

REFUGEE PROTECTION IN INDIA AND BANGLADESH

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DECLARATION

I declare that the dissertation entitled "Refugee Protection in India and Bangladesh" submitted by me in partial fulfilment of the requirements for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other University.

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We recommended that this dissertation may be placed before the examiners for the evolution.

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ABBREVIATIONS

AALCO	Asian- African Legal Consultative Organisation
APC	Asia Pacific Consultancy
BDRCS	Bangladesh Red Crescent Society
BLAST	Bangladesh Legal Aid and Services Trust
BNP	Bangladesh National Party
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CHT	Chittagong Hill Tract
CRC	Convention on Rights of Child
ELCOP	Empowerment through Law of the Common People
EPG	Eminent Persons Group
EXCOM	Executive Committee
GOB	Government of Bangladesh
GOI	Government of India
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
IFRC	International Federation of Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IOM	International Organization for Migration
IPU	Inter-Parliamentary Union

IRO	International Refugee Organisation
IRL	International Refugee Law
MFDM	Ministry of Food and Disaster Management
MoU	Memorandum of Understanding
MSF	Medicins sans Frontiers
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission
OAU	Organisation of African Unity
RRRC	Refugee Relief and Repatriation Commissioner
RSD	Refugee Status Determination
SAARC	South Asian Association for Regional Cooperation
TAI	Technical Assistance Incorporated
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDF	United Nations Development Fund
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugee
UNJI	United Nations Joint Initiatives
UNICEF	United Nations International Children's Emergency Fund
UNPFA	United Nations Peoples Fund
WFP	World Food Programme
WRY	World Refugee Year

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CHAPTER I

INTRODUCTION

Background

A State normally guarantees the basic human rights and physical security to its citizens. But when civilians become refugees this safety net disappears. Without some sort of legal status in their asylum country, they would be exceptionally vulnerable to exploitation and other forms of ill treatment, as well as imprisonment or deportation. A refugee has the right to seek asylum. However, international protection involves more than just physical safety: refugees should receive at least the same basic rights and help as any other foreigner who is a legal resident, including freedom of thought, freedom of movement and freedom from torture and degrading treatment. They should also get benefit from the host country's fundamental economic and social rights. The refugees have fled either from political and religious persecution or racial or social discrimination or wars and territorial conquest or economic deprivation. So they need protection and protecting refugees are the major responsibility of a State. This is the aim of the study.

Refugee protection is the first and foremost duty of a government to look into the needs of vulnerable and threatened individuals on a humanitarian ground. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol are landmarks in the setting of standards for the treatment of these refugees. Together, they incorporate, either directly or as an inevitable interpretation, the foundation concepts of the refugee protection regime which are as relevant in the contemporary context as they were in 1951. Refugee protection, embraces the safeguarding of a range of rights particularly vulnerable in refugee situations - the right to life, liberty and security of the person, the right to be free from torture and other cruel or degrading treatment, the right not be discriminated against, and the right of access to the basics necessary for survival (food, shelter, medical assistance), as well as, at a later point, for self-reliance (means to engage in a livelihood and to receive education, as well as health care).

While the international community has generally responded swiftly and generously to refugee crisis over the past half century, in recent years, some worrying trends have

begun to emerge. Countries that once generously opened their doors to refugees have been tempted to shut those doors for fear of assuming open-ended responsibilities, of abetting uncontrolled migration and people-smuggling, or of jeopardizing national security. Refugees have been refused admission to safety or have been expelled from asylum countries. Those who have reached a potential country of asylum have sometimes been turned away or sent back without being able to apply for asylum. Refugees have been the targets of violent attacks and intimidation, largely because they were perceived as “different” from the communities in which they are temporarily settled so their protection is under threat.

These fundamental concepts remain intrinsically sound as the framework for refugee protection 60 years after the adoption of the 1951 Convention. This being said, the protection principles, along with the regime of asylum State responsibilities, cannot effectively be viewed in isolation of the broader framework in which they will be applied. The changing nature of armed conflict and patterns of displacement, the more and more unfavorable cost/benefit equation of asylum, when seen from the State perspective, and serious apprehensions about "uncontrolled" migration in this era of globalization, are all part of the environment in which refugee protection has to be realized.

South Asia hosts the fourth largest concentration of refugees in the world constituting roughly about 12 percent of the total refugee population of the world. A large portion of the South Asian population either lives as refugees in one or the other neighboring countries or as internally displaced in their own countries as a result of persecution, war, human conflict or forced relocation. A majority of displaced persons who have crossed international borders in this region are not regarded as "refugees" by the host governments. They are usually treated as "undesirable aliens" or “illegal immigrants”. The presence of refugee crisis in the South Asian region is divided into two broad categories. The first category includes the refugee movements within the region, from one country to another in the region. The second category would include those movements of refugees from countries outside the region to the countries within the South Asian region. This region has witnessed a number of refugee movements both from

within the region as well as from outside the region. About 12.04% of the global refugee population continues to remain in this region.

The major refugee generating countries in the region are Afghanistan, Bangladesh, Bhutan and Sri Lanka. India is the major refugee hosting state in the region apart from that it continues to host some refugee groups from outside the region. Other refugee hosting states in South Asia are Pakistan, Nepal and Bangladesh. Pakistan is facing the problem of Afghan refugees, as is India. Nepal is facing the problem of refugee from Bhutan. Bangladesh is battling with the problem of refugees from Myanmar; Sri Lanka has its own problems arising from internal displacement. These countries are not parties to the refugee convention, although India, Pakistan and Bangladesh are members of the Executive Committee which is the highest decision making body of the UNHCR. Also, there is no regional arrangement to deal with refugee situations. So the refugees are in vulnerable situation and they lack protection from their own as well as from the host government.

In the modern world, the term “protection” in its legal meaning essentially refers to a defined system of rights and enforcement mechanism having its origin in the authority of the state to formulate the conditions of existence within its dominion. Refugee protection is a great concern to the international community ever since the creation of the United Nations. International protection includes all of those activities through which refugees’ rights are secured. The 1951 Convention relating to the Status of Refugees and the Protocol adopted in 1967, is the central feature in today’s international regime of refugee protection, and some 144 States (out of a total United Nations membership of 192) have now ratified either one or both of these instruments (as on August 2008). The Convention, which entered into force in 1954, is by far the most widely ratified refugee treaty, and remains central also to the protection activities of the United Nations High Commissioner for Refugees (UNHCR). Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specially regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin.

South Asian states have no national laws which define or distinguish refugees from others who cross the borders. The UNHCR is not able to intervene effectively in this region. The governments of South Asian states generally do not allow the UNHCR to intervene with the refugee problem except in selected areas. They maintain that the 1951 Convention is Euro-centric and cannot be effectively implemented in the South Asian region. As there is no refugee-specific law, refugees are dealt with under *ad hoc* administrative arrangements which by their very nature can be arbitrary and discriminatory.

India, along with all the other South Asian states, is not a party to the United Nations Convention relating to the status of refugees 1951 and to the 1967 Protocol. The Indian government deals with refugees at both the political and administrative levels. In the case of refugee protection, the Constitution of India guarantees certain fundamental rights, which are applicable to all non-citizens. The National Human Rights Commission of India (NHRC) is functioning effectively for the protection of the refugees. Refugees are registered under the 1939 Registration Act, which is applicable to all foreigners entering India. In India, the judiciary is playing a very important role in protecting refugees. Court orders have filled legislative gaps and in many cases provided a humanitarian solution to the refugees' problem. Indian Courts have allowed refugees and intervening NGOs to file cases before them. Further the courts have interpreted provisions of the Indian Constitution, existing laws, and in the absence of municipal law, provisions of international law to offer protection to refugees and asylum seekers. The Indian court is providing Physical Security, Non-Refoulement and Right to Refugee Status, Right to Basic Amenities, Against Forced Repatriation, Right to Leave (Return).

Like India Bangladesh too is not signatory to the 1951 Convention relating to the Status of Refugees nor to its 1967 Protocol and has not enacted any national legislation on refugee matters. It is significant that Bangladesh has acceded to several of the existing international rights Covenants and Conventions and has provisions within its Constitution that uphold the rights and duties within the UN Charter and further safeguard the legal protection of non-citizens within its territory. As a result, it recognizes a body of international law which provides the framework for protecting refugees. The difficulty

lies in ensuring compliance and sustainability in the standards of protection when there is no law regulating refugee status itself. The absence of a national legal and administrative framework for refugees leaves them exposed to serious protection risks. The Foreigners Act of 1946, Bilateral agreements, *ad hoc* arrangements negotiated with UNHCR and the discretion of Bangladeshi authorities are the main determinants in decision making in dealing with refugees and those in refugee like situations in Bangladesh.

A great challenge to ensuring protection of refugees in many developing nations, like South Asian Countries, is the absence of a national legislative and administrative framework to ensure smooth management of all the processes consequential to a refugee situation; applications, registrations, determination of refugee status, admission etc. This absence of law, on the other hand is restricting the development of a reasonable social understanding of the refugee problem.

Throughout the World a gap between international legal and humanitarian standards and actual state practice is growing. The problem of Refugee is social and humanitarian in nature which can become a cause of tension between states so the protection must be extended to all categories of Refugees without any discrimination. It is the responsibility of States to protect their citizens. When the governments of home countries are not able or willing to protect the basic rights of people living in the State and these people are forced to cross an international border to escape persecution, generalized violence, conflict, or serious human rights violations, then the Government of the respective host country has the responsibility to protect them and their basic rights. In particular, refugees must be protected against forced return to countries where their lives and freedom may be threatened, and the availability of safe first country asylum must be preserved.

Review of Literature

The refugee protection is one of the global problem, affecting not only millions of marginalized people directly but also the policies and practices of virtually every government in the world. UNHCR believes that it is necessary to broaden the base of state support for these refugee instruments, ensuring that the protection provided to

refugees is more universal in scope and the burdens and responsibilities of governments are equitably distributed and consistently applied. So many scholars have already done their research on protection of refugee on different parts of world like Africa, America and Europe etc. However there is scarcity of literature related to the protection of refugees in South Asia and especially in India and Bangladesh.

Protection of Refugees

Jastram and Achiron (n.d.) give the general principles of international refugee law and how they are implemented. They mentioned that at the start of the 21st century, protecting refugees' means maintaining solidarity with the world's most threatened people. Their handbook is the outcome of co-operation between the Inter-Parliamentary Union, the World Organization of Parliaments and UNHCR, and was developed by UNHCR experts with close input from experienced parliamentarians and senior officials of both the UNHCR and the IPU.

Chimni (2000) introduced all aspects of international refugee law. Different chapters examine: the definition of a refugee; the law of asylum; the role of the United Nations High Commission for Refugees; humanitarian assistance; gender issues and refugee children; laws governing state responsibility; internally displaced people; and the range of available solutions. With numerous case study examples, including a postscript on Kosovo, this book is the definitive source on laws, practices and issues in refugee matters.

Patil and Trivedi (2000) look into the problems of refugees from the perspective of human rights. Forced displacement or as it is called the refugee problems have assumed serious proportions involving pain, suffering and misery to millions of people around the world. The massive human tragedy is the result of war, pestilence, famine, and other manmade and natural calamities. All this calls for concerted and coordinated action at the international level in the form of humanitarian action and emergency relief like food, clothing and shelter. But it is also a fact that promises or assurances of governmental organizations to reduce human suffering turn out to be only half-hearted measures without any realistic possibility to put them in a meaningful operational mode.

Feller (2001) in the article starts with the development of the International Refugee Protection regime, its expansion, restrictions, the realities and the way ahead for the International Refugee Protection Regime and finally states that refugee protection is, and must remain, not a static, but rather a dynamic and action oriented function.

Newland (n.d.) in his article examined how refugee protection and assistance have been defined and redefined as matters of international public interest, and who responds with what means to that interest. He tracks the evolving, and sometimes contradictory, practices and norms of both protection and assistance, and describes what has been learned from the experience of the latter half of the twentieth century. He also explored whether the deterioration of the classic regime represents a clearing out of obstacles to the formation of a new regime, or simply a growing deficit of international governance in an arena whose importance for human well-being can scarcely be exaggerated.

Kelley (2007) looks at the major refugee protection challenges that confront at the beginning of the 21st century on both sides of the development. It also addresses why many of these problems have developed and examines some of the emerging opportunities, which, if realized in good faith, could provide more robust protection for refugees, while responding to the security, sovereignty and economic concerns of States.

Helton (2003) describes about the aspect of refugee protection which contains both back-to-the basic and onward-to-the future elements. According to him the tension between these two directions is reflected well in recent “Global Consultations on Refugee Protection” process with governments. In this regard, a successful effort to learn lessons from the recent past and infuse policy with a more proactive character will be needed in order to make protection more effective and enduring. The necessity of the new strategies to make international protection smarter is also mentioned.

Guy S. Goodwin-Gill (2008) looks back to the 1920s, and tries to trace out the politics of refugee protection as it evolved in the practice of States and international organizations in a period of growing ideological differences. The question addressed is whether the politics of protection at any particular moment are humanitarian or whether they serve primarily other purposes, in which the refugee is merely instrumental. It is unrealistic to

imagine that the problem of refugees can ever be entirely non-political. What the history of the 1920–55 periods confirms is the continued vitality of self-interest as a motivating factor in the responses of States to refugee flows. The international refugee regime that emerged in the late 1940s and early 1950s defined refugees through the politics of denunciation in a persecution-oriented definition that continues to limit and confuse, not only at the international operations level, but also in national asylum procedures. In this context, the article concludes that the art for UNHCR is not to allow solutions or assistance to have priority over protection. If it cannot provide protection, it will be judged a failure and accountable, and not merely excused because it tried hard in difficult political circumstances.

Field (2010) describes the refugee regime's present inability to cope with refugee flows, proposing as a partial solution an international, rather than a territorial, paradigm of duty. She first argues that the refugee regime already in place supports such an international paradigm and then proposes principles for defining the scope of the international duty. Finally, she discusses strategic reasons for states to assume international responsibility even absent legal compulsion. She explains the international refugee regime contains a gap between the rights it promises and the responsibility it assigns to make those rights reality. This is particularly problematic because many receiving states are unwilling or unable to protect refugees and manage refugee flows within their territory. Under a territorial paradigm of state duty, this leaves enormous problems for which no state bears responsibility.

Refugee protection in South Asia

Oberoi (2006) discussed about the Indian subcontinent is the site of significant population flows for centuries, and the region witnessed some of the largest and most complex movements of refugees in contemporary history. This study traces the history of refugee policy-making and its motivations on the Indian subcontinent since 1947, examining subcontinent since 1947, examining in detail the six major instances of forced displacement of the territory of states in the region. She also examines the changing nature of the relationship between South Asian states and the United Nations High Commissioner for refugees. The volume explores why the states of South Asia construct

a particular understanding of 'a refugee' and how they communicate this understanding in their policy behavior, also analyzed the impact of refugee presence on bilateral relations. Oberoi argues that refugee's policy in South Asia is often tempered by the exigencies of nation building, development issues, and political unrest, which may at times even explain South Asia's minimal devotion to the norms of the international refugee regime.

Chari (2003) explains that South Asia has 14 percent of the world's refugee population and is the principal source and host of refugees. The causes behind the displacement, political instability, armed conflict, lack of resources and so on in South Asia and its immediate neighborhood have not declined but, in fact, have been increasing; and the security threats posed by the refugees and internally displaced persons (IDPs) is set to increase given the lack of resources and poor governance prevalent in the region. Yet, none of the countries in South Asia have signed any major convention or treaty at the international level in regard to refugees; nor have they any national legislation or regional framework to deal with these issues.

Mishra and Mujumdar (2003) mention that from time immemorial, human movement has been a feature of civilizations but the emergence of nation-states as sovereign political entities with fixed frontiers put a barrier to it. When the country of origin is unable or unwilling to offer protection, compulsions lead to blind flights of people from one country to another in search of safety and security. These hapless people are entitled to basic human rights and basic minimum standards of living but very often they encounter huge reluctance from the host country from the other side of the border. Elsewhere from home and liabilities to the country that provides refuge, they are always somebody else's responsibility. In this collection, status and conditions of certain refugee groups explored in the light of legal instruments available or contemplated for refugee protection; and attempts have been made to understand the pattern of state response in particular cases.

Muni and Baral (1996) have recognized various factors exacerbating the Refugee movements in South Asia. There are no easy solutions at present nor indeed any possibility of a regional approach to solving the crisis. In fact, the SAARC does not allow for discussion of bilateral issues, so there is little hope for solving inter-state problems

through that channel. Unlike India, which is primarily a receiver of refugees, Bangladesh is both a refugee generator and host. While India has time and again expressed its unhappiness with the influx of Bangladeshis in search of food security, New Delhi cannot escape partial responsibility for this development. For, in the first place, it used the refugee crisis to actively control and finally concludes the liberation struggle in Bangladesh, in the process redefining its equation with Pakistan and emerging as the regional power. Meanwhile, impoverished Bangladesh grapples with the problem of refugees from Burma, mainly the Muslim Rohingyas. Bangladesh cannot hope for an early solution, writes University of Dhaka scholar Imtiaz Ahmed.

Kantakar (2000) concerned with the refugee issues in a limited context of South Asian region. It examines the problems of South Asian refugees within the frame work of international responsibility, solidarity and humanity. He describes about the dimensions of refugee problem became so enlarged and complex during the interwar period that attempts were made through the setting up of international organizations to deal with the millions of refugees generated by the First World War and the breakup of multinational empires. The lack of an adequate legal regime to ensure the rights of refugees, who as aliens are often among the most vulnerable members of society, is an ongoing problem.

Vijyakumar (2001) explains the reasons for not ratifying the Refugee Convention of 1951 or the Protocol of 1967. The probable reasons for not ratifying the Refugee Convention or the Protocol, the lack of any regional approach or national legislation to address the problem, the contribution made by the international community to the crises in this region, nature of protection, the extent of rights available to the refugees and a brief comparison between the Northern and Southern perspectives have also been explained. This article concludes by emphasizing that through a comparative analysis of both the Northern and Southern perspectives relating to the protection of refugees, each can benefit from the experiences of the other, improve and build a scheme to care for the millions of refugees as well as others of concern in the new millennium.

Bose (2000) presents a case for the creation of a legal framework by the states of South Asia for the protection and rehabilitation of refugees and migrants. He explains the reality of South Asia is that millions of these "illegal aliens" are present in most countries of the

region. Their illegal status has made them vulnerable to the manipulation and machinations of unscrupulous and corrupt elements in our societies. Opportunist sections of certain political parties in the region have tried to use these "illegal" people as captive "vote banks" by trying to "regularise" their stay. These developments present a threat to the social and political stability of our 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 affects the society of the host country.

Arbar (2010) concludes that the adoption of national legislations would be an effective first step. It calls for state accession to those other international instruments with implications for refugee protection in the region and urges South Asian countries to engage with Western states in dismantling the non-entrée regime which is undermining the basic principles of international refugee protection.

Shrama (n.d.) mentioned for the necessity regional cooperation to solve the refugee problem in South Asian region. He explains that Large section of the people in South Asia have very poor socioeconomic standard. Yet South Asia hosts a big chunk of refugee populations of the world. Most often human lead reasons like religious persecution, cultural discrimination, human rights violation, social discrimination, minority complex of the majority communities and so forth have resulted into generation of refugees in the region.

