

Term Paper for Module C 2006

Do you think that the category of "well-founded fear" reflects subjectivity in the definition of refugees as indicated in the Convention Relating to the Status of Refugees? Comment in the light of the definition adopted by the OAU Convention.

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The 1951 Convention on the Status of Refugees mandates as refugee, the persons who "as a result of events occurring before 1st January 1951 and owing to *well-founded fear* of being persecuted for reasons of race, religion, nationality of a particular group or political opinion is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself with the protection of that country or who is 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 Convention definition extends to only those people whose civil and political rights are violated and not those whose socio-economic rights are at risk. The current essay aims at understanding the crucial phrase 'well founded fear' which occurs in the definition. The phrase becomes all the more crucial by the virtue of being placed as a pre-condition for being mandated as a refugee. The endeavour begins with a characterization of the definition of refugees as per the Convention. This is followed by an analysis of the historical conditions of rise of such a definition and characterization. Then it goes on to explore the question of well found fear of what? The definition as we know of it talks of well founded fear of 'prosecution'. A holistic understanding of the phrase in question will also need an in depth understanding of what is and what isn't considered to be well found fear of prosecution. The issue then to be addressed is who decides what can amount to 'well founded fear of prosecution', for whom and under what conditions? There is an inherent question of power built into this issue, which deserves to be bought out with particularly with reference to the past experiences of the claimants of refugee status globally. At this stage one can go onto look into the several lacunae in the convention definition of refugees in the light of the definition adopted by the OAU Convention. All these will help us not just to understand the subjective or objective nature of Convention definition of refugees but to arrive at a position on the current status of refugees with respect to this definition.

Hathaway (1991) points to the two main characteristics of the Convention definition----- Eurocentric focus and strategic conceptualization. The Eurocentric goal of the Western states was achieved notwithstanding the vigorous objection from various delegates from the developing countries by restricting the scope of mandatory international protection to those whose flight was prompted by a pre-1951 event within Europe. The aim was to secure an amicable redistribution of the post-war refugees on the European shoulders. The strategic dimension of the definition comes from the successful attempts of the Western capitalist nations to prioritize the protection needs of those whose flight was motivated by pro-Western politico-ideological values. This was an attempt of the powerful Western states to increase the international visibility of the political migrations from the socialist regimes prominently former USSR. As a result of the strategic interests of the Western capitalist powers it was decided to restrict the scope of protection only up to the claimants who feared prosecution due to their political and civil status. According to Hathaway, such an apparently neutral formulation launched a two-pronged attack on the Soviet bloc. First, the concept of prosecution was sufficiently open ended to allow the West to embrace ideological dissidents of the Soviet bloc to international protection. Secondly, the precise formulation of the prosecution standard meant that refugee law couldn't readily be turned into political advantage to the Soviet bloc. Thus, the definition of refugee was carefully phrased to include persons who have been disenfranchised by their state on the basis of race, religion, membership of certain social group or political opinion--- matters with regard to which the East/Soviet bloc historically had a less than wholesome record. Even persons denied basic rights such as food health-care, education, etc. are excluded from international protection unless this denial is proved to be stemming out of the political and civil status of the persons. The admission of those, whose Western-inspired civil and political rights are threatened for protection and exclusion of those whose socialist inspired socio-economic rights are at risk, has been referred to as the incomplete and politically partisan human rights rationale of the Convention by Hathaway. Chimni (2000) very aptly notes that the Convention definition of refugees illustrates the point that definitions aren't neutral devices but embody a particular usually partial interpretation of social reality. Thus, the features of the Convention were heavily coloured by the historical context of the Cold War and the ideological clash of capitalism and socialism in the height of which the Convention took place.

Hathaway (1991) enumerates five essential criteria, for a claimant to be granted international protection under the Convention, he/she must fulfil:

1. Alienage to their country of nationality or in case of stateless persons the country of habitual residence.
2. The claimant must be genuinely at risk--- well founded fear. And the claim must be supported by objective facts and not just the claimants' subjective notion of being at threat.

3. The claimant's flight must be motivated by a prospect of prosecution--- well founded fear of nothing-else but prosecution against which the state of origin is unwilling or unable to protect.
4. The risk faced by the claimants must have some nexus with their civil and political status.
5. There must be a genuine need for and legitimate claim for protection.

The phrase 'well founded fear of being prosecuted' is thus the key phrase in the definition of refugees. According to the UNHCR Handbook, the notion of 'fear' is subjective to the claimant. Added to the subjective condition of fear is the qualification of 'well founded'. This implies that it isn't only the frame of mind of the person concerned but also the subjective facts which will support the stand of claimant. Thus, the UNHCR Handbook endorses the term as containing both the subjective and the objective elements. Due to the importance attached to the subjective element an assessment of credibility is indispensable. The apparent credibility check takes into account personal/family background, membership of racial/religious/political groups, his own interpretation of his situation, his personal experiences and everything which serves to indicate that the predominant motive of his application is fear. At the same time an objective assessment of the situation in the claimant's country of origin by credible authorities is an important aspect of the assessment of the credibility of the claimant's subjective fear towards his admission for international protection. It isn't just for the claimant to prove his subjective case using objective evidence, but the proof has to be in a sense commendable/acceptable to the host authority, irrespective of the reality of the case of the claimant.

For 'fear' to be qualified as 'well-founded' and hence legitimate for a refugee status claimant there are two requirements. First, as mentioned earlier the subjective perception of fear has to be consistent with the objective facts regarding the situation in the claimant's country of origin. Second, the hallmark of a Convention refugee is his/her unwillingness to return home due to an extreme fear of persecution. Hathaway argues that this two pronged approach of defining well founded fear is neither historically defensible nor practically meaningful. Historically indefensible in the context of the drafting history of the convention vis-à-vis the popular reading of the term fear. It is practically meaningless in the sense that there will hardly be any instance of a judgement which bore evidence of a wholehearted slant towards the refugee's emotional reaction. On these grounds Hathaway claims that the concept of well founded fear has nothing to do with the state of mind of the individual claimant. The concept is rather inherently objective and the apparent subjectivity is intended to restrict the scope of protection. The notion of well-founded fear is made crystal clear in the statement of Lord Keith during the decision of British House of Lords in the *R v. Secretary of State expatriate Shivakumaran* (1998) as follows:

"....the general purpose of the Convention is surely to afford protection and fair treatment to those for whom neither is available in their home country nor doesn't extend to allaying of fears not objectively justified, however reasonable these fears may appear from the point of view of the person in question....Fear of persecution in the sense of convention, is not to be assimilated to the fear of instant personal danger arising out of immediately presented predicament....the question is what might happen if he were to return to the country of his nationality...."

