Term Paper for Module C 2004

How have recent global economic and political trends and changes impacted on international refugee law
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Modern refugee law is based on the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Today some 140 states are bound by the Convention and/or the Protocol. The history leading up to the coming into force of this law, and developments from 1951 up to the 1990s, are set out in detail in Lubbers, 2002 and Chimni, 1998 and will not be discussed in this paper.

There is some criticism that these international documents are no longer sufficient to cope with refugee problems (for example Castro-Magluff). Firstly, there has been a massive increase in the numbers of refugees. This has been caused partly by the change in the nature of armed conflict, with armed conflict of a non-international nature becoming much more common, and attacks on civilians becoming commonplace, in turn creating dramatic refugee flows. States already suffering conflict or major regime change are also often suffering from socio-economic disasters (Lubbers, 2002). There has also been a huge increase in the number of economic migrants, so groups arriving in host countries are often made up of persons with different legal statuses (Lubbers, 2002). The change in migration patterns and increase in economic migrants, together with the effects of terrorist acts in the past 3 years, which has created an increased fear and distrust of foreigners, has led to a clamping down on all asylum seekers, even those who would merit protection under the Convention, and allows governments to appear justified for their more restrictive approach (Lax, 2003, 12).

More recent developments and changes in the refugee field highlight very clearly the tension that exists between a sovereign state's right to regulate entry into its territory and the rights of persons facing persecution or risks to life and liberty. In technical legal terms, international documents can be seen as a limit on a state's sovereign power to regulate its own domestic matters. Recently, states seem to be becoming scared about asylum seekers and have been amending state legislation so as to swing the balance of sovereign right and responsibility more in favour of state interests (Lubbers, 2002). Chimni (1998) explains that prior to 1989, refugee issues were relatively depoliticised, following a positivist legal tradition. International involvement did not concern itself with the internal problems of the country of origin but only with the protection of the persons having left that country. However, with the end of the Cold War, the opinion underlying many states' approaches to refugee issues changed and non-entrée regimes were established (Chimni, 1998). This approach was both strengthened and justified by the so-called "myth of difference", where it is argued that the number and type of refugees in the northern and southern hemisphere are very different, justifying the deviation from the general approach agreed under the 1951 Convention. (Chimni, 1998).

There are several methods utilised by states to enforce their reluctance to open their borders to asylum seekers. These include:

- Non-admission, for example, having strict visa controls (Lubbers, 2002; Feller, 2001, 7) or even intercepting travellers at sea. In this regard, the important US decision in the case of Haitian refugees trying to enter the US in 1991-92 must be noted. In this case, asylum seekers were denied entry and forced to return to their place of origin. These acts were held not to constitute *refoulement* (Castro-Magluff; Chimni, 2000b, 124-129). States are also using 'safe havens' or 'safe third country' rules to prohibit the entry of asylum seekers in the first place. It is questionable whether such safe havens fulfil the obligation to uphold the right "to seek and to enjoy in other countries asylum form persecution" as is set out in article 14 of the Universal Declaration of Human Rights.
- Interpreting the definition of 'refugee' in the 1951 Convention and 1967 protocol more narrowly/exclusively (Feller, 2001, 7). For example, in Western Europe in the 1990s, many asylum seekers from the former Yugoslavia, Afghanistan and Iraq were offered only temporary humanitarian protection, remaining as 'war refugees', but were not accepted as Convention refugees (Lax, 2003, 1). In Germany, this category of leave to remain was called *Duldung* (toleration). In contrast to traditional refugees, the duration of the stay of the war refugee was restricted from the outset, and the host state had the right to declare a certain country of origin safe to return to at any time. Thus it appears that persons fleeing their home countries, in this situation may have more of a 'duty' to return rather than a 'right' (Lax, 2003, 11). This can mean that negative factors in the host country 'push' out the displaced, rather than positive factors 'pulling' them. Additionally, the uncertainty of short term residency permits can have a huge personal and psychological effect on refugees, and is likely to have a negative effect as regards their integration into the host country. The insecurity may create an atmosphere of distrust of the host country authorities, and begins a cycle of xenophobia in the society (Lax, 2003, 13).

- Lowering the standard of treatment, for example, denying certain rights such as gainful employment (Castro-Magluff). For example, in Germany, those asylum seekers with 'toleration' status are entitled only to state benefits as are considered absolutely necessary, and residency permits are sometimes offered only on a 3 month basis and must be continually reapplied for.
- 'Detainment' in camps, where movement is restricted (Castro-Magluff). This may be in the host country or through the use of 'safe havens' as discussed above.
- Curtailment of refugee resettlement programs in favour of repatriation programs (Lubbers, 2002). This policy is supported by Western Europe's generous aid and development packages for certain countries, such as in South-east Europe.