Refugee Protection in India

Tarkroo (n.d.) describes the complexities of refugee protection in India. The building blocks for refugee law and the need for a national legislation are elaborated and emphasized. While the book mainly focuses on the foundations and frameworks of international refugee law, it analyses in some detail the domestic legal framework available to bring this special group within its ambit. Special emphasis is placed on issues relating to extremely vulnerable groups like children and women. The attention of the legal community is also drawn towards the compelling need for a national legislation on refugees. Setting standards for granting asylum and protection requirements would go a

long way in bridging the gap between administrative attitudes and ad hoc policy decisions. The aim is to facilitate the efforts of those engaged in advocacy for the rights of refugees and issues relating to their protection.

Dhavan (2004) describes that Refugee Law and policy issues are part of an unfinished public agenda. There is also a need for a change in the law. The model law has not been sufficiently considered by the Union Government. For the last five years, the NHRC has been requesting the Government to provide refugee protection. India needs to review its ambivalent refugee law policy, evolve a regional approach and enact rules or legislation to protect persecuted refugees. This is one step towards supporting a humanitarian law for those who need it. As a refugee-prone area, South Asia requires India to take the lead to devise a regional policy consistent with the region's needs and the capacity to absorb refugees under conditions of global equity.

Nair (2007) discussed about the Refugees in India from various countries and their overall conditions. The obstacles in the formation of law and its benefits are discussed. This paper intends to ascertain whether a uniform national law would be beneficial to the interests of the three main parties involved with refugee policy in India, namely the Government of India, the UNHCR and the refugee communities themselves.

Saxena (2007) attempt to examine the provisions of the draft law, insofar as it confirms to the international standards. The paper also evaluates the competence of the draft law to answer security considerations after 9/11. The paper suggests suitable amendments that may make the enactment of national law a reality, so that the void in the international regime of refugee protection can be filled effectively and fast.

Bhattacharjee (2008) clearly establishes that Indian law and practice provides a distorted and incomplete protection to refugees. Indian law even fails to recognize refugees as a distinct category of persons and treats them at par with all other foreigners. So India should go for the law for the protection. The absence of a national law on the status of refugees has also meant that refugees are dependent on the benevolence of the state rather than on a rights regime to reconstruct their lives with dignity.

Refugee protection in Bangladesh

Bangladesh: Analysis of Gaps in the Protection of Rohingya Refugees, this report examines the situation of camp based Rohingya refugees in Bangladesh. The analysis provides a comprehensive view of the main risks and problems faced by refugees including obstacles in the way of more durable solutions. It further highlights those areas where protection risks are experienced by refugees and local residents alike. Moreover, the analysis attempts to capture the capacity of the Government of Bangladesh (GoB) as well as that of the refugee and local communities to address such risks, improve the lives of refugees and expand opportunities for durable solutions.

Haldar (1999) gives comparative study of Bangladeshi refugees in India and Myanmar refugees in Bangladesh and an analysis of the activities of the UNHCR, particularly during complex emergencies. It also analyses the role of UNHCR as a humanitarian organization and concludes by suggesting that the mandate should be updated.

Bikash (2008) explains that Protection of refugees forms the core of all Human Rights Law and Humanitarian Law. The absence of a legal framework and access to asylum procedure in Bangladesh, newly arrived Rohingyas are forced to stay illegally here and be prone to various vulnerabilities including engagement in illegal activities and even in terrorism so there is need for a legal framework.

10 Years for the Rohingya Refugees in Bangladesh: Past, Present and Future, essay is about the, History and Background as well as the Humanitarian Situation in the Camps in Bangladesh, of the Rohingyas. The issues about the Food and Nutrition, Health and Health Care, Water, Sanitation, Housing, Restricted Freedoms and Opportunities, Education and Self-Help Activities also discussed. The process of Repatriation and Protection, the conditions of the new arrivals and their future situation also explained. The response from the people i.e. the Rohingyas during the interview is also mentioned.

Crabtree (2010) explained how Bangladesh is insisting the Rohingyas to return to Burma in the soonest possible time. Although Bangladesh is not a party to the convention, the principle still applies because non-refoulement is an international custom. According to him they should be protected from compulsory return to Burma, many Rohingya would

be prepared to return to a Burma that recognizes them as citizens and provides them with the full protection of the law like other citizens.

Definition, Rationale and Scope of the study

According to United Nations Convention Relating to the Status of Refugees of 1951 a refugee is more narrowly defined as a person who “owing to a 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 to or, owing to such fear, is unwilling to avail himself of the protection of that country.”

An important regional initiative in the South Asian region is the Asian-African Legal Consultative Organization (AALCO), an intergovernmental consultation group, consisting of forty-four members meets annually to discuss issues of concern to the region and the status and treatment of refugees. The AALCO provides for an expanded definition of the term “refugee” which includes “every person who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or in 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.”

Protecting refugees is a core human rights issue. The center of the international refugee regime is the fundamental right of any individual to seek and enjoy asylum from persecution in other countries. Enshrined in article 14 (1) of the 1948 Universal Declaration of Human Rights, the principle of asylum recognizes that when all other forms of human rights protection have failed, individuals must be able to leave their country freely and seek refuge elsewhere.

In most of the countries in south Asia, especially in India and Bangladesh refugees are not protected by the by Governments but by UNHCR. For the most part refugees have no choice but to approach UNHCR, because the governments in this region are not parties to the convention related to the refugee status. So UNHCR faces enormous challenges in its task of providing international protection and assistance to refugees worldwide and in helping countries seek durable solutions to their plight. Globally, there is less tolerance

and more hostility towards refugees than there was fifty years ago and countries in the developed and developing world alike are closing their doors to refugees. The international refugee law is effective only in so far as it comprehends the distinctive political reality that frames the contemporary problem of the refugee.

The Rationale of the study comes from the fact that South Asian states are kin states. They share ethnicity, languages, religion, culture and traditions. Social and political upheavals inside one country invariably disturb the social and political stability of its neighbors. Though the refugees are the additional threats to national security, they should be protected from any kind of violence. There is neither a regional treaty nor declaration on Refugees, nor have any South Asian countries adopted a national legislation for the protection of Refugees. The lack of adequate legal regime to ensure the rights of the refugees, who as aliens are often among the most vulnerable members of society, is an ongoing problem.

This study aims to describe the necessity and the protection of South Asian refugees, especially in India and Bangladesh as well as their rights. Moreover, this will examine the role of international organizations such as the UNHCR, domestic NGOs and the host State etc. in providing protection. It further aims to illustrate the role played by the Indian judiciary in protecting refugee and their interests in the context of India not being a party to the Refugee Convention or its Protocol. Along with this, the efforts taken by the Supreme Court of India in bridging the gap between India's international obligations and domestic laws, both treaty-based and customary, will be mentioned briefly. It will also briefly describe the role of Bangladesh Government as well as other Organizations for the protection of refugees.

Objectives

1. To understand whether in the absence of proper rules and laws the host states can still protect the refugee interests.
2. To find out the current protection apparatuses as they operate in India and Bangladesh.
3. To study the perceptions of respective states towards different refugee groups.

4. To understand the reasons for not acceding to the international Refugee Conventions.
5. To assess the role of the UNHCR in refugee protection.

Research Questions

1. Why the Protection of Refugees is necessary?
2. What are the procedures and the minimum conditions for granting asylum in India and Bangladesh and how are the refugees protected in these countries?
3. What are the reasons for the absence of a comprehensive Refugee Law in South Asia?

Hypotheses

1. Refugees are not entitled to protection as the host states are not obliged to do so and the problem has been thrust upon them.
2. Refugee protection is not possible without a proper legal regime ensuring protection.

Methodology

The research method will be descriptive and analytical. The data base will be both primary and secondary sources. The primary sources will be mostly government documents and UNHCR data sources while the secondary sources will be from books, journal articles, newspaper reports and Internet sources.

Tentative Chapters

Chapter I: Introduction

This chapter will be introductory part. It will provide an overall view of the purpose, context and scope of the study. Various factors responsible for refugee problems will be explained.

Chapter II: 'Protection' as a concept

This chapter will describe the concept of refugee protection in the global context and the gap between the refugee rights and the reality of protection regimes. The issue will be discussed in the context of state security, sovereignty and economic capability. The role of the UNHCR in refugee protection will also be analyzed.

Chapter III: Refugee Protection in India

This chapter will be about the problems faced by the refugees in India due to lack of legislation as well as the impact of the absence of a special law on protection and rights of refugees which is resulted in the denial of basic protection to the large number of refugees. Mainly this chapter will focus on how India deals with the refugee at both political and administrative level. The role of the government as well as the UNHCR, NHRC, Judicial approach in India for the protection of refugees will also be discussed. This will briefly discussed about the refugee determination process, Subsistence allowance (SA) and self-reliance, Living conditions, Medical and educational assistance, Legal services in India.

Chapter IV: Refugee Protection in Bangladesh

This chapter will be about the situation of refugees in Bangladesh. It will also provide a comprehensive view of the main risks and problems faced by refugees including obstacles in the way of more durable solutions. It will further highlight those areas where protection risks are experienced by refugees. Moreover, this will analyze the role of the Government of Bangladesh (GoB) to address such risks, improve the lives of refugees and expand opportunities for durable solutions.

Chapter V: Conclusion

This part will offer some concluding remarks to the study as a whole and particularly necessity of the protection of the Refugees. The probable reasons for not ratifying the Refugee Convention or the Protocol, the lack of any regional approach or national legislation to address the problem, the contribution made by the international community

to the crises in this region, nature of protection, the extent of rights available to the refugees will also be discussed.

CHAPTER II

‘PROTECTION’ AS A CONCEPT

Introduction

Refugees have existed as long as history, but an awareness of the responsibility of the international community to provide protection and find solutions for Refugees dates only from the time of the League of Nations. The total refugee population is vastly greater than the number of protection places available. The problem is felt more in recent years as in the prospect of terrorism, state security, and economic recessions, which have substantially weakened the ideological value of refugee protection, as is enshrined in the 1951 Refugee Convention. These issues have given rise to the development of elaborate policies of deterrence and deflection in the states, which over centuries have welcomed frightened, weary strangers, the victims of persecution, and violence provoked people as refugee. This highly interconnected global landscape allows for an extensive network of readmission agreements coupled with the development of sophisticated border control technology allow the states an unparalleled capacity to deflect refugee movements from their territories. The lack of avenues to protection left two thirds of the world’s refugees trapped in situations of protracted exile with no immediate hope of being granted asylum.

The League of Nations defined refugees by categories, specifically in relation to their country of origin. Dr. Nansen’s (the first High Commissioner for Russian refugees in 1921) mandate which was subsequently extended to other groups of refugees, including Armenians in 1924, as well as Assyrian, Assyro-Chaldean, and Turkish Refugees in 1928. Until 1950 the League of Nations, and thereafter the UN, established and dismantled several international institutions devoted to refugees in Europe (Feller 2001a: 129). The International Refugee Organization (IRO) was the last to precede United Nation High Commissioner for Refugee (UNHCR). The IRO was created in 1947 to deal with the problem of refugees in Europe in the aftermath of the Second World War and was terminated by June 30, 1950. It was soon apparent, however, that the comprehensive nature of the task which had been assigned—to address every aspect of the refugee

problem from registration and determination of status, to repatriation, resettlement, and “legal and political protection”—included winding up of that international effort.

In December 1949, the General Assembly decided to replace the IRO with UNHCR, which was established for an initial period of three years, as a subsidiary organ of the General Assembly under Article Twenty-two of the UN Charter. On December 14, 1950, the General Assembly adopted the Statute of the UNHCR. UNHCR’s tasks stated therein to provide international protection for refugees and to seek permanent solutions to their problems by assisting governments to facilitate their voluntary repatriation or their assimilation within new national communities.

The realist and neo-realist have failed to incorporate the problems of refugee phenomena within their agenda as their basic assumptions, which force them to negate the possibility of peaceful transformation of international politics. However, within the framework of neo-liberalism, it is possible to address the question concerning refugee issues in international relation. Within this framework, it may be argued that refugee problems are not confined within the boundaries of nation states and their solutions require transnational cooperation. This involves not only prevalence of certain international institutions, but also requires regime formation in the refugee issue area. Such regime may function as global institution of governance with elements at the local, regional and international levels. Thus, if both realism and neo-realism fail to address the refugee question because of their too much concern to power politics, neo-liberal approach emphasizes both managerial and governability dimensions of refugee problems.

The characteristic that most distinguishes Conventional refugees from other migrants (for example, those seeking better standards of living, often confusingly called "economic refugees") is their need for protection (Young 1998: 6). In crossing an international border and being unwilling or unable to return, refugees place themselves outside the realm of protection normally provided by a state to its citizens. The most central aspect of the role of UNHCR is to ensure that refugees receive that protection by: providing protection against refoulement, providing their basic physical needs (shelter, food and so on), and ensuring respect for other basic human rights.

Protection

There is no singular concept of ‘protection’ in international law. Although ‘protection’ forms the essence of States’ obligations vis-à-vis refugees, the term itself is not defined in any international or regional refugee or human rights instrument. It is a term of art (Goodwin Gill 1989: 19).

The need for international protection is predicated on the breakdown of national protection—a lack of the basic guarantees, which a state normally extends to its citizens (McAdam 2001: 20). This factor distinguishes refugees from people simply in need of humanitarian assistance. UNHCR says that ‘the protection that states extend to its refugees is not, properly speaking, “international protection”, but national protection extended in the performance of an international obligation’,¹ and is better described simply as ‘asylum’. In contemporary practice, protection is triggered not merely by a *de jure* loss of nationality, but by a loss of ‘the protection resulting from nationality’, and it is that provides the link between the individual and international law. In fact, when the term ‘international protection’ was first coined by the French delegation during the drafting of the UNHCR Statute in the 1950s, its purpose was to distinguish between international protection extended by UNHCR and national protection extended by states. Accordingly, international protection provides a substitute for national protection, which lasts until the refugee is able to benefit again from national protection, either in the country of origin or by assuming a new nationality.

B S Chimni has used the vocabulary of human rights to legitimize the language of security in refugee discourse, blur legal categories and institutional roles, turn repatriation into the only solution, and promote a neo-liberal agenda in post-conflict societies leading to the systematic erosion of the principles of protection and the rights of refugees. Refugee protection is no exception to this deployment of the language of rights.

¹UNHCR’s observation on the European Commission’s proposal for a council directive on minimum standards for the qualification and status of Third country Nationals and Stateless persons as refugees or as

The protection that the international community extends to refugees is a response to the specific needs of people who have good reason to fear that their own governments cannot or will not safeguard their rights (Newland n.d.: 518). It provides a temporary substitute for national protection, until refugees can either return to their country of origin or form a new and durable relationship with a government that will protect them as permanent legal residents or citizens. Above all, international protection is meant to prevent refugees from being returned against their will to a place where they reasonably fear being persecuted.

The norm of international protection is the institution of asylum, by which refugees gain access to the territory of a state that, will accord them the same civil and economic rights as other legal residents, without discrimination. This includes the key elements of national protection as physical security (guaranteed as best the state can through military and police protection), access to the courts in case refugees are attacked or their rights are violated, and protection against economic exploitation (Newland n.d.: 119). Obviously, the capacity of the countries of asylum to deliver these protections varies, but the international system seeks to ensure that a refugee is no worse off than the citizen or legal migrant in the country of asylum. UNHCR and other protection advocates also work to ensure that refugees are allowed to escape from danger and gain access to asylum. This internationally agreed system of protection has provided safety to many millions of refugees in the last half-century. A strong record on international protection arises from three factors: access to protection, quality of protection, and respect for the principle of non-refoulement.

Principles of Protection

The following principles underpin the elements necessary to guard refugee protection standards globally:

- An individual must be granted, without delay, the human rights to which he/she is entitled under international refugee and human rights law.
- The responsibility for hosting and protecting the world's refugee population must be shared more equally between states.

- Strengthening protection in regions of origin should not be regarded as a means of returning or transferring asylum seekers and refugees from host countries to other.
- No state should assist another state to act in ways that would breach its own obligations under international law.

Elements of Protection

If refugees are to access effective protection, they must enjoy the rights flowing from the relevant international and regional refugee and human rights instruments (Buscher 2005: 17). The elements are such as:

- The guarantee of non-refoulement, as the essence of refugee protection and part of customary law, is, in this context, the first essential step towards ensuring protection is available.
- Refugees must enjoy all their civil and political rights and not only rights such as freedom from torture, cruel, inhuman or degrading treatment or punishment, or the right to life.
- Economic, social and cultural rights are essential to the enjoyment of protection and other human rights. States restricting the economic rights of refugees are not providing them with effective protection.
- The right to legal protection (including access to a legal status and necessary documentation) should last for as long as international protection is required and until a durable solution ensues.
- Particular attention should be given to the needs and rights of vulnerable groups, including women, children, the disabled and older persons, in accordance with the relevant international human rights instruments.
- Refugees should have timely access to a durable solution. States should play a leading role in the development of comprehensive strategies for durable solutions.

For protection to be considered effective, governments in all regions must, without reservations, accede to and comply with the standards set out in the 1951 Refugee Convention and the 1967 Protocol, and other relevant international and regional human rights instruments.

Delimiting refugee protection

Approaching refugee protection from a human rights point of view inevitably raises the question of delimitation (Hattrell, 2010). Refugees are symptomatic of much greater problems and injustices on the global landscape, and represent only a very small proportion of the global population of forced migrants, which numbered 43.2 million in 2009 (UNHCR report: 2010). ²While the majority of these individuals do not qualify as Convention refugees, they nonetheless have a very compelling moral claim to international protection on the grounds of human rights.

In the contemporary global context, the political biased definition of the refugee is highly problematic. There are inherent difficulties in drawing the distinction between ‘push’ and ‘pull’ factors, and distinguishing between refugees and economic migrants, as political violence and poverty are often interlinked, and refugee protection is inextricably linked to the broader issue of global inequality.

In many ways, refugee law provides benefits to a somewhat arbitrarily selected group of people. As Jacqueline Bhabha observed: “The institution of asylum... acts as a filtering process that is designed to separate eligible from ineligible travellers [and] is constructed to be a strictly limited humanitarian safety valve, permitting only a fraction of would-be immigrants, the discrete class of ‘genuine’ refugees, to trump immigration restrictions and gain access to the developed world”(Bhabha 2002: 161).

The growing numbers of ‘environmental refugees’ are another potent example of the blurring distinction between refugees and other displaced populations. These inconsistencies have ignited a complex legal debate whether humanitarian refugees are recognized under current international law norms. The UNHCR now provides assistance to other categories of forced migrants, and has highlighted the need for the international community to consider whether these persons are in need of protection.

²UNHCR, “Number of forcibly displaced rises to 43.3 million last year, the highest level since mid-1990s,” 15 June, 2010, accessed 29 September, 2011, <http://www.unhcr.org/4c176c969.html>

The sheer scale of the global refugee crisis needs a rights-based vision of refugee protection beyond the non-refoulement provisions of international refugee law, and engage with the human rights needs of the global refugee population. While a comprehensive, approach to protection is essential to addressing the plight of those refugees in protracted exile. Protection through admission must remain the cornerstone of the international refugee regime.

