

12. Introducing the topic, the *Deputy Secretary-General* stated that the Secretariat had prepared three studies on the subject : (i) Rights and duties of a refugee in the first country of asylum; principle of *non-refoulement*; (ii) The establishment of a Safety Zone in the country of origin for the displaced persons; and Report of the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in the Asian-African Region. The first study discussed the principle of *non-refoulement* both as a generally recognised principle of law and as State practice. The second study analyzed the status of the persons seeking asylum in the safety zones, the issue of domestic jurisdiction, the status of the safety zone and safety zones in practice. The third was a report covering the proceedings and outcome of the AALCC-UNHCR Workshop held in New Delhi in October 1991.

The Deputy Secretary-General drew attention of the AALCC to two of the recommendations made by the Workshop. The first one urged the member States of the AALCC to consider the possibility of preparation of model legislation in cooperation with the Office of the UNHCR with the objective of assisting member States in enacting appropriate national legislation on refugees. The second one urged the Asian-African States to move a step forward by considering adherence to the 1951 Convention relating to the Status of Refugees and/or the 1967 Protocol.

13. The Representative of the United Nations High Commissioner for Refugees, at the outset, expressed appreciation to the Secretary-General and the Secretariat of the AALCC for the very close cooperation between AALCC and UNHCR on behalf of Mrs. Sadako Ogata, the High Commissioner. He said that this had been exemplified by the New Delhi Workshop and by the facts that very important refugee questions were being considered at the Islamabad Session and that many AALCC member States gave generous asylum to a large number of refugees bearing the humanitarian burden as a result.

14. Commenting on the reports submitted by the Secretariat he pointed out that :

- (i) The study on the Rights and Duties of a Refugee in the First Country of Asylum was a most comprehensive review of the question and had pertinent and succinct conclusions on *non-refoulement*.
- (ii) The study on the Establishment of a Safety Zone in the country of origin for the Displaced Persons was a timely study of an issue that appeared to be gaining importance and relevance. Also being a difficult question, it was an issue in which a clear distinction between humanitarian and political aspects, and between State sovereignty and obligations, were not easy to delineate, as was recognised in the study. It would be helpful to distinguish three objectives : (1) preventive – such zones could help remove the need to flee; (2) such zones could increase safety during flight – orderly

departure; and (3) they could facilitate voluntary return by helping remove causes of the flight.

- (iii) In the context of prevention, not should be taken that while by definition such persons were not refugees, in October 1991 the Executive Committee of the UNHCR, which includes several AALCC members, not only recognised responsibilities of States to eliminate the causes of refugee outflows, but also called upon the High Commissioner to actively explore preventive strategies in that regard. Two important points were to be kept in mind : (i) it was difficult to consider safety zones in isolation of the humanitarian needs which the international community did not yet address properly of internally displaced persons, and (ii) whatever approach was adopted, it must not inhibit the right of persons to seek and enjoy asylum.
- (iv) The Report of the New Delhi Workshop recommended the preparation of a model legislation. In this regard the UNHCR was ready to cooperate with the Secretariat in elaboration of such a model, whether as a text, principles to be considered in any such legislation, or a combination of both. UNHCR representatives in the capitals of member States would also be ready to assist directly.

15. The *Delegate of Egypt* drew attention to the recommendations made by the AALCC-UNHCR Workshop and proposed their adoption by the AALCC since they covered most aspects relating to refugees.

16. The *Delegate of Pakistan* recounted the practical experience of his country in dealing with the status and treatment of refugees. Pakistan was host to the single largest population of Afghan refugees numbering over three million who had been looked after very well. This fact had been endorsed by the international community. While Pakistan had given asylum to refugees, it consistently believed that asylum/refuge was a temporary phenomenon which could be addressed by voluntary repatriation of refugees to their country of origin. Efforts were being made to settle the issue at a political level in keeping with the five-point UN programme.

17. The *Delegate of Japan* commended the AALCC for organising the New Delhi Workshop and felt that this kind of activity was particularly useful and consonant with the goals set for all countries concerned with the solution of the refugee problem. There were over 7 million refugees from Afghanistan, Palestine, Indochina, Africa, Central America and elsewhere in the world. The refugee problem was basically a humanitarian issue, and therefore, extending a helping hand to the refugees who had escaped fighting or oppression and were deprived of basic human needs such as shelter, food and clothing, was an international obligation. He mentioned his country's financial contribution towards this end in detail and stated that Japan saw cooperation to help refugees as part of its 'cooperation for peace'.