In addition, many states have shifted their focus from an exile-oriented approach to an approach focusing more on security and root causes, and using the language of human rights and protection. In relation to countries suffering complex emergencies, and therefore, refugee flows, the root causes of these crises were often described as being due to the post-colonial states. External factors that may have had a big impact on the situation were often ignored. By using human rights language, the argument can then be made that it is better to try to help the country to overcome human rights abuses, poverty etc. and improve democracy and the rule of law (Chimni, 1998). Such an approach allows these states to reject the concept of exile and to make arguments for having safe havens or safety zones, for offering only temporary protection or a special category of protection, and holding persons in safe third countries (Castro-Magluff). This can have the side-effect of creating a greater number of internally displaced persons because although a host country may declare a particular country to be safe and insist that the displaced return, the returnees may become internally displaced upon their return (Chimni, 1998; Lax, 2003, 10). Focusing on the internal problems of the state of origin rather than also looking at possible external factors leading to refugee flows also suggests that your main aim is repatriation (Chimni, 1998). The international community works towards rebuilding the country in question, providing aid and development funding, and making it safe to return to. The right of voluntary repatriation is a key element of these international treaties, however, it must be asked whether the more recent changes to the legal system for protection of refugees has not in some cases created a situation of involuntary repatriation. All of this has an impact on the governing refugee law principle of *non-refoulement* (Chimni, 1998).

The protection and human rights-based approach mentioned above also blurs certain legal categories because it can be argued that all people within the state need protection and support. The displaced, therefore, may lose their ability to have protected status as refugees (Chimni, 2000a).

The actions of state to try to limit the number of asylum seekers and migrants crossing their borders can actually lead to greater problems of racism and xenophobia. The events of 11 September 2001 only worked to reaffirm the image of foreigners as being dangerous (Lubbers, 2002).

It must also be noted that recently some positive movements can also be seen in legal developments. In July 2004 in Germany, a law amendment that comes into force in January 2005 will limit the application of the 'toleration' category of asylum seeker and recognize persecution form non-state actors as a valid ground for protection under the 1951 Convention, bringing Germany into line with the law applying in Europe (UNHCR, 2004). While this will limit the problem of uncertainty the 'toleration' policy caused, it remains to be seen whether the now more 'black and white' decision that must be taken will lead to a greater number of asylum claims being rejected.

In this paper, I will focus on one of the above restrictive policies: safe havens. In the United Kingdom in February 2003, a policy paper was leaked to the media. It was called "A new vision for refugees", prepared by the Cabinet Office and Home Office. This paper set out the plan to have safe havens for holding asylum seekers close to their countries of origin, or in the source countries themselves. Countries such as Turkey, Iran, Iraqi Kurdistan and Morocco were mentioned as possible locations. The paper also mentioned a desire to revise the 1951 Convention (Mir Haschemi, 2003, 17). Certain minimum levels of protection would be necessary in these safe havens, to ensure that international human rights commitments were met. The paper also mentions an 'intervention action plan', which includes the last resort action of military intervention in order to stop refugee flows and to enable returns (Mir Haschemi, 2003, 18). While much of the discussion seems to focus on a prevention of conditions in source countries which lead to refugee flows, ensuring better protection in source regions and raising awareness of state responsibility to accept returns, which is difficult to fault, nevertheless, it can be argued that the real goal of the United Kingdom in taking such an approach is to limit the number of arrivals in the United Kingdom and to other EU states (Mir Haschemi, 2003, 19, citing Amnesty International). Certainly, there are many other contentious issues connected to the concept of 'safe havens', for example, the number of refugees could increase because the distance to travel to lodge a claim would be smaller. It may be difficult for European states to ensure effective protection from human rights abuses if the safe havens are located in developing countries. On the other hand, if greater protection and benefits are given than exist in the local host community, inequalities between different groups will be strengthened. Camps could become targets for attacks, or be labelled as training grounds or reservoirs for opposition activists. Finally, the existence of such safe havens mean that the displaced are, 'for their own safety', effectively detained simply because they are seeking asylum (Mir Haschemi, 2003, 19). Even if such policies are legally justifiable in a strict sense, careful consideration must be given to

whether they are morally acceptable, effective and in line with principles of humanitarianism. Asylum seekers deserving of full protection under the 1951 Convention are penalised by the approach of treating all asylum seekers not suitable for entry into the host country.