From the Shivakumaran case a bias towards evidence extraneous to the refugee claimant is reflected unlike the prescription of a combination of subjective and objective approaches by the Convention. If the 'well-founded' nature of fear is to be objectively determined then where does the objective analysis begin? In a judgement in the British House of Lords Lord Goff states that an appropriate starting point for the analysis of objective conditions within the refugee claimant's country of origin could be an examination of the general human rights track record of the country, as inefficiency of the state protection is the *sine qua non* for recognition as refugees. However Chimni asserts that the problem of advocating the solely objective test is the underlying assumption that the subjective perception of the individual is an arbitrary evaluation of events. He aptly questions if a solely 'objective' determination is at all possible. Can there be these ideally objective facts in the claimant's country of origin waiting to be discovered? Do these apparently objective facts allow one to reach an ethical judgement on the pain and fear of individual experiences? At the same time according to Tuitt (1996) there also are obvious criticisms against the subjective fear approach. Overemphasis on the subjective aspect will imply discrimination on the basis of differential levels of emotional strength.

Tuitt notes that so far, for all practical purposes the view that dominated the academic discourse and judicial authority regarding the 1951 Convention definition is that, the definition of refugee under Article 1.A (2) was constructed mainly of subjective elements. As per this school of thought the 'well founded fear' criterion mainly looked into the refugee's emotional reaction to persecutory events. And this is qualified by objective facts about the claimant's country of origin don't contradict his subjective assessment of threat. This approach has dominated judicial procedures in UK till House of Lords judgement on Shivakumaran case was an exception where there was a distinctive bent towards the objective approach. It was argued that 'the adjective "well-founded" qualifies but can't transform the subjective nature of the emotion....' According to Tuitt this has prompted a general shift from the subjective to an objective approach leading to an increasing disenfranchisement of the

refugee claimant from the decision making process in favour of generalized concepts as founding basis of refugeehood claims. This she says is as a result of an inability of the refugee receiving structures to cope with the challenged notions of reasonability which is presented in individual case enquiries. In response to these challenges the refugee has been portrayed as a fundamentally unreliable base-point of enquiry, as in the Shivakumaran case. This has allowed a justification for this shift to a generalized or group based evaluation of well founded fear and hence the 1951 Convention definition.

With the passage of time and increasing complexity of global politics this internationally accepted Convention definition of refugee has proven inadequate to deal with the problems posed by millions of externally displaced persons in the Third World. Keeping in mind the highly Eurocentric and strategic-contextual nature of the Convention this was inevitable. To adapt the Convention definition to their own socio-political realities many Third world nations have advanced broader definitions of refugee. The first of these broader definitions was advanced in the Organization of African Unity OAU Convention, 1969. Though the OAU convention sought to broaden the scope of the Convention definition, it also arose out of contextual urgency of the African sub-continent facing massive refugee problems through the 1960s—the decade of maximum decolonisation and of intensification of struggles of the African nations. Article 1 of the OAU Convention says:

"The term 'refugee' shall also apply to every person who owing to external aggression, occupation, foreign domination or even seriously disturbing public order in neither part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another part outside his country of origin or nationality".

The key features of this broad definition are:

- The term refugee is made applicable to asylum seekers who left their country of origin owing to external aggression, occupation, foreign domination or events seriously disrupting public order. Such individuals would acquire *ipso facto* refugee status without justifying their fear of persecution, as required in terms of the 1951 Convention.
- It considers situations where the qualities of deliberateness and discrimination need not be present reflecting the ground reality of wide-spread armed conflict in Africa during that period.
- It granted refugee status to nonetheless dangerous consequences of intensive fighting and associated random lawlessness in their countries of origin/habitual residence.
- As a response to the immediate humanitarian concerns the terminologies used were far less rigid than in the 1951 Convention. The new definition gave secondary consideration to strict legal meaning of its terminology and to case law, manifesting into simpler and more practical refugee status determining procedures.

Thus, the inclusion of humanitarian consideration made the new definition more effective in the protection of people in armed conflicts. In fact it is widely believed that human rights law can be practiced only under conditions of peace, but during situations of armed conflict as in Africa humanitarian law is far more effective. For the first time the legal term refugee was extended to individuals forced to leave their country of habitual residence due to external 'aggression'. In fact aggression was seen as defining refugee status in the OAU Convention, 1969. This marked the beginning of a refugee protection system which directly addressed the causes of mass refugee influxes, by emphasising the causes of mass refugee influxes, by emphasising objective conditions in the country of origin.

From the discussion above one can't safely say that the definition of refugees as in the 1951 Convention is predominantly subjective or objective. Attempt was made to keep the voice of the claimant central to the whole procedure. At the same time serious attempt has been made to balance the subjective element with objective facts about the situation in the claimant's country of origin. But the question here is whose subjectivity is it anyway? A disproportionate power equation between the refugee (and refugee generating nation) and the status determining authorities (of refugee receiving nation) can lead to a biased decision on several grounds:

- Differential cultural and emotional structures leading to divergent threat perceptions.
- Differential levels of economic well being- most often the refugee receiving nations are economically much better off than those which are flushing out refugees. An obvious point of consideration for the status determining authorities is that the refugee claim is not motivated by the better economic prospects.
- International political strategy—Today international policy of the nation states regarding refugees is largely coloured by the idea of strategic 'gains' and 'losses' for the host country or at least the people at the helm of the decision making process there.
- Notions of reasonableness tainted with local perceptions of the decision makers.

- Political activity/ ideological allegiance of the claimant prior to the application for refugee status are taken into consideration for ascertaining the credibility of the claimant.

Clearly, there can be several grounds on the basis of which a claimant's application is rejected. And if the notion of well founded fear is subjective from the point of view of the claimant, it is also subjective from the point of view of the status determining body. Now, the question as already mentioned here is whose subjectivity is it. Evaluating the positions of both the parties here, the subjectivity of the one who is at position of greater power would obviously prevail. So, at the end of the no matter how well the refugee claimant argues his case it is up to the status determining body/tribunal to validate the claim on the basis of well foundedness of the claimant's subjective fear. One such instance of the subjectivity of the status determining body having prevailed over the refugee claim is that of Sri Lankan Tamil claimants seeking asylum in Britain in 1987. Douzinas and Warrington (1995) note that in this case the sole point of consideration before the House of Lords was the proper basis of the determination of a 'well founded fear of persecution.' The Court held that the test for well founded fear would be satisfied by showing:

- actual fear.
- good reason for this fear, looking at the situation from the point of view of one of reasonable courage.

In the case in question the court found the applicant's subjective fear not to be qualifying as well founded because it didn't meet the objective criteria. The neutral observer- the Home Secretary concluded that Army activities amounting to Civil war occurred principally in the regions inhabited by the Tamils. However that doesn't qualify as an evidence of specific persecution of the Tamils as such. Hence no real risk to the applicants was perceived and their application rejected on that basis.

Thus, the Convention definition though theoretically has been designed to balance subjectivity and objectivity. They can be found more leaning towards subjective approach in two ways:

- Overt objectivity as in the Shivakumaran case eventually amounts to subjectivity.
- Subjectivity of one side --- either the claimant or the determining body.