He observed that his country, respecting fully the spirit and provisions of the 1951 Refugee Convention had enacted appropriate national legislation

on refugees, and that the principle of *non-refoulement* had also been incorporated into the legislation.

As for the establishment of safety zones for refugees or displaced persons in their country of origin, he observed that the proposal seemed interesting in that it would lessen the burden of the country which provided temporary shelter. However, he cautioned the AALCC to proceed with utmost prudence taking into account the difficulties that could arise from the creation of such zones which would be controlled and supervised by outside authorities in the territory of a sovereign State.

18. The *Delegate of Sudan*, narrating his country's experience with the refugee problem, stated that Sudan was surrounded by eight countries which were closely linked and it had given shelter to refugees from those States as those States had also given shelter to the Sudanese refugees. He observed that it was the policy of his Government to endeavour to reach a peaceful settlement with the countries of origin. He cited the example of fruitful cooperation between Sudan, Ethiopia and the UNHCR in repatriating refugees voluntarily. He urged the international community to bear responsibility for meeting the requisite needs of the refugees.

19. The *Delegate of the Republic of Korea* stressed the necessity of wider adherence to the 1951 Refugee Convention which he considered essential for solving the refugee problem. Referring to the deliberations of the AALCC-UNHCR Workshop held in New Delhi in October 1991, he stated that it would help in enhancing awareness of the participating countries about the refugee problem and expressed the hope that member States which had not yet acceded to the 1951 Convention and the 1967 Protocol would consider doing so. He urged the international community and the Asian and African countries to work towards a universal legal regime covering the whole gamut of the refugee problem, but felt that this ought to be done in a way which ensured balance between the need for protection of basic human rights and the territorial sovereignty of States. He seconded the Egyptian proposal for the formal adoption of the recommendations made by the New Delhi Workshop.

20. The *Delegate of Sri Lanka* expressing his views on the concept of safety zones stated that they could be established in keeping with the sovereignty and territorial integrity of the State of origin.

21. The *Delegate of Kuwait* pointed out that with the cooperation of the UNHCR, camps had been set up in the neighbouring countries giving shelter to refugees and that Saudi Arabia had also set up such camps following the crisis in the Gulf region. He stated that the State of Kuwait had contributed generously as it believed in the humanitarian role being played by agencies like UNRWA and ICRS with which Kuwait had concluded a headquarters agreement.

22. The *Delegate of Sierra Leone* directed a question to the representative of UNHCR as to how the refugee flows could be arrested in the countries causing such flows.

23. The *Representative of UNHCR* stated that arresting the flows of refugees was primarily a political question and the UNHCR was not directly concerned with it. However, it took action to alerting the political organs of the United Nations to specific problems and causes.

24. The *Delegate of Ghana* supported the formulation of model legislation on refugees by the AALCC Secretariat. He pointed out that his country in Section 14 of its legislation on refugees had provided for naturalization of refugees. He wanted the definition of 'refugee' as given in the 1951 Refugee Convention and the 1967 Protocol to be amended so as incorporate other qualifications such as those in the OAU Convention and the Cartagena Declaration on refugees.

25. The *Delegate of Uganda* considered the subject of refugees to be very important to the AALCC as most of its member States had suffered from colonisation and were saddled with the refugee problem. He urged the AALCC to address this problem seriously.

26. Following upon these deliberations, the AALCC adopted the following resolution unanimously :

## "STATUS AND TREATMENT OF REFUGEES

### *The Asian-African Legal Consultative Committee*

*Taking note of the studies prepared by the Secretariat entitled "Rights and Duties of a Refugee in the First Country of Asylum ; Principle of Non-Refoulement"; "A Note on the Establishment of a Safety Zone in the Country of Origin for the Displaced Persons" and "Report on the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law held in New Delhi from 24 to 26 October 1991";*

*Also taking note with appreciation of the statement made by the Representative of the UNHCR;*