The above comments do not intend to give the opinion that the current legal system should be put aside and a new system established. On the contrary, it can be argued that the 1951 Convention and 1967 Protocol are of even greater relevance today despite global political and economic trends. In any event, given the current political climate and states' approaches to refugee policy, reaching agreement on an international document offering greater protection would not be possible. Developments recently give the impression that states are blurring the distinction between their domestic concerns and their international responsibilities. Castro-Magluff therefore argues that it is important that the Convention is applied as liberally as possible to ensure maximum protection for vulnerable persons. In addition Castro-Magluff argues that it is possible to examine root causes of refugee flows in source countries without excluding the possibility of exile to another state. In the words of the High Commissioner for Refugees, "[t]he Convention has proven its resilience by providing protection from persecution and violence to millions of refugees over five decades. It is the hub upon which the international protection regime turns, and we would tamper with it at our peril." (cited in Chimni, 2001)

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International Humanitarian laws and the Human Rights Laws and how it reflects on situation of refugees in South Asia

By K. M. Parivelan

The South Asian States are not signatory to the '1951 Convention on Status of Refugees' or '1967 Protocol' as of yet. So it is obvious that if we need to analyse the situation of refugees in this region, the reliance has to be on the normative basis of international humanitarian laws and human rights laws followed and/or on the empirical situation prevailing here.

'International humanitarian law' is a branch of international law, which provides protection to human beings from the consequences of armed conflicts. This term was probably used for the first time in International Red Cross Conference Vienna Resolutions in 1965. Humanitarian law is referred to the body of law, which defines those principles, and rules limiting the use of violence in times of war. International humanitarian law obviously has much in common with the human rights law since both the bodies of rules are concerned with the protection of the individuals. The Geneva Conventions include: (a) Convention for the Amelioration of the Condition of the Wounded, Sick in Armed Forces in the Field/ (b) and at sea, (c) Convention relative tot he treatment of the prisoners of war and (d) Convention relative to the protection of civilian persons in time of war.[1] There are important differences between the International humanitarian law and human rights law: firstly, the difference is that while international humanitarian law is applied during the time of war or armed conflict alone, the law of human rights is applied in peace time; secondly, while a State which becomes a party to a human rights treaty assumes an obligation to treat all persons within the jurisdiction in accordance with the provisions of the treaty, humanitarian treaties, by contrast, are binding only between States which are to those treaties. However, once it is established that the humanitarian treaties are binding upon States on both sides in a conflict, the application is not dependent upon reciprocity. So it can be seen that law of human rights and humanitarian law is different from one to another because they are applied in entirely different circumstances.

It has to be noted also that the Geneva Conventions of 1949 are not sufficiently broad in the scope to cover all armed conflicts. The United Nations Conference on Human Rights of 1968 held at Tehran stated that massive denial of human rights, arising out of aggression or any armed conflict with their tragic consequences, and resulting in untold human misery.[2] The General Assembly of the United Nations has adopted quite a number of resolutions regarding humanitarian law under the title of 'Respect of Human rights in Armed Conflicts', thus emphasising for obvious reasons the close interrelationship existing between them. International humanitarian law applies to all armed conflicts, i.e., international armed conflicts as well as non-international armed conflicts. This resolution affirmed that even during the periods of internal armed conflicts humanitarian principles must prevail, and therefore, it called for measures to ensure better protection of civilians, prisoner of war and combatants in all armed conflicts. Later two more Protocols (I&II) were attached with the Geneva Convention; it incorporated certain elements from the Universal Declaration of Human Rights (1948), European Convention on Human rights (1950) and International Covenants on Human rights (1966). The four Geneva Conventions of 1949 and its two additional Protocols form the basis and main source of international humanitarian law. They are required to be effectively implemented with cooperation of States. Either a national legislation or administrative measures are required to implement them in letter and spirit. It needs to be analysed how far it is practically implemented.

The 1993 Vienna Conference on Human Rights called upon States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and protection of international law as well as minimum standards for protection of human rights as laid down in international Conventions. There is also range of limitations for these international humanitarian laws: (a) in the context of armed conflicts that take place among warring factions within a State, the existing laws are vague or ambiguous in regulating or containing it, (b) such conflicts often spill across the borders, endangering the security of other states and resulting in complex humanitarian emergencies, (c) there are many human rights abuses prevalent in internal conflicts and (d) destruction of civilian infrastructure and deliberate targeting of non-combatants.

