845 for the year 2000-2017. NHRC also registered 22566 cases for Unlawful detention, 15 cases of Custodial Rape, 8518 cases of Custodial Torture, 266 cases of other Custodial Violence and 1782 cases of Alleged Fake Encounter between the year 2000-2017. Commission also recommended persecution of errant police officials in 33 cases and disciplinary actions in 191 cases.[67]

1.6 Complaints Against Police: 2001-2016

Another great indicator to analyze the impunity of the police is the data regarding complaints against the police in all forms. These data are reported by NCRB and are under the head of "complaints against police". These complaints are not specifically for Human Rights Violations but include all the other forms of complaints against the police personnel including that of Human Rights Violations.



[67]RTI by Karan, *Supra* note 3.

Table 4: Complaints against Police 2001-2016, NCRB

As visible from the chart above, there are a lot of complaints against police for various reasons. On an average, 54638 complaints were received yearly between years 2001-2016, with a total of 819572 complaints, although the data for the year 2016 for complaints was not available. The highest number complaints ever received between these periods were in 2006, with 62822 complaints. However, the impunity of police can be seen from analyzing the other heads. Out of the total complaints between years 2001-2016, only 113689 were registered as a criminal case, out of this, in only 699 cases there was a conviction of the police officer. However, data seems better when we look at the dismissal rate, where 10856 police were dismissed in total between 2001 and 2016 because of these complaints. The total conviction rate of police between these periods, in instances where a case is registered, is alarmingly low at 0.61%. The rate of dismissal is also not looking with only 1.32% of a policeman getting dismissed between this period based on the total complaints and on the basis of cases which got registered, the dismissal rate is 9.54%. However, only 13% of the total complaints are being registered as cases against the police which show that most of the complaints were rejected. On an average 54638 complaints are received per year and only 45 convictions with 7569 cases registered against police per year. These figures point out that how errant police personals aren't being dealt with in a satisfactory manner.

1.7 Conclusion and Findings

Police are the protector of law and are called as a Law Enforcement agency. The police force had a long history spanning from the ancient period to post-independence period. Indian police were governed by the Indian Police act 1861, and still, it is being governed and structured in the same way as it was structured in the colonial times. The Irish-Constabulary model was perfect for an outsider wanting to suppress the native population and had the sole objective of maintaining law and order. There were several laws which gave immunity to the

police in the name of "Sovereign Immunity or Authority" for the purpose of maintaining law and order, and same law is still in existence and enforced today, like sec 197 of CrPC. and various provisions of IPA 1861. Apart from these, police have been given discretionary powers under CrPC. However, they might have been done with a good intention of maintaining law and order of such a vast country such as India, but these provisions gave birth to the culture of impunity to the police. The impunity directly flows from the enabling provisions of the law. Due to this culture of impunity, Police atrocities remained widespread throughout the country with new patterns and modus-operandi. There were many instances of custodial deaths, custodial rapes, illegal detention, and all other human rights violation. Police atrocities don't just remain bounded in the police station but, as can be seen from the cases of alleged "fake encounters" and police brutality, it has spread outside. Indian constitution is the supreme law of the land and provides various fundamental rights including the most important, Right to Life and Right to Dignity. However, a Police atrocity violates such rights and thus Police atrocities violate the human rights of the people.

The patterns of police atrocities and its existence have already been established including the causes under this paper and the cause too, which is the impunity to the Police and failure of the Human Rights protections mechanism in the country, as can be seen by the conviction rate of the police personnel. The solution lies in either removing the impunity granted to the police via several provisions which makes it difficult to persecute police and also by creating a watchdog specifically for Police atrocities, which has the power to punish the Police for Police Atrocities.

CASIHR JHRP VOL. 3, ISSUE 1

THE PROTECTION OF HUMAN RIGHTS UNDER THE PROCEDURAL CLAUSES OF THE ROME STATUTE

Karan Godara*

"*While the ICC is not a human rights court in the strict sense, it has great significance for the global protection of the most fundamental human rights and values.*"[1]

Dr.Hans Peter Kaul

1. Introduction

The modern concepts of human rights and international criminal justice are both closely related. It was the aftermath of World War II that prompted the transformation of these abstract concepts into a living reality. Whereas on the one hand, the world witnessed the adoption of the first document in human history to proclaim the universality of human rights in the form of the Universal Declaration of Human Rights which has been aptly described as "…….the mine from which other conventions as well as national Constitutions protecting these rights have been and are being quarried"[2], on the other hand, it was during the same timeframe that the Nuremberg Tribunal which has come to be regarded as the "birth certificate of International Criminal Law"[3] was established.

Looking at the relationship between the two concepts from the perspective of the individual as the subject, it appears that human rights as well as international

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[1] Dr. Hans-Peter Kaul, *Human Rights and the International Criminal Court*, International Criminal Court 2 (Jan.10,2011) available at: https://www.icc-cpi.int/NR/rdonlyres/2C496E38-8E14-4ECD-9CC9-5E0D2A0B3FA2/282947/FINAL_Speech_Panel1_HumanRightsandtheInternational.pdf

[2] J.E.S. Fawcett, *The Law of Nations*, The Penguin Press, 1st edn. 1968, p.158.

[3] Gerhard Werle, *Principles of International Criminal Law*, Oxford, 3rd edn. 2014, p. 5.

criminal law are two sides of the same coin as it is the individual in whom both human rights and human duties including international criminal responsibility reside.[4] The linkage between international criminal law and international human rights law also stands established from a bare reading of article 36(3)(b) of the Rome Statute which lays down the eligibility criteria for prospective judges to be elected to the International Criminal Court (hereinafter called "ICC").[5] Article 36(3)(b), inter alia, lays down that every candidate shall have competence either in criminal law and procedure or in relevant areas of international law such as international humanitarian law and the law of human rights.

International bodies such as the ICC have come to play a very crucial role in the protection of human rights in the 21st century. Although the jurisdiction of the ICC established under the Rome Statute is limited to the four core international crimes namely genocide, war crimes, crimes against humanity and the crime of aggression, nevertheless, it helps tremendously in deterring national leaders or high-ranking officers from grave violations of human rights. There can be no doubt that each time an international crime occurs, it amounts to a violation of one or more human rights as well. It is common knowledge that the ICC performs the onerous task of protecting human rights as a natural corollary to its primary function of punishing the perpetrators of the four core international crimes within its jurisdiction. What this paper attempts to unravel goes beyond the apparent. In this paper, an attempt has been made to analyse the provisions of the Rome Statute from the procedural vantage point in order to determine how far the procedural clauses help in guaranteeing the protection of the most fundamental human rights known to mankind. This is an intricate study which shall help in better

[4] *Id.* at p. 51.
[5] Kriangsak Kittichaisaree, *International Criminal Law* , Oxford University Press, 1st edn reprint. 2009, p. 62.

comprehension of how the principles of criminal law adopted under the Rome Statute are also championing the cause of human rights.

2. Protection of Human Rights Under the Procedural Provisions of the Rome Statute

There are several fundamental procedural guarantees that have been incorporated under the Rome Statute which help in securing the human rights enshrined under international law. The human rights enunciated under the International Covenant on Civil and Political Rights (hereinafter called "ICCPR") have been taken as the benchmark to determine the compliance of international standards of human rights under the Rome Statute. The following procedural guarantees are available under the Rome Statute:

2.1 Right against double-jeopardy

The prohibition of double jeopardy is based on the maxim *Ne bis in idem* which means that nobody should be judged twice for the same offence. The Rome Statute has incorporated the principle of *Ne bis in idem* under article 20 of the statute. The protection afforded under article 20 of the Rome Statute is three pronged:

(a) No trial of person by the ICC where he has been convicted or acquitted for the same crime by the ICC;

(b) No trial of person by another court where he has been convicted or acquitted for the same crime by the ICC;

(c) No trial of person by the ICC where he has been convicted or acquitted for the same crime by another court except when such proceedings were conducted for the purpose of shielding such person from criminal liability or

the proceedings were not conducted independently or impartially in accordance with due process recognized by international law;

2.2 Right to Non-Retroactive Application of Law

Retroactive application of law is not unknown to international criminal law; in fact it lies at the heart of its origins. The Nuremberg Charter is the prime example of retroactive application of law. The Nuremberg Tribunal would ordinarily have been unable to extend its jurisdiction over the crimes encompassed under the Nuremberg Charter as the conduct sought to be punished thereunder had not been criminalized prior to the infractions having taken place. The retroactive application of law under the Nuremberg Charter has been sought to be legitimized on two grounds: (a) the legal argument that customary international law had transformed the conduct sought to be criminalized into criminal offences in the meantime; and (b) the moral argument that crimes are committed by men and not by abstract entities and therefore it is the individuals who should be punished;[6] Nevertheless, the retroactive application of criminal rules is unfair in the least because it seeks to criminalize conduct which did not constitute a criminal offence at the time of its commission.

The principle of non-retroactive application of law is reflected in the Latin maxim *nullum crimen nulla poena sine lega* which translates into no crime or punishment without law. To make amends for Nuremberg and other subsequent tribunals, non-retroactivity of law has been explicitly adopted under articles 22, 23 and 24 of the Rome Statute which will ensure that no person is punished for conduct prior to its criminalization under international criminal law. In fact, these articles go further to ensure the absolute protection of human rights by adopting (a) the principle of specificity whereby the definition of a crime under the statute shall be strictly

[6]Illias Bantekas, *International Criminal Law*, Hart Publishing, 1st edn. 2010, p.23.

construed in accordance with the provisions of Rome Statute without expanding definitions by analogy; and (b) extending the benefit of favourable changes in law in favour of the person being investigated, prosecuted or convicted.

2.3 Right to Trial before Independent and Impartial Judges

Faith in the judicial process is the most fundamental aspect of delivering justice. Justice should not only be done, but should manifestly and undoubtedly be seen to be done.[7]

The judicial independence and impartiality in the international criminal legal system can be maintained by ensuring the following:[8]

- Selection mechanisms that help in choosing not only competent and unbiased judges but also those independent of political or government authority.
- Prohibition on judges from receiving instructions from outside or being involved in the concerns of the parties.
- The establishing of monitoring procedures that prevent the practice of bias and removal of judges from the case or even the court where found to be so.

The Rome Statute has done well to ensure judicial independence and impartiality by adopting the following norms in relation to its judges:

[7] *R* v *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256.
[8] Antonio Cassese, *International Criminal Law*, Oxford, 2nd edn., 2008, p.379.

- Article 36(9)(a) of the Rome Statute envisages the inability of the judges from seeking re-election after the completion of their term. This allows the judges to function independent of political or government control as it can decide cases without fearing for a subsequent nomination by their respective governments in the Assembly of State Parties.

- Article 40(1) of the statute mandates that the judges shall be independent in the performance of their functions.

- Article 40(2) mandates that judges must not partake in activities likely to jeopardize the performance of their judicial functions or to affect the confidence reposed in their impartiality.

- Article 40(3) requires the judges to not undertake any other professional occupations while serving as judges of the ICC.

- Article 41(2)(a) disqualifies a judge from participating in a case where his or her impartiality may be doubted on any ground. In particular, he or she shall be disqualified from the case when the judge has been involved in any capacity before the ICC or in a related criminal case at the national level.

- Article 48(2) shields the judges of the ICC with the same privileges and immunities as enjoyed by diplomatic missions during as well as after the expiration of their tenure for anything said or done in the performance of their official functions. This immunity protects the judges from the undue interference of nation-states.

2.4 Rights during the Investigative Stage

Article 55 of the Rome Statute enlists several rights made available to an individual whilst under investigation. These include:

- Right against self-incrimination or the confession of guilt;
- Right against coercion, duress or threat, torture, cruel, inhumane or degrading punishment;
- Right to access of interpreter if language cannot be understood by said person;
- Right to protection against arbitrary arrest or detention;
- Right to remain silent during questioning;
- Right against interpreting silence to be an admission of guilt during questioning;
- Right to legal assistance of one's choosing and presence of counsel during questioning;

2.5 Right to be Tried in the Presence of the Accused

Under ordinary circumstances, it is true that the right to remain present during the trial must be treated as sacrosanct; however, there have been instances when this right has been statutorily overlooked, especially so when the accused is knowingly playing truant. For instance, article 12 of the Nuremberg Charter[9] permitted trials

[9]Article 12 of the Charter reads "The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of Justice, to conduct the hearing in his absence." See Charter of the InternationalMilitaryTribunal,1945.

to take place in the absence of accused when the accused deliberately failed to appear before the tribunal despite being formally notified to appear before it.

There is not a single provision in any international treaty which explicitly or impliedly prohibits trials *in absentia.* It is true that article 14(3) (d) of the ICCPR provides for a trial in the presence of the accused as a minimum guarantee in the determination of criminal charges against him, yet the same has never been interpreted to rule out the possibility of trials *in absentia* under extraordinary circumstances.[10] In *Daniel Mbenge* v. *Zaire*[11]it has been laid down to the effect that article 14(3) (d) of the ICCPR cannot be construed to render proceedings *in absentia* as impermissible per se. Circumstances may arise where a trial *in absentia* may be necessitated. Where the accused willingly remains absconding despite the knowledge of commencement of proceedings against him is one such instance or else it would amount to permitting him to thwart justice and escape the clutches of law by fleeing the jurisdiction even before the commencement of the trial.