*Adopts the recommendations made by the AALCC-UNHCR Workshop on International Refugee and Humanitarian Law in the Asian-African Region, held in New Delhi from 24 to 26 October 1991;*

*Approves of the suggestion to prepare a model legislation in cooperation with the Office of the UNHCR with the objective of assisting Member States in enacting appropriate national legislation on refugees;*

*Expresses the hope that Member States of the AALCC would adhere to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol;*

*Decides to place the item entitled 'Safety Zones for Refugees or Displaced Persons' on the agenda of its thirty-second session; and*

*Directs the Secretariat to update the study including how to minimize and remove the causes of flows of refugees."*

1. While the contemporary world is seriously concerned with man-made problems such as the environmental pollution and the green house effects, an equally serious man-made problem of humanitarian, economic and social concern is the "refugee problem". The challenge posed by the mass exodus of refugees is, however, not a new phenomenon. Since time immemorial people have felt intolerance, oppression, war and civil strife.

2. During the past four decades the entire Asian-African region has witnessed numerous refugee situations which account for the growing concern of nations for the well-being of those who are forced to leave their homeland. Millions of refugees have crossed borders and have entered neighbouring countries due to well-founded fear of being persecuted and in search of food, safety and security. Majority of them in the country of refuge or asylum have been welcomed as unwanted guests. Nevertheless, they have been provided with all possible assistance for resettlement and integration in the mainstream of population. However, there have been cases where unfortunate refugees have faced a climate where they have been pushed back or forcibly returned to the country of origin.

3. In most cases, however, though the refugees are considered as an unwanted guest or as a burden, the first country of asylum seldom forces a refugee to quit or forcibly return to the country of origin. This is mainly due to the well established and recognised "principle of non-refoulement".

#### ASYLUM AND NON-REFOULEMENT

4. The 1951 Geneva Convention does not regulate the right of admission but grants refugees protection against expulsion or return to a country in which they may fear persecution. Following are the two most important provisions of the 1951 Geneva Convention :

##### *Article 32*

##### **Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during the period such internal measures as they may deem necessary.

#### Article 33

##### Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

5. Similarly, the Universal Declaration of Human Rights expresses the principle that "everyone has the right to seek and enjoy in other countries asylum from persecution."<sup>1</sup> The United Nations Declaration on Territorial Asylum (1967) also specifies that persons entitled to invoke the Universal Declaration of Human Rights shall not be subjected to measures such as rejection at the frontier, return or expulsion which would compel them to return to or remain in a territory where they may be persecuted".<sup>2</sup>

6. Extradition is not expressly mentioned in any of these international instruments. The principle of non-extradition to the refugee's country of origin would, however, seem to be implicit in the general principle of asylum and has also been expressly stated in some more recent multilateral and bilateral extradition agreements.

7. It would be appropriate now to highlight the formal work provided under the Bangkok Principles (1966) and the OAU Convention (1969) on the question of asylum and *non-refoulement*, and any difference, if there be any, with the Geneva Convention (1951).

<sup>1</sup> Article 14 of the Declaration.

<sup>2</sup> Articles 1 and 3 of the Declaration on Territorial Asylum.

## Bangkok Principles

### Article III

#### Asylum to a Refugee

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.
2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.
3. No one seeking asylum in accordance with these Principles should, except for over-riding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well founded fear of persecution endangering his life, physical integrity or liberty in that territory.
4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

### Article VIII

#### Expulsion and Deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum the State shall not expel a refugee.
2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.
3. A refugee shall not be deported or returned to a State or country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.
8. The provision of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) provides :

## Article II

### Asylum

1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
2. The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin.

#### The Principle of Non-Refoulement: A Generally Recognised Principle of Law

9. The international law grants every sovereign State the power to expel unwanted aliens. However, exceptions have been made in favour of political refugees. As a rule, refugees are not expelled to countries where they would be persecuted or have the fear of being persecuted. It may be noted that the right of States to expel aliens from their territories has also been restricted to a greater extent by several multilateral treaties relating to them.

10. The rule of *non-refoulement* is an obligation on the part of the State to refrain from forcibly returning a refugee to a country where he is likely to suffer political persecution. This principle as a positive provision has been laid down in various multilateral treaties. Notable among them are as follows:

- (a) Article 3(2) of the Convention relating to the International Status of Refugees of 28 October 1933;
- (b) Article 5(3) (a) of the Convention concerning the Status of Refugees coming from Germany of 10 February 1938.