The Protection of Refugee under International law

Three areas of international law are particularly relevant for the protection of refugees: international refugee law (IRL), international human rights law (IHRL), and international humanitarian law (IHL).

International refugee law (IRL)

A number of global and regional international instruments have established and defined basic standards for the treatment of refugees. The most important are the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees. UNHCR is the UN agency mandated to provide international protection for refugees and to supervise the 1951 Convention, the 1967 Protocol, and other international refugee instruments. UNHCR's core mandate is defined in its Statute, but has been developed further by General Assembly Resolutions and Ex Com Conclusions as well as decisions taken by the Secretary General. According to the Statute, the essential function of UNHCR is to provide international protection to refugees and to seek durable solutions to their problems by facilitating either their voluntary repatriation or their integration into new national communities in safety and with dignity.

The Convention relating to the Status of Refugees (1951) is the key legal document that defines who is a refugee, what his/her rights are, and the relevant legal obligations of States. Article 1 asserts that a refugee is any person "...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 aim of the Protocol relating to the Status of Refugee (1967) was to acknowledge the applicability of the 1951 Convention to contemporary refugee population movements. The Protocol is an independent instrument to which States may accede without becoming Parties to the 1951 Convention, though this rarely happens. States, which are Parties to the Protocol, agree to apply the Convention's definition of a refugee, but without the Convention's time and geographical limitations.

Regional instruments

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969 by Member States of the Organization of African Unity (OAU, now the African Union). It complements the 1951 Convention, which contains a broader definition of a refugee (Article I). It is like an obligation to make the best efforts to grant asylum (Article II), provisions for durable solutions (Article V), and provisions on prohibiting subversive activities by refugees (Article III). According to this Convention, 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".

Government representatives, distinguished academics, and lawyers from the Latin America region adopted the Cartagena Declaration on Refugees in 1984. The Declaration established the legal foundations for the treatment refugees in the region, including the principle of non-refoulement, the importance of integrating refugees, and the need to eradicate the causes of mass population movements. The definition of a refugee in the declaration is similar to that found in the OAU Convention. The Cartagena Declaration considers as refugees are those "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression,

internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”

The Cartagena Declaration is not binding on States. It is, however, applied in practice by a number of Latin American States and, in some cases, has been incorporated into domestic legislation. On the twentieth anniversary of the Cartagena Declaration, 18 Latin American States adopted the Mexico Declaration and Plan of Action to strengthen the International Protection of Refugees in Latin America.

Certain Asian, Middle Eastern, and African States adopted the Bangkok Principles on the Status and Treatment of Refugees in 1966. These principles, which were updated in 2001, are significant in that they reflect the views of many States that have had extensive experience in providing asylum, including some States that are not Parties to the 1951 Convention or its 1967 Protocol. Like the OAU Convention and the Cartagena Declaration, the Principles include a refugee definition that is broader than that found in the 1951 Convention.

International human rights law (IHRL)

Under human rights instruments, rights are generally granted to all individuals, not only to nationals of States Parties. Therefore, non-nationals usually also benefit from the rights guaranteed in human rights instruments – with limited exceptions, such as rights pertaining to political participation. Given the universality of these rights, asylum seekers, refugees, and stateless persons must be granted all the rights and freedoms envisaged in human rights treaties without discrimination of any kind.

While the 1951 Convention, which sets minimum standards for the treatment of persons who qualify for refugee status, predates the major international human rights mechanisms by over a decade, it is generally accepted that the provisions found in those human rights instruments complement the Convention and so offer greater protection to all persons of concern to UNHCR.

Human rights norms are particularly relevant to refugee protection because:

- Some human rights instruments have been ratified by more countries than the 1951 Convention and its Protocol. For example, the Convention on the Rights of the Child (CRC) has been ratified by 192 States. Therefore, in countries that are not States Parties to the 1951 Convention, Article 22 of the CRC, which addresses refugee children, may be used to provide protection to children who are refugees.
- Human rights instruments envisage a broader range of rights than that found in international refugee law instruments. Moreover, even when certain rights are protected under two branches of international law; those rights protected under human rights instruments are generally more widely applicable.
- Human rights instruments usually provide for the same treatment for nationals and non-nationals, including refugees, asylum seekers, and stateless persons. While the 1951 Convention contains different criteria for entitlement and, in most cases, the rights are accorded on the basis of the most favorable treatment accorded to aliens, under human rights instruments, asylum-seekers and refugees are entitled to the same enjoyment of rights as nationals.
- The principle of non-discrimination contained in human rights treaties is wider than the non-discrimination clause in the 1951 Convention and its Protocol. While the 1951 Convention limits the prohibition of discrimination against refugees to the grounds of “race, religion, and country of origin” (Article 3), the corresponding provisions under human rights treaties enumerate more grounds for discrimination that are prohibited; and those lists are not exhaustive.
- Human rights norms provide protection to everyone under the jurisdiction of a State Party. Therefore, they are particularly relevant to those individuals, including refugees, who have not yet gained access to asylum procedures or who have not otherwise regularized their stay and so might not yet meet the requirements of “lawfully staying in their territory” – which is a precondition for many of the provisions of the 1951 Convention.

International humanitarian law (IHL)

International humanitarian law is a branch of international law. It predates both human rights and refugee law, consists of rules that apply during armed conflict. These rules

restrict the actions of the parties to a conflict by providing for the protection and humane treatment of persons who do not take part in the hostilities (civilians, medics, aid workers) and those who can no longer take part in the hostilities (wounded, sick, and shipwrecked troops, prisoners of war). IHL also regulates the means and methods of warfare. The “guardian” of the IHL is the International Committee of the Red Cross (ICRC), which was founded in 1863. The ICRC exercises its supervisory mandate by establishing a relationship of trust with the belligerents in a conflict.

Protection under IHL covers:

- a. International Armed Conflicts, that is, conflicts between two or more States
- b. Non-International Armed Conflicts, that is, conflicts between a State and non-State armed forces, or between two or more non-State armed groups within the territory of one State

IHL protects refugees only in situations of international or internal armed conflict. If a refugee flees due to armed conflict, but finds asylum in a country that is not involved in international or internal armed conflict, IHL no longer applies to that refugee. ICRC also plays an important role in protecting internally displaced persons who have been forced to flee their homes because of international and internal armed conflicts.

Challenges to refugee protection in the North and South

Since the 1990s, there has been a dramatic shift in a states’ behavior, which is far away from the observance of the principles of the 1951 Convention in both the North and South, placing incredible strain on UNHCR and the international refugee protection regime. In the North, the period since the end of the Cold War has been marked by a shift “from asylum to containment,” (Shacknove, 1993) where Western states have largely limited the asylum they offer to refugees and have focused on efforts to contain refugees in their region of origin. In the South, which continues to host the vast majority of the world’s refugees, are also responding to the mass arrival and prolonged presence of refugees by placing limits on the quantity and quality of asylum they offer.

The asylum crisis in the North originated in the 1980s when the number of asylum seekers arriving in developed countries due to conflicts in Africa, Asia, the Caribbean, Central America, and the Middle East. For example, asylum applications in Western Europe rose from 20,000 in 1976 to 450,000 in 1990. While this rise in numbers is clearly significant, some commentators have rightfully concluded that “rising asylum claims tell us what governments have been reacting to, but they do not tell us why governments have grasped with such alacrity measures designed to restrict and prevent rather than include and manage those striving for asylum”(Gibney, 2001). More significant was the fact that the majority of these asylum seekers came from developing countries, many of whom had traveled to the North with false documents and with the help of smugglers. At the same time, large numbers of illegal migrants used asylum channels to gain entry to Western countries. In response, Western states introduced a series of measures to reduce the number of individuals seeking asylum on their territory. These measures included non-arrival policies, such as carrier sanctions and visa requirements, diversion policies, such as safe-third country agreements, an increasingly restrictive application of the 1951 Convention, and a range of deterrent policies, such as detention of asylum seekers and the denial of social assistance. Over a period of some 20 years, Western states have systematically eroded the principle and practice of asylum to the point where some states, like the UK, have openly called for the scrapping of the 1951 Convention and a new international refugee regime, premised on containing refugees within their region of origin (Loescher, 2003). After the 9/11 terrorist attacks in the United States, asylum policies in the North were exacerbated by heightened security concerns and became linked to the so-called global war on terror.

These moves to contain refugees in their regions of origin, coupled with a rise in global refugee numbers in the early 1990s and the problematic response by the international community have placed a significant strain on asylum countries in the South, especially in Africa and Asia. As refugee numbers continued to rise in the 1990s, states in the developing world began to place restrictions on asylum. Some states limited the quantity of asylum they offered to refugees, by closing their borders to prevent arrivals, by pushing for the early and often unsustainable return of refugees to their country of origin, and, in exceptional cases, forcibly expelling entire refugee populations. More generally,

states have been placing limits on the quality of asylum they offer to refugees, by denying them the social and economic rights contained in the 1951 Convention, such as freedom of movement and the right to seek employment. Many states in the South now require refugees to remain isolated and insecure in refugee camps, cut off from the local community, and fully dependent on dwindling international assistance (Loescher 2008: 101-102).

The gap between refugee rights and reality of Protection regime

Rights of refugees

The present concept of international protection has evolved gradually and today implies a series of institutional and legal responses. Projecting refugees and seeking durable solutions to their problems are the two main functions of the High Commissioner for Refugees (Fact Sheet No.20, Human Rights and Refugees). In practical terms, the task of international protection includes the prevention of refoulement, assistance in the processing of asylum seekers, providing legal counsel and aid, promoting arrangements for the physical safety of refugees, promoting and assisting voluntary repatriation, and helping refugees to resettle (article 8 of the Statute of the Office of the UNHCR).

Thus, the international protection function has a legal basis, and its exercise is mandatory for the High Commissioner. The right to protection, although not defined as a separate right as such, is implicit in the 1951 Convention and its fundamental provisions, particularly the principle of non-refoulement.

In addition, many universally recognized human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-treatment, the right to nationality, the right to freedom of movement, the right to leave any country, including one's own, and to return to one's country, and the right not to be forcibly returned.

These rights are affirmed, with other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International

Covenant on Economic, Social and Cultural Rights which together make up the International Bill of Human Rights.

- a. "No one shall be subject to arbitrary arrest, detention or exile" (Universal Declaration of Human Rights, article 9);
- b. "Everyone has the right to seek and to enjoy in other countries asylum from persecution." (Universal Declaration of Human Rights, article 14);
- c. "Everyone has the right to a nationality" (Universal Declaration of Human Rights, article 15);
- d. "Everyone has the right to freedom of movement and residence within the borders of each State" (Universal Declaration of Human rights, article 13; International Covenant on Civil and Political Rights, article 12).

The Realities of Protection

UNHCR's perception is that refugee protection stands at a crossroads (Feller 2001b: 136). It's most important tool—the 1951 Convention—sets out a basic framework that remains directly relevant to many, but not to all, displacement situations. Concerns about the 1951 Convention, specifically for what it does not address, have led some states to go so far as to question its continuing value. Many states have increasingly disregarded it or find ways around it. Furthermore, alliances on protection are shifting. Some states that were formally devout practitioners are starting to distance themselves from its basics as they seek to redefine their responsibilities in the face of the changed nature of conflicts, due to larger numbers of vulnerable people, and a globalized irregular migration movement. Waning public support for refugees and a resurgence of xenophobia have found their political expression, in many countries, in taking a harder line toward those who come uninvited. This harder line often is rationalized on the basis of arguments that rest on a few challengeable assumptions.

The first assumption is that the 1951 Convention is outdated, unworkable, irrelevant, or an unacceptably complicating factor in today's migration environment (Feller 2001b: 136). The fact is that the 1951 Convention was never conceived of as an instrument of migration control. Its terms affect the sovereign right to regulate entry across borders,

with a view toward introducing a needed exception for a clear category of persons. States' inability otherwise to control their borders, or to deport aliens with no valid claim to continue residence on their territories, should not be blamed in the pretext of the 1951 Convention.

The second assumption is that illegal entry is incompatible in many important ways with refugee status (Feller 2001c). The fact, however, is that refugees have always entered countries illegally—often without proper documents and with the help of traffickers. None of this detracts from their refugee status. On the contrary, these facts may confirm it. Economic migration is not new, and the attempts of would-be migrants to use asylum channels for entry in the absence of migration programs do not invalidate the asylum process.

A third assumption is that unsuccessful asylum seekers are all bogus (Feller 2001c). The fact is that an increasing number of states apply a narrow interpretation of the refugee definition. Many asylum seekers who are unsuccessful are the victims of this restrictive interpretation, which incidentally is not so applied in the south.

The 1951 Convention is sixty years old, but not outdated; human rights principles are not weakened by age. UNHCR decided to take the opportunity of the forthcoming anniversary of the 1951 Convention to initiate a process of open dialogue, or Global Consultations, with governments, nongovernmental organizations, and refugee experts with a view to revitalizing the 1951 Convention regime.

Refugee protection in the context of state security and sovereignty

State Security aspect

‘The security of individuals is locked into an unbreakable paradox in which it is partly dependent on, and partly threatened by, the state.’ International protections for refugees have been repeatedly frustrated as states have expressed an increased reluctance to offer asylum. One of the main challenges for UNHCR lies in finding the proper balance between international responsibilities towards refugees and legitimate state interests.

History has shown that the two are not inherently incompatible and can co-exist: the refugee treaties themselves allow for this (McMara 1999: 6).

Current anxieties about international terrorism are fueling a growing trend towards the criminalization of refugees. Refugees have a difficult time in a number of States, either accessing procedures or overcoming presumptions about the validity of their claims, which stem from their ethnicity, or their mode of arrival. The fact that Refugees have arrived illegally does not vitiate the basis of their claim. Because they have a certain ethnic or religious background, which may be shared by those who have committed grave crimes, does not mean they, themselves, are to be excluded. The language of security veils the fact that the threat perception can often be attributed to a policy of containment or to the absence of burden sharing. The end result is the erosion of fundamental principles like the principle of non-refoulement as states feel justified in closing their borders or returning refugees to the country of origin in less than ideal circumstances (Chimni 2000b: 11).

With the expansion of the concept of security, refugees today are regarded as a source of non-military threat to national security. While scholars and policy makers have devoted time and resources to the study of refugees per se, not much work has been done on the implications of the presence of the refugees on the security of the state that hosts them (Chandran 2003: 151). It has been argued that the presence of refugees poses threats to the social, economic and political institutions in the host state. Refugees are considered as security threats for the following reasons:

- a. The inherent tensions among the various groups-each with its own clan, regional, religious and ethnic loyalties-have security implication for the host country.
- b. Refugees are involved in petty crimes and become a part of the local underworld, thus increasing the law and order problems in the host country.
- c. The struggle for scarce economic resources results in competition between the local population and the refugees.
- d. The presence of refugees exerts its own influence over local politics.
- e. Refugees pursue their armed struggle against their home state, thus affecting the relation between the host country and the originating country.

The actual security implication of the refugee movements need to be assessed apropos to the refugee generating [home state], the refugee receiving [the host state], and external aspects of home and the host states' security. "The home state, by driving its citizens out, exposes itself to international criticism and embarrassment, pressures and even intervention for atrocities on its own people. Whereas, the security implications of the refugees in the host country are far-reaching and multi-dimensional evident both in relations to internal and external security (Muni 1996: 24).

Sovereignty aspect

The developed world has used the concept of sovereignty as a defense mechanism against the influx of refugee and asylum claimants. It is a well-known fact that one of the foundations of immigration policy, including refugee policy, is the concept of state sovereignty. In the contemporary international state system the problems of border control and trans-boundary flows of refugees are ever relevant to states. Refugee-creating forces such as interstate warfare, ethnic cleansing, genocide and famine continue to occur with regularity. Thus the states are finding difficulty to reconcile the need to control their borders with their international obligation to assist and protect refugee. The international instruments providing for the protection of refugees are seen as restraining states' jurisdiction to control the admission of foreign nationals into their territory. The idea of policing one's borders to control the entry and residence of non-citizens plays an important role as the primary symbol of sovereignty, both in terms of separation of independent states' exercise of jurisdiction, and in the general perception of independence and nationhood.

The doctrine of national sovereignty can be defined as a principle which reserves to each sovereign state, the exclusive right to take any action it thinks fit, provided only that the action does not interfere with the rights of other states, and is not prohibited by international law on that or any other ground. Under this definition, every sovereign state is free to do what it wants with its own nationals and territory, as well as to enter into legal relationships with other sovereign states.

Now with such enormous right given to state to determine who should enter their territorial space is one major fact that is serving as a hindrance today to the protection of refugees who are seeking for refuge from persecution or war. States are now taking different restrictive measures to ensure that refugees do not flux into their boundaries. These restrictive measures through the excessive power of national sovereignty exercised by states have directly affected the ability for asylum-seekers and refugee claimants either to enter the safe country in the first place, or to claim asylum once they have crossed the borders.

The moral and legal duties of states that are laid out by the international regime of refugee protection are thus minimized as much as possible, as states use sovereignty as an excuse to commit themselves to minimum levels of obligation to nationals of refugee-producing states.

Role of UNHCR

UNHCR's international protection function has evolved greatly from being a surrogate for consular and diplomatic protection to ensuring the basic rights of persons. While the main responsibility for safeguarding the rights of refugees and others of concern lies with States, UNHCR's statutory role is to assist governments to take the necessary measures, starting with asylum and ending with the realization of durable solutions. The first chapter of the statute of UNHCR sets two main functions for the United Nation High Commissioner for Refugee. These are

- i. Providing international protection to Refugee
- ii. Seeking permanent solutions for the problems of the Refugee (Ishtiyag 2004: 37)

In performing the primary functions, the UNHCR seeks to provide an international substitute for diplomatic and consular protection of state. The purpose of international protection is to give refugees a recognized legal status and effective implementation of these legal statuses such as employment, education, residence, freedom of movement and safeguard against being returned to country where refugees may have reason to fear persecution. In performing the second function, the UNHCR seeks to facilitate the voluntary repatriation of refugees and social and economic integration of refugee that

have been offered asylum (UNHCR No.33). The Office assists host governments to safeguard the basic rights of refugees and to take the necessary measures to guarantee protection throughout the displacement cycle, from preventing refoulement and securing asylum to the realization of durable solutions (voluntary repatriation, local integration and resettlement). Various protection-related activities are undertaken both in the field and at Headquarters.³ These are follows:

- Ensuring the granting of asylum, and admission to asylum countries, and intervening, where necessary, to avoid refoulement and to ensure access to refugee status determination procedures;
- Assessing needs and monitoring the treatment of refugees and asylum-seekers;
- Ensuring, together with host governments, the physical security of refugees and other persons of concern;
- Identifying vulnerable groups, ensuring their particular protection needs and prioritizing assistance to ensure their well-being;
- Supporting a number of States to establish registration and documentation systems and participating in national refugee status determination procedures or directly undertaking determination of refugee status;
- Promoting the avoidance and/or reduction of statelessness;
- Actively pursuing the revitalization of protection regimes as well as co-operating with civil society, non-governmental organizations (NGOs) and international organizations to ensure wide support for these regimes;
- Promoting refugee law, including the advocacy of accession to the Conventions and Protocols and assisting in the development of national institutions and legislation;
- Protecting internally displaced persons (IDPs) whenever conditions for involvement according to policy guidelines on the subject are met;
- Further developing UNHCR's own protection capacity;

³ UNHCR's Protection Mandate, UNHCR Global Report 2001

- Promoting and implementing durable solutions through the facilitation of voluntary repatriation, reintegration and resettlement; and
- Identifying resettlement needs and processing submissions on behalf of refugees applying for resettlement in third countries.