Being a basic human right recognized by the ICCPR, conducting trials in the presence of the accused has been rightly incorporated under article 63[12] of the Rome Statute. But it has come to light that this principle is being maneuvered as a loophole under international criminal law inasmuch as several accused persons

Availableat:http://www.un.org/en/genocideprevention/documents/atrocitycrimes/Doc.2_Charter%20of%20IMT%201945.pdf.

[10]Cassese, *supra* note 8, at pp.390-391.

[11]Views of the UN Human Rights Committee under article 5 (4) of the *Optional Protocol to the International Covenant on Civil and Political Rights,*1983, paragraph 14.1. Available at: https://www.ohchr.org/Documents/Publications/SelDec_2_en.pdf.

[12]Art 63. 1. The accused shall be present during the trial. 2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

continue to evade the law by not joining the trial before the ICC. The former Sudanese president Omar Al-Bashir is one such glaring example who has been evading arrest warrants since 2009 for five counts of crimes against humanity, two counts of war crimes and three counts of genocide.[13]

Probably the time has arrived to amend the provision incorporated under Article 63 of the Rome Statute insofar as trials *in absentia* may be permitted as an exception to the general rule when the accused continues to willfully abscond from the proceedings to thwart the process of international criminal justice. The right of the accused to be tried in his presence has to be weighed against the victims' right to justice for the commission of the most serious international crimes. After all, justice delayed is justice denied.

2.6 Right to Presumption of Innocence

All major legal systems around the world proclaim the principle of presumption of innocence. The legal precept of being innocent until proven guilty entails the following:[14]

- The person charged with a crime must be treated as being innocent until the charges against him stand proved.

- The burden of proof of the guilt of the person charged with the crimes is on the prosecutor. All that the person charged with the crime has to do is rebut the evidence produced by the prosecutor; he need not prove his innocence.

[13] *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 available at: https://www.icc-cpi.int/darfur/albashir.
[14] Cassese, *supra* note 8, at pp. 380-381.

- In order to find the accused guilty of the crimes charged, the judge must find the accused guilty beyond reasonable doubt.

The presumption of innocence has been adopted under article 66 of the Rome Statute. The presumption of innocence adopted under article 66 is complete and wholesome in the sense that it incorporates all the aforementioned dimensions associated with the legal precept of being innocent until proven guilty.

As regards the burden of proof on the prosecutor, failure to produce convincing evidence will lead to dismissal of charges. The charges may be thrown out even before the end of the trial at the request of the defence.[15] For instance, in *The Prosecutor* v. *Laurent Gbagbo and Charles Blé Goudé*[16] the defendants were charged with crimes against humanity in relation to the violent political conflict following the 2010Côte d'Ivoire presidential elections. The two defendants were acquitted following the motion for acquittal & immediate release and a no case to answer motion by the defence team. The trial chamber noted that the prosecutor had failed to establish the core elements of the alleged crime which translate into (a)a "common plan" to keep former President Laurent Gbagbo in power; (b) the commission of crimes against civilians "pursuant to or in furtherance of a State or organizational policy"; (c) the existence of patterns of violence from which a "policy to attack a civilian population" could be said to be inferable. Failing to submit sufficient evidence to prove the culpability of the defendants, the trial chamber ordered the release of the two defendants.[17]

[15] *Id.* at 382.
[16] ICC-02/11-01/15.
[17] Press Release, *ICC Trial Chamber I Acquits Laurent Gbagbo and Charles blé goudé from all charges,* InternationalCriminal Court ,15th jan. 2019 available at: https://www.icc-cpi.int/pages/item.aspx?name=pr1427.

2.7 Rights of the Accused in the Course of the Trial

The accused has been extended a number of rights under article 67 of the Rome Statute. All these rights ensure that there is no miscarriage of justice during the trial process:

- Subject to the limitations of the statute, the accused shall be entitled to a public hearing. Article 68(2) operates as an exception to the general rule of public hearing. It provides for proceedings in camera to protect victims, witnesses or an accused person.
- The accused shall be entitled to a fair and impartial hearing.
- The accused shall be entitled to be immediately informed of the details of the charges leveled against him in a language within his comprehension.
- The accused shall be entitled to adequate preparation of his defence and confidential communications with the counsel of his choosing.
- The accused shall be entitled to a trial without undue delay.
- The accused shall be entitled to legal assistance of his choice and the court must assign legal assistance to the accused free of cost in cases where he lacks sufficient means to pay for it.
- The accused shall be entitled to call witnesses and have them examined on his behalf.
- The accused shall be entitled to raise defences and present other evidence admissible under the Rome Statute.

- The accused shall be entitled to the services of an interpreter and translated documents free of cost where the language of the court is not within the comprehension of the accused.

- The accused shall be entitled to remain silent without such silence being interpreted as his guilt.

- The accused shall be entitled to make an unsworn statement in his defence.

- The accused shall be entitled to not have a reversal of the burden of proof or any onus of rebuttal.

- The accused shall be entitled to the disclosure of any material within the prosecutor's possession which may exonerate or mitigate his guilt or which may affect the credibility of the prosecution's evidence.

2.8 Rights of victims

The definition of the term "victims" was subject to lengthy debate at the Preparatory Commission for the International Criminal Court.[18] The definition adopted today defines victims as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.'[19] The term also includes within its ambit 'organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.'[20]

[18]Kittichaisaree, *supra* note 5, at p.299.
[19]Rule 85 of the Rules of Procedure and Evidence. Available at: https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf.
[20]*Ibid.*

The victim has been given a number of rights under article 68 of the statute:

- The court to safeguard the victim's right to physical and psychological safety, dignity and privacy. The court shall take into account relevant factors such as age, gender, health and nature of the crime. Particular attention must be given to crimes involving sexual or gender violence or violence against children. However, none of the measures shall be prejudicial or inconsistent to the rights of the accused and a fair trial.

- The court may conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or special means in seeking to protect victims. In particular, these measures are to be undertaken when it is a case of sexual violence or a child victim. The court shall have due regard to the views of the victim in making its decision on the matter.

- The court shall permit the expression of the views and concerns of the victims where their personal interests have been affected. However, the manner of expression shall not be prejudicial or inconsistent to the rights of the accused and a fair trial.

- The "Victims and Witnesses Unit" may advice the prosecutor and the court regarding measures that would be helpful in securing the protection, security, counseling and assistance necessary for the victims.

Additionally, there exists the right to reparation for the benefit of the victims which includes the right to restitution, compensation and rehabilitation. Article 75 of the statute empowers the court to make an order either directly against the convicted person to make appropriate reparations to the victim or to use its discretion to order the award of reparations from the Trust Fund of the ICC.

2.9 Right to Compensation for Wrongful Arrest or Conviction

Although compensation cannot undo the physical or psychological harm suffered by a person who has been wrongfully arrested or convicted, nevertheless, compensation has developed as an important remedy under international law for a person who has suffered at the hands of the legal system.

Article 85 of the Rome Statute seeks to provide the remedy of compensation to (a) victims of unlawful arrest or detention; (b) persons whose conviction has been reversed on newly discovered facts conclusively showing that there has been a miscarriage of justice unless the non-disclosure of unknown facts is wholly or partly attributable to the person seeking the remedy himself; and (c) persons released from detention following acquittal or termination of proceedings where the court finds conclusive facts demonstrating grave and manifest miscarriage of justice.

3. Concluding Remarks

Human rights protection has been generally regarded as the task of the nation-states. Human rights are implemented within the bounds of the nation-state rather than in between two or more nation-states. Many a time, the nation-states themselves initiate the violation of human rights against their own subjects or the subjects of other nation-states which has led to the internationalization of human rights protection.[21] The coming into force of the Rome Statute has been one of the most significant developments in the fields of International criminal law and human rights.

The Rome Statute has made the deliverance of International criminal justice a reality. For the first time in world history we have a permanent forum for trying

[21]Werle, *supra* note 3, at p. 51.

the most serious core international crimes. What is exemplary about the Rome Statute is its ability to deliver justice against the most heinous international crimes while strictly maintaining the international standards of human rights at the same time.

An analysis of the Rome Statute from the procedural standpoint reveals that the protection of human rights has been given paramount importance throughout the Statute. The Rome statute has not merely adopted the bare minimum guarantees enshrined under the ICCPR but has gone a step further in adopting many additional provisions which help in the protection of human rights.

ALIENS BEING ALIENATED FROM HUMANITY: HUMAN RIGHTS OF THE MIGRANTS

Omkar Upadhyay*

1.Introduction

From the dawn of the civilisation, migration has been a known factor of civilised life. People havebeen crossing borders varied reasons of which improving economic conditions is universal. Toady, 3% of the total population is on the move, the number would be even larger if irregular migrants are taken into account. The rate of migration is growing at an unprecedented level and is becoming increasingly visible. The increased flow of people has been given a boost by the other international phenomenon known as globalisation. Out of the total number of migrants, women constitute half of them. Children too constitute a significant proportion of the migrants. The migrants move into a territory to which they are largely unfamiliar, and mostly are seen as aliens in the territory of the host country.

The issue with migration has always been that the world tends to ignore the benefits and advantages that this phenomenon yields. Migration leads to economic growth and diversification of the market. What the world does sees in migration are its ill effects. Nation-states tends to regard migrants as encroachers who have no right to have access in their territory. Thus a discriminatory treatment is attributed to them which leads to the violation of human rights.

Keeping in mind the discrimination to which the migrants are exposed to, the author has undertook this study to delve into the different aspects of treatment

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which the migrants receives in the course of their journey; starting form the moment they leave their homeland, to the time they are in transit, reaching the borders and concluding at their arrival in the desired country. The author in his paper has tried to analyse how the migrants becomes victims of practices which leads to violation and exploitation of their human rights. The paper deals with the ways in which the migrants are made devoid of their rights in the different phases. The author has divided cases of violation in three phases, namely during transit, at the borders, and after arrival. Also the paper discusses the plight of the migrants with a categorical division of the most vulnerable groups which includes the irregular migrants, women, children and unaccompanied minors along with the migrant workers. Before the discussion of the abuses of human rights the author has first given a brief overview of what migration is and then has tried to set up a linkage between the concept of migration and human rights. Paper also covers certain of the relevant international instruments in place for dealing with the issue in hand.

The following study is limited in its scope and only covers on category of aliens i.e. migrants and not refugees.

2. Concept of Migration: A Brief Overview

An age-old phenomenon, migration as a practice has been prevalent in the world for a very long period of time. It is an old practice of people to travel from their homeland to another country for reasons such as employment opportunities, escape from poverty, wars etc. In the modern times there has arisen a distinction between these moving peoples into two categories namely, refugee and migrants. A refugee, under the international law, has been defined as a person leaving his country of origin due to well established fear of being persecuted or because of

war.[23] However, the term migration have not been able to achieve an universally accepted definition, the reason being its diverse nature. UNESCO has defined a migrant as being "any person who lives temporarily or permanently in a country where he or she was not born, and has acquired some significant social ties to this country"[24]. A more broader definition of a migrant can be laid as, "any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is."[25]

International migration is a complex phenomenon having impact on economic, social and security aspects of our lives. In this globalised world, migration too have become globalised touching each and every part of the world.[26] There has been an increase in the number of migrants in the recent decades. Current estimates show that at present there are about 244 million migrants on the move which constitutes about 3.3% of the world population.[27]

Having dealt with the 'what' of migration, it is necessary now to delve into the 'why' of migration. Though the movement of people was existent in the earlier times too but the motivating factors of the past and the present have changed significantly. Just like its definition, the reasons guiding migration are diverse in nature. One of the most prominent factor have been the poor living conditions in

[23]Article 1(A), *Convention Relating to the Status of Refugees*, UNHCR, 1951.
[24]www.unesco.org/new/en/social-and-human-sciences/themes/international%20migration/glossary/migrant/. (accessed on 10 May 2019).
[25]UN Migration Agency, *International Organisation for Migration*, available on https://www.iom.int/who-is-a-migrant. (accessed on 10 May 2019).
[26]https://www.iom.int/wmr/chapter-1. (accessed on 10 May 2019).
[27]World Migration Report 2018, *International Organisation of Migration,* The UN Migration Agency, available on https://publications.iom.int/system/files/pdf/wmr_2018_en.pdf. (accessed on 10 May 2019).

their homeland and a desire for better lifestyle. The conditions could relate to ranging from availability of arable land to better employment opportunities. Another of the reason could be economic stagnation of the country of origin, which combined with por living conditions further motivates the people to migrate for search of something better. Apart from the economic reasons, the political factors too play an important and major role in influencing the decision of the people to migrate.

However, it is pertinent to be kept in mind that the reasons are not limited to the ones mentioned here and does not operate in isolation. Also, the same set of causes does not have universal applicability. With each case, the reason and the guiding factors may be different. Though appearing as a meek phenomenon, migration provides with multiplicity of challenges, the prominent of them being the issue of human rights violations of the migrants.