The very violation of humanitarian laws and human rights laws are often causes which force individuals to flee their countries in search of asylum elsewhere. International humanitarian law is increasingly perceived as part of human rights law applicable in armed conflict. However, as human rights law and humanitarian law has totally different historical origins, the codification of these laws has until very recently followed entirely different lines.

There were many preventive practices and customs on hostile activities as seen in the history of different parts of the world. The first factor of importance is that humanitarian law was developed at a time when recourse to force was not illegal as an instrument of national policy. The foundations of international humanitarian law were laid at a time when there was no disgrace in beginning a war. The motivation for restraint in behaviour during war stemmed from notions of what was considered to be honourable and, in the nineteenth century in particular, what was perceived as civilised. It seems that the customary law of war the Lieber Code of 1863, was used as the principal basis for the development of the Hague Conventions of 1899 and 1907, which in turn influenced later developments. In this respect it is worth recalling that many of the early customs of war, which were set down in written instructions to armies, were motivated by a desire to encourage discipline.[3] Secondly, some acts may have a certain military value, but it has been accepted that humanitarian considerations override these. On this basis, the use of poison and toxic gases has been prohibited.

Conceptually, these provisions resemble more closely the limitation clauses commonly found in human rights treaties. Some provisions introduce the limitation within the body of the protective rule, for example, medical personnel cannot be attacked unless they engage in hostile military behaviour. Secondly, certain protective actions required by the law are restricted by the military situation. For example, parties to a conflict are to take "all possible measures" to carry out the search for the wounded and dead, and "whenever circumstances permit" they are to arrange truces to permit the removal of the wounded.[4] There are also a number of limitation clauses that refer directly to military necessity. For example, immunity may in "exceptional cases of unavoidable military necessity" be withdrawn from cultural property under special protection.[5] Unlike human rights law, however, there is no concept of derogation in humanitarian law. Derogation in human rights law is allowed in most general treaties in times of war or other emergency threatening the life of the nation.[6] Humanitarian law is made precisely for those situations, and the rules are fashioned in a manner that will not undermine the ability of the army in question to win the war.

Turning now to the nature of human rights law, we see that the origin of this law is actually very different and that this has affected its formulation. In human rights treaties we can see that they are arranged in a series of assertions, each assertion setting forth a right that all individuals have by virtue of the fact that they are human. Thus the law concentrates on the value of the persons themselves, who have the right to expect the benefit of certain freedoms and forms of protection. As such we immediately see a difference in the manner in which humanitarian law and human rights treaties are worded. The former indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law

concentrates on the rights of the recipients of a certain treatment. The second difference in the appearance of the treaty texts is that humanitarian law seems long and complex, whereas human rights treaties are comparatively short and simple. Thirdly, there is a phenomenon in human rights law which is quite alien to humanitarian law, namely, the concurrent existence of both universal and regional treaties, and also the fact that most of these treaties make a distinction between so-called "civil and political rights" and "economic, social and cultural" rights. The legal difference between these treaties is that the "civil and political" ones require instant respect for the rights enumerated therein, whereas the "economic, social and cultural" ones require the State to take appropriate measures in order to achieve a progressive realisation of these rights. The scene has been further complicated by the appearance of so-called "third generation" human rights, namely, universal rights such as the right to development, the right to peace, etc.[7]

The most important change as far as humanitarian law is concerned is the fact that recourse to war is no longer a legal means of regulating conflict. In general, humanitarian law is now less perceived as a code of honour for combatants than as a means of sparing non-combatants as much as possible from the horrors of war. From a purist human rights point of view, based as it is on respect for human life and wellbeing, the use of force is in itself a violation of human rights.[8] This was indeed stated at the 1968 Human Rights Conference in Tehran as follows:
"Peace is the underlying condition the full observance of human rights and war is their negation".[9]

A conceptual question of importance is whether human rights law can be applied at all times, thus in armed conflict as well, given that the philosophical basis of human rights is that by virtue of the fact that people are human, they always possess them. The answer in one sense is that they do continue to be applicable. The difficulty as regards human rights treaties is that most of them allow parties to derogate from most provisions in time of war, with the exception of what are commonly termed "hard-core" rights, i.e., those which all such treaties list as being non-derogable. These are the right to life, the prohibition of torture and other inhuman treatment, the prohibition of slavery and the prohibition of retroactive criminal legislation or punishment.

Human rights lawyers have consequently turned to humanitarian law because, despite its different origins and formulation, compliance with it has the result of protecting the most essential human rights both of the "civil" and the "economic and social" type. The major legal difference is that humanitarian law is not formulated as a series of rights, but rather as a series of duties that combatants have to obey. This does have one very definite advantage from the legal theory point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights.