Refugee status determination

The UNHCR currently carries out refugee status determination (RSD) under its mandate in some 70 countries. With nearly 80,000 applications received in 2007, UNHCR's share of global RSD applications stood at 12 per cent. The RSD Unit in Geneva oversees the Office's activities and coordinates initiatives to enhance and harmonize standards in field offices.

About 90 per cent of UNHCR's RSD work (in terms of applications received) is concentrated in 15 countries. In 2009, these offices will continue to be the primary beneficiaries and focus the efforts to enhance the quality and efficiency of mandate of RSD operations. However, support will also continue to provide the smaller RSD operations that lack the resources or capacity to respond to operational problems or emergencies.

UNHCR field offices regularly face refugee emergencies or sudden increase in asylum applications. The Office deploys RSD consultants and United Nations Volunteers (UNVs) through the RSD Project to provide the expertise and additional staff required by field offices.

In 2009, in the context of the 10-Point Plan of Action, UNHCR decide to supports field offices facing resource constraints when tackling significant mixed migratory movements.

UNHCR operations in the Gulf of Aden (Somalia and Yemen), in North Africa (e.g. Algeria and the Libyan Arab Jamahiriya), in the Middle-East (e.g. Egypt and the Syrian Arab Republic) and in Asia (e.g. India) are particularly affected by increases in asylum applications and by mixed migration flows, and will be given priority for RSD support. The Office will strive to develop more accurate projections for case processing and

staffing requirements, assist field offices in using appropriate case management strategies, and participate in the development of regionally coordinated procedural responses.

The Office is providing comprehensive RSD training to UNHCR field staff through the RSD Learning Programme, which is mandatory for all staff carrying out or supervising RSD in UNHCR operations. This training is helping to address the high turnover of staff in RSD operations (UNHCR Global Appeal 2009 Update).

Main Protection-related Activities/Achievements

In planning its objectives for protection activities, UNHCR set itself four overarching tasks: (UNHCR report)

- combating the deteriorating quality of asylum;
- improving the efficacy of the international refugee protection system;
- ensuring worldwide consistency in the application of protection standards, to address the trend towards regionalization of approaches to protection;
- Re-vitalizing old and building new partnerships for protection.

Durable Solution

The UN refugee agency's mandate is also actively looking for solutions to refugee's plight. Three main options have been suggested: (UNHCR report, 2008-09)

I. Voluntary repatriation

It is the preferred long-term solution for the majority of refugees. Most refugees prefer to return home as soon as circumstances permit (generally when a conflict has ended), and a degree of stability has been restored. UNHCR encourages voluntary repatriation, as the best solution for displaced people, provided it is safe and their reintegration is viable. The UNHCR often provides transportation and a start-up package that may include cash grants, income-generation projects and practical assistance such as farm tools and seeds.

Sometimes, along with its many NGO partners, it extends this help to include the rebuilding of individual homes, as well as communal infrastructure such as schools and

clinics, roads, bridges and wells. Such projects are often designed to help Internally Displaced Peoples as well as returning refugees – while also benefitting other impoverished people in the area who may never have moved anywhere. Field staff monitors the well-being of returnees in delicate situations. Longer term development assistance is provided by other organizations.

In all, some 731,000 refugees repatriated voluntarily to 46 countries during 2007. Globally, an estimated 11.4 million refugees have returned home over the past 10 years, including 7.3 million with UNHCR assistance.

II. Local integration

Some refugees cannot go home or are unwilling to do so, usually because they could face continued persecution. In such circumstances, UNHCR helps to find them new homes, either in the asylum country where they are living (and in an increasingly crowded world, relatively few countries are prepared to offer this option), or in third countries where they can be permanently resettled.

III. Resettlement

Only a small number of nations take part in UNHCR resettlement programmes and accept quotas of refugees on an annual basis. In 2007, for example, 49,868 people were resettled in 25 countries. The number of refugees submitted by UNHCR to resettlement countries increased by 83 per cent compared to 2006 (54,182 submissions), with 98,999 submissions in 2007. For the first time in 20 years, UNHCR submissions exceeded the global capacity of resettlement countries (about 70,000 people).

The challenges ahead

UNHCR faces enormous challenges in its task of providing international protection and assistance to refugees worldwide and in helping countries seek durable solutions to their plight. Globally, there is less tolerance and more hostility towards refugees than there was fifty years ago and countries in the developed and developing world alike are closing their doors to refugees. As UNHCR, reflects on sixty years of service to refugees worldwide and looks to the future, Human Rights Watch has identified some of the major

challenges facing the organization in the years ahead (UNHCR report). These include, the growing threat to the right to seek and enjoy asylum; the funding crisis facing UNHCR and the disparity in the international response to refugee problems; responding to the problem of internal displacement; meeting the specific needs of particular groups such as refugee women, refugee children, urban refugees, and stateless persons; and ensuring the safety of UNHCR and other humanitarian workers. The right to seek and enjoy asylum from persecution – a core principle of human rights protection and the very foundation of international refugee protection - is under serious threat, not least from the same states who were the primary architects of the international refugee regime fifty years ago. Although the vast majority of refugees continue to seek protection in the world's poorer nations, it is the wealthy industrialized states of Europe, North America, and Australia, that have adopted the most hostile and restrictive refugee policies designed to stem flows and keep people out.

The Global Consultations on International Protection

The Global Consultations on International Protection, launched in late 2000, are UNHCR's contribution to revitalize the framework for refugee protection established by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and reequip States to address current humanitarian challenges in a spirit of dialogue and cooperation. The primary objectives are: to reaffirm State's commitment to the Refugee Convention, to resolve interpretative inconsistencies, so as to ensure full and consistent implementation of its provisions, and to devise new tools and approaches to situations not fully covered by the Convention.

The first objective was in part realized with the Declaration of State Parties in December 2001, whereby States reaffirmed their commitment to implement their obligations under the Refugee Convention and recognized the need to work more cooperatively in sharing responsibilities and in providing solutions to refugees worldwide. The framework for meeting many of these ambitions became The Agenda for Protection, endorsed by UNHCR's Executive Committee and welcomed by the United Nation General Assembly in 2002.

The Global Consultations process provides a forum to (Feller, 2001c):

- Mark the 60th anniversary of the 1951 Convention;
- Reaffirm, in a declaration to be adopted at the 12 December 2001 Ministerial Meeting of States Parties, the collective commitment to the 1951 Convention and 1967 Protocol and the values they embody;
- Encourage States Parties to withdraw any reservations that they may have made at the time of their accession and encourage States that are not yet Parties to the 1951 Convention/1967 Protocol to accede to these treaties;
- Take stock of developments in refugee law and develop guidance on current open interpretative questions of the 1951 Convention;
- Foster a common understanding of the protection challenges and enhance cooperation to address them;
- Identify and promote practical responses to current protection gaps;
- Develop new approaches, tools and standards to strengthen protection;
- Enable governments to present their view of how to improve the international governance of the refugee problem and the directions to be pursued for refugee protection in the future.

Conclusion

Though the international instruments remains the cornerstone of international protection for refugees and are the strongest expressions of international concern for the plight of refugees, it has become increasingly clear that they are not sufficient to deal with the magnitude and complexity of today's refugee problem. Indeed, the emergence of new refugee problems has seriously strained the existing international regime relating to the protection and treatment of refugees by exposing its gaps and conceptual inadequacies. It is now said that the international refugee law is at a crossroad.

Erika Feller, Director of the Department of International Protection of the UNHCR has succinctly summarized the principle of Refugee protection that the refugee should not be returned to face persecution or the threat of persecution-the principle of non-refoulement;

protection must be extended to all categories of refugees without discrimination; the problem of refugees is social and humanitarian in nature, and therefore should not become a cause of tension between states; since the grant of asylum may place unduly heavy burdens on certain countries, a satisfactory solution to the problems of refugees can only be achieved through international cooperation.

Most states fulfill their obligations to protect refugees. Others, however, avoid their responsibility by pointing to a lack of resources, threats to national security, fears of domestic political destabilization, infiltration by armed groups or drug traffickers, and/or the arrival of even greater numbers of refugees. As a result, large numbers of people have been and are forced back contrary to the 1951 Convention relating to the Status of Refugees.

The number of refugees has steadily increased and, while a number of refugee problems have been solved, many more show no signs of resolution. Many of the world's refugees now originate in the Third World and do not necessarily fit the Convention's narrow definition of "refugee". Mass movements also defy the Convention's implied individualized approach to persecution. The UNHCR's Executive Committee has established a working group to study all aspects of refugee protection today.

Refugees have to move if they are to save their lives or preserve their freedom. They have no protection from their own state - indeed, it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not help them once they are in, then they may be condemning them to death - or to an intolerable life in the shadows, without sustenance and without rights.

CHAPTER III

REFUGEE PROTECTION IN INDIA

Introduction

India's diversity, stability and relatively well established rule of law have made it a natural destination for people fleeing persecution and instability in their own countries. Within the South Asian region, India stands out as an exception of tolerant, democratic and secular government in a neighborhood of unstable and volatile states. India has historically faced numerous influxes over many millennia and the ability of these peoples to integrate into a multi-ethnic society and contribute peacefully to local cultures and economies has reinforced the perception of India being a country traditionally hospitable to refugees. India shares seven land borders and one sea border with countries in varied states of strife and war; and, over the years, has hosted large refugee populations from neighboring countries. Various Internal conflicts and political upheavals in countries bordering India its forcing citizens to seek refuge elsewhere. Additionally, ethnic and religious persecution forced minorities to join similar peoples in India's multi-ethnic and multilingual society. This has resulted in the flight of refugee groups, who enter India through the porous borders to seek protection. The refugees who have fled to India face serious problems in their daily lives. From forcible repatriation to starvation, refugees find themselves on the edge, clawing for mere survival.

However, many refugees in India face social discrimination because of their place of origin, nationality or other reasons. Many refugees in India face poverty due to job discrimination, which restricts them to doing menial jobs, such as domestic work, construction or labor work. As the legal status of refugees is still a gray area, they are paid very less for the work they do as their legal rights are not acknowledged under any Indian laws. They also face unnecessary legal harassment and arbitrary arrests.

India is neither a party to the 1951 Convention nor to the 1967 Protocol which is related to the status of Refugee. The lack of specific refugee legislation in India has led the government to adopt an ad hoc approach to different refugee influxes. The status of

refugees in India is governed mainly by political and administrative decisions rather than any codified model of conduct. The ad hoc nature of the Government's approach has led to varying treatment of different refugee groups. Some groups are granted a full range of benefits including legal residence and the ability to be legally employed, whilst others are criminalized and denied access to basic social resources.

The legal status of refugees in India is governed mainly by the Foreigners Act 1946 and the Citizenship Act 1955. These Acts do not distinguish refugees fleeing persecution from other foreigners; they apply to all non-citizens equally. Under the Acts it is a criminal offence to be without valid travel or residence documents. These provisions render refugees liable to deportation and detention.

India and the International Refugee Regime

Despite UNHCR's attempts to persuade India to ratify the convention, India maintained its distance from the agency, abstained during a Soviet-sponsored vote in the Fifth Committee to halt funding to UNHCR, and insisted that 'this was a problem of no direct concern to it [India], and therefore one in which it was not interested'. The Indian Joint Secretary (UN Affairs) also declared in late 1953: 'The question [of India's relationship with UNHCR] has a history, and it was a policy decision that India abstain on this issue.'⁴

In early 1959, the Government of India received correspondence from UNHCR relating to the proposed 'World Refugee Year' (WRY). This was an initiative that originated in the United Kingdom in April 1958, and was supported in the third committee of UN on 6 November 1958. On 5 December 1958, the General Assembly adopted a draft resolution relating to the WRY, a resolution on which India abstained.⁵ The most obvious reason for this was that India was simply unable to contribute financially to the WRY while it was providing relief for both Partition and newly arrived Tibetan refugees. In addition,

⁴UNHCR Archives, Progress Report No. 1- Relations between GOI and UNHCR from Ali, 14 December 1953, Fonds11, series 1, 6/1/INDIA in Oberoi, Pia (2006), "Exile and Belonging: Refugee and State policy in South Asia", Oxford University Press: New Delhi, p.27

⁵An internal memo of the MEA states 'it may be worth-while to point out here that Russia with seven others voted against it, where as India and eight other abstained. Therefore, it is mainly a western sponsored resolution'. NAI, World Refugee Year 1959: Indian participation In, F.No 22(3)-UNI/59

India pointed out that it was also contributing considerable funding for the relief of Palestinian refugee, as well as smaller amounts for Algerian refugees in Morocco and Tunisia. Yet it would still have been possible for India to make a symbolic contribution to the WRY, and the fact that this was ruled out on the fact that India's constraints were more political than financial.

In her reply to United Kingdom Secretary of State for Commonwealth Relations, Vijaya Lakshmi Pandit stated: 'The Government of India feels that it would be inappropriate to make the kind of gesture visualized in view of India's own refugee problem which has been one of the biggest in the world. As you are already aware, this has been a tremendous burden financially for the past twelve years.'⁶

By the end of 1967, as the Tibetan refugee presence dragged on and there no longer seemed any realistic hope of their speedy repatriation, the Indian Government was seriously reconsidering the role of UNHCR in India. So on 1 February 1969, the UNHCR Branch office was opened in New Delhi. However, no formal agreement was signed between India and UNHCR, and the refugee agency was required to work under the auspices of United Nation Development Fund (UNDF). The UNHCR office in Delhi was treated as independent entity and the Government extended all facilities to the Representatives and staff.

Over the next few years a working relationship between UNHCR and the government of India was established, and in 1971 UNHCR was appointed the focal point for the massive international relief effort organized for refugee from the civil war in East Pakistan.

In June 1975, UNHCR discontinued its assistance to Tibetan refugees in India and closed its office in New Delhi. By January 1976, the UNHCR field presence on the Indian subcontinent had been terminated, and the 'Regional Office for Western South Asia' in Bangkok was designated responsible for the four major states of South Asia.

⁶NAI Confidential letter to the Rt. Hon. The Earl of Home, Secretary of State for Commonwealth Relation from Vijya Lakshmi Pandit, High Commissioner to the United Kingdom, 17 June 1959. NAI, F.No.22 (3) in Oberoi, Pia (2006), "Exile and Belonging: Refugee and State policy in South Asia", Oxford University Press: New Delhi, p.28

However, following the Soviet invasion Afghanistan in 1979, Afghan asylum seeker that had made their way over to India began to approach the UNDP office in New Delhi for assistance (on occasion as far as to hold demonstrations outside the UNDP office). When reports began to circulate that there was a protection gap for this group of 'urban refugee', UNHCR again approached the Government of India seeking permission to post a representative in New Delhi. Although the post of Charge de Mission was formally established in 1981, the office was still not permitted to establish an independent presence in the country. This situation continues to the present day, with India maintaining that 'UNHCR's activities in India are permitted by the government on humanitarian grounds', but refusing to formalize the Office's status in the country. Despite this, however, on 28 December 1993 India sent a *Note Verbale* to the UN Secretary General expressing a desire to gain membership of UNHCR's Executive Committee, stating that 'India's interest in joining the Executive is based on its experience in handling refugee issues in the past. India has accommodated and extended hospitality to thousands of refugees from its neighboring countries'. Accordingly, on May 1995, India was officially nominated to this body, where it continues to play an active role.

Reasons for not ratifying the 1951 Convention

India's policy towards the UNHCR and joining the Refugee convention of 1951 has been ambivalent due to a succession of historical reasons. At first, it found the Convention too Eurocentric. Later, it saw it as part of the cold war between Russia and America and others, since refugee concerns were over focused on those who had 'fled' from the communist regimes. Since in 1994, India has been a member of Executive Committee of the UNHCR. However, in the absence of specific legal mechanism to protect refugees, India's policies remain inchoate-as half empty as they are half full.

There are a range of discomfitures, discontents and concerns that militate against India adopting a comprehensive refugee law and policy, which include the following (Dhavan 2004: 15-14).

- i. India's confidence in its 'success' in tackling enormous refugee crisis, without subscribing to or enacting a specific legally binding international framework towards refugee, reinforces its belief that such a framework is unnecessary.
- ii. India's real or imagined discomfiture about security suggests that India should hold on to a tough regime towards foreigners generally, so that their operational day-to-day options are not foreclosed.
- iii. India feels that its positive attitude of care and concern in the treatment, absorption and integration of foreigners obviates the need for a defining legal regime in a society otherwise kindly disposed to those who cross into its borders.
- iv. India also feels that its track record in relation to, as well as kindly disposition towards, foreigners should not result in in-equitability increasing its global responsibility towards refugees. This could further result in a global refugee policy being based more on geographical contiguity than on general burden-sharing. This is, and could be, seen as perpetuating an invidious responsibility based on shielding 'developed' nations from assuming their share of global responsibility, and encouraging inchoate but not intangible discrimination on grounds of race, colour, religion or regional contiguity.
- v. India's alleged record towards foreigners has also created angst, anguish and protests against undeserved priority given to 'local integration' solutions that are considered by refugees to be imperfect, incomplete and inadequate, not just for the primary refugees but especially for women and children.
- vi. In addition, there is an alleged covert intemperance in India's immigration policy towards some classes of foreigners, resulting in the targeting of certain communities of particular faiths.

Status and Socio-economic condition of Refugees in India

Refugees in India can be classified as mandate and non-mandate refugee (Trakroon.d.: 58). Those who are under the protection of UNHCR are known as mandate refugees. Most of the refugees in India are non-mandate refugees. They are under the direct protection of Indian government, which prefers to discuss refugee issues at a bilateral level with the countries concerned.

Tibetan Refugees

Legal status

Tibetans who arrived in India in the late 1950s and early 1960s were accorded refugee status by the Indian government despite India not being party to either the 1951 UN Convention Relating to the Status of Refugees or the 1967 Protocol. Although the Indian government continues to allow Tibetans to enter the country, it has not afforded them the same legal status as the first wave of Tibetans. However, some Tibetans who arrived in the second-wave were able to obtain their registration certificates by claiming that they were born in India.

Socio-economic conditions

Tibetans in India live in 37 different settlements and 70 scattered communities in Himachal Pradesh, Ladakh, Arunachal Pradesh, Karnataka, Uttar Pradesh, Madhya Pradesh, South Sikkim, West Bengal, Maharashtra and Orissa. Of the settlements, just under half are based on agriculture, while one-third is agro-industrial and a fifth is handicraft-based. The scattered communities consist of smaller groups of Tibetans outside of the official settlements who were not willing, or not able, due to limited resources, to be accommodated in the settlements.

Sri Lankan Refugees

Legal status

The legal status of Sri Lankan refugees in India is officially governed by the Foreigner's Act 1946 and India's Citizenship Act 1955 which defines all non-citizens who enter without visas to be illegal migrants, with no exception for refugees or asylum seekers. Sri Lankans who are considered to be a threat to national security are deemed to be militants and detained in 'special camps' in Chenglepet or Vellore and. Nonetheless, in general the Government of India recognizes Sri Lankans fleeing violence at home to be refugees and accordingly grants them protection.