3. Human Rights Migration Linkage: Violations and Need for Protection

Before discussing the human rights of the migrants, it is pertinent to probe into the meaning of the concept of human rights in general. The UN Human Rights Office of the High Commissioner (OHCHR) defines human rights as- Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.[28] This definition by the OHCHR has been regarded as universal because of its comprehensiveness. The definition in itself carries the qualities that have been attributed to human rights. Human rights have been considered as universal and inalienable, interdependent and indivisible, equal and non-discriminatory above all

[28]https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. (accessed on 11 May 2019).

a fundamental possession of every human being by virtue of him/her being a human. The Universal Declaration of Human Rights (UDHR) can be regarded as the prominent international instrument recognising and upholding the values of human rights and their necessities. Human rights' universal applicability has been reiterated in several conferences, dialogues and meetings of the international organisations. Especially after the second World War, where the world as witnessed the dearth of humanity, human rights became the grounds of the customary international laws finding place in the international treatises, documents etc.

It is clear that human rights operates for all without any discrimination, however, this non-discriminatory value seems to fade away when the question of migrants comes into picture. Article 13[29] of the UDHR lays down that it is the right of every individual to leave his country and travel to the country of his will. Thus migration is in itself an inherent human right guaranteed by UDHR and receives universal acceptance because of ratification of the instrument by almost all of the nations. It has been observed form time to time that the migrants, being alien in the territory of the host country, are denied of their basic human rights and thereby subjecting them to discrimination .Human rights, as guaranteed under both national and international laws, have an essential duty in protecting the migrants in the countries to where they have fled. The State or the nations where the migrants seeks asylum have been known to act arbitrarily, treating them as inferiors and often neglecting them thereby exposing them to human rights violations. However, it is necessary to be kept in mind that migrants too are human beings and empowered to exercise their human rights. As stated by the Global Migration

[29]Article 13-
(1) Everyone has the right to freedom of movement and residence within the borders of each State.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

Group (GMG), regardless of a person's migration status, he possesses certain fundamental rights such as that of life, liberty and security; right to be free from discrimination based on any criteria; right to have free trial etc.[30] All these are human rights to which everyone is entitled without any exception. They don't acquire these rights because of being a citizen, but because of them being a human.

3.1. Violations of Human Rights of the Migrants

Migration largely has economic reasons as well as consequences. If given proper care and protection, this phenomenon could assist in the economic conditions of the receiving conditions as a result of increased labour along with new skills. The benefit is also to the country of their origin, as the remittances send by them to their families or friends will ultimately lead to increase in the per capita income of the country. This is one side of migration, the side which is desired consequence of migration. However, migration also possess important challenges of vulnerability and discrimination.

The violations of human rights of the migration have largely been attributed to the government, who does it through its actions, decisions, laws and policies. The receiving country's government considers the migrants as secondary to their own citizens and treats them accordingly justifying their action by pleading the protection of interests of their citizens. Also while formulating policies and arriving at decisions the interest of the migrants are often kept it bay. The irregular migrants are the ones who are victimised the most. The ones at the border are not allowed to get in and the ones who are already in are subjected to the most stringent forms of surveillance and scrutiny. At the basic levels, migrants are faced with difficulties such as non-recognition of their educational degrees, denial of

[30]GMG, *Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation*, 2010, available at https://www.refworld.org/pdfid/4f7157bc2.pdf. (accessed on 10 May 2000).

employment opportunities and a constant fear of deportation to their homeland from which they have escaped. Another of the state supported discriminatory tactic is the practice of 'racial profiling' of the migrants, which is the clear violation of there human right of equality and non-discrimination on grounds of race. Racial profiling has been ascribed the meaning of a practice involving police or other such security personnel stopping, questioning and arresting the migrants or any other stateless person without any valid ground apart from racial grounds.[31]

The violations to which migrants are faced with can broadly be divided under three phases:

(a) During transit.

(b) At the borders, and lastly,

(c) After arrival.

3..1.1 During Transit

Migrants are most vulnerable of being subjected to violation of human rights during the course of transit. The study by the UN department OHCHR titled as 'Situations of Migrants in Transit', reports that during 2015 alone, more than 5000 migrants lost their life on the migratory routes around the globe.[32] Reason for this is the great amount of time the migrants have to spend while migrating. On the one side the migrants are faced with challenges such as starvation, lack of physical security, abduction and trafficking, rape in case of women and children and such alike problems. The other side is much related to governmental actions. Primarily countries of Middle-East and countries along the Mediterranean have been the

[31]Maria Deanna P. Santos, *Human Rights and Migrant Domestic Works* , 2005, p.59.
[32]Available at https://www.ohchr.org/EN/Issues/Migration/Pages/Migrantsintransit.aspx. (accessed on 11 May 2019)

places where the migrants wishing to enter the west halt. These becomes the transit countries. It is the inability of these countries in protecting the rights of the migrants which results in such discrimination.

Most migrants lose their life while on sea routes because of the denial of entry by the governments. Most of the times the states refuse and orders to return he boats of the migrants arriving at its coast by pleading that it will endanger the nation's security and sovereignty. Thus migrants becomes stranded, they are denied access to the country they were hoping to enter and they cannot return to their homeland from which they have escaped for whichever reason. Amnesty International describes the fate of such stranded migrants as, "Many migrants are stranded in countries of transit or destination: they have been denied the right to enter and remain legally, but are unable to return to their countries of origin. Some migrants cannot return to their countries of origin due to continuing insecurity, because there is no legal means to get there, or because it is impossible in practice for them to return."[33] Interception of migrants on transit cause the violation of their human rights. The migrants on transit either die in the sea, by starvation, by scorching heat or by being buried under the snow. But the states were and are inconsiderate of their plights.

3.1.2 At the Borders

Borders plays an important role in the fate of the migrants. It is at the borders where the future course of the migrants gets decided. International borders are rather a dangerous place for the migrants, especially the irregular ones, as much of the draconian acts occur here. Some of the prominent ones could be listed as below:-

[33]'*Living in the Shadows: A Primer on the Human Rights of Migrants*,' Amnesty International, 2006, p27.

- Threat to life and physical safety- all humans , migrants being no exception, are entitled to the basic human right of life and of personal safety. However, it has been evident from the past experiences that States have been known to order their security forces stationed at the borders to take stringent actions against the migrants wishing to enter, irregular migrants in particular. Sometimes, or to say most of the times, the actions have been known to result in the deaths of the migrants. Actions such as 'shoot at sight' taken to deter irregular migration are in clear violation of the human rights.[34]
- Denial of asylum – the country into which the migrant desires to seek asylum may, on grounds unjustifiable, deny them of such request. Though states are entitled to determine who does or doesn't enter their border, they must adopt a humanitarian view while doing so to be considerate to the needs of the migrants especially the weaker sections such as women, disabled or children. The denial of asylum leads to multiplicity of other issues which are mentioned below,
- Smuggling and Trafficking- before delving into this issue it is important to know between smuggling and trafficking. While trafficking involves use of force with no consent of the person, smuggling may or may not be voluntary. Thus a person may consent to be smuggled across borders.

  In case of migrants, after they are denied asylum in their desired country, no other option is left to them other than taking illegal means to cross and enter the border. Often the most used way is smuggling. The problem has been recognised by the world organisations with the 2000 UN Protocol

[34]Recommended Principles and Guidelines on Human Rights at International Borders, OHCHR, UN. Available at https://www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. (accessed on 11 May 2019).

against the Smuggling of Migrants by Land, Sea and Air, referred as Smuggling protocol defining smuggling of migrants as "procurement of the illegal entry of a person into a state of which the person is not a national or a permanent resident, in order to obtain a financial or other material benefit."[35] Although not a direct violation of human rights, smuggling makes the migrants exposed and vulnerable. Also States considers smuggled migrants as illegal and therefore criminal, thus giving a free pass to the State to be arbitrary.

On the other hand trafficking of the migrants arriving at the borders is a graver threat. On a false promise of a better living conditions, migrants are deceived and subsequently trafficked across borders where they are subjected to numerous instances of human rights violations. The victims are usually women and children.

- Arbitrary Detention- having denied asylum, the governments, pleading prevention of illegal migration, deter the migrants without any valid grounds. While the human rights advocates that detention of migrants must be justified as a necessary and last resort option, the reality is often different. Improper and unjust use of detention powers at the borders interferes with the human rights of liberty, dignity and freedom of the migrants.

3.1.3 After Arrival

Many of the migrants especially the irregular ones are not able to enter the country of desire because of being detained at the borders or intercepted in the transit itself. Few ones who does manage to enter the country of destination either on grant of

[35]Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000).

asylum or by other means does not get emancipated from the miseries. After their arrival the challenges for the migrants comes mainly from two fronts; from the government and from the people, the society. The below points better elucidate the proposition:-

- Poor Asylum and Detention facilities- the conditions in the asylum centres where the migrants are allowed to stay are miserable with general issues such as lack of sanitation facilities, lack of clean drinking facilities, improper housing and shelter facilities etc. Access to such basic amenities are fundamental requirements of any person regardless of his or her status of being a migrant. There are only few governments who actually take care of such things, in the rest of the cases, the conditions of migrants are comparable to animals or even worse off.
- Restrictions on freedom- in order to keep a check and maintain peace, the governments of the receiving countries have been known to impose arbitrary restrictions on the freedoms of migrants such as that of association, expression, movement and alike.[36]
- Criminalisation of the migrants- in order to deter migration, the State adopts the policy of criminalising the migrants. The irregular migrants who are undocumented are termed as illegal and instead of legal recourse are subjected to detention under conditions unfavourable to human rights principle. Even the migrants who have been trafficked by being deceived are treated as criminals and instead of adopting a humanitarian governance system, the trafficked migrants are subjected to stringent measures.
- Confiscation and invalidation of documents- the identity documents of the migrants along with their passports are often confiscated by the security

[36] *Living in the Shadows: A Primer on the Human Rights of Migrants*,' Amnesty International, 2006, p. 44.

forces of the receiving countries. Thus migrants face serious violations of human rights having being deprived of their liberty, dignity and identity. Also the receiving country's government refuses to accept the educational qualifications of the migrants as valid thus depriving them of suitable employment opportunities.

- Refoulement and deportation- though the principle of 'non-refoulement' has been in almost all international instruments dealing with the rights of the aliens; migrants, refugees or other stateless persons, such as Global Compact for Migration, New York Declaration, ICRMW, 1951 Refugee Convention etc, the governments often violate this principle. Refoulement refers to forcible return of the asylum seekers. Also the migrants are in constant fear of being deported to their homeland. This is the most serious violation of their human rights as they are left out helpless, they are not allowed to stay in their desired country and if they are returned to their homeland they would again be subjected to the treatments from which they have escaped.
- Racism, Xenophobia and other such discrimination- the migrants, especially from the third world countries migrating into the west are subjected to racism and xenophobia. Being treated as racial inferiors, their human rights of equality and non-discrimination is violated. Though there are international instruments such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) in place which guarantees equal rights and treatments, but they seem to have limited application while it comes to the cases of migrants. [37]

[37]Frances Webber, *Borderline Justice*,[1st] ed., 2012, p.13.

4. Categories Of Migrants: The Most Vulnerable Groups

Though the migrant community as a whole is a victim of human rights violations and discriminatory treatment, there are certain sections within them which faces challenges unique to themselves and thus require special kind of treatment. The categorical divisions of the migrant community has been well recognised by the international community which has been iterated by the international instruments specifically targeted. This section thus seeks to analyse the different categories of migrants, the ones who are at an heightened risk of human right abuses, their issues as well as the relevant international instrument.

4.1 Irregular Migrants

Irregular migrants are those who crosses borders without any proper and valid documentation. They have a heightened risk of human rights violations. Having no document, they are virtually inviable in official reports and accounts.[38]Given their vulnerable legal position in the host country they are an easy victim of abuses either at the hand of government or at the hands of smugglers, traffickers, or employers.[39] Given their non-existence in the official records it becomes easier for the perpetrators to get away with the crimes they direct against the irregular migrants. Thus irregular migrants are the worst off when it comes to human rights protection.

4.2 Women: Gendering the Migration

Women constitute about half the number of people on the move. Being a migrant is a challenge and being a women is an add-on to the challenge, increasing the vulnerability of human rights abuse. Female migrants either migrate as part of the

[38] Available at https://globalmigrationgroup.org/theme/human-rights-migrants. (accessed on 12 May 2019)

[39]ILO, *Towards a fair deal for migrant workers in the global economy*, 2004. Available at https://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf. (accessed on 12 May 2019).

family or independently. In case when they migrate with family, much of the time it has been observed that during transit or at borders, they get separated from their families giving them an exposure to discrimination. The situation is no different in case of them being independent, instead it is worse. Women are the ones who are mostly the target of trafficking and smuggling especially the younger women. Also, in the transit, they are always at the risk of being abducted or raped. Also in order to support their families after crossing the borders, they are forced to take up petty jobs or have work as a bonded labour or slave. Forced prostitution of the migrant women is regarded as the worst case of human rights abuse of migrant women.