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Haraway James (1991), *The Law of Refugee Status*, Butterworths, Toronto, pp vi, vii, 2-10, in B. S Chimni (ed) *International Refugee Law* pp 10,11, 16,17

Tuitt P, *False Images---* *Laws Construction of Refugees* in B. S Chimni (ed.) *International Refugee Law* pp 18-20

***Do you think that there is a need for a national law on refugees? Argue your case with reference to experiences of any country.
[Need for a National Law on Refugees in Bangladesh]***

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Introduction

The refugee phenomenon has been an integral part of Bangladesh state formation process. It is a refugee-generating as well as a refugee-receiving state. During the War of Independence, Bangladesh produced about ten million refugees, who took refuge in neighboring India. Upon independence, about three hundred thousand Biharis became refugees who proclaimed themselves as 'Stranded Pakistanis' in the aftermath of the war and opted for repatriation to Pakistan. An agreement in 1974 facilitated repatriation of 170,000 Bihari refugees. But Pakistan's domestic politics and its general disinterest in receiving the Biharis have prevented a permanent settlement of the problem to date.

In the post-independence era, Bangladesh generated as well as hosted refugees. It produced over 50,000 ethnic conflict-induced Pahari (Hill People) refugees, who crossed international border to take refuge in the neighboring Indian state of Tripura. A substantial number of Hindus have also allegedly migrated to India since independence. Insecurity and discrimination against this religious minority community as well as the factor of religious affinity with the majority population of India have precipitated their movement. In addition, development activities during the nation-building process and environmental degradation resulting from it have displaced a large number of people within and outside Bangladesh.

Despite such conditions, none of the South Asian countries have framed laws that deal with refugees, nor have they acceded to the international refugee instruments. This paper strongly argues that both as refugee producing and receiving country Bangladesh should provide the lead in framing a national law for refugees.

Bangladesh and the 1951 Convention

There exists a general ignorance in the countries of South Asia about the provisions of the 1951 Convention. This has to some extent been fostered and nourished by the government machineries. This gives them wide leverage to act arbitrarily. Aversion to accession also points to an imaginary and deliberate fear of undertaking concrete obligations under international law.^[1]

Some agencies of Bangladesh government took several initiatives to become a party to the 1951 Convention but were not able to impress the Government to do so. The main reasons seem to be that (a) no country within the Indian sub-continent became a party to the Convention, (b) once Bangladesh is a party to the Convention, it will be legally obliged to accept refugees from other countries and (c) Bangladesh is not only an overpopulated country but also is a poor country and to take such obligations under the Convention could be difficult and onerous. But this does not mean that Bangladesh has not provided shelter for refugees.

The international communities and others have considered the track records of Bangladesh in dealing with refugees as satisfactory to some extent. Both in 1978 and during 1991- 92 it allowed asylum seekers to enter the country and provided refuge and assistance. During the large-scale refugee influx for the second time, the government invited the international refugee agency, UNHCR in 1992 to launch their assistance activities in Bangladesh. Accordingly, UNHCR started its operation in Bangladesh in 1992. The government also allowed NGOs, both national and international in the refugee operations.

When a state signs, ratifies or accedes to any treaty or convention, what are the factors to be taken into consideration? Common sense leads us to enumerate them as below :

That the convention is not contrary to the state's national interest, rather it serves its national interest;
That the convention is not opposed to the state's fundamental constitutional principles, government policies and people's aspirations and beliefs.
That the convention does not put burden the state cannot bear.

It can reasonably be argued that the principles for the protection of refugees which are contained in the Convention and on which there is universal consensus well correspond to the national interest, constitutional norms, government policies, people's aspirations, beliefs, tradition and culture of the countries of South Asia. These principles can be stated in brief as below.

(a) A person who has fled to escape imminent danger to his life ought to be provided protection. This is a fundamental demand of humanity. Nobody abandons his own house and accepts refugee life at his own sweet will. Fear which haunts and compels him to flee his own country is the main element for determining refugee status. Sources of fear or threat to life can be many. The 1951 Convention has laid some of them. Africa and Latin America have added to the list. People genuinely in need of help are to be distinguished from economic migrants and illegal entrants.

(b) Nobody is to be denied entry to a country's territory and pushed back to a place where his life would be at stake (*non-refoulement*), and if that person is already in the territory of that country, he shall not be returned to a place posing danger to his life.

(c) Once the refugees are in the territory of a country, whether they are accorded formal refugee status or not after due screening is done, they must be given protection, shelter and other minimum human necessities for sustaining their life.

(d) When the conditions which produced refugees have improved or ceased to exist, steps would be taken for their voluntary repatriation.

(e) World community's concern for refugees anywhere in the world being the fundamental human element, international cooperation, burden sharing and active presence of an international body i.e. UNHCR, to mobilise and organise world community's efforts for the protection, rehabilitation and welfare of the unfortunate lot of the humanity are the prerequisites for the effective management of the refugee problem. These prerequisites are denied by none.

(f) Those who have committed war crimes, crimes against peace and humanity as well as those who have committed serious non-political crimes cannot be accorded asylum.

(g) While dealing with the problems of refugees, the countries of refuge can take measures which they consider necessary to ensure safety, security and public order of their own countries.

There is universal consensus on the above fundamental principles regarding the refugees. This being so, absence of national legislation or accession to the 1951 Convention is puzzling. This led the Eminent Persons Group in South Asia led by Justice Bhagawati of India to draft a model law for the nations of South Asia.^[2] The model law also incorporated the above principles. Adoption of model law by the countries of South Asia with necessary modifications peculiar to their respective countries, of course, would not exclude from agenda the question of accession rather it would strengthen the case of accession. On the other hand, accession can also precede the adoption of national legislation. Besides special mention of the protection of refugee women and children, model law's significant contribution to the development of refugee law would be its provision for the situation of mass influx of refugees and implied temporary refuge to be accorded to them.^[3]

Legal Status of Refugees in Bangladesh

There is no domestic law or specific national policy governing the protection of refugees in Bangladesh. Briefly speaking, like other South Asian States, Bangladesh is neither a State Party to the 1951 Convention nor its 1967 Protocol. It also does not have any domestic/national law, which covers the issue of asylum seekers and refugees. In practice, foreigners, irrespective of asylum seekers or simply visitors are treated here under some aged old laws (e.g. the Foreigners Act, 1946; Registration of Foreigners Act, 1939; Passport Act, 1920; Bangladesh Citizenship (Temporary Provisions) Order, 1972; Extradition Act, 1974; and Naturalization Act, 1926 etc.) which are inadequate to meet the need of the time.

However, during 1978 and 1991-92, the asylum seekers from Myanmar, mostly the Rohingyas from the Northern Rakhine state were provided refuge status by the Government of the People's Republic of Bangladesh under 'executive orders.' They were granted prima facie refugee status (on a group basis). Refugee law experts are of the opinion that these measures do not address the need of an individual asylum seeker/refugee and are also not consistent. This results in differences in authority's approaches- such as varying criteria for solutions and varying standards of treatment to the refugees.

Bangladesh's Obligation under the International Treaties Law Regime

Bangladesh is a State Party to major international human rights instruments. Among them the significant ones are the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture etc. Several provisions of all these international instruments oblige a State party to provide protection for asylum seekers and refugees. The country is also committed to the principle of non-refoulement being party to the above mentioned instruments.

Article 14 of the UDHR states that "Every one has the right to seek and to enjoy in other countries asylum from persecution." The Declaration and Programme of Action of the World Conference on Human Rights also reaffirmed the right of every person to seek and enjoy asylum. The CRC also obliges the State Party to take care of the interest and rights of the refugee children including their birth registration.