Socio-economic conditions

Sri Lankan refugees remain largely in Tamil Nadu and live in refugee camps scattered across the state. At present, more than 72,000 thousand Sri Lankan refugees live in over 120 camps in Tamil Nadu. In addition to this, a further 30,000 Sri Lankans are living outside the government camps (SAHRDC, 1997). Those that choose to live outside must register with the local police and visit the camps on a fortnightly basis to register their attendance. Though not officially permitted to work in India, the refugees worked as unskilled labour in the informal sector to supplement their incomes.

Bhutanese refugees

Legal status

Since 1949, Bhutanese citizens have been permitted to move freely across the Indian border. A reciprocal arrangement between Indian and Bhutan grants its citizens equal treatment and privileges. The right to residence, study, and work are guaranteed without the need for identity papers. For this reason, the Indian government has not acknowledged the ethnic Nepalese Bhutanese, who were forced to flee to be refugees, and nor has it provided any sort of assistance (Trakroo n.d.:66). The UNHCR does not carry out status determination for the Bhutanese.

Socio-economic conditions

Under its reciprocal arrangement with Bhutan, the Indian government affords the Bhutanese more freedom of movement and residence than to recognized refugee groups. Nonetheless, because the Bhutanese are not recognized as refugees, they are not eligible to receive the amenities and assistance afforded to refugees. Despite being officially treated as equals to Indian citizens the refugees still experience difficulties in securing driving and business licenses, travel documents, cooking gas and school and university admission.

Hindu Pakistani refugees

Legal status

Roughly 115,000 people displaced from Pakistan have arrived in India since 1965 and most have settled in Rajasthan or Gujarat. The Indian government does not recognize this group to be refugees and as a result, they are unable to acquire residence permits and find it difficult to gain employment. The Indian Constitution and the Indian Citizenship Act 1955, however, make specific provision for those who were born or whose parents were born in undivided India to apply for Indian citizenship. The Citizenship Amendment Rules 2004 specifically provide for Pakistanis to apply for citizenship in Gujarat and Rajasthan. The amendment of the Citizenship Act in 2005, however, has drastically increased the fee structure for citizenship application

Socio-economic conditions

Despite the acquisition of India citizenship, some Pakistani Hindus report ongoing problems with accessing the associated benefits including ration cards and other government schemes. The Pakistani communities generally work in the informal sector and often take jobs as manual labourers and in quarries to earn a living. As with many other refugee groups in India, they often experience exploitation in the work place and often do not earn enough to adequately support themselves and their families.

Burmese refugees

Legal status

Most of Burmese enter India from the northeast and very few asylum seekers who travel to Delhi are recognized as refugees by the UNHCR. The UNHCR in Delhi assists about 2,000 Burmese refugees, the majority of whom are from Chin state. The organization provides the more vulnerable individuals with a small monthly stipend, which is often not enough to cover basic necessities. In addition to the Burmese who are recognised refugees by the UNHCR, there are also a large number of Burmese asylum seekers living in India.

Socio-economic conditions

Daily life is a struggle for many Burmese refugees in New Delhi. Many live in the slums or share cramped accommodation with other refugees. Furthermore, they often do not speak English or Hindi, nor possess the skills to allow them to compete with Indian citizens to secure jobs. Access to education is formally ensured for every child protected by the UNHCR mandate; however, educational institutions require a birth certificate and papers for registration and fees, which refugees cannot always provide.

Somali refugees

Legal status

Somalis refugees constitute the largest African community in India, numbering approximately 400 people, although less than 200 are officially registered. Somalis who reached Delhi applied for refugee status under the UNHCR mandate were not granted refugee status. Some Somalis report problems in the past in accessing the subsistence allowance from the UNHCR but state that the situation has improved since the beginning of 2007 (HRLN 2007: 16). Nonetheless, the subsistence allowance is not enough to cover the refugees' basic needs, and many rely on small donations from friends and families living abroad to support their stay in India.

Socio-economic conditions

Somalis face greater challenges than other refugee groups in finding housing, gaining access to education and medical treatment and seeking employment. There are two reasons for this. First, the majority of the Somali community in India cannot speak English or Hindi. Secondly, they are discriminated against because of their colour. Somali refugees report that it is extremely difficult for them to find housing since many Indians do not want to lease properties to them.

Afghan refugees

Legal status

The Indian government does not officially recognize the Afghan community to be refugees. Instead, they are recognized and protected under the UNHCR mandate. The Indian government has issued most Afghan refugees with valid residence permits. This affords them a degree of legal protection, which allows them to stay in the country despite not having valid passports. Attaining residence permits has been more difficult for the newer arrivals that arrived in India between 2004 and 2007 (HRLN 2007: 21).

Socio-economic conditions

The Afghan Hindu and Sikh community are generally well integrated in Indian society since they share same religious beliefs and often speak Hindi. Since the majority of the Afghan community holds resident permits, many Afghans are able to work in the informal sector, for example, running shops and working as salespeople. The UNHCR also runs various assistance programmes through its implementing partners for the benefit of Afghan refugees.

Bangladeshi Refugees

Legal Status

In early 1986, 51,000 refugees belonging to ethnic and religious minority groups, mostly Buddhist Chakmas (one of the several ethnic groups that comprise the Jumma people) fled from the Chittagong Hill Tracts (CHT) region of Bangladesh and were sheltered in six camps in India's remote northeastern state of Tripura. Although India allowed them to stay on, it did not permit the UNHCR or any other international agency to visit the refugee camps.

Socio-economic conditions

The Indian government drew up Chakma resettlement schemes and refused to deport them even in the face of growing local political pressure demanding their deportation. Their living conditions are extremely poor, in sharp contrast to those of Tibetan refugees.

Since 1994, some of families have been repatriated to Bangladesh. In one incident in 2001, thirty-four families fled due to communal violence and were forcibly returned into Bangladesh by border gaurds within twenty-four hours of their arrival (Dhavan 2004: 124).

The International Commitments

The international obligations to protect refugees, including non-refoulement, non-expulsion or non-extradition and the minimum standard of treatment are traced in customary international law as well as in international treaty law in the form of United Nation's Convention relating to the Status of Refugees, 1951 along with the Protocol of 1967. India has neither signed the 1951 Convention nor the 1967 Protocol.

It must be noted that India's refusal to join the Refugee Convention of 1951 does not abstain it from basic commitment to humanitarian protection of refugees. The right of refugees to non-refoulement has been recognized, even if with some reservations, as a part of customary international law (Chimni, 2007). Thus, respect for this right is incumbent on the Indian government as the Constitution of India mentions, as one of the directive principles of state policy that "the state [India] shall endeavor to foster respect for international law and treaty obligations in the dealings of organized peoples with one another (Article 51)." It is pertinent to note that it is now well-established that the phrase, "international law" represents customary international law (Article 51).

The long tradition of humanitarian assistance in the country is extended further by the international obligations chosen by the country (Saxsena 2004: 24). India is a signatory to the Universal Declaration of Human Rights (UDHR), Article 14 of which is the fountainhead for subsuming refugee protection in human rights. India also voted to adopt the UN Declaration of Territorial Asylum in 1967.

In addition, India has signed numerous human rights instruments that articulate a commitment to protection of refugees. India is party to the Universal Declaration on Human Rights (UDHR) 1948 and has joined the International Convention on Civil and Political Rights (ICCPR-1966) and the International Convention on Economic, Social and Cultural Rights (ICESCR-1966) since 1979. It is also a signatory to the Convention

on the Elimination of all forms of Racial Discrimination (CERD-1965) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Torture Convention-1984).

Apart from the Executive Committee of the UN High Commissioner's Programme (EXCOM), India also participates in the deliberations of the Asian-African Legal Consultative Committee (AALCC), the 1966 Principles Concerning the Treatment of Refugees, popularly known as the Bangkok Principles, and the Informal Consultation on Refugee and Migratory Movement in South Asia (also known as the Eminent Persons Group or EPG) and the Asia/Pacific Consultations.

None of these have any binding force but the creation of convergent expectations through repeated participation in such processes of consultation over time would tend, eventually, to influence state behavior (Oberoi, 1999). The fact that governments' joining in these deliberations signifies the compelling influence of such platforms.

Legal Framework for Refugee Protection

After the Second World War and the shared European experience of massive displacement, the Refugee Convention was adopted with restricted geographical and temporal conditions to apply to post-War Europe. In 1967, in an effort to give the Convention universal application, a Protocol relating to the Status of Refugees ["1967 Protocol"] that removed the restrictions of the Convention was added. Together, these two key legal documents provide the basic framework for refugee protection across the world.

India has repeatedly declined to join either the Refugee Convention or 1967 Protocol. In addition, India has resisted demands for a national legislation to govern the protection of refugees. In doing so, India has met the many refugee influxes into its territory through an ad hoc system of executive action which is determined by the government's policy towards the country of origin. The relative success that India has had with this approach, which is guided by political instinct free from legal obligation, has led to an institutional complacency towards legal rights-enabling obligations to refugees. There has also been a hardening of attitudes about foreigners in recent years in light of heightened security

concerns. This has resulted in genuine refugees paying an unfortunate price in a country that otherwise has an impressive history of protecting refugees.

a) The Foreigners Act and its Application to Refugees

In the absence of a specialised statutory framework, India relies on the Foreigners Act, 1946 to govern the entry, stay and exit of foreigners in India. However, the Foreigners Act is an archaic legislation that was enacted by a colonial government in response to the needs of the Second World War.⁷ Its continued application in independent India for more than sixty years after the end of the war can only be seen as an indication of the government's desire to retain almost absolute powers to deal with foreigners. Section 2(a) of the Act defines a 'foreigner' as "a person who is not a citizen of India", thus covering all refugees within its ambit as well. Without a specialized governance regime for refugees they are usually treated on par with foreigners and illegal migrants, without any special protection being accorded to them. However, it is necessary to draw a distinction between foreigners as a general class and refugees as a special subset of that class.

Section 3 of the Foreigners Act vests the Central Government with the power to issue orders to control foreigners in India. There are a number of such Orders in force that restrict the movement, activity and residence of foreigners; and, require their proof of identity and regular appearance before the police.⁸ In addition, Section 5 of this Act prevents foreigners from changing their name while in India; Section 6 requires masters of ships and pilots of aircraft to maintain records of travelling foreigners; Section 7 obliges hotel-keepers to maintain records of the stay of foreigners; Section 12 provides for the delegation of these powers; and, Sections 14, 14A and 14B penalize foreigners and abettors found in contravention of the Act or any Order made thereunder (Trakroon, d.: 79). The Foreigners Act gives the executive wide powers to remove foreigners from India that have generally been exercised free from judicial review. This

⁷See the Statement of Objects and Reasons of the Foreigners Act, 1946 in Bhairav Acharya (2004), *The Law, Policy and the Practice of Refugee Protection in India*, New Delhi, p.2

⁸See, for instance, the Foreigners (Restriction on Movements) Order, 1960; Foreigners (Restriction on Activities) Order, 1962; Foreigners (Restrictions on Residence) Order, 1968; Foreigners (Proof on Identity) Order, 1986; and, Foreigners (Report to Police) Order, 1971 in Dhavan, Rajeev (2004), *Refugee Law and Policy in India*, UNHCR and PILSAARC: New Delhi, p.63

power is given to the Central Government by Section 3(2)(c) of the Foreigners Act, 1946.⁹ This is in addition to the power to refuse entry for non-fulfilment or entry conditions that invites instant deportation. The unrestricted power of the executive to remove foreigners was first confirmed by the Supreme Court in 1955, where it held that:

“The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.”¹⁰

The untrammelled right of the executive to remove foreigners from India has been upheld by the Supreme Court in a number of subsequent decisions. Furthermore, while exercising this vast executive discretion, any foreigner may be deported without the executive being burdened to give a reason for the deportation. Thus, there is no need for the executive to comply with any form of extended due process or for giving a hearing to the person to be deported.

b) Limited Constitutional Protection

However, foreigners are entitled to some degree of constitutional protection while in India. These include the protection of the equality clause [Article 14] and the life, liberty and due process provisions [Article 21] of the Indian Constitution.

While Article 14 guarantees equality before the law and the equal treatment of the law, classifications of persons into separate and distinct classes based on intelligible differentia with a nexus to the object of the classification are allowed. Thus, the executive may distinguish between classes or descriptions of foreigners and deal with them differently. It follows that a foreigner discriminated by state action as against another foreigner of the same class or description has a valid constitutional cause of action (Acharya 2004: 5).

⁹Section 3(2) (c) of the Foreigners Act reads, “In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner...shall not remain in India, or in any prescribed area therein.” in Bhairav Acharya (2004), *The Law, Policy and the Practice of Refugee Protection in India*, New Delhi, p.3

¹⁰ibid

Article 21 protects any person from the deprivation of his life or personal liberty except according to procedure established by law, from a rather static interpretation of this provision, the Supreme Court has radically reinterpreted Article 21 to include a substantive due process of law to be followed for any state action infringing on life and personal liberty. Foreigners enjoy the protection of Article 21 in two ways:

- a. they are equally entitled to the right against deprivation of life or bodily integrity and dignity, and
- b. to a certain extent, the right against executive action sans procedural due process accrues to them.

However, cases which suggest a due process for deportation have to be confined to their own facts. Indian courts have generally upheld deportation orders passed in contravention of the *audi alteram partem* principle.

In addition, foreigners are also entitled to the protection of some of the rights recognised in Article 20 [the right against prosecution under retrospective penal law; the right against double jeopardy; and, the right against self-incrimination]; Article 22 [rights upon arrest or detention]; Articles 25 – 28 [the right to freedom of conscience and the free practice and propagation of religion]; and, Article 32. [the right to move the Supreme Court for enforcement of the rights listed above].

India's practice regarding Refugee Protection

It should be appreciated that a person becomes a refugee because of circumstances which are beyond that person's control, often poignant. He/She is left with no other option but to flee from human rights violations, socio-economic and political insecurity, generalised violence, and civil war or ethnic strife all these leading to fear of persecution. The import of this observation would be evident when one looks at the definition of a 'refugee'. The term 'Refugee' has a particular meaning in international law and its legal definition is laid down in the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Therefore, the need to give due importance to humanitarian and human rights aspects in dealing with refugees cannot be over-stressed. Thus, it may be noted that there are well-defined and specific grounds, which have to be satisfied before a person

can qualify to be a 'refugee'. These grounds are well- founded on fear of persecution and considerations of a number of factors which may operate individually or collectively (Ananthachari, 2001).

Even though Indian law does not treat refugees as a special class distinct from foreigners, there have been a number of special legislative measures to deal with refugee influxes. Special laws to deal with refugees have been used primarily by the various State Governments. Through a series of executive and administrative orders, both the Central and State Governments have distinguished refugees from foreigners while responding to various refugee related crises. This approach, however, is an ad hoc one and recognizes refugees as special class only when faced with mass influxes of people into India.

The practice of the Indian Government has been to deal with refugees in three main ways:

- (a) refugees in mass influx situations are received in camps and accorded temporary protection by the Indian Government including, sometimes, a certain measure of socio-economic protection;
- (b) asylum seekers from South Asian countries, or any other country with which the government has a sensitive relationship, apply to the government for political asylum which is usually granted without an extensive refugee status determination subject, of course, to political exigencies; and
- (c) Citizens of other countries apply to the Office of the United Nations High Commissioner for Refugees (UNHCR) for individual refugee status determination in accordance with the terms of the UNHCR Statute and the Refugee Convention.

Indian refugee policy is often guided by political compulsions, not rights-enabling legal obligations. The first mass influx following the Partition of the country in 1947 was met with a number of legal, executive and administrative mechanisms designed to assist and eventually integrate the incoming Hindus and Sikhs into the national mainstream. The first 'foreign' influx of refugees occurred in 1959 from Tibet when the government, politically uncomfortable with China, set up transit camps, provided food and medical supplies, issued identity documents and even transferred land for exclusive Tibetan

enclaves across the country for cultivation and occupation along with government provided housing, healthcare and educational facilities. The Sri Lankan Tamil refugees, having arrived in India in three waves beginning in 1983, have also been relatively well received in the geographically and ethnically contiguous State of Tamil Nadu where a large degree of local integration has occurred. In comparison, the Chakma influxes of 1964 and 1968 saw a subdued and reluctant government response.

Perhaps the largest mass influx in post-Partition history occurred in 1971 when approximately 16 million refugees from erstwhile East Pakistan sought safety in India. Enormous amounts of socio-economic and other resources were expended by the both the Central Government and the governments of the neighboring States to deal with the crisis. Although most of the refugees returned within a year, the experience left the Indian government both bitter at the non-responsiveness of international organizations and complacent in the confidence of being able to deal with future mass influxes.

Refugees who are not extended direct assistance by the Indian Government are free to apply to the UNHCR for recognition of their asylum claims and other assistance. To this end, the UNHCR is mandated by its parent Statute to conduct individual refugee status determination tests and issue certificates of refugee status to those who fulfill the criteria of the Refugee Convention. The Refugee Certificates issued by the UNHCR are not formally recognized by the Indian Government, making them legally unenforceable in India. However, the authorities have, in general practice, taken cognizance of the UNHCR's Refugee Certificates to allow most refugees an extended stay in India in the absence of political opposition. Therefore, while a de jure system of refugee protection in India does not exist, there is a system of procedures and practices that serve to create a de facto refugee protection regime in India.

The ambivalence of India's refugee policy is sharply brought out in relation to its treatment of the UNHCR. While no formal arrangement exists between the Indian government and the UNHCR, India continues to sit on the UNHCR's Executive Committee in Geneva. Furthermore, India has not signed or ratified the Refugee Convention. This creates a paradoxical and rather baffling situation regarding the UNHCR where India sits on its Executive Committee and allows the UNHCR to operate

on its territory, but refuses to sign the legal instrument that brought the organization into existence.

Role of Judiciary

Despite the absence of a formal legal instrument, the judiciary in India has played a major role in safeguarding the rights of refugees and asylum seekers. Indeed, some Indian judicial pronouncements have enshrined principles on the right to seek asylum, non-refoulement, and voluntary repatriation. The courts have arrived at their decisions without specifying or entering into a discussion on international refugee law. They have relied on applicable 'Rights on Provisions' in Indian Constitution, including Article 14 (Right to equality) and Article 21 (Right to Life and Liberty), which have been determined to be applicable to refugees.

The courts in India have laid down guidelines in the area of refugee protection by reading Article 21 in its expansive significance in the light of the directive principles of state policy. Despite the absence of a legal framework, the Indian administrative and legal systems can be activated in favor of refugee protection by relying upon (Chari 2003: 119)

- (i) the Indian humanitarian tradition;
- (ii) India's international legal obligations;
- (iii) the Constitution of India; and
- (iv) the humanist jurisprudence of the Constitution of India.