4.3 Children and Unaccompanied Minors

The most vulnerable section of the migrant community. Much has been written about their plight but less has actually been done. Children in general are the weakest and thereby the most exposed to exploitation. They are also victims of smuggling, trafficking, bonded labour, sexual abuse etc, as apart from being denied access to education and proper health facilities. The situation becomes shoddier when it comes to children who are not accompanied by their parents or anyone elder. This strata ofmigrant children has been referred to as 'unaccompanied minors'. The first international document to address this population was *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.*[40] The Guideline defines an unaccompanied minor as, "separated from both parents and [were] not being cared for by an adult who by law or custom had responsibility to do so."[41]These unaccompanied minors usually face challenges in seeking asylum because of them

[40]Jacquelin Bhabha, *Child Migration and Human Rights in a Global Age*,1st ed., 2014, p.4.
[41]Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in Australia, the U.K., and the U.S.*2006, p.58.

not having any identity proofs. They are separated from their families, no asylum to stay, no guardian to protect them, conditions suitable for the exploiters to take full benefit of them. Their right to family life is compromised, a right which for them is the most crucial and vital for their survival and decent living. Also human rights abuse of minors have long term psychological effects sticking with them throughout their life.

4.4 Migrant Workers

Most of the times the guiding factor for people taking the course of migration is and has been seeking better employment opportunities. The migrants with proper paperwork and documentation may find it easier to survive at the place of employment. However, the situations are not similar for the irregular migrants, women and children. For them, their workplaces becomes a breeding ground for human rights abuses. To begin with, the migrants are generally employed as temporary workers, thus they are under threat of losing their job any time or in other words they do not have any job security. Also not being a citizen of that country, the general employment laws are inapplicable to them.[42] Thus being a temporary resident is the primary challenge to the migrant workers.

Another kind of exploitation being faced by them is trafficking, especially in case of women and children workers, often landing in places where they are sexually abused. Situations are worse in case of unorganised sectors of employment mostly in case of domestic labour. Many migrant women work in unregulated and gender-segregated areas of work such as domestic work where they are at high risk of human rights abuses including rape and other sexual violence.[43] The conditions under which they are employed; long working hours, hazardous tasks, unhygienic

[42]Laurie Berg, *Migrant's Rights at work*,1st ed.,2016,p.39.
[43]Living in the Shadows: A Primer on the Human Rights of Migrants,' Amnesty International, 2006, p41.

conditions, are also violative of their human rights. Slavery is also one of the ways in which the migrant workers are denied their right of liberty and dignity as well as right of freedom.

5. International Bodies and Instruments for Migrant Rights

International human rights framework operates in a universal and non-discriminatory manner. Therefore, whatever human rights treaties, documents and laws are available to normal citizens are also operative in relation to migrants. This makes the Universal Declaration of Human Rights as the prime guardian of the human rights of migrants in particular while it intends to preserve the human rights of all in general. UDHR has been signed and ratified by most of the countries. This makes them obligated to the preservation and protection of the people migrating or transiting through their territory as well also of those who seek asylum.

UN is the prime body that can be trusted with the work of upholding the rights of the migrants, which it has been doing from a long time. International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic, Social and Cultural Rights (CESR) are two of the most prominent instruments for protection of rights. The protection provided under the Covenants could be and have been extended to cover migrants. The two most frequent subjects of concern for the CCPR regarding migrants' rights are detention, especially its duration and conditions, and deportation of aliens, in particular the use of excessive force.[44]Also instruments such as Convention to End Discrimination against Women (CEDAW), an almost universally ratified treaty can be utilised to raise concerns regarding the conditions of the women migrants who face abuses at every step in the migration

[44]Ryszard Cholewinski *et al, Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, 2009, p.130.

journey. A similar instrument Convention on the Rights of the Child (CRC) can be used to further the interest of child and unaccompanied minor migrants.

With organisations such as International Organisation of Migration (IOM) and Global Migration Group (GMG) in place to protect the rights of the migrants, it would be possible to see a reduction in the abuses of human rights of the migrants. However. it is necessary that these organisations to be successful in realising their objective, must receive support from all thenations or at least from the major powers of the world. Apart from these two of the most breakthrough international instruments in existence solely targeting the human rights of the migrants are International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and a more recent one Global Compact for Migration (GMC).

ICRMW can be seen as the strongest yet the weakest instrument aiming at protection human rights of the migrants. Strongest in the sense that it expands on human rights only partly covered by other treaties. Weakest in the sense that it has received the least number of ratifications. Countries have refused to ratify the convention on the ground that it is an unnecessary convention because there are already many conventions in existence dealing with these issues. However, the reality is that ICRMW is the most comprehensive convention including within its ambit not only the rights of the migrant workers but also of their families which automatically covers right of women and children. The convention seeks to prevent exploitation of migrants at the workplace by recommending proper sanitation and hygiene facilities and also seeks to curb the practice of smuggling and trafficking for the purposes of sex based employments. ICRMW also derives its value due to the fact that the issues which are not dealt in other treatises are covered by it. Also, while the other treaties seem to just touch upon the issues of irregular migrants, ICRMW expressly includes rights for the undocumented

migrants.[45] Part III of the convention titled as 'Human Rights of All Migrant Workers and Members of their Families' supports the proposition. This part of the convention is the most comprehensive elaboration of the rights of the migrants.

In more recent times, after the New York Declaration for Refugees and Migrants, 2016, a new instrument came into existence which is Global Compact for Migration. The Compact for safe, orderly and regular migration was adopted by 164 of the member nations. It seeks to better manage migration at local, national, regional and global levels, in order to reduce the risks and vulnerabilities of migrants. However, because of its non-binding legal nature, it cannot be accepted that the countries will adhere to the principles enshrined in the Compact. Also, this Compact has criticism including USA for being pro migratory.

Thus what can be said that there are enough instruments already in place for dealing with the issue of human right of the migrants, but the need of the hour is their effective implementation which is only possible if the world community comes together and resolve at aiming removal of every kind of abuses of migrants and stand together for preservation and protection of the rights of the migrants.

6. Conclusion and the Way Ahead

Having dealt with the issues and challenges faced by the migrants, it has become quite clear that out of all the population, the migrants are one of the most vulnerable groups to be victims of the human rights abuses, especially the irregular, women and child migrants. The perpetrators of such abuses, as observed are mostly governmental forces and at times the society. Also seeing that the abuse is still in existence even after several of treatises, agreements and conventions points that the international instruments have, to some extent, failed to serve the

[45]Ryszard Cholewinski *et al, Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, 2009, p.146.

purpose for which they were made. Thus, what can be concluded that the world doesn't need any more treaties or conventions. What the world is in need of is a commitment from all the nations to adhere strictly with the principles of such instruments and formulate their domestic as well as border laws in accordance with them.

Several solutions are present which would improve the conditions of the migrants and which have been reiterated from time to time but will only be successful when migrants are seen as any other human who has human rights. The most suitable solution is a comprehensive integration policy to be adopted by the receiving host countries. By evolving strategies such as educating them of local languages and skills it would be possible to integrate the migrants in the society so that they will no longer remain alien in the host country. The prime focus must be at the most vulnerable groups' needs as they are the most exposed to abuses.

Therefore, the conclusion remains that it is the government of a country who can and who has the resources the human rights of the migrants by evolving migrant policies that protect the human rights and by adopting a humanitarian view in governance of the migrants. Because in the end…. "Migrants cannot be stopped, but they can and must be managed better, more humanely, protecting migrants' human rights whilst accepting states' rights to control their borders" – Kofi Annan.

Kumar Mukul Choudhary*

Varsha Singh**

1. Introduction

While commenting on the trial of Nazi general Adolf Eichmann, philosopher Karl jaspers wrote "Something other than law is at issue here and to address it in exclusively legal terms is a mistake.[1]" Similar is the case of Drėlingas v. Lithuania[2] were on 12th march 2019, European court of human rights departed from formalistic interpretation of genocide convention of 1948 and interpreted the word genocide through a dynamic and a transformative approach.

The case of Drėlingas v. Lithuania was related to article 7[3] of European convention on human rights, but in essence it widens the interpretation of definition of genocide and tried to include protected group in particular. This judgement constitutes a series of judgement against the soviet repression of Baltic states, after they were occupied and annexed by the Soviet Union. These states

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[1] Mykola Hnatovsky, ECHR decision on "ethnopolitical genocide" in Lithuania deals blow to Soviet crimes, Euromaidan Press, (May 18, 2019, 10:43 Am), available at http://euromaidanpress.com/2019/03/24/how-the-echrs-recent-decision-on-a-case-in-lithuania-may-change-the-concept-of-genocide/.

[2] *Drėlingas* v. *Lithuania*, Application no. 28859/16.

[3] 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

were sovietised in a most brutal way from 1940 to 1955 and acts of repression committed in this period were brought before the court many times, this case was one such instance.

1.1 Historical Development

The importance of this judgement lies in its background and the case decided prior to it that is Vasiliauskas v. Lithuania[4], which is also related to genocide. In that case Vasiliauskas was a K.G.B agent who was also convicted for genocide by various courts of Lithuania for his acts of killings two partisans in 1953, the main question before the constitutional court of Lithuania was that whether the broadened definition of genocide in the constitution of Lithuania of 1990, which provided protection to political group can be adopted retrospectively. The constitutional court answered it in negative and held that the accused can never except such broader definition of genocide in 1953, but it further pointed out that social and political group although may not form a group retrospectively, but if the social political group formed part of substantial group of protected ethnic or national group then in that case it would amount to violation of genocide convention even if the convention is applied retrospectively[5].

The upreme ourt of Lithuania pointed out that such reasoning can be derived from the term "in whole or in part" of the convention that provides for the responsibility of genocide even if only a part of group was targeted. This was also the main argument of Lithuania in E.C.H.R[6].

Then this matter was taken before the grand chamber of E.C.H.R and by a split majority of 9:8 the E.C.H.R does not accept the abovementioned reasoning and

[4] *Vasiliauskas* v. *Lithuania*, (Application no. 35343/05).
[5] *Ibid,* Para 38.
[6] *Ibid*.

held that Lithuania was found to be on breach of article 7 of the convention on three facets,

1. The E.C.H.R was not satisfied with the Lithuania position that in 1953 a customary definition of genocide existed which was broader than 1948 definition.

2. E.C.H.R did not accept that part of the group interpretation can be foreseen in 1953.

3. Lithuania failed to define significance of targeted group in relation to national group[7].

This interpretation and judgement of E.C.H.R was heavily criticized for its formalistic interpretation of law and not looking upon the essence of the matter.

2.The Judgement of E.C.H.R In Drlingas and Dynamic Interpretation

In the background of above case the judgement in Drėlingas becomes historic because it tried to move away from the formalist approach to dynamic and transformative approach.

The facts of Drėlingas are as follow- Drėlingas was an operative of U.S.S.R repression agency that is K.G.B/MGB in the year 1956 he participated in the arrest of the one of the most important members of the anti-Soviet armed resistance leader Adolfas Ramanauskas (whose code name was Vanagas) and his wife Birutė Mažeikaitė (code name Vanda), after being captured Vanagas was tortured horribly then he was tried by soviet courts and eventually executed his wife was

[7]Justinas Žilinskas, *Drėlingas* v. *Lithuania (ECHR): Ethno-Political Genocide Confirmed*?, EJIL:TALK, (May18, 2019, 11:29AM) available at https://www.ejiltalk.org/drelingas-v-lithuania-echr-ethno-political-genocide-confirmed/.

sent to Siberia, all these events took place when the armed resistance was almost over. After restoring its independence in 1990 Lithuania amended its genocide law, there after they put Drėlingas on trial on the basis of his indulgence in the act of repression and genocide in 2014[8].

In this case similar problem of applying genocide law retrospectively has arose which they have applied in the case of Vasiliauskas and failed, Drėlingas case followed in the wake of Vasiliauskas. Despite losing the battel in the case of Vasiliauskas in E.C.H.R, national courts on all instances supported Drėlingas conviction on the grounds of genocide, stating that the acts of Drėlingas contributed to the heavy destruction of the partisans of Lithuania which are in themselves considered as a political group.

However, this time the supreme court further pointed out that this political group also formed a substantial part of Lithuanian nationals, indeed the wide repression of soviet union not only targeted the armed resistance but also it repressed many layers of Lithuanian society which includes intellectuals, state officials, police, military personnel, farmers, entrepreneurs, politicians, supporters of partisans in particular, etc. which are the backbone of pre-war Independent Lithuania. Some estimates find that 20000 people were killed and 50000 perished in Siberia, so all those acts amounts to genocide as a particular national group were attacked which is within the definition of genocide according to 1948 convention[9].

After this an appeal was made to E.C.H.R as many thought that the judgement was violative of article 7 of European convention, and everyone in Lithuania thought that the case of Drėlingas would also have same fate as Vasiliauskas, however this

[8] *Supra* note 2, para 22, 23, 24, 25.
[9] *Supra* note 7.

time E.C.H.R position and view were different to is prior judgement and it could be summed up on two broad points-

1. The E.C.H.R firstly made it clear that it will not look upon the facts of the case established by the domestic court of Lithuania, regarding Drėlingas role during the capture of partisans neither his status as the assessor of the crime despite he has no decision making power in execution of Vanagas.