Bangladesh's Obligations towards Refugees under the Domestic Laws

In this part of the paper an attempt is made to find out existing legal provisions in Bangladesh, if any, which could be translated for the protection of asylum seekers (a person whose request or application for asylum/refugee status has not been finally decided on by a prospective country of refuge or UNHCR) and refugees. In absence of any protection by national statute or governmental policy, one has to look at the constitutional safeguards and the international instruments which are in consonance with constitutional principles.

Now, let us proceed to the constitutional provisions of the State. The Fundamental Principles of the State Policy of Bangladesh are respectful to international law and the principles enunciated in the UN Charter. Article 25 of the Constitution states that "the State shall base its international relations on the principles of respect for ... international law and the principles enunciated in the United Nations Charter". The UN Charter in its preamble specifically refers to the reaffirmation of "faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. The Charter in its Articles of 1, 55 and 62 reiterates the observance of human rights for all peoples of the world.

Part III of the Constitution of Bangladesh guarantees a series of fundamental human rights, drawing heavily from the international human rights discourse. For example Article 27 of the Constitution provides equal protection of law for all. Article 31 provides that not only the citizens are entitled to have the protection of law but the foreigners (non-citizen) who for the time being are staying in the country are also entitled to have so. The Constitution also guarantees right to life and personal liberty^[4]; safeguards from arbitrary arrest and detention^[5]; prohibition of forced labour^[6]; right of fair trial^[7]; freedom of movement^[8]; assembly^[9], association^[10], profession or occupation^[11], religion^[12]; right to property^[13] etc.

However, for the translation and execution of these legal provisions in favour of the interest of the refugees, needs comprehensive legal interpretations and pro-active initiatives from the government. Till now, there is no significant indication in this regard. Unlike India, Bangladesh lacks judicial activism in this regard.

Need for a National Law on Refugees

South Asian countries sharing so many common historical experiences but having a divided political fate dictated by the existence of diverging religious identities and the way the British left the region, experienced history's one of the most massive cross border movements. This experienced human tragedies unprecedented in history. That tragedy did not end in few years. Unfortunately it still persists and lingers. Cultural similarities as well as dissimilarities, religious similarities as well as dissimilarities, linguistic similarities as well as dissimilarities amongst the people of the region and the physical proximity of the countries having fluid borders accompanied by political rivalries explain the complex and peculiar nature of mass influx of the refugees within this region.^[14] But whatever are the conflicts and tragedies resulting in mass production of refugees, countries of the region have done their utmost to provide humanitarian help and accommodate them. This is in harmony with the region's one of the fundamental human attributes *karuna* which means compassion to be shown to the suffering humanity.^[15]

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It is, therefore, a paradox that while the countries in South Asia including Bangladesh have always risen to occasions to take proper care of the refugees, they have always been reluctant to accept legal obligations to do so. Consequently, they have neither enacted national laws, nor have they any regional declaration of policies concerning refugees, nor they have acceded to the 1951 Refugee Convention or the 1967 Protocol. Whatever rich cultural heritage they may have inherited and however spiritually enlightened they may be to extend assistance to suffering humanity, complexities of modern life and norms of international law demand that a legal framework be devised to guarantee minimum standards of treatment of the refugees. This is for transparency in the treatment of refugees, to check administrative lapses and bureaucratic arbitrariness and to provide greater opportunity to civil society to monitor compliance with traditions, standards and norms for the safeguard of the refugees. It has been rightly argued that the South Asian countries have to codify their good practices as regards the treatment of refugees in order that their good tradition and culture does not fall prey to the whims of any bureaucratic organ or person.^[16] Since there is no national standard for caring for refugees, protection is left up to the states. As a result, there are wide variations in refugee treatment, reflecting politics, personality and economics. The lack of national standards means that refugees in the same group often receive sharply different treatment.

There are several reasons why national law should be framed. The fast and foremost among them is that a distinction must be made between people who cross borders for economic opportunities and those who do so for fleeing persecution. In order to make that distinction, necessary structures need to be in place that can only be attained through national legislation.

In most cases, refugees are dealt with on an ad-hoc basis. The absence of law contributes to compounding of problems by depending on this type of approach. There is a need for appropriate legal and institutional structures so that refugees and asylum seekers can be dealt with in an organised manner. Structures based on law would mean better management, efficiency, transparency and accountability. A national law will better equip the state to face problems that it may have to face from time to time.

Bangladesh is constitutionally bound to frame such a law. Articles 31, 32, 33, 34, and 44 of the Bangladesh Constitution have given a large number of rights to non-citizens as well. Article 31 states that apart from citizens every other persons for the time being within Bangladesh has "the right to enjoy law, and only in accordance with law...". Despite such explicit declaration Bangladesh is yet to develop a legal framework for refugee protection.

If Bangladesh has a legal structure in place to deal with asylum seekers and refugees, then its act of considering and granting asylum would be acts in fulfilment of its own national law. This would protect Bangladesh from likelihood of charges indulging in unfriendly acts by the states of origin of the person/s concerned. Bangladesh can rightly claim granting asylum is in conformity with its own national legal obligation. If Bangladesh had proper structures, rules and regulations on asylum in place then complications of asylum related cases such as that of Anup Chetia's could be avoided.

In formulating a national legislation, the Model National Law for Refugees developed by a civil society group, Eminent Persons Group (EPG) is the best guidelines not only for Bangladesh but also for other South Asian Countries. The Model Law, incorporating some of the basic principles of international humanitarian law, provides a general guideline and framework for refugee protection and administration. The government should consider this as a priority issue.

This legislation should not only spell out the rights of the refugees; it should also safeguard the territorial integrity and security of the state. Today the problems of the refugees are dealt with on an *ad hoc* basis. However, there are issues that cannot be addressed in this way. For example, do the refugees have the right to work? Do they have freedom of association? Refugee Law, as Justice P.N. Bhagwati has pointed out, would "help to provide a measure of certainty in the states, dealing with the problem of refugees". It would also provide greater protection to them.^[17] The legislation would enable all concerned to make a distinction between economic migrants and refugees. And, above all, it would incorporate the principle of non-refoulement, the basic tenet of International Refugee Law. Article 33 (D) of the UN Convention states: "No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontier 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".^[18]

In fact, a national law on refugees is also a major instrument for the protection of the legitimate interests of the State. Given the existence of the Rule of Law in the country and guarantees of fundamental rights in the Constitution, it is appropriate to establish a uniform refugee determination and protection strategies through adoption of law. This will be helpful to have a coordination among different agencies and concerting search durable solution for a group of refugees. It will also be helpful in conducting our foreign relations. Given the example of granting of refugee status to a national of another country will constitute a legal obligation for the host country based on international humanitarian law. So, there will be no scope of misunderstanding such an act as 'unfriendly' by the State whose national is accorded the refugee status. In fact, a set of law with clear distribution of authority would establish a proper status determination procedure. It will also provide a guideline regarding rights and obligations of refugees. If there is a specific guideline in the form of law it will empower the authorities even to withdraw refugee status if it is found that one has fled the country of origin for escaping prosecution (for any criminal activity) or if there is a significant development in the country of origin.