The protection of children and family life is also given a great deal of importance in humanitarian law. Respect for religious faith is also taken into account in humanitarian law, not only by stipulating that prisoners of war and detained civilians may practice their own religion, but also by providing for ministers of religion who are given special protection. In addition the Geneva Conventions stipulate that if possible the dead are to be given burial according to the rites of their own religion. However, it should be noted that there are a number of human rights, such as the right of association and the political rights, that are not included in humanitarian law because they are not perceived as being of relevance to the protection of persons from the particular dangers of armed conflict.

South Asian states have common cultural mosaic sharing ethnicity, languages, religion, culture and traditions. These countries share long and porous borders and yet they have not been able to create a legal framework to deal with the problem of mass migration across borders. The reality of South Asia is that millions of these “illegal aliens” are present in most countries of the region as a result of failure to adhere to the humanitarian law and human rights norms. These developments present a threat to the social and political stability to this region. It also seriously undermines the fundamental principles of democracy, transparency, rule of law and respect for human rights. The absence of a legal framework not only harms refugees and asylum seekers, it also adversely effects the society of the host country.

Internal conflicts and border wars, the continuing abuse of human rights by the forces of the state and intolerable conditions of poverty are some of the factors responsible for forced movement of populations. Not all the uprooted people cross international borders. In fact the number of persons who remain displaced within their home state is much larger. Mass migrations are not a new phenomenon. In the post- colonisation phase of South Asia saw forced movements of people on an unprecedented proportion. “The partition of the Indian subcontinent in 1947 created nearly 15 million refugees. Myanmar after its independence threw out about half a million people to the neighbours. In 1959, China’s entry into Tibet forced over 130,000 people into India and Nepal. Pakistan’s military crack down in the erstwhile East Pakistan; present Bangladesh in 1970-71 had sent more than 10 million Bengali Muslims and Hindus across to India in search of safety. The three India-Pakistan wars and the continuing violence in Kashmir displaced over 850,000 Kashmiris. State sponsored ethnic cleansing in Bhutan has caused the eviction of more than 130,000 of its citizens. In Afghanistan, the take over by the Soviet Union and

later the Taliban, sent 3 million fleeing to Pakistan. The ongoing civil war in Sri Lanka has forced nearly a million Sri Lankan Tamils to leave their home and hearth in search of safety".[10]

South Asia hosts nearly the fourth largest concentration of refugees in the world. Non-governmental and semi-governmental agencies, working with refugees and the displaced claim that the number of persons living in refugee-like situations in the region is much higher than the official estimate. Large number of the displaced who have crossed international borders in South Asia, are treated as undesirable aliens or illegal immigrants by host governments. South Asian states have no national laws which define or distinguish refugees from others who cross the borders. Moreover, none of the South Asian governments have signed the 1951 UN Convention Concerning the Status of Refugees and its 1967 Protocol. These are the main UN mechanisms for the protection and rehabilitation of refugees. However other UN covenants and mechanisms like the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR)[11], International Covenant on Civil and Political Rights (ICCPR)[12], International Convention for Elimination of all forms of Racial Discrimination (ICERD)[13], Convention for the Elimination of Discrimination against Women (CEDAW)[14], the Child Rights Convention (CRC)[15] and the Convention against Torture (CAT)[16] obligate the state parties to provide protection and relief to asylum seekers.

The UNHCR has not been able to intervene effectively in this region. The governments of South Asian states generally do not allow the UNHCR to intervene with the refugees expect in selected areas. Another limiting factor is the definition of the "refugee" as incorporated in the 1951 UN Convention on Refugees and in its 1967 Protocol. Only those who are persecuted in their home countries for their political belief, opinion, race and religion are regarded as refugees by the UNHCR[17]. Many governments and non-governmental organisations (NGO) of the region have responded much more flexibly to the situation of forced migration in this region than stipulated by the UNHCR's mandate. The politics of majoritarianism and the national security perspective of the states of the region have made the lives of minorities uncertain. As a result, these minorities are forced to migrate to another country. The states of the region are extremely defensive about criticism of their human rights records. And, as violation of human rights is often the main cause of forced population movements in the countries of this region, the governments have been reluctant to involve the UNHCR and other international agencies in relief and rehabilitation of victimised people.

In the last decade the new challenges posed by the refugee crisis, has obliged the UNHCR to recognise the need to expand its mandate and the definition of refugees or persons of concern. Under instructions from the UN Secretary General it has developed a programme to provide support to those who have been displaced by ethnic strife, and communal or sectarian violence even before they cross international borders. In other words, the internally displaced person (IDP) has finally become a person of concern for the UNHCR.