2. The E.C.H.R analysed the judgement of domestic court of Lithuania specially the Lithuanian supreme court plenary session judgement, the E.C.H.R held that the judgement of supreme court clarified the points raised in the case of Vasiliauskas and successfully proved the argument "in part" and further clarified any other doubt in Vasiliauskas case. This can be understood from following paras of the judgement-

> "*Having regard to the principle of subsidiarity and to the wording of the Court's 2015 judgment, the Court considers that the Supreme Court's finding, that the applicant was guilty of genocide of partisans A.R. "Vanagas" and B.M. "Vanda", the partisans being significant for the survival of the entire national group (the Lithuanian nation) as defined by ethnic features <...>, provides plentiful indication of the grounds on which it was based. Those grounds do not distort the findings of the Court's judgment. On the contrary, this was a loyal interpretation of the Court's judgment, taken in good faith in order to comply with Lithuania's international obligations. The Court thus concludes that the Supreme Court's interpretation of the Court's 2015 (Vasiliauskas – add.) judgment was not, seen as a whole, the result of any manifest factual or legal error leading to the applicant's unforeseeable conviction for genocide*[10]"

The chamber decided that in both the cases the main problem was insufficient proof of "part of the group" issue, but in case of Drėlingas there was sufficient proof so it does not violate article 7 of the convention.

[10] *Supra* note 2, Para 105.

The European court held that, the Supreme Court had explained why the partisans who had struggled against Soviet rule could be considered as an significant part of the nation and thus be covered by international law, Article II of the Genocide Convention, at the stretch of the events. Therefore, the applicant had to have been conscious in the 1950s that he could be prosecuted for genocide and his conviction had been foreseeable. There had therefore been no violation of the Convention.[11]"

3. Importance of E.C.H.R Judgement

The judgement in the case of Drėlingas was historic in many facets, one of the most important of those aspects was recognition of ethno-political genocide as part of 1948 convention and widening of the ambit of genocide convention. This interpretation would be helpful in curbing of many historical crimes and acts of repression which were left unpunished because of limited ambit of the genocide convention of 1948.

The judgement in the case of Drėlingas decided by E.C.H.R has some noteworthy and transformative aspects with regards to genocide convention, although this judgement carries some sui generis character but the result of this judgement would be historic and could be very far reaching on following three counts.

1. It challenges a widely accepted view that the repressive acts of Soviet Union and other communist regime would not be considered as genocide, as they were imposed on the basis of social and political attitude rather then the ethnic or the national attitude[12].

2. It again brings us back to the discussion started by the father of the concept of genocide Raphael Lamkin that, whether the protection of the

[11] *Supra* note 1.
[12] *Supra* note 7.

political or the social group would be included in the wider definition of the term genocide. This time it was included through backdoor by way of ethno-political genocide[13].

3. The concept of crime against humanity is for the protection of the civilian population but after this judgement of Drėlingas, it is expected that people who are resisting against a regime with the help of arms can also be protected under the new interpretation[14].

4. Conclusion

Human right is an essential right given to every human being for his growth, development and protection and for providing him a dignified life, but many times many oppressive regimes around the world affect these rights, and many time laws were codified in such a manner that those repressive acts can escape from the sting of the protective laws. Hence, on many occasions a dynamic approach is needed to interpret the law so that these human rights can be protected.

In the case of Drėlingas vs Lithuania the E.C.H.R provided one such occasion when it interpreted the genocide convention in a transformative way to include in that ethno-political genocide and widened the ambit of genocide, so that the repressive acts of soviet regime cannot be go unpunished, this judgement was the need of the hour so to protect the rights of those who suffers repression for using there right of self-determination.

Hence, the judgement of Drėlingas bring new hope to protect the right of those groups who by way of political means try to protect their national identity.

[13] *Ibid*.
[14] *Ibid.*

LEGALITY OF EUROPE'S STRIFE AGAINST THE MIGRANT CRISIS

Mohit Kar*

1.Introduction

Though the past few years have brought out migration to be a burden in most European countries, in reality it generates an opportunity along with challenges. Migration certainly has its advantages like multicultural exchange and economic progress in harbored countries, but its mishandling may lead to the threat of social unity, democracy as well as security. However, major issues arise when the nation is not willing and ready to take steps in aiding those people that flee conflict and war.

The recent migrant crisis affecting Europe has brought out a clear picture that the Member states of the European Union (EU) in Europe are not yet inclined to go beyond the interests of their region in order to help the suffering people. That is to say, a strong legal structure for systematic immigration and asylum policies was very much missing, due the EU Member States insisting on preserving much of their autonomy in this area. The migrant crisis has indeed to a large extent demonstrated all shortcomings and pitfalls of the multinational community European countries have made an effort to build over the last seven decades. Immigration in reality is a notable political, economic, social and legal issue throughout Europe in addition to the most advanced and industrialized nations since it has an impact on the social and political life of its people.

European countries are experiencing large scale immigration recently while it was already in occurrence in countries like Australia, the US, or Canada. Europe is

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being encountered by the largest migration of people since the 2nd World War. Additionally, immigration to Europe is very varied since different European nations have immigrant populations that are divergent in terms of origin, ethnicity, and educational qualification. Hence, they have applied distinctive set of policies in order respond to the migrant question and latterly to assimilate those people into new surroundings. In recent times nothing as noticeably can characterize the reality in Europe as the migrant crisis has done. For example, in Germany, where western Germany's introductory *Willkommenskultur* or welcoming culture, was conflicted with a dubious attitude in the regions of former East Germany.[2]

Ever since it began in 2014, on an approximate 1.5 million people have arrived at European Union borders through irregular channels, fleeing conflict and violence at home or in search of better life opportunities.[3] Although the European continent has been attractive to foreigners and especially to foreign workers over the last decades, this latest migration surge is becoming the largest and most challenging that Europe has come across ever since the Second World War took place. The European powers have grown to understand that this problem can be resolved only via cooperation and transnational plans. Hence, the members of EU have made an effort to concur on similar refugee protection jurisdiction in order to amicably face the challenge. The European refugee governance has depended on a set of Republican ideas that favor the individual interests of the domestic majority. However, the new and upcoming European schemes have been favorable towards those seeking refuge in the continent.[4]This post-national straightjacket was

[2]Doris Akrap, *Germany's response to the refugee crisis is admirable. But I fear it cannot last* | Doris Akrap the Guardian , 2019.
[3]McDonald-Gibson, Charlotte, *Syria Conflict: Hundreds More Desperate Refugees Could Die at Sea as Europe Does Little to Help*' | McDonald-Gibson, Charlotte, The Independent, 15 May 2014.
[4]Karolewski, I. and Suszycki, A., *European Welfare States – Citizenship, Nationalism and Conflict. Osnabrueck: Fibre Verlag*, 2013.

sustained after 1989, even in the face of so-called welfare nationalism, by the notion that the EU's economic advantages came with certain duties attached. Few of the European nations have seen the migrants as a profitable economic opportunity which could help grow the economy of European societies.

1.1 Anatomy of the European Migrant Crisis

Non-uniform migration is a pervasive worry in modern industrialized nations, mainly for those countries where a large number of migrants have already found settlement as this in itself acts as an attraction away from the migrants' home countries (mainly due to chain migration). Yet, present-day Europe had never faced the enormity of ingoing migration like it did in 2015–16: there were 1.8 million uneven border crossings into the EU in 2015, an expansion of 546 per cent as compared with 2014.[5] Member states answered by restarting the pre-Schengen border checks and taking strict actions.[6] Still the migrant numbers showed no sign of receding: 147,000 illegal migrants had entered Greece by the end of March 2016. During the same time period, 53,941 migrants were stuck while travelling to northern Europe – 50,308 in Greece alone – when EU member states began to close their borders in February 2016 in response to an anticipated deal of 'one Syrian in and another out' with Turkey.[7] Throughout 2016 the EU's deal with Turkey, which was finalized in July, seemed to be holding, with crossings from Turkey dropping to below 100 a day, compared with 2,000 a day before the agreement was implemented. However, a failed military coup d'état in Turkey in July increased the (already considerable) strains on Turkey's relations with the

[5]Berry, Mike, Garcia-Blanco, Inaki, and Moore, Kerry., *Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries.* Report prepared for the *United Nations High Commission for Refugees*, December 2015.
[6]Boot, N., & Wolff, G. B. *Cross-border commuters and trips: the relevance of Schengen.* Bruegel Blog, 3rd December, 2015.
[7]Situation Mediterranean Situation, Data2.unhcr.org 2019, available at https://data2.unhcr.org/en/situations/mediterranean (last visited 05 May 2019).

West and made the EU–Turkey deal ever more fragile as President Erdogan's government rounded up thousands suspected of being involved in the plot.[8]

Europe had not experienced in the likewise of post-2014 asylum-seekers since 1992, during which the EU had received 6,72,000 asylum applications from nationals of Yugoslavia anything quite like the volume of post-2014 asylum-seekers since 1992, when the EU-15 received 672,000 asylum applications from. Subsequently, asylum applications fell to below 200,000 (2006) before beginning their upward trajectory to the 2015–16 record numbers when, from July 2015 to May 2016, 1 million people applied for asylum in Europe (Connor and Krogstad, 2016; Eurostat, 2016). A significant difference between the migration crisis precipitated by Yugoslavia's civil war and the contemporary crisis was that the EU-15 did not include central and eastern European countries (CEECs), which have not dealt effectively and efficiently with the large numbers of asylum-seekers transiting through to northern Europe from Greece.

The post-2014 migrants were categorized as 'economic-migrants'. Their domicile status could be determined easily. Resultantly, they could be detained and returned without the international protection required by international law. But most of the post-2014 migrants have been 'irregular' and asylum-seeking migrants who have sought international protection (in 2015, 1.3 million, compared with the two previous years of 431,000 (2013) and 627,000 (2014).[9] This crush of asylum-seeking migrants has required EU member states to have in place, both before and during the asylum-determination process, a large and sophisticated network of border control agents, police, inspection officers, and supporting human services, plus the budgets to support these needs. These, the EU and its member states have

[8]Dinan, D., Nugent, n. and Paterson, W. E.: '*The European Union in crisis'*.
[9]Council of the European Union, 2016a; Eurostat, 2016.

not had. Most of the requests for international protection have been from Syrian asylum-seekers: 125,000 in 2014, and 363,000 – or 29 per cent of total asylum applications – in 2015. The plight and human suffering of 13.5 million people inside Syria is mind boggling. Hunger, lack of sanitation and hygiene besides adequate medical facility affect them all, triggering humanitarian crisis with all of them badly needing humanitarian assistance for survival; 4.5 million in hard-to-reach besieged areas; 6.5 million internally displaced; and over 4.5 million refugees registered or awaiting registration (primarily in Lebanon, Jordan, Iraq, Egypt, and Turkey).[10] The principal relevant intergovernmental organization – the Office of the United Nations High Commissioner for Refugees (UNHCR) – and refugee relief and humanitarian international non-governmental organizations (INGOs) have looked to Europe (and the USA) for help in relocating Syrians. But, meanwhile, hundreds of thousands of Syrians have taken their chances on the high seas rather than wait in limbo in Turkey and the Middle East where they had inadequate accommodations, no schools, limited healthcare, and little to no prospects of earning a living. Beyond Syria, other third-country asylum-seekers as a percentage of the total have come from Afghanistan (14 per cent), Kosovo and Albania (14 per cent), Iraq (10 per cent), and Pakistan (4 per cent). Europol has also maintained reports about large number of migrations from Somalia, Niger, Morocco, Senegal and other African countries. Thus, asylum-seekers from beyond the Middle East have also been exerting migratory pressures on the EU and its member states.

2.The European Union's Legal Framework for Granting Asylum

2.1 International and Regional Treaties and Conventions

[10]United Refugees, *Syria emergency UNHCR* (2019), https://www.unhcr.org/syria-emergency.html (last visited May 05, 2019).

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights); the 1951 United Nations Convention Relating to the Status of Refugees; the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 18 of the EU's Charter of Fundamental Rights[11].

2.2 EU Legislation

The Common European Asylum System (CEAS) was established in 2003. It consists of:

2.2.1 Dublin Regulation (604/2013) –

• Establishes the criteria and mechanisms for determining the member state responsible for examination of an asylum application. Generally, an asylum-seeker must register and go through the asylum process where they entered the EU and remain in that country until a determination has been made (predecessors: Dublin I, 2000; Dublin II 2003).

• European Union has a common policy to deal with migrants. These conventions and regulations collectively fall under European Union's asylum policy called "Common European Asylum System" (CEAS). This policy has been in force since 2005. CEAS consists of the Dublin System which further consists of:-

- Dublin Convention (1990)

- Dublin II Regulation (2003)

[11]Article 18 of the EU's Charter of Fundamental Rights.

- Dublin III Regulation (2013)

- Dublin IV Regulation (In the making)

• The Dublin Convention is the law determines which country will process the application of a personseeking asylum under the Geneva Convention. The EU's 28 member states, and Liechtenstein, Norway, Iceland and Switzerland are a part of the Dublin Convention. The regulation is also referred to as Dublin III which came in force in 2013, which replaced the earlier EU Dublin regulations Dublin II of 2003 and the original Dublin Convention of 1990. The EU is now in process of forming Dublin IV which will replace the currently existing Dublin III. Under this system, it is determined which country from the member states of the Dublin Convention is responsible for processing an asylum seeker's application. Usually, this is the first EU member state that the migrants have entered in.