Conclusion

The problem of the refugees has been among the most complicated issues before the world community for a long time. The concept of international protection for refugees evolved gradually. Now, it implies a series of institutional and legal responses. In Bangladesh adopting a national legislation would be a first step towards establishing a humane and right based treatment of refugees, which fits well within the democratic framework of Bangladesh Constitution. So, the country should adopt national legislation for the protection of asylum seekers and refugees. This will enable to handle the problem in more humane and effective ways and enhance country's image in terms of implementation of obligations promised through signing and ratification of different human rights instruments.

[1] *Fifth Informal Regional Consultation on Refugee and Migratory Movements, op.cit.* P.16.

[2] *Roundtable Workshop on Refugees in the SAARC Region : National Legislation on Refugees, op.cit.,* pp.19,61.

[3] *Fourth Informal Consultation on Refugee and Migratory Movements in South Asia, op.cit,* p.9.

[4] Article 32 of the Constitution of Bangladesh

[5] Article 33 of the Constitution of Bangladesh

[6] Article 34 of the Constitution of Bangladesh

[7] Article 35 of the Constitution of Bangladesh

[8] Article 36 of the Constitution of Bangladesh

[9] Article 37 of the Constitution of Bangladesh

[10] Article 38 of the Constitution of Bangladesh

[11] Article 40 of the Constitution of Bangladesh

[12] Article 41 of the Constitution of Bangladesh

[13] Article 42 of the Constitution of Bangladesh

[14] *Fifth Informal Regional Consultation on Refugee and Migratory Movements, Kathmandu, 9-10 November, 1998,* p.14.

[15] *Roundtable Workshop on Refugees in the SAARC Region: National Legislation on Refugees, SAARC LAW-UNHCR, 30 April, 1999, New Delhi, p.37.*

[16] *Roundtable Workshop on Refugees in the SAARC Region: National Legislation on Refugees, SAARC LAW-UNHCR, 30 April, 1999, New Delhi, p.10, 22.*

[17] P.N. Bhagwati, "Presidential Address", *Refugees in the SAARC Region: Building a Legal Framework* (New Delhi, 1997), pp.19-23.

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What do we mean by Refugees,Asylum,and Protection etc. in Socio-Political and Legal Terms?

The word refugee can be traced in bibliographical history when the Israelites due to persecution of Pharaoh, of the king of Egypt, migrated under the leadership of Moses. Prophet Mohammad (PBH) was also subject to persecution and migration from Makkah city to Madinah, the traditions of persecution followed by migration and refugees are as old as human beings. Those who migrated were called Muhajirs and the people of Madina gave them well reception and assistance. These people were called as Ansars. This may be seen as an example for respect of refugee's rights and dignities. In ancient India also there have been instances, when peoples had to flee leaving the areas of their natural abode, due to persecution or fear of persecution. When Aryans invaded India, the Dravidians, who were inhabitants of Northern India, were pushed to migrate to southern parts of the country. But these instances merely shows the human behavior or the attitude towards refugees, persecuted persons, and does not cast even dim lights to have an interference that there had been any law. In eighteenth and nineteenth centuries, the age of colonialism, Europeans, particularly Britishers used to migrate criminals to remote and isolated islands, like to Australia and USA, and Andaman Nicobar Island. But after Industrial revolution, and scientific development there came radical changes in the magnitude of persecution, oppressions, and migration, resulting to millions of refugees.

Irrespective of all odd epithets of gross and violent persecution, oppressions and tyrannies, now our society has entered into a civilized phase, so we have forums and assemblies to condemn these activities and to formulate laws to redress these problems. The outcome of the two world wars, was not only the universal miseries and destruction, but silver lines also that can be seen in the form of "League of Nation" or the "United Nations". The miseries of two world wars have made us more civilized, with an attitude to develop more and more international co-operation. The scientific advancement particularly in the field of transportation, communication and information technologies have led us in a new era that is known as Age of Globalization.

Though the terms persecution, migration and refugees are very ancient, but these terms in the legal sense and jurisprudence, can be traced and defined through 1951, convention of United Nation Organization. Before it, commonly the term refugee was used for a person who had been forced to flee his or her home for any reason for which he or she was not responsible, be it persecution public disorder, civil war, or any natural disaster.

Article I of the convention relating to the Status of Refugees, done at Geneva on 28th July 1951, defines the term refugee as follow:

"For the purpose of the present convention the term refugee shall apply 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.

"Well founded fear" is a crucial phrase used in the definition of Refugees. It is a matter of debate whether this phrase should be taken in its objective meaning or subjective meaning. The UNHRC's handbook on procedure and criteria for determining Refugee status recommend use of both the subjective and objective test. The renowned scholar in the field of International Law, James Hathway has however emphasized on objective test. He is of the opinion that granting refugee status has little to do with the state of mind of the individual concerned.

Further another term used in the definition "Persecution" has also left undefined, and perhaps it has been deliberately left undefined, as it is very difficult to define the word. The modes of persecution, the venues of persecution and the magnitude of the persecution, are very relevant, and the issue of debates. Whether on the basis of persecution in the commercial and financial affairs, the case is considered for grant of status of refugee, or whether it should be restricted to only political and civil affairs only. Hathway has attempted definition of persecution by linking it to wider development in the field of human rights. However the term persecution is viewed as a narrow subset of human rights.

Due to prevailing conditions in different regions, the term "refugee" is defined in different way at regional level. The OAU convention expanded the definition contained in 1951, to include the persons fleeing their country of origin due to external aggression, occupation, foreign domination, or the events leading to seriously disruption in public order. Thus the ingredient of "well founded fear" which was emphasized in 1951 convention has been excluded by OAU convention. The Cartagena Declaration, has also the similar approach, in defining refugee vide these two documents viz.

OAU convention and Cartagena declaration the definition of refugee has been expanded in Africa and Latin America respectively.

With regard to Asia, the Asian African Legal Consultative Committee (AALCC) in 1966 adopted Bangkok principles. As per these principles the term refugee is defined as follows:

"A refugee is a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group:

leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or,

being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection;

The term "refugee" shall also apply to every person, who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

A person who was outside of the State of which he is a national or the Country of his nationality, or if he has no nationality, the State of which he is habitual resident, at the time of the events mentioned above and is unable or unwilling due to well founded fear thereof to return or to avail himself of its protection shall be considered a refugee.

The lawful dependents of a refugee shall be deemed to be refugees.

A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or Country of which he is a national.

But since these principles are not binding, therefore failed to create influence as in the case Cartagena.

The Arabs viewed these problems in percept of problems prevailing in Palestine. An Arab Convention which was adopted in 1992 at Cairo, have a broad concept of "refugee" and "displaced persons" it was emphasized that refugees be distinguished from Stateless persons.

The Jurisprudence parlance view the refugee, on the ground of their membership of a group of persons effectively deprived of formal protection of the government of its state of origin. The refugee was defined a person deprived of State protection. But subsequently a social approach to the definition of refugee was taken and refugee was defined as helpless person, who is separated from their home society due to social or political occurrence.