11. Article 33 of the 1951 Convention relating to the Status of Refugees which deals with the principle of *non-refoulement* is directly binding only on the State parties to the Refugee Convention. Moreover, its (direct) applicability is restricted to persons who are "refugees" as defined in Article 1 of the Refugee Convention and with respect to the parties thereto—persons covered by the terms of the Protocol relating to the Status of Refugees (1967).

12. It may be added that, the provision may only be invoked in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State. Article 33 only prohibits the expulsion or return (*refoulement*) of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting States to admit any person who has not already set foot on their respective territories.

13. The United Nations Conference on the Status of Stateless Persons (New York, 13 to 23 September, 1954) unanimously adopted the following Resolution, which was included as Part IV in the Final Act of the Conference, dated 28 September 1954:

"The Conference,

Being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person, in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,

Has not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951."

14. Atle Grahl-Madsen in his book *The Status of Refugees in International Law* (Vol. II — Asylum, Entry and Sojourn)<sup>3</sup> has raised the following questions on the above-mentioned Resolution:

- What kind of principle is it that the Conference refers to? Is it a principle considered binding under international law, or a moral principle?
- Whatever its nature, has the principle really become generally accepted?

<sup>3</sup> See: Pages 94-98.

- What is the authority on which the Conference has based its Resolution, and what authority does the Resolution itself possess ?

15. According to Atle Grahl-Madsen, "The available sources do not support a contention to the effect that prior to the debate at the 1954 Conference, the principle of *non-refoulement* was a 'generally accepted principle', whatever its nature (legal or non-legal). The 1933 and 1938 Conventions were only acceded to by a very small number of States and at the time when the 1954 Conference convened, the 1951 Convention had only been in force for a few months; it entered into force on 22 April 1954."

16. It is further noted that the provisions regarding the granting of asylum in the post World War II West European countries and the United States only sanctioned the withhold of deportation of any person who would be subject to physical persecution. But Madsen concludes that "there may have been similar legislations in a few more States and there were on record some court decisions pointing in the same direction. But this hardly constitutes a basis for contending that the principle of *non-refoulement* has become a 'generally accepted principle'.

17. One may not completely endorse the views of Madsen that the principle of *non-refoulement* has not become a "generally accepted principle". What was said in the context of the Convention relating to the Status of Stateless Persons (1954) may not be true in this contemporary period.

18. There is absolutely no doubt that the principle of *non-refoulement* has been recognised as a fundamental humanitarian and generally accepted (recognised) principle of law recognised by the States. Since 1951, the principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels. The following are the examples which would testify that the principle of *non-refoulement* is a generally recognised principle of law :

- (a) Principles concerning treatment of refugees (Bangkok Principles) as adopted by the Asian-African Legal Consultative Committee in 1966. Article III of the Principles states that "No one seeking asylum should be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."
- (b) Resolution 14 (1967) on Asylum to persons in danger of persecution adopted by the Committee of Ministers of the Council of Europe on 29 June 1967. It recommended *inter alia* that "..... no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution for reasons of race, religion,

nationality, membership of particular social group or political opinion."

- (c) UN Declaration on Territorial Asylum, as adopted by the General Assembly on 14 December 1967 (Resolution 2312 (XXII) in Article 3 states that "No person shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."
- (d) The Final Act of the International Conference on Human Rights held in Tehran in 1968 in its Part II relating to the co-operation with the United Nations High Commissioner for Refugees "Affirms the importance of the observance of the principle of *non-refoulement* embodied in the above-mentioned instruments and in the Declaration on Territorial Asylum adopted unanimously by the General Assembly in December, 1967."
- (e) The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969 states in Article II "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons....."
- (f) Article 22 (8) of the American Human Rights Convention adopted in November 1969 (Pact of San Jose, Costa Rica) also provides that, "In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion."
- (g) Lastly, the Cartagena Declaration (1984) also provides in one of its Conclusions and Recommendations that "reiterate(s) the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner stone of the international protection of refugees. The principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*."