Given below is a summary of the type of protection that India courts have provided to refugees (Bose 2001b).

i. Physical Security

India courts have decided in a number of cases that the Constitutional protection of life and liberty must be provided to refugees.

ii. Non-Refoulement and Right to Refugees Status

In a number of cases in India Court have protected the right of refugees where they are substantial ground to believe that life would be in danger. There are case where the courts

have order the life of refugees who are in danger be safeguarded and have allowed them to be granted status by UNHCR.

iii. Deporting on grounds of National Security and Criminal Activities

The Court has ruled that refugees can be deported on the grounds of national security. Under the foreigner Act of 1946 if they were found indulging in activities undesirable and prejudicial to the Security of India. The High Court of Delhi at New Delhi ruled that International Law and Conventions cannot be applied to refugees indulging in criminal activities. They can be repatriated or deported.

iv. Right to Leave (Return)

The Court has upheld a refugee's right to leave the country. The courts ruled that even those refugees against whom cases were pending for illegal entry should be provided exit permits to enable them to leave the country for third country resettlement.

v. Application of International Laws for the protection of refugees

This included conformity with International Conventions and Treaties, although not enforceable, the government was obliged to respect them. But the power of the government to expel a foreigner is still absolute. Art. 21 guarantee the right to life for non-citizens. International Covenants and Treaties which effectuate the fundamental rights can be enforced. The principal of non-refoulement is encompassed in articles so long as it is not prejudicial to national security. Under Art 51 (C) and 253 international law and treaty obligation are to be respected, as long as they are consistent with domestic law (Bose, 2001b).

So far premise on which the judiciary has been acting to protect the interests of the refugees is that basic human rights are supposedly implied in every civilized system and that unless there is an inconsistent provision in the domestic laws, basic human rights have been read into the provisions of the constitution and other enacted laws.

Therefore, it is as a result of judicial creativity that certain basic rights of refugee have been taken care through the medium the courts. In India, the Supreme court has led the

certain basic rights such as the right to equality (Article 14), the right to life and liberty (Article 21), and the freedom to practice and propagate one's religion (Article 25) are available to non-citizens as well. Due to this creative and humanistic interpretation of the law by the apex court, the rights of citizens as well as non-citizens have been expanded by Indian courts (Chari 2003: 121).

National Human Rights Commission

On a regional basis a number of human rights treaties have been adopted. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981). In South Asia, despite efforts in this direction, no regional human rights framework has yet been established. However, several Asian states have enacted or have expressed their commitment to enacting national human rights legislation.

India generously accepts large groups of refugees who are fleeing not just for reasons relating to persecution, but also due to generalized violence as is the case of Sri Lankan Tamils. However, this does not hold good for all groups as certain refugees like Afghans, Iranians, Iraqis, Somalis, Sudanese and Myanmarese are not recognized by the Indian Government. For which reason, UNHCR has had to intervene through determining and granting refugee status under its mandate.

This differential treatment of refugees is a fundamental problem. It negates the provision of legal rights and assistance which would normally be granted by an asylum country. Moreover, it is not clear what legal status or rights accrue to a person as a result of registration by the government of India as a refugee, nor the relationship between "refugee" status granted by the government and corresponding national laws governing the entry and stay of foreigners (Chimni, 1994).

Although the hosts of international human rights instruments which have been ratified by India and other South Asian countries may significantly strengthen the international

regime of human rights protection in the region,¹¹ it remains a curiosity that none of the South Asian countries have acceded to the international refugee instruments. Nor have any of them enacted a domestic legal framework in the form of a refugee or asylum law or determination procedure. In the absence of a domestic legal framework and procedure, national human rights institutions and the courts can play an important role.

The 1993 Protection of Human Rights Act established the Indian National Human Rights Commission (NHRC or Commission). Under the Act the NHRC has a wide range of powers and functions. First and foremost, it may inquire *suo moto* or on the basis of a petition the violation of human rights of any person. Under its authority the NHRC can intervene in any human rights proceeding before any Court, or visit any jail or other institution under control of the state Government to investigate illegal detentions or conditions of legal detentions. The NHRC is authorized to review legal provisions and factors inhibiting the enjoyment of human rights in India and make recommendations to remedy any violation. It is also empowered to summon and examine witnesses, requisition and discover documents including public records consider affidavit evidence and undertake field investigations.

The NHRC may study treaties and international instruments on human rights and make recommendations on their effective implementation along with promoting research and performing functions necessary for the promotion of human rights. In respect of this particular function the Commission reportedly played an active role in encouraging the Indian government to accede to the UN Convention against Torture.

The NHRC comprises a chairperson who has been a Chief Justice of the Supreme Court of India, a member who has been a Judge of the Supreme Court, a member who has been a Chief Justice of a High Court, and two other members with experience in the field of human rights. Under the Act, Human Rights Commissions may also be established at the state level. The organizational set-up of the state Commissions are quite similar to that of

¹¹the Indian Supreme Court judgment of Vishaka et al. v. Rajastanetal., Writ Petition (Criminal) Nos. 666-70 of 1992, unreported judgment of 13 August 1997 in Brian Gorlick and SumbulRimi Khan (1997), Refugee Protection as Human Rights Protection: International Principles and Practice in India, Refuge, Vol. 16, No. 6, p.40

the National Commission with the Chairperson being a former Chief Justice of the High Court. At the state-level the Act provides for the establishment of Human Rights Courts for the purpose of providing speedy trial of offences arising out of violations of human rights. To assist the Court, the state government is also permitted to appoint an experienced Public Prosecutor or advocate as Special Public Prosecutor who would be responsible for conducting cases.

Till date, the NHRC has been considerably active in the field of protection of human rights of refugees. Specific interventions made by the Commission have resulted in wide ranging consequences relating to the protection of Chakma refugees who have sought refuge in the Northeastern states of India, particularly the States of Arunachal Pradesh and Tripura. It has also effectively intervened and continues to do so in cases of illegal detention of Sri Lankan Tamil refugees in the State of Tamil Nadu.

The ability and willingness of the Commission to take up the cause of refugees in the future will depend on many factors. These include the quality and presentation of complaints which come to its attention, as well as the crucial part played by advocates and NGOs in pursuing such matters before the NHRC. In this regard the work of the national Commission should have a positive impact on the emerging activities of the state-based human rights commissions. As an institution which enjoys independence of process and procedure, and as a result of the status and expertise of its members, there are high expectations that the NHRC will continue to play an important role in safeguarding and expanding the legal protection of refugees in India.

UNHCR and Refugee Protection in India

The UNHCR has no formal accreditation and operates under the umbrella of United Nations Development Programme (UNDP). UNHCR has established the office of the chief Mission in New Delhi. In carrying out its mandate of protection, this office interviews individual asylum-seekers for refugee status and promotes durable solutions (Trakroo n.d.:185). Those asylum-seekers who are not offered direct protection by the Indian government can apply for refugee status with the UNHCR. The Statute of the Office of the UNHCR empowers the UNHCR to issue refugee certificates to those who

fulfill the criteria under the 1951 Convention after having conducted interviews with such asylum-seekers for refugee status determination. The refugee certificates issued by the UNHCR are, in practice, recognized by the Indian government, creating a de facto system of refugee protection in India (Sengupta 2008: 3). In the absence of a national legal and administrative framework, UNHCR, based in New Delhi, conducts refugee status determination (RSD) for asylum-seekers from non-neighboring countries and Myanmar. UNHCR also has a presence in Chennai, Tamilnadu in the south to support the voluntary repatriation of Sri Lankan refugees.

Main objectives and targets (UNHCR Global Report 2001: 244)Favorable protection environment

- UNHCR provided documentation and technical advice to the Government of India as part of its input to the draft national refugee law.

Fair protection processes

- All asylum-seekers were registered on an individual basis within 21 days of first approaching UNHCR. Thanks to increased staffing and the streamlining of procedures, RSD processing was conducted in a timely and efficient manner. First-instance RSD decisions were made on average within 12 days of interview.

Security from violence and exploitation

- All reported survivors of sexual and gender-based violence received support from UNHCR and its partners. UNHCR also organized a number of training and sensitization sessions with local police and residents' welfare associations to raise awareness on refugee issues.

Basic needs and services

- Due to insufficient resources, only 1,260 of the most vulnerable refugees received financial assistance. Social services support was provided to some 860 unaccompanied and separated children, approximately 130 disabled refugees and 80 elderly refugees.

- UNHCR reached an agreement with government schools and the National Institute of Open Schools, whereby they now accept UNHCR certificates in lieu of birth certificates and prior education certificates for the enrolment of refugee and asylum-seeker children. Some 280 refugees and asylum-seeker children from Myanmar have, for the first time, enrolled in government schools. Overall, some 10 per cent of school-aged refugee and asylum-seeker children enrolled in government and open schools, while many others attend private schools.
- A public health doctor was funded by UNHCR to strengthen the health programme. More than 7,000 refugees and asylum-seekers were assisted by UNHCR to use health-care centres and hospitals. More than 90 percent of children of concern were vaccinated for measles.

Community participation and self-management

- UNHCR fostered better relations with persons of concern through various channels, including the Women’s Protection and Outreach Centres, participatory assessments and open house meetings. Women constituted more than 40 per cent of participants in community focal point meetings.
- The first regional dialogues with refugee women and girls were successfully organized and active participation of 200 refugees and asylum-seekers from Afghanistan, Myanmar and Somalia.
- UNHCR expanded self-reliance and livelihood programmes. Some 3,700 refugees and asylum-seekers benefited from income-generation activities, small business grants, local-language classes, skills training and job placement support. Most of the activities were conducted in UNHCR’s partners’ premises, providing a safe working environment, particularly for women. In addition, 40 unaccompanied and separated children participated in a special “learn and train” project.

Constraints

While the Government continued to respect protection and humanitarian principles in general, the lack of a national refugee protection framework remains one of the major challenges in India as ad hoc approaches are adapted to refugee protection. Poverty

emerges as the greatest concern for refugees and asylum-seekers in India. Addressing this issue, in a context where almost 40 per cent of the population is below the poverty line, remains a major challenge. Moreover, there is limited knowledge of refugee issues, and while the protection of environment remains generally favourable, it is affected by xenophobia in some quarters of the local population against refugees and asylum-seekers. Despite increased prevention and response efforts, women remained vulnerable to sexual and gender-based violence. Improving their livelihoods remains one of the key challenges for refugees and asylum-seekers living in India. UNHCR's efforts are geared towards assisting refugees and asylum-seekers develop coping mechanisms and to become self-reliant. However, due to financial constraints, UNHCR was able to assist only half of the targeted persons with specific needs and had to restrict its income-generating activities to a very small group of refugees (UNHCR Global report update 2011: 20).

Conclusion

Indian law does not define the term 'refugee' but interestingly, the World Refugee Survey 2009, conducted by the U.S. Committee for Refugees and Immigrants, revealed that there are nearly 411,000 refugees in India. Most of these refugees fled from their own countries due to the fear of persecution. The largest number of asylum seekers in India, are from Tibet. They constitute over 100, 000 of total number of refugees in India. The second largest group comprises of Sri Lankan Tamils. Further, there are refugees from Myanmar, China, Bhutan, Nepal, Afghanistan, Iran, Iraq and Bangladesh.

It can be easily seen that India notwithstanding its own security concerns, particularly in the last couple of decades, and pressure of population and the attendant economic factors, continues to take a humanitarian view of the problem of refugees. Even though the country has not enacted a special law to govern 'refugees', it has not proved to be a serious handicap in coping satisfactorily with the enormous refugee problems besetting the country. The spirit and contents of the UN and International Conventions on the subject have been, by and large, honored through executive as well as judicial intervention. By this means, the country has evolved a practical balance between human and humanitarian obligations on the one hand and security and national interest on the

other. It is in balancing these interests, which may sometimes appear to be competing with each other, that the security and law enforcement agencies face day-to-day challenges. If and when a separate 'Refugee Law' for the country is enacted, it is important that this aspect is given due consideration. It is important that security and enforcement officials do not overlook both the legal as well as the underlying human angles inherent in the 'refugee' situation, especially the latter (Ananthachari, 2001). Though two proposed bills were drafted in 1997 and 2006, respectively, the government of India rejected the Bills on the ground of security threats such as external militancy. In the coming years, more attention shall draw the country's legislators to the growing number of problems faced by refugees in India and surely, there is every possibility that a beneficial legislation will be passed that defines the scope of their rights and ensures the country's safety and sovereignty from external and internal threats.

However, Indian laws for refugees are actually nonexistent. As mentioned earlier, the term 'refugee' is not even defined under any Indian law. Till date, India has not yet signed the Refugee Convention. There is considerable dispute about the legal status of refugees in India and they are treated like foreigners with no legal rights. Although the U.N. Refugee Agency (UNHCR), an international body which supports the refugees, is an active agency, its role in India is highly restricted.

The absence of a national law on the status of refugees has also meant that refugees are dependent on the benevolence of the state rather than on a rights regime to reconstruct their lives with dignity. Thus, the refugees are left to the mercy of the state and have no recourse against systemic violations of its legal obligations by the state. Therefore, a just, fair and humane response to the question of refugees in India, in conformity with India's international and constitutional obligations requires, as an immediate imperative and adoption of a definite statutory regime that will clearly define refugees as a distinct class of persons which will spell out a fair procedure for determination of the status of refugees and outline a due process for refugee protection in consonance with the right to non-refoulement and the right to a dignified life.

CHAPTER IV

REFUGEE PROTECTION IN BANGLADESH

Introduction

Bangladesh is a refugee prone country. It is a refugee producing as well as refugee hosting nation. It has been hosting refugees for a long time, however it is not a party to the UN Convention Relating to the Status of Refugees 1951 or its Protocol of 1967 but it is a member to the Executive Committee of UNHCR- Ex Com. There is also no domestic legal framework to deal with the issue of asylum and refugees. Although there are few provisions in the Constitution, which could be translated for the protection of refugees but there is a lack of common understanding on those. Here Refugees are subjected to same laws as of foreigners. These hardly considered protection need of an individual, especially in case of women and children fails, due to lack of any explicit legal regime. Asylum seekers and refugees are dealt under *ad hoc* administrative arrangements, which by their very nature could be arbitrary and discriminatory, and do not accord any right to the refugees.

Bangladesh is not well placed to cope with this protracted refugee situation. The country is confronted with extreme poverty and high rates of population growth, and is increasingly affected by natural disasters and climate change. The refugees are to be found primarily in remote and impoverished areas of Bangladesh which have not benefited from the modest economic growth that has recently taken place in some other parts of the country. It may not party of the Refugee Convention and Protocol, but as a member of United Nations it has responsibility to protect the general norms of human rights for asylum seekers. Their bad situation draws attention in world media. Still, Bangladesh government is reluctant to take any effective measure to protect this displaced people. It is not justifiable that in the name of pull factors, socio-political and security concern, a country of asylum is not accountable to maintain the human rights standard for the displaced people.

In case of Bangladesh, those who use to make decisions to declare a group as refugees during an influx and to do other activities are not guided by any proper mechanism of determination procedure. Sometimes it led to administrative arbitrariness and lack of consistencies in actions. For example, about 26,000 refugees, the remaining caseloads of the 1991- 92 influxes that were registered then by the government and are living inside the camps are considered as refugees. However, an estimated 100,000 to 300,000 Myanmar nationals (i.e. Rohingyas and might be for the same reason of persecution) who are reportedly not registered and living outside the camps have been here without any status. They are considered as 'illegal foreigners' and/or 'economic migrants.'

In the absence of a legislative framework on asylum, asylum seekers and refugees who are intercepted while attempting to enter Bangladesh without authorization are treated as illegal entrants and face a risk of being detained. The GoB does not engage in systematic refoulement, however there is no specialized government body with the responsibility of determining refugee claims or making formal referrals to UNHCR.

The difficulty lies in ensuring compliance and sustainability in the standards of protection when there is no law regulating refugee status itself. The situation of the refugees demonstrates the challenges in providing protection in an ad hoc, arbitrary and discretionary system (Phirin.d.: 1). The refugees are still denied freedom of movement, the right to work and the right to education – and thus are denied the chance of self-reliance and self-determination. Refugees are forced to engage in clandestine activity, working illegally in low wages. They have been denied the opportunity to develop, to learn and to better themselves, restricted until recently to informal education classes taught by refugee volunteers with limited courses and grades.

Bangladesh and the International Refugee Regime

Bangladesh achieved its independence more than two decades after the other states of the Indian Subcontinent got their Independence. Born out of a civil war, Bangladesh was essentially created in and out of a refugee crisis. Indeed, the UNHCR representative in Dhaka, John Kelley, was a major player in negotiating the parameters of the surrender of West Pakistani troops to the Indian army in December 1971. Following the liberation of

Bangladesh, the first task of the newly independent state was to recognize the repatriation of upwards of 10 million refugees sheltering in the neighboring Indian state of West Bengal. Bangladesh was assisted by UNHCR, and the repatriation operation was essentially completed within a matter of months. In January 1972 UNHCR launched an international appeal for the repatriation process, and later transferred over \$6 million to the Bangladesh government to finance relief and rehabilitation projects for returnees.

However, a more protracted situation resulted from the above mentioned tripartite of refugee and prisoners of war between India, Pakistan and Bangladesh. This operation continued the presence of UNHCR in Dhaka to oversee the airlift, in partnership with the international Committee of the Red Cross.

As with the rest of South Asia, UNHCR continued to press Bangladesh to accede to the 1951 Convention. Following the repatriation of thousands of Burmese Rohingyas refugees to Burma from Bangladesh in 1979, there was renewed correspondence between UNHCR and Dhaka on the question of accession. Indeed, in 1982 the chief of UNHCR's General Legal Section wrote in a memo that 'it is very encouraging to know that the matter of accession by Bangladesh has been cleared by the competent authorities. We hope that Bangladesh will soon become a party to these instruments.'¹² In the 1990s, again, the question of accession was raised, and even approved by the Foreign Ministry. However, Bangladesh's position, in the words of one UNHCR official, continues to be: 'Neither India or Pakistan are acceding, and since these big powers are not doing it, Bangladesh, which came very close to acceding, is now saying, "if they have not done it, then should we"?'¹³ In addition, as the poorest of the four states of the sub-continent, Bangladesh has historically been apprehensive of the potential impact on its sovereignty of a permanent UNHCR presence on its territory.

¹²UNHCR archives, Memo to UNHCR Legal Advisor in Asia from chief, General Legal section, 5 May 1982, Fonds 11 Series 1.671.1 BGD in Oberoi, Pia (2006), *Exile and Belonging: Refugees and State policy in South Asia*, New Delhi: Oxford University Press, p.41

¹³Interview with Shamsul Bari. Former chief mission, UNHCR, New Delhi and head of CASWANAME, Dhaka, 4 November 1999 in Oberoi, Pia (2006), *Exile and Belonging: Refugees and State policy in South Asia*, New Delhi: Oxford University Press, p.41

Nevertheless, a UNHCR mission was established in Dhaka in May 1988 in response to the influx into Bangladesh of Rohingyas refugees fleeing persecution in Myanmar. Four years later, the refugee agency was finally allowed to become involved in the relief and repatriation operations for Rohingyas Muslim refugees in the Chittagong province itself. This involvement, however, was only sanctioned by the Government of Bangladesh following intensive negotiations with senior UNHCR officials. The Minister for Foreign Affairs, Abdus Samad Azad declared, on the relationship between Bangladesh and international refugee regime that ‘we do attach importance to [the 1951 Convention and the 1967 Protocol] and strive to ensure that our activities and attitudes confirm their provisions. In particular, we respect the core aspect of the High Commissioner’s mandate, namely asylum and the principle of non-refoulement.’(Samad 1997: 21). In October 1995, Bangladesh took part in its first session of the Executive Committee as a full member of that body, noting that it had ‘direct experience and first-hand knowledge of the refugee problem in all aspects’.¹⁴ In addition, the former head of government, Habibur Rahman has asserted that ‘in order to familiarize government functionaries and the public with international standards governing refugees’, the texts of the 1951 Convention and 1967 Protocol have been translated into Bangla (Rahman 1997: 21-22).