As compared to many developed countries of the world who have adopted very strict entry procedures, South Asian states have adopted rather soft policies on entry of asylum seekers. The states have also given shelter and other humanitarian relief to different varieties of victims of forced migration, including victims of natural disaster, people fleeing generalised violence, abuse of human rights by state and non-state parties, communal and ethnic strife and even the victims of human-made ecological disasters.

Accommodating as the actual response of the South Asian states on the whole may be, governments have followed differentiated policies towards different groups of refugees or asylum seekers originating from within the region. While a state might welcome some groups of asylum seekers it may not be receptive or kind to others. The powers to grant residential permits have been relegated to administrators at district and sub-district levels who grant and revoke these certificates at their discretion. These policies have been dictated by the politics of kinship and inter-state relations. Experience shows that there is no consistency in admissions, grant of asylum, education, employment, rehabilitation and repatriation. Each influx of refugees receives a different package depending on political motivation and ethnic and religious linkages.

Although all the countries of South Asia have witnessed forced population movements, a general distinction can be made between countries, which generate refugees and those that receive refugees. Though as the empirical experience of the region shows countries can be both refugee generating and refugee hosting, Bangladesh, India, Pakistan and Nepal are countries that receive refugees, while Bhutan and Sri Lanka have generated refugees. Bangladesh and India have also generated refugees, e.g. Chakmas and Kashmiris.

The South Asian states also had to deal with the problem of statelessness almost immediately after achieving political independence. Under the programme of Burmanisation in 1948, Burma (present Myanmar) expelled approximately 500,000

persons of Indian origin. These people had lived in Burma for generations. In the fifties and the sixties, most of them returned to India in a penniless condition. In the seventies and eighties Burma had similarly expelled several thousand persons of Nepali origin. The government of Nepal had allowed these stateless persons to settle down in the south-eastern parts of Nepal. Approximately 900,000 persons were rendered stateless in 1949-50 in Sri Lanka when the island's government refused to grant them citizenship after independence. These were the Tamil plantation workers who were taken to the island by the British in the early 19th century. The government of Sri Lanka wanted India to take them back. After several rounds of bilateral negotiations between 1964 and 1987, India agreed to accept approximately 340,000 Tamil plantation workers from Sri Lanka. The liberation war of Bangladesh in 1970-71 sent approximately 10 million refugees to India. Most of them returned to Bangladesh after its liberation. However the liberation of Bangladesh left approximately 300,000 Pakistanis stranded in Dhaka. They are mainly Bihari Muslims who migrated to the erstwhile East Pakistan in 1947 from India.[18].

In Nepal, since 1991, over 100,000 Bhutanese of Nepali ethnic origin from southern Bhutan have taken refuge in Nepal. They were stripped of their citizenship and pushed out of Bhutan by its Royal Government following the implementation of the programme of Bhutanisation. Bhutan refuses to take them back while Nepal has refused to rehabilitate them. In short, the post colonial states in South Asia were born expelling large number of people and the state system, as it stands today in the region, is perched precariously on the creation of minorities, stateless populations and the continuing exodus of victims of various kind of violence.

In South Asia, in Sri Lanka alone more than a million people have been rendered homeless within their own country by the 18 year old ethnic conflict. In India nearly 250,000 Kashmiri Hindus and Muslims have become internally displaced. According to a study about 21 million person were internally displaced in India by big and medium size dams and mining projects. During the eighties, the government of Bangladesh had moved about half a million Bengali Muslim peasantry, who were land less, from the plane areas to the Chittagong Hill Tracts displacing the hill tribes from their traditional habitat. Sri Lanka government has also moved large numbers of ethnic Sinhala peasantry from the south to the north and north-east of the island, which is dominated by Sri Lankan Tamils.

To conclude, South Asian region has very complex refugee situation as a consequence of *inter alia* ethnic, religious and territorial conflicts. There are two ways of addressing the refugee problem in this region; (a) by going to the very causes of tensions and strife which trigger refugee crises could be sorted; (b) to have South Asian regional refugee law and/ or national law respectively to provide effective management to refugees issues. It is obvious that the first approach is very tough since there are complex issues clubbed with social and economic problems already prevailing in the region. So it will take a very long time to achieve it, where as the second approach is little easier, since it involves only political will to constitute committees to frame laws in tune with international standards. SAARC is the ideal regional forum for creating such a regional mechanism. It is committed to promote economic and social cooperation, for the "welfare of the peoples of South Asia and to improve their quality of life"..