19. The above examples would certainly suffice that the principle of *non-refoulement* has become a generally recognised principle. Even the Executive Committee of the UNHCR at its 28th Session held in 1977 (No. 6 (XXVIII)) concluded that since the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels it is a generally accepted principle recognised by States. In addition to statements in the above international instruments adopted at the universal and regional levels, the principle of *non-refoulement* has also found expression in the constitutions and/or ordinary legislation of a number of States. Because of its wide

acceptance at universal level, it is being increasingly considered in jurisprudence and in the work of jurists as a generally recognised principle of international law.

#### EXCEPTIONS TO THE PRINCIPLE OF NON-REFOULEMENT

20. While the principle of *non-refoulement* is basic in character, it is recognized that there may be certain cases in which an exception to the principle can legitimately be made. Article 33(2) of the 1951 Geneva Convention provides that :

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

There are also similar exceptions in other instruments, whether universal or regional. In view of the serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution in exceptional cases only. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of, rehabilitation and reintegration within the society.

#### PRACTICE OF STATES IN REGARD TO NON-REFOULEMENT

21. The principle of *non-refoulement* constitutes one of the basic articles of the 1951 Geneva Convention to which no reservations are permitted. It is also an obligation under the 1967 Protocol by virtue of Article I(1) of that instrument. Unlike various other provisions in the Convention, its application is not dependent on the *lawful* residence of a refugee in the territory of a contracting State. The words "Where his life or freedom would be threatened" have been the subject of some discussion. It appears from the *travaux préparatoires* that they were not intended to lay down a stricter criterion than the words "well-founded fear of persecution" figuring in the definition of the term "refugee" in Article 1A(2). The different wording was introduced for another reason, namely to make it clear that the principle of *non-refoulement* applies not only in respect of the country of origin but to any country where a person has reason to fear persecution. In evaluating the practice of States in regard to the principle of *non-refoulement*, it should be emphasized that the principle applies irrespective of whether or not the person concerned has been formally recognized as a refugee. In the case of persons who have been formally recognized as refugees under the 1951 Convention and/or the 1967 Protocol, the observance of the principle of *non-refoulement* as expressed in Article 33 should not normally give rise to any difficulty. Moreover, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists,

the applicant is almost invariably protected against return to his country of origin pending a determination of his refugee status.

22. There are, however, a number of situations in which the observance of the principle of *non-refoulement* is called for, but where its application may give rise to difficulties of a technical nature. Thus the person concerned may find himself in a State which is not a party to the 1951 Convention or the 1967 Protocol, or which, although a party to these instruments, has not established a formal procedure for determining refugee status. The authorities of the country of asylum may have allowed the refugee to reside there with a normal residence permit or may simply have tolerated his presence and not have found it necessary formally to document his recognition as a refugee. In other cases the person concerned may have omitted to make a formal request to be considered a refugee.

23. In situations of this kind it is essential that the principle of *non-refoulement* be scrupulously observed even though the person concerned has not or has not yet been formally documented as a refugee. It should be borne in mind that the recognition of a person as a refugee, whether under the Statute of UNHCR or under the 1951 Convention or the 1967 Protocol, is declaratory in nature.

#### OPINION OF THE JUDICIARY

##### The Supreme Court of the United States

(a) *Immigration and Naturalization Service (INS) V. Stevic*, 467 US 407 (1984)

24. The Refugee Act of 1980 established a new statutory procedure for granting asylum to refugees. The 1980 Act added a new section 208(a) to the Immigration and Naturalization Act of 1952 which left to the determination of the Attorney-General the eligibility for asylum for an alien who is a refugee. Prior to 1968, the Attorney-General had discretion whether to grant withholding of deportation to aliens under S. 243(h). In 1968, however, the United States agreed to comply with the substantive provisions of Article 2 thru 34 of the 1951 United Nations Convention Relating to the Status of Refugees. Article 33(1) of the said Convention is reflected in the S. 243(h) of the US Act which imposes a mandatory duty on Contracting States not to return an alien to a country where his "life or freedom would be threatened" on account of one of the enumerated reasons.