Reasons for not ratifying the 1951 Convention

There seems to be no official document to indicate or explain the reasons for not ratifying the Refugee Convention or the Protocol. However, various writers have indicated the reasons for this behavior based on their knowledge and expertise in this region. Many other opinions have been expressed by the officials in the respective ministry on this issue and as such cannot be quoted with authority. This has allowed the critics the freedom to infer the reasons for not signing these two international instruments, based on their own understanding and circumstances. Apart from the sources that can be quoted authoritatively, the rest of the reasons are at best only inferences that can be drawn from the past behaviors and practices. Some of the reasons would include the following.

¹⁴UNHCR, executive Committee, 46th Session, 500th meeting, Summary Records, 16 October 1995, para 83 in Oberoi, Pia (2006), *Exile and Belonging: Refugees and State policy in South Asia*, New Delhi: Oxford University Press, p.41

- i. Like both India and Pakistan, Bangladesh have been advancing the argument that the refugee definition is very narrow as well as Euro-centric and that it would not serve the objectives in the South Asian context.
- ii. Bangladesh prefers on a 'bilateral approach' rather than 'multilateral approach' in their policies to resolve their conflicts, including the policies on 'population displacement' and 'refugees'.
- iii. Bangladesh allege that even the states that have ratified the Convention or the Protocol are not following the provisions effectively and as such would not be beneficial to the countries in the South Asian region to ratify them now. These countries also fear that they would be obliged to take additional burdens and responsibilities when these two instruments are ratified.
- iv. According to Bangladesh the Convention and the Protocol have not been addressed the larger issues relating to 'security', 'poverty' and as such the provisions are being invoked by economic migrants, terrorists and other groups of forced migrations.
- v. There is bureaucratic insensitivity coupled with the lack of political will that seems to be the dominating practical reason in the South Asian region. Whenever questions relating to the accession of these two instruments are raised, there is astonishingly a uniform response given that it is not in the priority list of the state.
- vi. Another important argument against the accession to the Refugee Convention and the Protocol is that it would lead to the establishment of a number of administrative and quasi-judicial bodies' for status determination and that involves enormous expenditure from the state exchequer. As a poor country, it cannot afford to spend huge sums of money in the process of status determination as well as other related areas.

Status and Socio-economic condition of Refugees in Bangladesh

Bangladesh hosted an estimated 50,000 ethnic Rohingya and approximately 3,000 ethnic Chin and Arakanese refugees from Myanmar (Burma) in 1999. Some 106 Rohingya refugees were repatriated from Bangladesh to Myanmar. UNHCR also assists a hundred other refugees, including 62 Somalis and 27 Iranians in Bangladesh. Its mandate does not

extend to 238,000 Biharis who live in refugee like circumstances. 40,000 Chakma refugees were repatriated from India to Bangladesh in 1999.

Rohingya Refugees

Legal status

Bangladesh has experienced two influxes of refugees from Myanmar, the first in 1978 and the second in 1991-92. Around 250,000 people were involved both times. Both influxes were followed by large-scale repatriation exercises whose voluntariness was seriously questioned. Some of those who were repatriated subsequently fled again to Bangladesh, but, many were unable to recover their former Government acknowledged refugee status.

Bangladesh is currently host to some 29,000 recognized refugees who are accommodated in camps and an estimated 36,000 unrecognized refugees who have congregated in makeshift sites to which UNHCR and other international and national humanitarian actors have limited access. In addition, there are at least 200,000 undocumented Rohingya living in host communities and who are also considered to be of concern to UNHCR.

Socio Economic conditions

Initially, the Government of Bangladesh (GoB) welcomed the Rohingyas and made substantial efforts to accommodate them. But the GoB had clearly maintained from the beginning that asylum for the refugees was temporary and encouraged their immediate return.

Of the original 20 refugee camps that were constructed in 1992 in south-western Bangladesh, only two remain: Nayapara camp near Teknaf and Kutupalong camp near Ukhia, giving shelter to 21,621 refugees. Kutupalong camp officially houses 8,216 refugees, and Nayapara 13,405, as of December 2001 (UNHCR figures). The size of the population in relation to the size of the actual living space accounts for many concerns, including health conditions, water and sanitation, and housing.

For 10 years running, the majority of the Rohingya refugees have been malnourished. In a closed-camp setting, the refugees still do not have enough food. Today, 58 percent of the refugee children and 53 percent of the adults are chronically malnourished (ODRAFT report, 2001).

According to the UN Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, the Muslim communities in Northern Rakhine State, known as the Rohingya, are faced with systematic and endemic discrimination.¹⁵ This discrimination, which is framed as an immigration problem, leads to basic and fundamental human rights being denied to this population. Measures taken against this population include the restriction of movement, limitations on permission to marry, and forced labor.¹⁶ The Special Rapporteur notes that it is important to understand that discrimination against the Rohingya leads to increased forced labor, exacerbated by their location along the border where there is a strong military presence including NaSaKa, the Myanmar border security force. Discrimination also leads to forced deportation and restriction of movement owing to the enduring condition of statelessness which is the result of the Rohingya's historic difficulty in obtaining citizenship, particularly following the enactment of the 1982 Citizenship Act. Acts of land confiscation, forced relocation and eviction through violent means are also widespread and systematic.¹⁷

Bihari Refugees

Legal Status

In Bangladesh, the Biharis have encountered problems acquiring citizenship, as Bangladeshi citizenship provisions dating from 1972 deny citizenship to someone who 'owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state' (Bose, Manchanda: 1997). Although many Biharis have in practice been accepted in

¹⁵The report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, A/65/368, 15 September 2010, page 17-18 in Danish Immigration Service (2011), Rohingya refugees in Bangladesh and Thailand, *Fact finding mission to Bangladesh and Thailand 4 to 17 February 2011*, Copenhagen, p.10

¹⁶ibid

¹⁷ibid

Bangladesh, in 1999 over 200,000 Biharis were still living in 66 camps with poor facilities scattered around Bangladesh. Their unclear citizenship status has created innumerable problems for them. Since neither country is prepared to accept full responsibility for them, the Biharis are potentially stateless. After so many years of a refugee-like existence, there are now indications that some Biharis would prefer to obtain Bangladeshi nationality (Abrar2010: 13).

Socio-Economic conditions

During the period of united Pakistan (1947–1971), the Urdu-speaking Biharis were not assimilated into the society of East Pakistan and remained a distinct cultural-linguistic group. Due to being a different linguistic group they were assaulted by Bengalis and the Indian Army in the 1971 war. Many atrocities took place against Biharis and even after the war they are still living in the same conditions. At the end of the war many Biharis took shelter in refugee camps in different cities, the biggest being the Geneva Camp in Dhaka. It is estimated that about 250,000 Biharis are living in those camps today, with problems like continuous atrocities by the local Bengali population, rape on young girls, malnutrition and poor hygiene and living conditions.

Bangladesh was hostile to Biharis because of their alleged political opinions and cultural, linguistic and ethnic affiliation with Pakistan. Viewed as patriotic Pakistan nationals by Bangladeshis, the Biharis were victims of persecution in Bangladesh and were not allowed to return to Pakistan, their country of habitual residence. Therefore it is argued that the Biharis qualify as both refugees under the 1951 Convention and *de facto* stateless refugee as they are ‘unable.... to return their state of former residence’ as a result of their denationalization by Pakistan.¹⁸

For almost 40 years, the camp residents were stateless, non-citizens of Bangladesh or Pakistan. They were denied access to government services, including education, formal employment, property ownership, and driver’s licenses. In 2008, a Supreme Court

¹⁸It has been argued that persecution for reason of nationality is also understood to include persecution because of lack of nationality, resulting in Statelessness. See Grahl-Madsen *Status of Refugee*, 219 in Sen, Sumit, *Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia-part 1*, *International Journal of Refugee law* Vol.11 No.4, Oxford University Press, 1999, p.21

decision recognized their nationality rights. A large percentage of the adults were registered to vote in the 2009 election. After decades of isolation and discrimination, the group's is 94% illiterate, almost double the national rate. Despite being registered as voters and recognized as citizens, many Urdu speakers still are unable to obtain government jobs, access credit, get passports or obtain compensation for their property confiscated during the war.

The International Commitments

Bangladesh is party to the International Covenant of Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (with declarations on arts. 1, 2 & 3), the Convention on the Rights of the Child (CRC) with reservations to arts. 14(1) & 21, the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) - with reservations to Articles 2 & 13 (a). It has also signed the Convention on the Political Rights of Women and the Optional Protocol to the Convention on Elimination of Discrimination against Women. It is an active participant of the Asian-African Legal Consultative Committee (AALCC), the Asia-Pacific Consultations (APC) and the UNHCR Executive Committee Meetings (Ex Com) (UNHCR report 2007: 13).

The principle of non-refoulement is incorporated in the Asian-African Legal Consultative Committee's Bangkok principles concerning Treatment of refugees (1966). These principles forbid rejection of refugees at the frontiers. The Declaration and Programme of action of 1993 Vienna World conference on Human Rights reaffirmed the right of every person to seek and enjoy asylum (Abrar, Malik 2003: 46). One may also note that article 14 (1) of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution". At this stage it would be worthwhile to remember that one of the directive principles of state policy of Bangladesh is respect for international law and the principles enunciated in the UN charter.

UNHCR is the principal partner of the Government for providing protection, including assistance, to the camp based refugees. This relationship is formalized in a Memorandum

of Understanding (MoU) between the two parties. A number of specialized agencies work within this framework, including World Food Programme (WFP) in, pursuant to a MoU with UNHCR is responsible for food security and related assistance. WFP works with the International Federation of Red Cross and Red Crescent Societies (IFRC) and the Bangladesh Red Crescent Society (BDRCS). BDRCS provides services for lifting, transport, and storage, and handling, distribution of food and non-food items (UNHCR report 2007: 14).

Technical Assistance Incorporated (TAI) provides a number of services related to health and community development including: food distribution monitoring; sanitation maintenance and emergency water; community centres and activities; informal education and the implementation of gardening, poultry raising and tree plantation projects (UNHCR report 2007: 14). Bangladesh Legal Aid and Services Trust (BLAST) provide legal assistance to Rohingya and UNHCR Mandate 'urban' refugees.

The GoB has agreed to invite other UN Agencies and Non-Governmental Organizations (NGOs) into the programme although the formal invitations and subsequent bilateral agreements are still pending. At present, and as of 2007, the international NGO Médecins sans Frontières Holland (MSF-H) has been working within refugee camps to provide in-patient health care. United Nations Population Fund (UNFPA) has also, through UNHCR, been involved with regards to reproductive health.

Legal Framework for Refugee Protection

Like all other nations Bangladesh is legally obligated to respect and safeguard the fundamental human rights of persons within their borders, regardless of whether they are citizens or refugees. Bangladesh has no specific laws for the protection of refugees. The Foreigners Act of 1946, a colonial law left by the British, is still enforced. Bilateral agreements, ad hoc arrangements negotiated with UNHCR and the discretion of Bangladeshi authorities are the main determinants in decision making in dealing with refugees and those in refugee like situations in Bangladesh.

All these are not adequate to deal with the refugee issue. The constitution of the country has guaranteed the human rights of both the people of Bangladesh and refugees and their

access to justice (Haquen.d.: 5). For instance, Article 31 of the Bangladesh Constitution ensures the right to protection of law, right to life and personal liberty, safeguard from arrest and detention, prohibition of forced labor and protection in respect of trial and punishment. All of these are equally applicable for people living inside the country (Das, draft report). Moreover, Bangladesh is also neglecting their own Constitution of 1972's spirit which obliges the government to support people suffering from racism as well as to protect person's life or liberty.

The responsibility to register refugees lies with the Government of Bangladesh. A serious gap in protection is the situation of some 5,000 refugees who reside legitimately inside the refugee camps without recognition by the GoB. The GoB recognizes some 21,255 refugees on the basis of its 1992 registration whereas a recent profiling exercise conducted by UNHCR shows 26,317 legitimately residing within the camps. A high proportion of the vulnerable 'unregistered' group is made up of children. The GoB does not engage in systematic refoulement and refugees who are detained are often released upon some form of informal payment to border guards. There is regular cross border movement of seasonal workers and day laborers which helps to explain why refugees who are among such movements are able to enter the country relatively unnoticed.

Administratively, the Ministry of Food and Disaster Management (MFDM) is responsible for refugee related issues and coordinating activities in relation to camp based refugees. It in turn has designated responsibility for a range of camp administrative matters (management, delivery of assistance, health care, water and sanitation and camp maintenance) to the Office of the Refugee Relief and Repatriation Commissioner (RRRC).

Other general provisions of Bangladesh law apply to refugees in principle, although they are not necessarily observed in practice. Several articles in the Constitution, for example, arguably have a bearing on refugee affairs including: The obligation to 'support oppressed people throughout the world waging a just struggle against imperialism, colonialism and racism' (art. 24(1) (c)); the obligation to 'base its international relations on the principles and respect for international law and the principles enunciated in the UN Charter' (art. 25); the obligation to protect every citizen and 'every other person within

Bangladesh for the time being' (art. 31); the obligation that 'no person shall be deprived of life and liberty save in accordance with the law' (art. 32).

In addition, article 28 and 29 of the Constitution, the Prevention of Violence against Women and Children Act (last amendment 2003), Dowry Prohibition Act 1980, Cruelty to Women (Deterrent Punishment) Ordinance 1983, and some sections of the Penal Code provide procedures for the protection from violence against women. Domestic violence, however, is not a criminal offence in Bangladesh.

Bangladesh is constitutionally bound to frame law for the non-citizens. The Bangladesh Constitution under articles 31, 32, 33 34 and 44 has given a large number of justifiable human rights to non-citizens. Reference may be made to Article 31 which says that apart from citizens every other person for time being within Bangladesh has "the right to enjoy the protection of the law and to be treated in accordance with law, and only in accordance with law, in particular no action harmful to the life, liberty, reputation or property of any person shall be taken except in accordance with law"(Abrar, Malik 2003: 47). As justice Muhammad Habibur Rahman pointed out "we must not lose sight of the fact that we do not have any legal framework for refugee protection." In Rohingya refugee camps, the refugees are not allowed to move outside the camps. This is an action detrimental to the liberty of some person who are for the time being in Bangladesh.

In fact, there is no procedure in place and the GOB has never conducted any refugee status determination (RSD). No national asylum procedure means that, asylum-seekers do not have a scope to approach the GOB for protection related issues (Das, n.d.).In the legal context, the Constitution of the People's Republic of Bangladesh guarantees certain fundamental rights to citizens, as well as to non-citizens, like for eg. the right to life and personal liberty, etc. In Bangladesh, the major laws relevant to refugees are: Foreigners Act, 1946; Registration of Foreigners Act, 1939; Passport Act, 1920; and the Extradition Act, 1974.

As a result of the broad application of domestic legislation controlling the entry and stay of foreigners, many bona fide asylum seekers and refugees may run afoul of the law and be charged with any number of offences. The refugees in Bangladesh do not have the

right to acquire, hold, transfer or otherwise dispose of property. However, children who are for the time being on the territory of Bangladesh, shall have the right to education.

The absence of a national refugee and asylum legal and administrative framework leaves refugees and asylum seekers in a precarious situation in Bangladesh, exposed to serious protection risks and with limited opportunities for a durable solution to their plight.

Bangladesh's practice regarding Refugee Protection

There is no legislative framework in Bangladesh for the grant of temporary protection in the event of mass influx, or for the grant of complementary forms of international protection to those who do not meet the refugee definition. The GoB did not specifically consider the provision of temporary protection when recognizing Rohingya on a prima facie group basis, although they were recognised originally on a 'temporary' basis. UNHCR, operating under its mandate, takes a holistic and inclusive approach to the recognition of refugees.

The restrictions imposed on camp based refugees, and the non-recognition of those living outside the camps, is justified by the GoB on account of the severe social and economic challenges it faces in caring for its own citizens. Bangladesh is a developing country of over 147 million residents. Its large population is confined within a relatively small land mass, rendering Bangladesh the 7th most densely populated country in the world. Among the many development challenges it confronts are acute poverty, high levels of illiteracy, and insufficient health care and other basic services for its citizens. Bangladesh, therefore, is reluctant to extend its protection to non-citizens or to create conditions that might attract further asylum seekers onto its territory.

Nationality issues in Bangladesh are dealt with through the *jus soli* provisions of the 1951 Citizenship Act, according to which every person born in Bangladesh acquires citizenship automatically at birth (Kiragu 2011: 12). The Act also recognizes citizenship by descent and, as a result of amendments adopted in 2009, guarantees equal rights for male and female citizens to transmit their nationality to children. Bangladeshi law does not, however, allow dual citizenship.

There is no domestic law in Bangladesh to regulate the administration of refugee affairs or to guarantee refugee rights. UNHCR's legal status in the country is based solely on a Memorandum of Understanding that was concluded in 1993 and which was originally intended to remain valid for a year, with a second year's extension if required. Strongly focused on repatriation, it requires registered refugees to remain in camps and to refrain from engaging in economic activities.

UNHCR operations in Bangladesh are coordinated with the Refugee, Relief and Repatriation Commission (RRRC) which is located in the Ministry of Food and Disaster Management (MFDM) but out posted to Cox's Bazar. The MFDM has been the largest recipient of financial support from UNHCR, with allocations reaching 20 per cent of UNHCR's operational budget in 2011. UNHCR pays mission allowances to MFDM personnel seconded to the RRRC office in Cox's Bazar as well as the salaries of some 130 RRRC personnel hired locally in the Cox's Bazar area (Kiragu 2011: 13).

Two other ministries play pivotal roles in relation to refugees. Lately, the Ministry of Foreign Affairs has come to play an increasingly assertive role in all aspects of refugee policy. The Ministry of Finance's Economic Relations Division also has an influential coordination role, and no refugee-related project, however modest, can proceed without its authorization. Health-related matters are coordinated closely with the Ministry of Health through staff supported by UNHCR under the MFDM project.

Since it gained independence in 1971, Bangladeshi politics has been dominated by coalitions oscillating between two parties, the Awami League and the Bangladesh National Party (BNP), punctuated by periods of military-led caretaker governments. Both the Awami League and BNP have consistently opposed the local integration of refugees and pressed for their repatriation or resettlement (Kiragu 2011: 13).

In refugee areas socio-economic indicators of local residents are well-below the national averages and only marginally better than refugees. These factors led five UN agencies to develop the Joint Initiative for Cox's Bazar, a two-year, \$33 million development plan to strengthen education, health, livelihood and governance programs, but it failed to gain the Government's approval (Refugee International, 2011). Government officials said that the

improving conditions in Bangladesh would create pull factors for Rohingyas in Myanmar, and instead, the program should be implemented in other poor districts.