• Once a migrant applies for asylum, his basic information is recorded by the officials in-charge and their fingerprints are taken. In order to determine the member state responsible for asylum, officials take several criteria into consideration. These include, in hierarchical order - family considerations, recent approval of a visa or residence permit of a member state, and whether the entry of the applicant in the European Union is legal or illegal. In most cases, the migrant's personal interview is also taken with the officials processingasylum documents, to give them clarity as to why they are at danger in their native country and seek protection in Europe.

2.2.2 EURODAC Regulation(603/2013) (recast took effect July 2015)

Fingerprinting to determine in whichEU member state an asylum seeker arrived.

2.2.3 Qualification Directive (2011/95/EU)

Defines 'refugee' and provides for 'subsidiary protection'.Establishes common grounds to grant refugee or subsidiary protection status. (Third-country nationals may also be granted asylum status on humanitarian grounds, but it is not a matter for EU law for this is a national determination as defined in member state legislation.

2.2.4 Reception Conditions Directive (2013/33/EU) (recast took effect July 2015)

Attempts to standardizerules and cut down on asylum shopping. The rules include such detail as providing access to employment for an asylum-seeker within nine months.

2.2.5 Asylum Procedure Directive (2013/32/EU) (recast took effect July 2015)

Establishes commonprocedures for granting and withdrawing asylum status.

3.The Problem with the Dublin System

The Dublin system assumes that asylum laws and practices are uniform all European Union countries and all migrants who have applied for asylum will be receiving equal status of protection everywhere within the EU. But in reality, asylum practices and protection vary from country to country.

The member states which are at the EU borders have complained that, the Dublin System puts all burden of migrants on them as they are the first country in Europe that the migrants can flee too.[12] Therefore, the member states also feel that the burden of migrants is not shared equally by all the member states.

[12]Fratzke, Susan, *Not Adding Up – the fading promise of Europe's Dublin system*. Migration Policy Institute, 2015.

As the acceptance time for their application is uncertain, the applicants (migrants) applying for asylum often have to wait for some time without knowing whether their application will be accepted. During this period, they are forced to live in detention centers and are also often separated from their families.[13]

Several claims have been made to UNHCR and ECRE against the lack of following the proper procedure by the member states[14], breach of legal and human rights of asylum seekers including fair examination and effective protection of asylum seekers. But at times, they have gone unheard or no action has been taken against it.

Both Greece and Belgium being parties to the Dublin Convention have been criticized by migrants and by UNHCR and ECRE of ill-treatment and mismanagement of migrants who are seeking asylum in both the aforementioned countries.[15] Due to this reason, in 2008, Norway and Finland announced that they won't be sending back or retracing migrants back to Greece.

Dublin Convention was considered dysfunctional and was not found suitable to handle the 2015 migrant crisis. Due to this reason, several countries such as Germany[16], Hungary and the Czech Republic suspended the Dublin Convention during the 2015 European Migrant Crisis and instead, made use of the sovereignty clause of the convention and voluntarily agreed to process applications of asylum seekers and also assumed responsibility to give them asylum.

[13]Brekke, Jan-Paul y Brochmann, Grete. "Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences and the Dublin Regulation". *Journal of Refugee Studies*, 2014.
[14]EMN. The Organisation of Reception Facilities for Asylum Seekers in different Member States, 2014
[15]Guild, Elspeth, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax "Enhancing the Common European Asylum System and Alternatives to Dublin", CEPS Paper, 2015.
[16]Fischer, J. (2015, July 23). The Return of the Ugly German. Project Syndicate.

4.European Migrant Crisis and European Union's Area of Freedom, Security and Justice Policies

The migration crisis also became a test of the EU's area of freedom, security, and justice (AFSJ) policies because it became increasingly clear that when thousands of asylum-seekers are seeking to illegally enter the EU, national border authorities cannot properly investigate suspicious individuals. At the same time, Europeans were becoming concerned that terrorists and other criminals might be taking advantage of unsecured borders. When police investigations into the Paris and Brussels bombings, which took place in November 2015 and March 2016 respectively, confirmed suspicions that ISIS terrorists were taking advantage of the chaos in Greece's border controls to sneak undetected into Europe, the passport-free Schengen area – thought to have been an established feature of life in the EU – suddenly became highly contested. The large number of irregular migrants arriving in Europe in 2015–16 had now become an internal security problem.[17]

So, too, as European and national leaders began to reframe the migration crisis as an internal security issue, the crisis became more difficult to handle on a supranational (EU) basis. One of the reasons why the EU had established Europol (an AFSJ agency preceded by decades of intra-European police cooperation) in 1998 was to deal with the European-wide criminal and terrorist networks exploiting the removal of internal border controls. Yet keeping Europeans safe is inextricably linked to the EU's complex border control challenges: the EU's member states must monitor a territory that has nearly 1,800 designated external border crossing points, including 665 air borders, 871 sea borders, and 246 land

[17]Buonfino, Alessandra. "Between Unity and Plurality: The Politicization and Securitization of the Discourse of Immigration in Europe".*New Political Science 26* (1) 2004, pp. 23-48.

borders.[18] Smugglers favor several entry points. When one route closes, another opens. So, for example, the northern, or Arctic, route has caused considerable consternation in Finland, Norway, and Brussels, as the flow through Russia is 'almost entirely dependent' on Russia's Federal Security Service, a situation prompting NATO's Supreme Commander, US General Philip M. Breedlove, to accuse Russia of 'deliberately weaponizing migration in an attempt to overwhelm European structures and break European resolve'. There is an estimated 90 per cent of migrants who are given access to the EU by criminal networks. Europol has estimated that there is an involvement of more than 40,000, coming mostly from Bulgaria, Hungary, Iraq, Kosovo, Pakistan, Poland, Romania, Serbia, Sweden, Syria, and Turkey. Of those operating within criminal networks, 44 per cent are composed exclusively of non-EU nationals, 30 per cent are composed of EU nationals only, and 26 per cent are composed of both EU and non-EU nationals. In addition to human trafficking, criminal networks are also involved in drugs trafficking, document forgery, and property crimes. Thus, existing criminal networks have 'cashed in' on the Syrian crisis. As EU authorities have sought to patrol some areas, route diversification has continued to challenge border management as new centers of smuggling activity have emerged to fill gaps when routes have closed. Europol identified 230 extra- and intra-EU such locations in 2016 where facilitation (for example, document forgery) and migrant smuggling was taking place. As irregular migrants continued to flow into Europe in 2015–16, Europol reported 'a significant increase in the number of violent attacks targeting migrants in asylum centers and other accommodation … [I]n addition to direct assaults on migrants and facilities, many protests and anti-protests were organized by right-wing and left-wing extremist groups, sometimes leading to clashes among

[18]European Commission, (2015)"A European Agenda on Migration, 13.5.2015. Com (2015) 240 Final," Brussels: European Commission, 2015.

protestors.'[19] Migrants have also been involved in public order disturbances; for example, the former Calais 'Jungle' (the name given to it by its migrant inhabitants) was in the news frequently as migrants clashed with French authorities attempting to clear parts of the camp.

There are other AFSJ dimensions to the migration crisis that receive less publicity but are no less troubling. For example, a large percentage of asylum-seekers are vulnerable persons. In the year of 2015, there was a submission of 85,482 asylum applications in the EU by unaccompanied minors. In January 2016, 55 per cent of the irregular migrants arriving in the EU were women and minors. A Europol report concluded that 'the group of people vulnerable for labor or sexual exploitation is increasing' and that unaccompanied minors were disappearing immigrant sentiment are particularly problematic for policy-makers.[20] If cultural identity matters more than economic interests, then arguments and evidence about the net socio-economic benefits of immigration are unlikely to make significant inroads into anti-immigration opinion'. As the Brexit vote demonstrated, and the rhetoric and rise of the far-right in several EU member states suggests, reimagining identity to create a 'European identity' is a 'tall order'. Indeed, 'cultural integration' has become the watchword not just of the European far-right, but also of much of the centre-right as when, for example, in 2011 UK Prime Minister David Cameron declared 'the doctrine of state multiculturalism' had failed.[21] The cultural integration question has become particularly acute because the vast majority of asylum-seekers to Europe are Muslim. Since the terrorist

[19]Europol.europa.eu (2019), https://www.europol.europa.eu/sites/default/files/documents/epip_report_executive_summary.pdf (last visited May 08, 2019).
[20]Oldřich Bureš, *Intelligence Sharing and the Fight against Terrorism in the Eu: Lessons Learned from Europol,* 15 European View*,m2*016, pp. 57-66.
[21]Multiculturalism has failed - PM, BBC News (2019), https://www.bbc.com/news/uk-politics-12371994 (last visited May 05, 2019).

attacks in the USA on 11 September 2001, cultural and religious frames have conjoined with a 'security' frame (crime and terrorism) to argue the case for lower immigration levels. However, they have also produced rather bizarre attempts by politicians and street-level bureaucrats (that is, professionals who interact directly with the public and exercise considerable policy discretion) to implement hastily legislated inclusion policies, such as banning the Burkini after the 2016 Bastille Day Islamist cargo truck attack at Nice's seaside promenade.[22]

5.Cases Bought Forward in the European Union's Court by Asylum Seekers

5.1 Slovakia and Hungary v. Council[23]

Slovakia and Hungary sought to annul the Relocation Decisions taken up by the Council as a provisional measure under Article 78(3) and the CJEU reached its decision regarding the pertaining cases on 6 September, 2017.

Initially, the Court shunned the argument that there should have been a following of legislative procedure because Article 78(3) specifically provides that the Parliament of Europe is to be sought for. As that article does not contain any express reference to a legislative procedure, the provisional measure could be adopted in a non-legislative procedure and must be regarded as a non-legislative act. Therefore, its adoption was not subject to the requirements relating to the participation of national Parliaments and the public nature of deliberations.

Next, it gave a ruling that measures that are provisional in nature can deviate from legislative acts so far as their material and temporal scope is delimited.

[22]Police in Cannes stop Muslim women wearing banned burkinis, U.S. (2019), https://www.reuters.com/article/us-europe-burkini/police-in-cannes-stop-muslim-women-wearing-banned-burkinis-idUSKCN10S18C (last visited May 05, 2019).
[23]*Slovakia and Hungary v. Council*, ECLI:EU:C:2017:631.

Thirdly, it was satisfied that the European Parliament was duly informed of the amendments to the initial proposal before the adoption of the final version, without the need for a vote at the Parliament's plenary. Furthermore, it was pointed out by the CJEU that the Council could not have anticipated the various factors that led to the small number of relocations carried out, including, in particular, the absence of coordination on the part of certain Member States.

Lastly, there was a rejection of all pleas Finally, the CJEU rejected all pleas related to the proportionality and necessity of that measure, arguing that the mechanism actually contributes to give an ability to Italy Greece and Italy in dealing with the effects of the so-called migration crisis.

5.2 Hasan's Case[24]

The main proceeding concerns Mr Hasan, a Syrian national who made an asylum application in Germany in October 2014. The German authorities called upon Italy to take the applicant back under the procedures established by the Dublin III Regulation (DRIII) as the applicant had applied for asylum in Italy in the past. The citizen of Syria had later put a challenge to the transfer decision by filing before the Administrative Court of Trier, situated in Germany, which rejected his application for suspensive effect and later dismissed the action. Mr Hasan was transferred to Italy in August 2015, but returned to Germany later that month.

Furthermore, the CJEU ordered that Article 27(1) of the Dublin III Regulation does not prevent a legislative provision that may lead the court or tribunal hearing an action brought against a transfer decision to take into account circumstances that are subsequent not only to the adoption of that decision but also to the transfer of the person concerned. The Court evoked its jurisprudence in Mengesteab and

[24] *Bundesrepublik Deutschland* v. *Aziz Hasan*, CJEU - Case C-360/16, Hasan.

Shiri in an attempt to ensure compliance in accordance with international law. An effective remedy in respect of Dublin transfers must cover the examination of the application of the regulation besides the scrutiny of the legal and factual situation in the Member State to which the applicant is to be transferred. The carrying out of a transfer does not, in itself, definitively establish the responsibility of the Member State to which the person concerned has been transferred. As an appeal does not necessarily entail suspension of the transfer decision and a person can be transferred before the legality of that decision has been assessed by a court or tribunal, the effective remedy provided under the Dublin III Regulation would be largely superfluous and uncalled for.

Secondly, the CJEU found that a Member State to which an applicant has returned after being transferred is not allowed to transfer that person anew to the requested Member State without respecting a take back procedure. Thus, an applicant cannot be transferred to another Member State on the basis of a transfer decision previously adopted in his regard. On the contrary, a further transfer cannot be envisaged unless the situation of that person has been re-examined for the purpose of verifying that responsibility has not been transferred to another Member State following that person's first transfer. According to the Court, this would not jeopardize the objective of the rapid processing of applications for international protection, since this re-examination would merely entail taking account of the changes that have happened ever since the initial transfer decision was adopted.

Thirdly, the CJEU found that, in those circumstances, a take back request must be submitted within the periods prescribed in Article 24(2) of the Dublin III Regulation, which begins to run from the time the requesting Member State becomes aware of the presence of the person concerned on its territory. If a take back request is not made within this period, the Member State on whose territory

the person concerned is staying without a residence document is responsible for examining the new application for international protection.[25]

Furthermore, the Court had drawn a decisive conclusion that a pending appeal procedure brought against a decision that earlier rejected a first application for international protection must not be considered as equivalent to the registration of a new application.