1951 Convention –mandates protection only for those whose civil and political rights are at risk without protecting those socio-economic rights are at risk. Universal and religion human rights standards find their expression in the constitutions and or the domestic laws of most countries. Such laws often also provide for the national institutions necessary to ensure their effective implementation. Many countries have set up national human rights institutions in recent years. These institutions can also be helpful to the refugees or asylum-seekers. National human rights NGO's can also influence governmental policies and decisions, either through official institutions or through advocacy and lobbying.

The 1951 convention provides equality of treatment with citizens with respect to certain rights. But these rights are reinforced under provisions of various international human rights instruments as follows:

Freedom of religion is provided Under Article 18 of the Universal Declaration of Human Rights, Under Article 18 of the International Covenant on Civil and Political Rights, and Under Article 14 Convention on the Rights of the Child.

Intellectual property rights is provided under Article 27(2) Universal Declaration of Human Rights, and under Article 15(1)(c) International Covenant on Economics, Social and Cultural Rights.

Right to access to the courts is provided under Article 10 Universal Declaration of Human Rights, Under Article 14 of the International Covenant on Civil and Political Rights, and under Article 40 of the Convention on the Rights of the Child.

Right to elementary education is provided under Article 26 of the Universal Declaration of Human Rights, under Article 13 of the International Covenant on Economic, Social and Cultural Rights, and under Article 28 of the Convention on the Rights of the Child.

Right to public relief is provided under Article 25 of the Universal Declaration of Human Rights, and under Article 9 of the International Covenant on Economics, Social and Cultural Rights.

Rights associated with employment, labour legislation and Social security are provided under Article 9 of the International Covenant on Economics, Social and Cultural Right, and under Article 26 and 23 of the Convention on the Rights of the Child.

Right of association is provided under Article 20 of the Universal Declaration on Human Rights, Under Article 22 of the International Covenant on Civil and Political Rights, under Article 8 of the International Covenant on Economics, Social and Cultural Rights, and under Article 15 of the Convention on the Rights of the Child.

Right to work is provided under Article 23 of the Universal Declaration of Human Rights, and under 6 and 7 of the International Covenant on Economics, Social and Cultural Rights.

Right to housing is provided under Article 25 of the Universal Declaration of Human Rights, and under Article 11 of the International Covenant on Economics, Social and Cultural Rights.

Right to post-elementary education is provided under Article 13 of the International Covenant on Economic, Social and Cultural Rights, and under Article 28 of the Convention on the Rights of the Child.

Freedom of movement is provided under Article 13 of the Universal Declaration of Human Rights, and under Article 12 of the International Covenant on Civil and Political Rights.

Similarly there is no provision in the 1951 convention regarding freedom of assembly, but this right is protected under international and regional human rights instruments. International and regional human rights law generally protect the right to meet and gather with others in a peaceful assembly.

The right only protects "peaceful" assembly. There exists no international jurisprudence setting out parameters determining what constitutes a "peaceful" assembly. If the purpose of assembling is to incite other to riot and violence, it can hardly be considered "peaceful", even if the assembly itself does not resort to violence. Obviously, where the purpose of assembly is for the participants to engage in rioting, violence or looting, it is not protected under human rights instruments. Under international human rights law, the right of peaceful assembly may only be subject to such restrictions which are considered necessary in a democratic society.

There is no provision in the 1951 Convention relating to freedom of opinion and expression. The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa contains the following provision in Article III (2):

"Signatory States under to prohibit refugees residing in their respective territories from attacking any State Member of the OAU, by any activity likely to cause tension between Member States, and in particular by the use of arms, through the press, or by radio".

Other provisions are found in international and regional human rights instruments. The 1951 Convention guarantees to refugees equality of treatment with nationals as regards freedom of religion. Article 4 of the 1951 Convention provides that:

The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children”.

Freedom of religion is also guaranteed in international and regional human rights instruments.

International and regional human rights law generally protect the following:

- Freedom to hold (or not to hold) a religion or belief:
- Freedom to adopt a religion; and
- Freedom, alone or with others, to manifest one’s religion or belief through observance, worship, practice and teaching.

Refugees may have a different religion than the majority of the population in their host country, and might therefore be particularly vulnerable to measures, which affect their religious freedom. The Human Rights Committee has pointed out that where there is a state religion, or a religion to which most people in the country belong, this should not impair the religious freedom of minority groups. In addition, limitations on the grounds of protecting “public morals” might be onerous for refugees if they belong to a minority religion. In this connection, the Human Rights Committee has said that:

“[...] the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”.

In broad sense Asylum is protection and shelter to a refugee by a state where the refugee has migrated due to fear of persecution seeking shelter to save his life. However, the content of this term has varies from time to time and culture to culture.

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. The principle of non-refoulement has also come to be embodied in other international instruments. For example, Article 3 of the 1984 Convention against Torture, states:

“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations on human rights.

The 1951 Convention was drafted with the individual asylum-seeker in mind. It does not quite deal with a situation of mass influx of asylum-seekers which could either preclude formal determination of refugee status or/and exclude a lasting solution. Moreover, the asylum-seekers may include those who fall within the broader definition of refugee contained in the OAU Convention and the Cartagena Declaration. In the context of ‘protection’ of asylum-seekers in situation of large-scale influx’ the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) adopted Conclusion No. 22 in 1981 which insists on the provision of temporary refuge through the act of admission:

Article 14 of the Universal Declaration of Human Rights (UDHR) merely provides that 'everyone has the right to seek' but not be granted asylum. The 1977 United Nations Conference on Territorial Asylum convened to consider such a possibility ' was an abject failure'.

In the present scenario there are a number of territories outfits operating from across the borders indulging in the territories activities which are being defended by certain corners in the international politics as the battles for freedom of the particular land. There has emerged a conflict between the concepts of asylum and extradition. A number of the persons who are involved in the activities of high jacking of the terrorists activities are living either under the status of asylum or otherwise including illegal states in the foreign countries and the country to which they belong or where they had been carrying terrorist activities wants their extraditions and to prosecute that. However, 1951 Convention is silent on the issue of extradition but an international consensus has emerged against the crime of high jacking with the obligation of extraditions.

India is not a party to the 1951 convention. However, India is party to the two international Covenants in addition to the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination Against Women. India has also ratified the Convention on the Political Rights of Women, the Convention on the Suppression and Punishment of Apartheid, the convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and Convention on the Prevention and Punishment of the Genocide. It appears that India is also considering accession to the 1984 Convention Against Torture. NHRC of India stressed upon the Government of India the need for a comprehensive national legislation to deal with refugee situations facing our country and to distinguish bona fide refugees from economic migrants, illegal immigrants and other foreigners.

In the Memorandum of Action Taken on the Commission's annual report for 2000-2001, the Government of India has indicated that issues concerning the 1951 Convention and the 1967 Protocol were being examined by the Ministry of External Affairs, along with the drafting of a national legislation on refugees.

Thus we can conclude that though there are sincere attempts to protect the rights of refugees and asylum, but still there is no strong international law, the 1951 Convention which has left many terms undefined, has also failed to meet the need of hour, The convention either requires to be modified to remove these confusions or another legislation is required. Further there are more unfortunate persons falling in the category of displaced persons. Their position is worst as they have not come to the attention of international community and so deprived of rights and relief available to the refugees.