25. In *Stevic*, the Court dealt with the issue of withholding of deportation or *non-refoulement* under S. 243(h) which corresponds to Article 33(1) of the 1951 Convention. The Court held that significantly Article 33(1) does not extend this right to everyone who meets the definition of "refugee". Rather it provides that "no Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion,

nationality, membership in a particular social group or political opinion." Thus Article 33(1) requires that an applicant satisfy two burdens: first, that he or she be a 'refugee' i.e. prove at least "well-founded fear of persecution", second that the 'refugee' show that his or her life or freedom 'would be threatened' if deported. Section 243(h) of the US Acts' imposition of would be threatened requirement is entirely consistent with the United States' obligations under the Protocol.

(b) *INS V. Cardoza-Fonseca, No. 85-782(1987)*

26. The Immigration and Naturalization Services (INS) commenced a deportation proceeding against Cardoza-Fonseca, a Nicaraguan citizen. She conceded that she was in US illegally but requested withholding of deportation pursuant to S. 243(h) and asylum as a refugee pursuant to S. 208(a) of the US Immigration and Naturalization Act. To support her request under S. 243(h), she attempted to show that if she were returned to Nicaragua her "life or freedom would be threatened" on account of her political views. The Immigration Judge and the Board of Immigration Appeals (BIA) both decided against Cardoza-Fonseca. The BIA said that she had "failed to establish that she would suffer persecution within the meaning of Sections 208(a) or 243(h) of the Immigration and Naturalization Act".

27. In the Court of Appeals for the Ninth Circuit, she did not challenge the BIA's decision that she was not entitled to withholding of deportation under S. 243(h), but urged that she was eligible for consideration for asylum under S. 208(a) and contended that the Immigration Judge and BIA had erred in applying the "more likely than not" standard of proof from S. 243 (h) to her S. 208(a) asylum claim. The Court of Appeals agreed with her claim.

28. In this case the Supreme Court said "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 the Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world. Our holding today increases that flexibility by rejecting the Government's contention that the Attorney-General may not even consider granting asylum to one who fails to satisfy the strict S. 243(h) standard. Whether or not a 'refugee' is eventually granted asylum is a matter which Congress has left for the Attorney-General to decide. But it is clear that Congress did not intend to restrict eligibility for that relief to those who could prove that it is more likely than not that they will be persecuted if deported".

The House of Lords, U. K.

*Regina V. The Secretary of State for the Home Department (Appellant) and Ex. Parte Siva Kumaran and Others (Respondent)*

29. In the above case Lord Templeman expressed the view that "In order for a 'fear' of persecution" to be "well-founded" there must exist a danger that if the claimant for refugee status is returned to his country of origin he will meet with persecution. The Convention does not enable the claimant to decide whether the danger of persecution exists. The Convention allows that decision to be taken by the country in which the claimant seeks asylum. Under the Immigration Act of 1971 applications for leave to enter the United Kingdom, including applications based on a claim to refugee status, are determined by the immigration authorities constituted by the Act. By the rules made under the Act the appropriate authority to determine whether a claimant is a refugee, is the Secretary of State. The task of the Secretary of State in the present proceedings was and is to determine in the case of each appellant whether the appellant will be in danger of persecution if he is sent back to Sri Lanka. Danger from persecution is obviously a matter of degree and judgement. The Secretary of State accepts that an applicant who fears persecution is entitled to asylum in this country unless the Secretary of State is satisfied that there is no real and substantial danger of persecution....."

30. In the same case Lord Goff of Chieveley opined that, "I am with all respect unable to agree with the view expressed by Sir John Donaldson M.R.<sup>4</sup> at p. 1051, that different tests are applicable under Article 1 and Article 33 of the Convention.

31. The Master of the Rolls suggested, at p. 1053 that, even if the Secretary of State decides that an applicant is a refugee as defined in Article 1, nevertheless he has then to decide whether Article 33, which involves an objective test, prohibits a return of the applicant to the relevant country. I am unable to accept this approach. It is I consider as plain as indeed was reinforced in argument by Mr. Plender<sup>5</sup> with reference to the *travaux preparatoires*, that the *non-refoulement* provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention. I cannot help feeling, however, that the consistency between Articles 1 and 33 can be more easily accepted if the interpretation of "well-founded fear" in Article 1A(2) espoused by the Secretary of State is adopted, rather than that contended for by the High Commissioner."

4 One of the Judges of the Court of Appeal.

5 Counsel for the United Nations High Commissioner for Refugees.