Finally, in case the person concerned does not lodge a new asylum application, it remains open to the Member State on whose territory that person is staying to initiate, should it so wish, a take back procedure. However, that person cannot be transferred to another Member State without such a request being made.

6.Conclusion

I would like to conclude this paper by answering Van Rompuy's question, 'could the EU have done more' to anticipate and prepare for the migration crisis of 2015–16? The answer is 'probably not', because irregular migration had not reached crisis proportions and was still largely confined to and made the responsibility of those Mediterranean member states within easy reach of North Africa and the Middle East. The EU had advanced policy activities relating to its external borders, but its approach to irregular migration and asylum-seekers was never intended to be based on 'solidarity' and 'burden-sharing'. Rather, its main goal was sorting out responsibility for determining whether an irregular migrant qualified for international protection.

[25]Rapoport, Hillel and Moraga, Jesús Fernández–Huertas, "*Tradable Refugee-admission Quota: a Policy Proposal to Reform the EU Asylum Policy".*

ROLE OF JUDICIARY IN ENVIRONMENTAL PROTECTION: AN ANALYSIS

Dr. Monika Ahuja*

1. Introduction

The march of human civilization is always accompanied by the process of development. As the progress of human civilization is a continuous process, so is the case of the process of development. Therefore, the process of development has been in progress since the inception of human civilization, however, the thrust and course of development have changed over a period of time depending upon time and space. Apart from being a continuous process, the development has always had an intimate relationship with its surroundings, which is known as environment. Environment has two vital components: first is physical and second is social. History is the witness that the process of development has done a huge damage to the physical environment because it has resulted into the environmental pollution. It has not only led to massive deforestation but also polluted the air and water bodies all around. Further, the process of development has over-exploited the natural resources, which not only belong to the present generation but to the future generations as well. It means that the process of development has not remained compatible with the natural surroundings.[1]

The campaign for environmental protection has been in prevalence from time immemorial. It is to be noted that during ancient period human beings and

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[1]Mamta Rana Guleria, "Emerging Profile of PIL for Environmental Protection in India", In Lokendra Malik, *Judicial Activism in India*, Universal Law Publishing Co., New Delhi, 2014, p. 263.

environment were regarded as inseparable. At that time man never had an opportunity to pollute the environment indiscriminately as he does today. Ancient man was afraid of the natural environment and did not dare to pollute and damage it.[2] The concept of environment even found place in the *Kautilya's Arthashastra*. In other words *Kautilyan* jurisprudence dealt with law relating to environmental pollution. The rulers were duty bound to maintain and protect forests and its produce. Each individual was under a duty to protect the nature. The animals, trees, water, air and land were treated as divine power as they were supposed to control the universe. For a variety of other reasons, the trees, animals, air, water and land were worshipped by ancient men.[3]

Right from mother's womb one needs unpolluted air to breathe, uncontaminated water to drink, nutritious Food to eat and hygienic conditions to live in. These elements are *sine qua non* for sound development of human personality. In the absence of these, seldom do all the faculties of man grow to their fullest extent. Man in order to survive adapts himself to its environment but he rarely pays due attention for its improvement either because of his lack of ability to improve or change it or because of his ignorance for it.[4] The reason we are talking about the protection of the environment today is because of the immense environment pollution that is present in our times and is threatening the very survival of the human race. The protection of environment is a global issue and it is not an isolated problem of any area or nation. The problem of environmental pollution in an increasingly small world concerns all countries, irrespective of their size, level of development and ideology. Notwithstanding political divisions of the world into national units, the oceanic world is an interconnected whole; and winds that blow

[2]S.C. Tripathi, *Environmental Law*, Central Law Publications, Lucknow, 6th Edn., 2015, p.11.
[3]*Ibid.,* at p.1.
[4]H.N. Tiwari, *Environmental Law*, Allahabad Law Agency, Faridabad, 2016, p.1.

over it are also one.

The problem of environmental pollution is not new in origin. It is as old as the emergence of *Homo sapiens*on the planet and it was realized in the times of Plato 2500 years ago. However, dimension of the problem of environment protection and its management have taken a serious turn in the present era. Today, society's interaction with nature is so extensive that environment question has assumed proportions affecting all humanity. Industrialisation, urbanization, population explosion, poverty, over-exploitation of resources, depletion of traditional resources of energy and raw materials and the search for new sources of energy are some of the factors which have contributed to the environmental deterioration the world over. While the scientific and technological progress of man has invested him with immense power over nature, it has also resulted in the unthinking use of the power, encroaching endlessly on nature. It is a basic right of all to live in a healthy environment. The acute poverty in the country requires developmental process to be accelerated, but we cannot do so at the cost of environment thereby endangering not only the present generation but also future generations.[5]

Since Vedic time the main motto of social life was "to live in harmony" with nature. Sages, saints and great teachers of India lived in forests, meditated and expressed themselves in the form of Vedas, Upanishads, Smritis and *dharmas.* This literature of Iden times preached in one form or the other a worshipful attitude towards plants, trees, Mother Earth, sky (*aakash*), air (*vayu*), water *(jal),* and animals and to keep a benevolent attitude towards them. It was regarded a sacred duty of every person to protect them. The Hindu religion enshrined a respect for nature, environmental harmony and conservation. It instructed man to show reverence for the presence of divinity in nature. Therefore, trees, animals (cow), hills, mountains, rivers are worshipped as symbols of reverence to these

[5]P.S. Jaswal, *Environmental Law*, Allahabad Law Agency, Faridabad, 2017, p.1.

representative samples of nature.[6]

Two articles relating to environment were incorporated in the Indian Constitution—Articles 48-A[7] and 51-A*(g)*[8]. Article 48-A is a constitutional pointer to the State to protect and improve the environment, and Article 5i-A(g) confers a fundamental duty on the citizens of India to protect and improve the environment and have compassion for living creatures. This clearly shows that the Indian Parliament fell in line with old traditional values. The language used in the articles clearly indicated the principle of equity, coexistence, reverence for nature and non-violence has been given legal recognition. The use of the terms "protect and improve" implies the improvement of the natural environment and improvement of the quality of life. Further, protection of the environment implicitly directs us not to cut trees and to keep the water of rivers, lakes, etc. clean and wholesome. This is reminiscent of centuries old "Chipko movement" of village Kherjarilli of Rajasthan, where Amrita Bai, her four family members and other 359 persons sacrificed their lives to save trees of the village (popularly known as "Green Khejris").[9] Thus, we have a culture where trees are regarded more precious and revered than lives. The government has also declared the villages of Bishnois in Punjab, Haryana and Rajasthan States as "reserved areas", and cutting of trees and killing of animals has been declared an offence in those village territories. If one happens to visit these villages, one can witness deer and other innocuous animals roaming in the village freely and fearlessly.[10]

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[6]*Ibid.*
[7]Art.48-A: "The State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country."
[8]Art. 51-A: "It shall be the duty of every citizen of India, (g)... to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures."; *T.N. Godavarman Thirumalpad* v *Union of India,* AIR2003 SC724**.**
[9]The incident took place in 1731 A.D.
[10]S.C. Shastri, *Environmental Law* ,EBC Publishing (P) Ltd., Lucknow, 5th Edn., 2015, p.2.

2. Environment Protection through Public Interest Litigation

The Indian judiciary has demonstrated willingness to exercise its power whenever the political/executive organs of the State have failed to discharge their constitutional obligations effectively. This willingness has been often termed as 'judicial activism'. Around 1980, the Indian legal system, particularly the field of environmental law, underwent a sea change in terms of discarding its *moribund* approach and instead, started charting out new horizons of social justice. This period was characterized not only by administrative and legislative activism but also judicial activism. A subset of this has been environmental activism, which has developed in India in a very major way. One of the reasons for judicial activism in specific environmental cases has been the relaxation of the rule of *locus standi* giving a chance to the public to approach the Court under articles 32 and 226 of the Indian Constitution. Also, the recognition of environmental rights as a 'fundamental right' under Article 21 (Right to Life) of the Indian Constitution has given a constitutional sanctity to the 'right to enjoy a clean and healthy environment.[11]

The development of the law in this area has seen a considerable share of initiative by the Indian judiciary, particularly the higher judiciary, consisting of the Supreme Court of India, and the High Courts of the States. Within the last two decades, India, has not only enacted specific legislation on environmental protection but has also virtually created a new 'fundamental right to a clean and healthy environment' in the Constitution. *Prima facie* the forms and methods adopted in the Indian context appear to be very similar to those in other common law systems, but Indian environmental jurisprudence brings out the unique characteristics of a new legal order, which has gradually been established in India. The distinguishing nature of

[11] *Supra* note 1 at p. 266.

this jurisprudence is the emerging Indian environmental jurisprudence that bears testimony to the activist role of the Indian judiciary, which has had a significant impact in many areas.[12]

The growth of environmental law in India has been largely influenced and accelerated by PIL. It has generated tremendous awakening amongst people about environmental protection, has ushered in the evolution of innovative judicial techniques to arrest environmental degradation and has transformed the jurisprudence of public law review. The technique of PIL serves to provide an effective remedy to enforce group rights and interest as the traditional judicial system is not equipped to tackle such problems. The socio-economic demands of a changing society, groaning under the strains of rapid industrial development adversely impacting the natural riches, warrant a different kind of jurisprudence-dynamic, vibrant and resilient to address people's problems. PIL is one such tool to help the poor, under-privileged, downtrodden and exploited millions. It is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the Constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to provide social justice to them. Therefore, a citizen has a right to have recourse to article 32 of the Constitution for removal of factors causing detriment or impairment to the quality of life. PIL is more efficacious in environmental disputes because such disputes do not concern protection of enforcement of individual rights, but are more legitimately concerned with community rights.[13]

2.1 Right to live in Unpolluted Environment

[12] *Ibid.,* at p. 267.
[13] G.S. Tiwari, "Conservation of Biodiversity & Techniques of People's Activism", 43 *Journal of Indian Law Institute,* 2002, pp. 192-193.

The "right to life" under *Article 21* has been interpreted to mean *a life of dignity to be lived in a proper environment free from the dangers of diseases and infection.*[14] Clean surroundings lead to a healthy body and healthy mind. Maintenance of health, preservation of the sanitation and environment have been held to fall within the purview of *Article 21* as it adversely affects the life of the citizen. It amounts to slow poisoning and reducing the life of the citizen because of the hazard created, if not checked.[15]

The right includes *the right of enjoyment of pollution free water in sufficient quantity*[16] *and air,* for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to *Article 32* for removing the pollution of water or air which may be detrimental to the quality of life.[17]Therefore, any disturbance of the basic environment elements, namely, air, water and soil, which are necessary for *"life",* would be hazardous to "life" within the meaning of *Article 21.*[18]Likewise, *smoking in any form in public places* is held to be illegal, unconstitutional and violative of *Article 21* which includes maintenance of health and environment.[19]

The Supreme Court in *Virender Gaur* **v.** *State of Haryana,*[20] said that the word "environment" was of broad spectrum "which brings within its ambit hygienic atmosphere and ecological balance", free from pollution of air and water,

[14]*Ratlam Municipality* v. *Vardhi Chand,* AIR 1980 SC 1622.
[15]*L.K. Koolwal* v. *State of Rajasthan,* AIR 1988 Raj 2.
[16]*S. Joseph* v. *State of Kerala,* AIR 2007 NOC 545 (Ker.).
[17]*M.C. Mehta* v. *Union of India,* AIR 2004 SC 4016.
[18]*M.C. Mehta* v. *Kamal Nath,* AIR 2000 SC 1997; *F.K. Hussain* v. *Union of India*, AIR 1990 Ker. 321.
[19]*Murli S. Deora* v. *Union of India,* AIR 2002 SC 40. In this case the Apex Court, realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, issued directions to the governments to ensure prohibiting smoking in public places.
[20](1995) 2 SCC 577.

sanitation without which life cannot be enjoyed.

The Court thus held that hygienic environment was an integral facet of *right to healthy life* and it would be impossible to live with human dignity without a *humane and healthy environment.* Right to life, thus, includes *the right to good health.* Taking serious note of carcinogenic effect of diesel exhaust, the Supreme Court ruled that *the right to life* was violated by chronic exposure.[21] The continuing decline in the quality of the environment, showed a failure on the part of the authorities to perform their obligations under the constitutional scheme.[22]Referring to *Article 21* read with *Articles 48-A and 51-A(g),* the ApexCourt in ***M.C. Mehta*** v. *Union of India,*[23] said that blatant and large scale misuse of residential premises for commercial use in Delhi, violated the right to decent urban environment. Taking serious note of this menace, the Court issued directions to the Government, including the necessary action against the officers concerned.