Do you think that there is a need for a national law on refugees? Argue your case with reference to experiences of any country.

Dilip Gogoi

The Universal Declaration of Human Rights, 1948 by U N General Assembly in Article 1 states that "all human beings are born free and equal in dignity and rights." Article 3 emphasizes that "everyone has the right to life, liberty and security of person". Article 12 states that "no one shall be subject, to arbitrary interference with his privacy." However on account of the alarming rise in armed conflicts and other form of violence in different parts of the world – most of which are internal in character – countless innocent people have to face hardships and suffering. During the last few years, much attention has been focused on human rights issues in all over the world. Until recently subjects like Humanitarian Law, Human Rights Law and Refugee Law were largely neglected. It must be kept in mind that International Humanitarian Law (IHL), Refugee Law and International Human Rights Law (IHRL) are closely related to each other. Although their fields of application and the ways of achieving their objectives may be different, they all essentially deal with the broader aspect of the security of humanity. In other words, they are concerned with protecting human life and safeguarding human dignity. Political or social actions aimed at alleviating the hardships can be successful only if there is a foundation of humanitarian laws at domestic as well as at global stage with effective implementing mechanism that protect the rights and dignity of individuals and groups including refugee and internally displaced persons.

This paper is an attempt to comprehend the complex issues of refugees by highlighting India particularly with an argument for establishment of a comprehensive national law which could effectively deal with the refugee problem within and outside the country.

Who is Refugee?

Refugee, in common sense and conventional usage, is someone seeking refuge from danger. In contemporary international relations theory, as mentioned in article 1 in 1951 *UN Convention relating to the Status of Refugees*, the term "refugee" applies to any person who "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 1969 Convention of the Organization of African Unity on Refugee problems in Africa and the 1984 Cartagena Declaration on refugees have broadened that definition to include people fleeing events which seriously disrupt public order, such as armed conflicts and disturbances.

Thus, refugees are people who need the protection of a separate country. Refugees may enter a state legally or illegally, individually or as part of mass exodus. They may eventually return home, settle indefinitely in the foreign state of asylum, or resettle in a separate state that extends voluntary acceptance of refugees. Another humanitarian problem that is known as Internally Displaced Persons (IDPs). This should not be confused with that of refugees. Refugees are people who have fled their countries, while internally displaced persons are those who have not left their country's territory.

Refugee and International Protection Regime:

International Humanitarian Law is a very important branch of International Law. IHL is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non – international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.

The main treaty sources of IHL applicable in international armed conflict are the four Geneva Conventions of 1949 and their Additional Protocol I of 1977. The main treaty sources applicable in non – international armed conflict are article 3 common to the Geneva Conventions and Additional Protocol II of 1977.

IHL is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and / or claim certain behavior or benefits from the governments. Human Rights are inherent entitlements which belong to every person as a consequence of being human. Numerous non – treaty based principles and guidelines also belong to the body of international human rights standards.

IHL main treaty sources are the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966), as well as Conventions on Genocide (1948), Racial Discrimination (1965), Discrimination against Women (1979), Torture (1984) and Rights of the Child (1989). The main regional instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Declaration of the Rights and Duties of Man (1948) and Convention on Human Rights (1969), and the African Charter on Human and Peoples Rights (1981). In Asia there is no regional instrument in this regard.

Refugees enjoy first and foremost protection under the refugee law. The mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) is to implement the landmark 1951 Refugee Convention. The Convention protects some important rights which include freedom of religion (article 4), access to court (article 16), access to employment (article 17), access to education (article 22), public benefits (article 23), and freedom of movement (article 26). As far as possible, states are obliged to grant refugees the same rights as citizens. Even if they are in a State involved in an armed conflict, refugees are also protected by International Humanitarian Law. Apart from the general protection afforded by IHL to civilians, refugees also receive special protection under the Fourth Geneva Convention and Additional Protocol 1. This additional protection recognizes the vulnerability of refugees as aliens in the hands of a party to the conflict and the absence of protection by their state of nationality.

Similarly, IDPs are protected by various bodies of law, principally National Law, Human Rights Law and, if they are in a State undergoing armed conflict, International humanitarian law. If IDPs are in a state which is involved in an armed conflict, they are considered civilians – provided they do not take an active part in the hostilities – and, as such are entitled to the protection afforded to civilians. When they are respected, these rules play an important role in preventing displacement, as it is often their violation which leads to displacement. In addition, humanitarian law expressly prohibits compelling civilians to leave their places of residence unless their security or imperative military reasons so demand.

Once displaced, IDPs are protected from the effects of hostilities by the general rules governing the protecting of civilians and humanitarian assistance discussed above. The general rules of humanitarian law for the protection during displacement which prohibit:

- a) attack on civilians and civilian objects or the conduct of hostilities in an indiscriminate manner ;
- b) starvation of the civilian population and the destruction of objects indispensable to its survival ;
- c) Collective punishments – which often take the form of destruction of dwellings.

There are also the rules requiring parties to a conflict to allow relief consignments to reach civilian populations in need.

Status of Refugee at Global Stage:

The international refugee problem is growing inexorably in size and geographical scope. But the statistics collected by UNHCR tell quite a different story. Certainly, the problem of displacement has by most measurements become considerably larger and more complex over the years. But the number of refugees in the strict sense of the word has actually declined in recent times: from 18.2 million in 1993 to 13.2 million at the beginning of 1997. This trend appears to be the result of two principal factors : I) Firstly, the reduction in refugees numbers can be attributed to the succession of large – scale repatriation movements which have taken place since the beginning of the 1990s involving countries such as Afghanistan, Cambodia, Mozambique, and Rwanda. Altogether, more than 10 million refugees are thought to have gone back to their homes, either voluntarily or because they had little or no other option . ii) Secondly, recent years have witnessed a dramatic increase in the number of people who have been uprooted by persecution and violence but who have not crossed the border into another country.

In the popular imagination, refugees are perceived as people who live in sprawling camps, dependent for their basic needs on international relief organizations. Various governments prefer refugees to live in camps for two different reasons: I) to minimize social and political risks and ii) to encourage donor states and humanitarian organizations to assume a greater degree of financial responsibility. Relief Agencies too favour the establishment of camps, given the relative ease of providing food, health care, education and other services to refugees when they concentrated in large settlements. Even so, many refugees live outside organized camps and receive little or no international assistance. Some analysts have suggested that in Africa , well over half of all exiles fall into this category.

Such 'spontaneously settled' refugees are to be found living in the border areas of their asylum country, as close as possible to their homeland. For instance Guinea and Cote d'voire, have hosted more than 700,000 Liberian refugees early 1990s, almost all of whom are spontaneously settled.

Many of the world's poorer countries have a remarkable record of hospitality towards refugees. For instance, Malawi, a country which has few natural resources, a serious shortage of land, a population of below eight million, hosted more than a million Mozambican refugees from the mid – 1980s until the early 1990s.

Countries of the South – West Asia like Pakistan, India and Iran have pursued generous refugee policies. Pakistan and Iran have jointly hosted more than 5 million Afghans through out 1990s. Indian provides asylum to some 250,000 refugees.

In South – East Asia, Thailand has in recent years constituted the most important refugee hosting country, having granted temporary refuge to people from the neighboring States..