The South Asian states by ratifying the 1951 UN Convention Regarding the Status of Refugees and its 1976 Protocol, would commit them to respect international norms/standards, particularly the principle of *non-refoulement*. It would also provide the non-governmental organisations and other institutions of civil society a basis to campaign against any violations of these conventions, nationally, regionally and internationally. By acceding to these international instruments South Asian member states would attain a platform within the UN body to pressurise western countries to adhere to these international instruments (in letter and spirit), which are being undermined by their "non-entree" procedure to keep out asylum seekers. Further for country like India such initiatives to bring national legislation or regional legislation could bring more leverage *vis-à-vis* (a) more proactive role in world politics, (b) facilitate legitimate space for claim to UN Security Council and (c) to effectively solve many of the regional issues including refugee crisis which has become perennial now.

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[1] Conventions I,II,III and IV, respectively of Geneva Convention of 1949.
[2] Refer the text of United Nations Conference on Human Rights, Tehran, 1968.
[3] G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, Volume II, London, 1968, pp. 10-12.
[4] Article 15, First Geneva Convention of 1949
[5] Article 11 of 1954 *Hague Convention* for the protection of cultural property in the Event of Armed Conflict.
[6] Article 4 of the International Covenant on Civil and Political Rights, 1966 and other international human rights instruments emphasise this aspect
[7] Louise Doswald-Beck and Sylvain Vite, *International Humanitarian Law and Human Rights Law*, International Review of the Red Cross, ICRC, 1993

[8] *Ibid.*
[9] Resolution XXIII “Human rights in Armed conflicts” adopted by the International Conference on Human rights, Tehran, 12 May 1968.
[10] Tapan K.Bose, *Protection of Refugees in South Asia: Need for a Legal Framework*, SAFHR, 2000.
[11] Ratified by only India (1979), Nepal (1991) and Sri Lanka (1980)
[12] Ratified by only India (1979), Nepal (1991) and Sri Lanka (1980)
[13] All the South Asian states have signed it and except Bhutan all have ratified also.
[14] All the South Asian states have signed and ratified it.
[15] All South Asian States have signed and ratified it.
[16] Nepal (1991) and Sri Lanka (1994) have ratified it , India has only signed but not yet ratified.
[17] See Article 1 of 1951 Convention relating to the status of refugees.
[18] Tapan K.Bose…

Analyze the way international refugee law defines “fear” and “vulnerabilility”?
By Sudeep Basu

Refugee phenomenon continues to remain a global concern and various international and regional instruments, treaties and conventions have been brought to bear on the problem of refugees. Several attempts have been made to define the term ‘refugee’ in the course of the twentieth century. The mostly widely accepted definition of a ‘refugee’ is contained in the 1951 Convention on the Status of Refugees which provided the principles on which international system of refugee protection was to be built. The mandate of the Convention extends to any person who ‘as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’. The two main characteristics of the Convention definition are its strategic conceptualization and its Eurocentric focus. The strategic dimension of the definition comes from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-western political values.

A critical debate surrounding the 1951 Convention was generated centered around the interpretation of the phrase ‘well-founded fear of being persecuted’. The phrase replaces the earlier method of defining refugees by categories (i.e., persons of a certain origin not enjoying the protection of their country) by the general concept of ‘fear’ for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. Due to the importance that the definition attaches to the subjective element, an assessment of the credibility is deemed essential where the case is not clear from the facts on record. It would be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of the situation and his personal experience – everything should serve to indicate that the predominant motive for applying is fear. Fear must be reasonable.

One essential element of the Convention refugee definition is that the refugee claimant must be genuinely at risk. Believing oneself to be in jeopardy is not sufficient. Rather, there must be objective facts to provide a concrete foundation for the concern which induces the person to seek protection. This is evident from the qualification ‘well-founded’. In general, the applicant’s fear can be considered well-founded, if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition. The appropriate starting point for an analysis of objective conditions within the refugee claimant’s state of origin is an examination of that country’s general human rights record. The House of Lords decision in R v. Secretary of State ex parte Sivakumaran (1988) was one of the landmark decisions which heralded the present phase in the evaluation of the well-founded fear criterion. Sivakumaran established that whether a fear was well-founded was to be determined largely on the basis of the objective circumstances relevant to the refugee’s claim, with particular emphasis on the conditions found to prevail within the country from which asylum is being sought. Prior to this landmark decision, the view which dominated judicial discourse around the definition of the term ‘refugee’ was one which emphasized upon the subjective elements, found under Article 1.A (2) of the Geneva Convention. It is accepted that an overemphasis on the refugee’s subjective fears would result in inequalities between the treatment accorded to refugees on the basis of their varying emotional strengths. The refugee is weak at every level of the