Right to water, as also quality of life, are envisaged under *Article 21,* but also, has been recognised in *Articles 47 and 48-A. Article 51-A,* furthermore, makes a Fundamental Duty of every citizen, to protect and improve the natural environment, including forests, lakes, rivers, wildlife.[24]

[21]*M.C. Mehta* v. *Union of India,* (1999) 6 SCC 9.
[22]*M.C. Mehta* v. *Union of India,* (1999) 6 SCC 12; *Assocn. for Environment Protection* v. *State of Kerala,* AIR 2013 SC 2500, wherein the Apex Court held that clearance by the State Government of a project for renovation of park and construction of restraint on reclaimed land of water, without environmental impact assessment as required under Government Order, as resulting in violation of the right guaranteed under *Article 21.*
[23](2006) 3 SCC 399.
[24]Forests have been an important part of environment. They also constitute national assets. The present generation, it is said, would be answerable to the next generation, if deforestation is allowed to take place rampantly, which would violate inter-generational equity. *I.R. Coelho* v. *State of T.N.,* AIR 2007 SC 861.

2.2 Right Against Noise Pollution

A Division Bench of the Apex Court in *In re : Noise Pollution*,[25] held that human life has its charm and there was no reason why the life should not be enjoyed along with all permissible pleasures. Anyone who wished to live in peace, comfort and quiet within his house, has a right to prevent the noise as pollutant reaching him. While one has a right to speech, others have a right to listen or decline to listen. Nobody could be compelled to listen and nobody could claim that he has a right to make his voice trespass into the ears or mind of others and nobody could indulge into aural aggression. Taking serious note of this menace the Court issued detailed directions for spreading awareness about noise pollution.

2.3 Right to Sustainable Development

In a catena of cases, the Apex Court has reiterated that the *right to clean environment* is a guaranteed fundamental right. However, it has been ruled that balance has to be maintained between *environmental protection and developmental activities,* which can be achieved by strictly following the principle of *sustainable development,*[26] without which the, life of coming generations will be in jeopardy.[27]

In Rural Litigation and Entitlement Kendra v. *State of U.P.,*[28] the Court ordered the closure of certain lime stone quarries on the ground that there were serious deficiencies regarding safety and hazards in them. The Court had appointed a committee for the purpose of inspecting certain lime stone-quarries. The

[25]AIR 2005 SC 3136.
[26]*M.C. Mehta* v. *Union of India,* AIR 2001 SC 1948.
[27]Harmonization of the two needs, i.e., environment protection and promotion of development, has led to the concept of sustainable development, a development that meets the need of the present without compromising the ability of future generations to meet their own needs. Report on "Our Common Future", 1967 submitted by Brundtland Commission headed by the Norwegian P.M. Harlem Brundtland.
[28](1985) 2 SCC 431.

Committee had suggested the closure of certain categories of stone quarries having regard to adverse impact of mining operations therein. A large scale pollution was caused by lime stone quarries adversely affecting the safety and health of the people living in the area.[29]

Shriram Food and Fertilizer case,[30] the Supreme Court directed the Company manufacturing hazardous and lethal chemicals and gases posing danger to health and life of workmen and people living in its neighbourhood, to take all necessary safety measures before reopening the plant. There was a leakage of chlorine gas from the plant resulting in death of one person and causing hardships to workers and residents of the locality. This was due to the negligence of the management in maintenance and operation of the caustic chlorine plant of the Company. The matter was brought before the Court through a public interest litigation. The management was directed to deposit a sum of Rs.20 lacs by way of security for payment of compensation claims of the victims of Oleum gas leak with the Registrar of the Court. In addition, a bank guarantee for a sum of 15 lacs was also directed to be deposited which shall be encashed in case of any escape of chlorine gas within a period of three years from the date of the judgment resulting in death or injury to any workman or any person living in the vicinity. Subject to these conditions the Court allowed the partial reopening of the plant.[31]

In M.C. Mehta v. Union of India,[32] the Supreme Court ordered the closure of tanneries at Jajmau near Kanpur, polluting the Ganga, The matter was brought to the notice of the Court by the petitioner, a social worker, through a public interest litigation. The Court said that in spite of the comprehensive provisions contained in the Water (Prevention and Control of Pollution) Act and the Environmental

[29]J.N. Pandey, *Constitutional Law of India,* Central Law Agency, Allahabad, 55th Edn., 2018, p.440.
[30]*M.C. Mehta* v. *Union of India,* (1986) 2 SCC 176.
[31]*Ibid.*
[32](1987) 4 SCC 463.

(Protection) Act, no effective steps had been taken by Government to stop the grave public nuisance caused by the tanneries at Jajmau, Kanpur. In the circumstances, the Court ordered the closure of tanneries unless they took steps to set up treatment plants.

In *M.C. Mehta* (2*) v. Union of India,*[33] the petitioner brought a public interest litigation requiring the Court to issue appropriate directions for the prevention of Ganga water pollution. The Supreme Court held—The petitioner, although not a riparian owner (living on the river side) is entitled to move the court for the enforcement of various statutory provisions which impose duties on the municipal, and other authorities. He is a person interested in protecting the lives of the people who make use of the Ganga water. The nuisance caused by the pollution of the river Ganga is a public nuisance which is widespread and affecting the lives of large number of persons and therefore any particular person can take proceedings to stop it as distinct from the community at large. It also directed the Mahapalika to get the dairies shifted to a place outside the city and arrange for removal of wastes accumulated at the dairies to prevent it to reach the river Ganga, to lay sewerage line wherever not constructed, to construct public latrines and urinals, for the use of poor people free of charge, to ensure that dead bodies were half burnt bodies were not thrown into the river Ganga and to take action against the industries responsible for pollution, licences to establish new industries should be granted only to those who made adequate provisions for the treatment of trade effluent flowing out of the factories.

These directions apply *mutatis mutandis* to all other Mahapalikas and municipalities having jurisdiction over the areas through which the river Ganga flows.

In*Indian Council for Enviro-Legal Action v. Union of India,*[34] an environmentalist

[33](1996) 4 SCC 750.
[34](1996) 3 SCC 212.

organisation filed a writ petition under Art.32 before the Court complaining the plight of people living in the vicinity of chemical industrial plants in India and requesting for appropriate remedial measures. The fact was that in a village Bichari in Udaipur district of Rajasthan an industrial complex had been developed and respondents have established their chemical industries therein. Some of the industries were producing chemicals like oleum and sludge phosphate. The respondent had not obtained the requisite licences and nor did they install any equipment for treatment of highly toxic effluents discharged by them. As a result of this, the water in the wells became unfit for human consumption. It spread diseases, death and disaster in the village and surrounding areas. The villagers revolted against all this resulting in stoppage of manufacturing 'H' acid and ultimately these industries were closed.

This was a social action litigation on behalf of the villagers, whose right to life was invaded and infringed by the respondents as established by the various reports of the experts. The respondents were responsible for all the damage to the soil, to the underground water and to the village in general. The Central Government had power to decide it. The principle to determine the liability of the respondents to defray the costs of remedial measures would be, "the *Polluter Pays,"* that is, the responsibility for "repairing damage would be of the offending industry.

In M.C. Mehta v. Union of India,[35] (Pollution of Taj Mahal) the petitioner, Mr. M. C. Mehta, filed a public interest litigation in the Court drawing the attention of the Court towards the degradation of the Taj Mahal due to the atmospheric pollution caused by a number of foundries, chemically hazardous industries established and functioning around the Taj Mahal, and requested the Court to issue appropriate directions to the authoritiesconcerned to take immediate steps to stop air pollution in the Taj Trapezium (TTZ).

[35]AIR 1997 SC 735.

In *Samaj Parivartan Samyudayci v. State of Karnataka,*[36] the question involved before the Supreme Court was what should be appropriate contours of the Court's jurisdiction while dealing with allegations of systematic plunder of natural resources of a handful of opportunists seeking to achieve immediate gains. The Supreme Court held that in case of large scale damage to forest due to illegal mining instead of resort to statutory remedies, the remedy under Article 32 is justified as extra-ordinary situation demands extra-ordinary remedy.

In*Research Foundation for Science, Technology and Natural Resource Policy v.Union of India,*[37] in a writ petition filed by the Research Foundation for Science, Technology and Natural Resource Policy for direction to ban all imports of hazardous wastes, to amend rules in conformity with the BASEL Convention and Articles 21, 47 and 48-A of the Constitution as interpreted by the Supreme Court and to declare that without adequate protection to the workers and public and without any provision of sound environment management of disposal of hazardous/toxic wastes, the Hazardous Wastes (Management and Handling) Rules, 1989 violative of Fundamental Rights and, therefore, unconstitutional. The petitioner's contention was that the Ministry of Environment and Forest permitted import of toxic wastes in India under the cover of recycling making India a dumping ground for toxic wastes. The Supreme Court held– The directions contained in the BASEL Convention have to be strictly followed by all the concerned players before any vessel is allowed to enter Indian territorial waters and beach at any of the beaching facilities in any part of the Indian coast-line. For breach of the conditions, the authorities shall impose the penalties contemplated under the municipal laws of India. The polluter pays principle will apply whenever such violations occur. But no ban can be imposed on import till such time as a particular product is identified as being hazardous. Such import will be subject to

[36]AIR 2013 SC 3217.
[37]AIR 2012 SC 2627.

all other statutory conditions and restrictions as may be prevailing on the date of import. In the event of non-compliance, the provisions of the Hazardous Wastes (Management & Handling) Rules, 1989 cannot be declared unconstitutional since the same are in aid and not in derogation of the provisions of Articles 21, 39(e), 47 and 48-A of the Constitution.

In*Bhopal Gas Peedith Mahila Udyog Sangathan v. Union of India,*[38] the Supreme Court directed Union of India and State of Madhya Pradesh that the huge toxic materials/waste lying in and around the factory of Union Carbide Corporation (I) Ltd. in Bhopal, the existence of which was hazardous to health, needing to be disposed of at the earliest, which should be strictly in a scientific manner which may cause no further damage to human health and environment.

In *Lal Bahadur v. State of U.P.*,[39] for extending Gomti Nagar at Lucknow, the area was reserved for green belt in the master plan prepared in 1995 but on the prayer of Lucknow Development Authority the area was changed from green belt to residential one in 2005 by preparing fresh master plan on 31.3.2005 and thereafter a notification was issued the same day under Section 17(1) of the Land Acquisition Act, 1894, the corrigendum was issued on 5.5.2005. After acquisition of land, the possession was taken.The Court held that the land has absolutely vested in the State. The change of the area from green belt to residential was, in fact, in flagrant violation of the provisions of Articles 21, 48-A as also 51-A(g) of the Constitution. It was against public interest, protection of environment and such spaces reduce the ill-effects of urbanisation. It was not possible to change this area into urban areas as thegarden/Green-belt is essential for fresh air, thereby protecting resultants impacts of urbanization, such as pollutants etc. Authorities are enjoined with duty to maintain them as such as per doctrine of justice and trust. The Court

[38]AIR 2012 SC 3081.
[39]AIR 2018 SC 220.

ordered that in future, the purpose shall never be changed in any manner whatsoever. It quashed the master plan changing use of area in question from green belt residential one. It shall be held in trusteeship only for the purpose of park in future.[40]

3. Conclusion

The shortcomings of the executive in coping with the pressures on the environment brought about by change in the country's economic policies had thrust the responsibility of environmental protection upon the Judiciary. Inits efforts to protect the environment, the Supreme Court and the Indian Judiciary in general have relied on the public trust doctrine, precautionary principle, polluter pays principle, the doctrine of strict and absolute liability, the exemplary damages principle.The consistent position adopted by the courts as enunciated in judgments has been that there can neither be development at the cost of the environment nor environment at the cost of development. Public Interest Litigation has been the cornerstone of entire environmental movement and it influenced the conservation of environment through the principles of sustainable development. So, environment and development should go hand in hand, development should not be done at the cost of environment.

The Indian Constitution guarantees "right to equality" and "right to life" to all persons without any discrimination. This indicates that any action of the "state" relating to environment must not infringe upon the right to equality as enshrined in Article 14 and Article 21 of the Constitution. The Indian Courts, on various occasions, have struck down the arbitrary official sanction in environmental matters on the basis that it was violative of Article 14 (right to equality) and Article 21. Because sometimes arbitrary grant of lease and indiscriminate

[40] *Lal Bahadur* v. *State of U.P.*, AIR 2018 SC 220.

operation of mines may jeopardize the wildlife and natural wealth of the nation, and the courts had issued a writs to advance public interest and avoid public mischief which are the paramount considerations. Most of the pollution is mainly from trade and businesses– particularly from industries. Tanneries, acid factories, tie and dye factories, distilleries and nowadays the hotel industries are contributing to environmental pollution. Thus, it all relates to fundamental right to freedom of trade and commerce/business guaranteed under Article 19(1)(g) of the Indian Constitution.[41] Some of these industries or businesses/trades are carried on in a manner which endangers vegetation cover, animals, aquatic life and human health. But, time and again, it has been made clear that this freedom of trade and commerce is not absolute and is subject to certain reasonable restrictions. Therefore, any trade or business which is offensive to flora or fauna or human beings cannot be permitted to be carried on in the name of the fundamental right.

[41]Article 19.– Protection of certain rights regarding freedom of speech, etc.– (1) All the citizens of India shall have a right– . . .
(g) to practice any profession, to carry on any occupation, trade and business.

Form IV

(See Rule 8 of the Registration of News Papers (Central) Rules, 1956 under the Press and Registration of Books Act, 1867)

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