Mexico, provided asylum to over 100,000 Guatemalans during the 1980s and early 1990s, while many have been able to go home during the past years. Mexico announced that 30,000 of the remaining refugees could stay in the country indefinitely and benefit from an accelerated naturalization procedure.

However the global picture of refugee protection is not a very happy one. Indeed protection standards appear to have declined quite significantly. Sadly, some of the fundamental principles of the 1951 Convention and other refugee instruments are now being challenged – by industrialized and less-developed states alike. The UNCHR identified the three principal ways in which refugee protection standards are currently being undermined: by the denial of asylum by potential countries of refuge ; threats to the physical safety and human security of exiled populations; and a weakening commitment to the principle of voluntary repatriation.

Refugee in Indian Subcontinent:

- The countries of the South Asian region are affected with the refugee problem. Pakistan is facing the problem of Afghan refugees; Nepal has the problem of refugees from Bhutan; Bangladesh is facing the problem of refugees from Myanmar, Sri Lanka has her own problems arising from internal displacement and India has the problem of refugee during partition time and Bangladesh Liberation movement, Chakma refugees and migrant workers from Bangladesh, Tamil refugees from Sri Lanka, Tibetan refugees, Bhutanese refugees, Arakanese refugees from Myanmar and refugees from some other countries. India also has the problem of internally displaced persons namely Kashmiri Pandits and same problem in some parts of North eastern states.

It is fact that whether during partition in 1947, or later during the 1971 Liberation of Bangladesh, India has hosted some of the largest refugee population in the world. About 8 million Hindus and Sikhs left Pakistan to resettle in India while about 6-7 million Muslims left India to settle in the newly created country of Pakistan. Since then about 35- 40 million people have moved across national boundaries in India, Pakistan, Bangladesh, Sri Lanka, Nepal and Bhutan.

Despite the fact that none of the South Asian Countries have signed International Refugee instruments, viz, the 1951 Convention relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees, and also not enacted a Domestic Refugee Law or Procedure, the region has some interesting success stories in refugee management. For instance, over 150,000 Tibetan refugees have integrated into India and Nepal. Another instance, is over 10 million Bangladeshi (East Pakistan) refugees came to eastern and north eastern India on the eve of Liberation War in Bangladesh.

The refugee population in South Asia constitutes roughly about 12 percent of the world's total refugees. Some of the South Asian States like Bangladesh, Bhutan and Sri Lanka are gradually coming under the category of principal sources of world's refugees and asylum seekers. On the other hand countries like Afghanistan, Sri Lanka and India have substantial number of people who have been displaced within their home land (IDPs) as a result of persecution, war, human conflict, human rights violation or forced relocation.

Thus, one can find three broad categories of refugee movements in South Asia. *First*, the breakdown of colonial rule and the rationalization of some of the colonial policies pre – eminently the policy of divide and rule which led to massive cross – border flows. *Second*, state and nation building processes which precipitated political, ethnic and religious conflicts and also adversely affected economic and environmental conditions thus forcing people to migrate within and outside their countries. The *third* factor cited is an extra – regional development leading to the entry of refugees from outside the region.

North East India Scenario:

India's north east presents an interesting and complex scenario. On the one hand it has refugees in organized camps such as the Chakmas in Mizoram and earlier in Tripura And on the other hand the problem with Bangladeshi's where more than 10 million have come to the north-eastern India on the eve of Liberation War in Bangladesh and the influx continues unabated till today especially in the states of Assam, Tripura and Nagaland .They are popularly known as *Mias*. People are very suspicious and apprehensive about the influx of *Mias* in most of the NE states which is to be believed threatening the demographic composition of the some affected states. Besides, north – east also has a large presence of Nepalese and Tibetans competing for the scarce economic resources of the region. Strangely enough, in the region, the term refugee often tends to get confused with economic immigrants. The Chakmas would fall under the category of refugee whereas the ill-legal Bangladeshis staying in the region should be treated as immigrants, allowing law to deport them without showing considerations of any kind or for political gains. Today, many would agree that these people have become the captive vote banks of politicians for personal gain. States like Nagaland and Arunachal Pradesh in spite of Inner Line Permit checking could not stop the inflow of illegal migrants in their respective states.

One could argue that the migrants are also human beings and need soft considerations but one should also remain alert to the grave dangers they pose. The influx problem is increasing the level of competition for scarce resources such as employment, income – generating opportunities, education and health care, as well as basic commodities such as food, fuel wood, drinking water and even construction materials. Large increase in illegal trade and crime in the society like rapes, kidnappings, prostitution, killings, etc. in various parts of India can be also partly attributed to them.

Need for a Comprehensive National Law

In regard to Refugee Rights in India, although India has not signed the UN Convention of 1951 relating to the status of refugees, she has acceded to the two 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. However, these have not been integrated into the municipal laws of the country and are thus not enforceable in courts of law. The Indian Constitution guarantees fundamental rights, some of which are equally available to all persons whether citizens or aliens. Subject to these rights, Parliament has the exclusive power to make laws with respect to aliens and related matters. Furthermore, Article 51 of the Indian Constitution encourages the State to endeavor to promote peace and security and foster respect for international law and treaty obligations as well. Article 21 of the Constitution also states that "no person shall be deprived of life or personal liberty except according to procedure established by law". This is applicable to refugees as well.

However, these constitutional laws and ordinary laws through judicial process alone are not sufficient and adequate to deal with refugee problem in India. Moreover, these laws are not made for such specific purposes. The traumatic conditions of flight from country of origin, accompanying hardships, vulnerability and insecurity require specific treatment. Hence specific legislation relating to the treatment and welfare of refugees is necessary. Considering the huge size of refugee population inside India and recurrent history of refugee phenomenon in the south Asian region due to number of reasons, it is also necessary to enact a national law which could provide specific guidelines to the implementing agencies to uphold the refugee cause. The need of hour is to have a well defined national refugee law. This would further provide a national transparent protection regime by creating new institutions such as National Refugee Commission on the similar line of National Human Rights Commission. It would be helpful for the protection of basic human rights of refugees, asylum seekers etc. in India. Thus, national legislation is essential for ensuring the establishment of a regulated process of refugee status determination, reception, assistance which would guarantee fair trial and treatment to refugees and asylum seekers.

Conclusion:

Keeping in mind all the aspects of refugee problem in the region, people and the state must adopt a collaborative approach and comprehensive national law which could effectively deal with such situation in near future. Collaborative mechanism should be developed to take up the issue of refugee problem at national, regional and at the international level. National Governments should develop domestic procedures and create institutions so that any such situation can be taken care off without domestic compulsions. Simultaneously to sensitize national citizens regarding various international laws like humanitarian law, human rights, law relating to the refugees etc.,these can be taught through effective curriculums and awareness programmes.In this regards civil society institutions, specially the role of NGOs could be encouraged. Without awareness, sensitivity and a collaborative approach it is difficult to realize and secure humanitarian norms in regards to protection and promotion of refugee rights. For achieving this goal we need to work amongst ourselves and also add pressure on institutions to evolve effective mechanisms so that rights of the refugee could be upheld at any given circumstances.

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