process, from entry to eventual expulsion- in terms, for example, of their access to representation. These weaknesses, although woefully apparent even when the refugee was a principal focus of enquiry, are becoming increasingly so as the focus shifts from individual examination of the well-founded fear criterion to group determination based mainly upon an assessment of the country from which the refugee claims asylum. Within such inquiries, the refugee has little or no visibility, first because he is unable to challenge or contradict the evidence in most cases and second, where he seeks to challenge the evidence, refugee evidence is accorded low weight. Further, objective evaluation of the well-founded fear concept is tainted with local perceptions and thus often fails to be context-sensitive.

There is no universally accepted definition of 'persecution' and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a social group is always persecution. Due to the variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. Courts and commentators tend to see the persecution issue primarily in terms of the level of harm imposed on an individual. Two considerations are at work 1) the harm imposed must be of a serious nature; and 2) to qualify as persecution within the terms of the Convention, the harm must be imposed for one of the above designated reasons. Why the definition of persecution is necessarily linked to the five specified grounds? According to B.S.Chimni, this gets at something other than simply the level of harm. He calls it a 'qualitative' or 'normative' aspect of the definition of persecution. That is, persecution connotes unacceptable, unjustified, abhorrent infliction of harm, not simply a particular degree of harm. To see this, he compares to legal cases: that of an individual sentenced to life imprisonment for having committed murder and that of a person sentenced to ten years in prison for having circulated a pamphlet opposing the government. The first case is unlikely to be seen as persecution: the second might well be.

While states have refused to recognize a right of asylum, they have accepted the obligation of non-refoulement in Article 33 (1) of the 1951 Convention. Broadly speaking, it prescribes that 'no refugee should be returned to any country where he or she is likely to face persecution or torture'. Non-refoulement is not about returning refugees to intermediate countries of first asylum. Nor is it about the failure to provide durable solutions. The central question in the non-refoulement debate is the risk of refugees. In light of the massive refugee crises facing states in the less developed world, it is remarkable that the principle of non-refoulement is in fact respected by most of these states. Instances of refoulement of refugees from within the state's territory do, however occur, especially in the context of large influx of refugees. In 1982-83, thousands of Rwandans, including many refugees, were chased from western Uganda back to Rwanda. In Pakistan, non-Afghan refugees have not enjoyed official recognition by the government and some have been returned to their countries of persecution. Refoulement of refugees from within the territory of developed states most often occurs in a less direct form, namely by application of an excessively restrictive interpretation of the Convention definition, leading to the rejection of genuine refugees who may face persecution upon their return. States have also violated Article 33 by repelling refugees who claim asylum at their frontiers. Techniques of interdicting refugees at the border continue such as the push-backs executed most infamously by the Thai government in response to Vietnamese boat people and the border interdictions noted in the National Report for Austria.

The gravest contemporary threat to refugee protection is grounded in a third variant of refoulement, namely the new practice of non-entrée, which aim to exclude unwanted migrants through tactics which include the imposition of visa requirements on the nationals of genuine refugee producing countries enforced through carrier sanctions. Visa requirements and carrier sanctions are crude instruments that bar genuine refugees from exercising their right to see protection. The risk to refugees is inevitable given that the enforcement of the indiscriminate visa requirements is wholly outside the realm of legal accountability. The 'safe country of origin' concept is emerging as a new form of non-entrée, in that European immigration ministers have recently sanctioned its use as a tool for en bloc exclusion of nationally defined groups. As practice evolves towards the making of pre-emptive negative status determinations that take little or no account of individuated circumstances, the risk of refoulement is particularly acute unless states prove willing to abandon current, loose definitions of 'safe'. In Switzerland, for example, all of India is considered 'safe', while Germany regards Ghana, Romania and Senegal in the same manner. If designation of such countries as 'safe' is used to deny protection on a wholesale basis, there is reason to believe that genuine refugees are vulnerable and run the risk of refoulement.

Refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of States to respond in concert and wholeheartedly in a spirit of international solidarity. The principle of burden sharing, as another aspect of international refugee law needs to be applied progressively to facilitate the process of durable solutions for refugees and reduce their vulnerability. This should be manifested through effective measures in support of states requiring assistance whether through financial or material aid or through resettlement opportunities.