While the rejection of the Joint Initiative is deeply disappointing for both aid agencies and local Bangladeshis, Government rapidly denied the permits for aid agencies to assist undocumented refugees and host communities. Shelters are falling apart and are unlikely to resist this ongoing monsoon. In addition, government officials abruptly halted refugee resettlement in the official camps, and have closed all income-generating activities, including small shops and tailoring, stating that skills were provided to only help refugees upon their return to Burma (Refugee International, 2011). Rights groups urge the Government of Bangladesh to ensure national programs to operate on a non-discriminatory basis and allow joint projects for both undocumented refugees and host communities. Such joint programs were promoted in the past year on a small-scale and have reduced tensions between local residence and refugees.

The GoB does not issue refugees and asylum seekers with individual identity documents. Temporary documents issued by GoB are insufficient to protect against abuse. In refugee camps there is an urgent need to replace 'family books' with individual documentation in order to guarantee effective access to rights and entitlements, particularly for refugee women and children. Agreement has been reached between the GoB and UNHCR to abolish the family book system in favour of ration cards which will be made available to female and male heads of household and is awaiting implementation.

The GoB stopped registering refugees in 1992. Thereafter it has not permitted its officials or UNHCR to conduct new registration with the result that Rohingya who arrived after 1992 have not been able to register as refugees. In the absence of formal recognition by the Government, some 5,000 camp-based refugees are unable to effectively access their rights. Food security is a particular problem, as recognized refugees must share their rations with their unrecognized kin who do not have access to food distribution.

UNHCR Representative to Bangladesh Christopher Beng Cha Lee criticized the government for not signing the 1951 UN Convention on the status of refugees to protect basic human rights of the refugees in the country. "The government does not allow us to

make arrangements for minimum standard houses for Rohingya refugees, education of their children, plantation in their camps and teaching them Bangla language that they speak," he said at a workshop on 'Refugees' Rights and Role of Media' in the city.

Politicians don't have time to listen to us, it is a shame for the country," he added. Bangladesh government should understand the UNHCR is also working to change the situation in Myanmar and that Rohingyas will not be here permanently. So it should not take the issue politically, Lee insisted at the inaugural session, in his welcome speech and urged all to be aware of the refugee issue (Shahid, 2005).

Role of Judiciary

In Bangladesh, justice, judiciary and the rule of law are bound together as an integrated whole. Similar to other common law countries with written Constitution, neither the legislature nor the judiciary is supreme and the court acts as the final interpreter of law (Razzaquen.n.d.: 1). The functions of the judiciary are to enhance the rule of law, to promote the fundamental rights and to administer the law impartially between citizen and state as well as between citizen and citizen.

But there are no such laws mentioned in the fundamentals rights in the constitution for particularly refugees and the condition of judiciary is not satisfactory. After all, government must be committed to ensure the security of life and property of the people, protection of individual rights and the dissention of justice on the basis of the equality and fairness.

Advocate Naim Ahmed of the Supreme Court said though Bangladesh did not sign the UN Convention on refugees, it could not stop Rohingya migration to it. "Unidentified Rohingyas coming in large number to the country are likely to cause more social or economic problems, by spreading out across the country," he said. If Bangladesh signs the convention, there will be a legal framework to identify if they are 'economic migrants, criminals or refugees'. The international community will also come forward to help solve the problems, he pointed out. Bangladesh might face pressure from stronger neighbors in the absence of any legal framework on refugee issues, he thought. The protracted nature of the refugee problem in Bangladesh however, illustrates that restrictions alone will not

prompt return since Rohingya continue to experience serious risks to their safety and fundamental rights in Myanmar.

So the judiciary should start taking action in the matter of refugee issues and play a major role in providing protection to them.

National Human Rights Commissions

In dealing with the refugee problem, the human rights commissions have a vital role to play. Because in this present world, with the change of time the prudence of human rights is expanded to a large extent being the major concern of modern age. The National Human Rights Commission of Bangladesh was reconstituted in 2009 as a national advocacy institution for human rights promotion and protection. It is committed to the accomplishment of human rights in a broader sense, including dignity, worth and freedom of every human being, as enshrined in the Constitution of the People's Republic of Bangladesh and different international human rights conventions and treaties to which Bangladesh is a signatory.

The purpose of establishing such splendid institution is to contribute to the embodiment of human dignity and integrity as well as to the safeguard of the basic order of democracy so that inalienable fundamental human rights of all individuals are protected and the standards of human rights are improved in the country (NHRC Bangladesh).

Established by the National Human Rights Commission Act, 2009 in consonance with Bangladesh's commitment to international human rights law, the Commission serves as a mechanism for the enrichment of the realization of human rights. Its journey is aimed at creating a culture of human rights through public enlightenment on diverse human rights issues so that the people of the country can contribute to larger peace and security keeping in pace with the 'progressive aspirations of human kind.

It envisages that Bangladesh shall be a democracy where fundamental human rights and worth of human persons of all would be ensured. In line with these objectives, the National Human Rights Commission Act in its preamble [read with section 2(f)] has reflected that the National Human Rights Commission is being established in order to

protect, promote and foster human rights as envisaged in the Bangladesh constitution and international instruments.

Though there are no special provisions for the refugee in Bangladesh, but the other provisions related to the human rights can be applicable for the refugees because the government is obliged to do so. The expansion of human rights arena also includes the protection of refugee rights which is sounding globally in this contemporary world. But the unfortunate thing is that the basic human rights of refugees are largely ignored especially right to life, movement, right to work, right to protection of law or access to court is denied to the refugees etc. Keeping this scenario in mind, Empowerment through Law of the common people (ELCOP) is working laboriously since its journey to create awareness as well as to ensure basic human rights for the most vulnerable segment of human kind (Sarwar, 2011). It is a well-known fact that Human rights implantation in the administrative mindset has attained a place of prominence nowadays. Absence of human rights oriented administration system creates hindrance to attain the excellence of governance system. To come out from this scenario, the orientation of human rights particularly refugee rights among the member of law enforcing agencies can play a significant role. With a view to contribute in this context, ELCOP is working through the exploitation of its expertise to promote, protect, and defend the rights of the refugees by conducting training on refugee law.

A Round table conference on 'Refugees in Bangladesh: A way forward' was held on 16 July 2011, at CIRDAP auditorium. The conference was organized by the National Human Rights Commission (NHRC), Bangladesh in collaboration with the United Nations High Commission for Refugees (UNHCR). Mr. Kazi Reazul Hoque, the Full Time Member of NHRC, in his welcome speech figured out the sympathy of Bangladesh for the refugees with an imminent need of addressing the prevailing problems. The Hon'ble Secretary, Ministry of Foreign Affairs, Mr. Mijaru IQuayes delivered his speech at the beginning of the Conference. He stressed on the compliance of international laws on the part of Bangladesh Government on refugee issue in spite of being non signatory to International Refugee Convention and the Protocol. He also stressed on negotiation to solve this problem.

UNHCR and refugee protection in Bangladesh

The relationship between UNHCR and Bangladesh dates back to the 1971 war of liberation, well before the first major influx of Rohingya refugees. At that time, an estimated ten million people – one in seven of the population – fled to India. UNHCR provided the displaced Bangladeshis with food and other assistance and subsequently supported the massive post-war repatriation. UNHCR subsequently re-established its presence in Bangladesh in 1978, to deal with the first Rohingya influx, but closed its operations again in 1980. A further re-opening of the UNHCR office took place in 1991, in response to the second Rohingya influx.

UNHCR works closely with the Government of Bangladesh, especially with the Ministry for Food and Disaster Management. The Office provides support to the UN Development Assistance Framework in Bangladesh to combat poverty in the refugee-hosting districts. Measures to encourage more national NGOs to work in these areas are also important elements of UNHCR's operations. UNHCR also cooperates with other UN agencies, including WFP, UNICEF and UNFPA, as well as IOM. Finally, it engages international and national NGOs and civil society to promote refugee protection and the coexistence of refugees and host communities.

In the absence of local integration and other durable solutions for the Rohingya, UNHCR suggested that residents of the camps should at least be assisted to become economically self-reliant. The agency also explored the possibility of applying the cessation clause to Rohingya refugees in Bangladesh, a step that was ruled out by the significant number of those who had returned to NRS but who had subsequently re-crossed the border into Bangladesh because of adverse conditions in their country of origin (Kiragu 2011: 14). On the basis of improved relations with the government, UNHCR was allowed to promote self-reliance in the camps, to rehabilitate shelters and latrines, to initiate refugee education and resettlement programmes and to advocate on behalf of unregistered Rohingya. At the same time, the organization started discussions with other UN agencies in relation to the formulation of a UN Joint Initiative (UNJI) that would provide services to both unregistered refugees and host communities.

More than 90 per cent of UNHCR's Bangladesh budget is allocated to the Myanmar refugee programme. In 2006 and 2007, health and nutrition required the largest proportion of resources. In 2008, 2009 and 2011, the replacement of old shelters and rehabilitation of basic camp infrastructure were priorities. Since 2006, UNHCR has invested in procuring basic household items for refugees, while the refugees themselves have been engaged in producing soap, clothing and household items to aid their self-reliance. UNHCR has also channeled funding over the years to a supplementary feeding programme to address the high levels of malnutrition and anaemia among children and pregnant and lactating women in the camps.

Main objectives and targets

Favourable protection environment

Access to legal remedies and quality of registration are improved.

- Legal services and clinics are established and maintained.
- Some 5,000 refugees (registered with UNHCR but not with the Government) who are living in camps are duly registered and receive food rations.

Security from violence and exploitation

Community security management structures are strengthened.

- Approximately 75 per cent of conflicts are resolved through community resolution mechanisms.
- The number and severity of incidents related to tensions between refugees and host communities are reduced.

Basic needs and essential services

The provision of quality primary education is ensured.

- Some 90 per cent of school-age children are attending school.
- Primary education is expanded from Grade 5 to Grade 6.

Shelter and infrastructure are improved.

- All families of concern live in adequate dwellings.
- The construction and installation of all water and sanitation facilities is completed.

The health and nutrition of the population is improved or maintained.

- In-patient medical services are moved to sub-district health complexes to benefit refugees and host communities.
- Anaemia among women of reproductive age is reduced to 25 per cent.

Community participation and self-management

Community self-management and the participation of women in the relevant structures are enhanced.

- Some 40 percent of the participants in management structures inside the camps are women.

Livelihood opportunities are improved and the level of self-reliance is raised.

- Some 25 per cent of adult refugees aged 18 to 60 earn an income.

Constraints

The Government of Bangladesh has often raised concerns that the provision of assistance to people of concern from Myanmar could create a "pull factor". Hence it has applied a restrictive policy on assistance, limiting the protection space for the 29,000 registered Myanmar refugees in the two official camps, and allowing little access to the unregistered Myanmar refugees outside the camps.

Continued commitment by all stakeholders to pursuing the road map leading to the self-reliance of refugees in the camps, pending identification of durable solutions, is needed. Also needed is an agreement on the freedom of movement of the refugees, their right to work and access to education and skills training (UNHCR Global Appeal 2008-2009: 230). While the majority of refugees have clearly indicated their strong wish to be able to

lead normal productive lives, some refugees may resent any phasing out of the care and maintenance programme.

UNHCR's strategy in Bangladesh is geared toward ensuring that the Government and host communities remain tolerant of the unregistered population from Myanmar. Refugees face restrictions on their freedom of movement and lack the right to work. This limits efforts aimed at promoting their self-reliance and preparing them for eventual solutions, including voluntary repatriation.

Conclusion

As a country of asylum for the refugees, Bangladesh has not created any policy. Earlier, they looked it in a sympathetic way but from 2009 the situation is going to be worse. Since 2009, the government takes various actions against the refugee presence in Bangladesh. The present government tries to say that, the refugees are decade-long burden and security concern for Bangladesh. This argument and the government way of dealing with the undocumented refugees do not reflect the spirit of international human rights standards. As a result, the present GOB's policy could not justify the basic rights and ensures the human security for the undocumented refugees.

Refugees are not legally entitled to work in Bangladesh. Inability to survive without employment leads many refugees, particularly men, to seek employment illegally. They are exposed to serious risks in doing so including unfair/unsafe work conditions, harassment, exploitation and extortion. On the other hand, in the absence of a legal framework and access to asylum procedure in Bangladesh, newly arrived Rohingyas are forced to stay illegally here and be prone to various vulnerabilities including engagement in illegal activities and even in terrorism. Over the time, the Rohingya refugees have a significant impacts on the economic, social, cultural, environmental, and law and order situations in Bangladesh. At the latest, it has added to the security concern. It is reported that a section of the Rohingyas have link with domestic terrorist groups like JMB and guerilla group operative in Myanmar-India-Bangladesh borders who receive funds from abroad (Bikash, 2008).

The current government's various measures show that they are not willing to protect the Rohingya's basic human rights to safety, food, shelter and health care. Due to lack of legal entity, refugees are not able to access legal justice and basic protection. Local elites know that they can abuse the Rohingya refugees with impunity because the refugees cannot access to justice. Furthermore, they are not allowed to work, nor are they provided with any food or livelihood assistance. As a result, they face severe malnutrition.

Therefore, the Government should be serious on the matter. It is a high time that Government of Bangladesh should adopt a comprehensive policy on Rohingya refugee issues with a view to resolve the problem through bilateral and multi-lateral means. For this, pro-active diplomacy is required. A rights-based approach as to domestic legislation is to give "...weight within a framework that recognizes the distinctive essence of humanitarian problems and gives legal recognition to the fact that every person, alien or national, is of equal moral worth, and worthy of treatment that does not violate his/ her dignity," as Dr. B. S. Chimni rightly points out.

CHAPTER V

CONCLUSION

People usually become refugee because their human rights are at grave risk. They cut the link with their own state, and seek the protection of another state, because their own government is persecuting them or cannot be relied on to protect them. When refugees seek the protection of another state, they rarely receive a warm welcome. Many are turned back at the border without a hearing; detained as “illegal immigrants”; subjected to further violence or squalid conditions in refugee camps; unfair asylum procedures; or sent back to the country they fled.

Refugees are entitled to all the rights and fundamental freedoms that are spelled out in International human rights instruments. The protection of the refugee must therefore be seen in the broader context of the protection of human rights. The work of the United Nations in the field of human rights and that of the High Commissioner for Refugees is inextricably linked in the sense that both entities share a common purpose of ‘safeguarding the human dignity’ (Balochn.d: 5). The essence of convergence between human rights, refugee protection and humanitarian action is the respect for human values and for the dignity of the human being. The need for increasing protection of individuals in situations of conflict and internal violence has prompted the Commission on Human Rights to consider fundamental standards of humanity which call for the protection of victims of abuses in all circumstances.

Humanitarian need is not the only characteristic of the refugee. The refugee is also, in a very direct sense, in search of his or her rights: the right to be protected against violations; the right to be recognized. The international refugee regime stands for this: That any individual compelled or constrained to leave his/her country of origin should be ensured protection of his/her human rights. Any State receiving a refugee should be able, if it so needs, to call on the support of other States party to the protection regime; that States, international organizations, non-governmental organizations and all of them will co-operate in finding solutions at both individual and global level (Goodwin-Gill, 2005).

The goal of the regime is to moderate the inherent tensions – States, their interests, and their self-interest – to protect rights and to achieve solutions.

Nearly 60-years after its adoption, the Refugee Convention remain the only international instrument for the protection of refugees. Doubt is increasingly being expressed however as to its adequacy to meet that role. The crux of criticism is that the Convention is outdated and inappropriate to deal with contemporary challenges. The disparity between the costs and abuse of developed asylum systems, and the level of attention paid to refugee situations in poorer countries, has become increasingly apparent (Balochn.d.: 6).

The task of international protection includes the prevention of refoulement, assistance in the processing of asylum seekers, providing legal counsel and aid, promoting arrangements for the physical safety of refugees, promoting and assisting voluntary repatriation and helping refugees to resettle.¹⁹ Thus, the international protection function has a legal basis, and its exercise is mandatory for the High Commissioner. The right to protection, although not defined as a separate right as such, is implicit in the 1951 Convention and its fundamental provisions, particularly the principle of non-refoulement.

Many universally recognized human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-treatment, the right to a nationality, the right to freedom of movement, the right to leave any country, including one's own and to return to one's country, and the right not to be forcibly returned. These rights are affirmed, among other civil, political, economic, social and cultural rights, for all persons, citizens and non-citizens alike in the International Bill of Human Rights.

A central element of international protection is the right not to be forcibly returned or expelled to a situation, which would threaten one's life or freedom. This principle of non-refoulement finds further expression in the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment which stipulates that "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." Furthermore, "the competent authorities shall take into account all relevant

¹⁹Article 8, Statute of the Office of the UNHCR

considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”²⁰

Refugee hood is one form of unprotected statelessness. Under normal conditions, state protection appends to the citizen, following him into foreign jurisdictions. For the refugee, state protection of basic needs is absent, even at home. Alienage should be considered one manifestation of a broader phenomenon: the access of the international community to persons deprived of their basic needs (Shacknove 1985: 11). Thus, what is essential for refugees’ status, distinguishing refugees from all other similarly deprived persons, is either the willingness of the home state to allow them access to international assistance or its inability to prevent such aid from being administered.

The refugee management process in the region is not uniform and there have been shifts in terms of policy framework and strategy to mitigate its adverse impacts on the society, its polity, economy and the environment. Three factors-humanitarian, economic responsibility and national security largely shape state’s attitudes in either accepting or declining the refugees but interestingly all South Asian countries adopt haphazard and ad hoc policies on this complicated issue. The realization that refugees are people, they need family support and reunion and that they too need freedom, seldom dawns in the outlook of the refugee generating countries and the end result is delay and separation, and a useless life in pitiable conditions behind barbed wire.

Neither India nor Bangladesh are willing or able to take action to prevent refugee flows, or to bring protection and assistance to these groups, whose situation was no different and no less terrible than that those who had managed to cross the frontier. In both India and Bangladesh there is lack of some common mechanisms for the proper protection to the refugees. These are such as:

- The proper registration and documentation of refugee are not only important for accessing and monitoring assistance needs. They are also significant protection tools, notably against refoulment and arbitrary detention, facilitating access to

²⁰Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

basic rights and family reunification, enabling identification of those in need of special assistance, and supporting the implementation of appropriate durable solution. The lack of such official documentation for refugees continued to impede access to residence permits, public health care and social assistance and to results in incident of refolement, arrest and discrimination.

- Securing the physical protection of refugees is a central responsibility of States and a major concern of UNHCR. Especially in situation of mass influx, locating refugee camps and settlement at a reasonable distance from the border, maintain law and order and preventing their use for military purposes are important security measures. Furthermore, emergency preparedness measures and negotiation to secure access to border areas are essential initiatives, even before an influx takes place.
- There are no evident, simple or quick solutions to resolve increasing migration pressures and congested asylum systems. Poverty and the effects of globalization are likely to continue to contribute to the acceleration of migratory movements. Repressive regimes, human rights abuses and war are equally likely to continue to force people to flee. And these combined factors mean that people seeking to move from one country or region to another will continue to do so as part of mixed flows.
- Strengthening the capacity of host countries to protect refugees often a largely invisible function, but it is crucial to the establishment of effectively functioning asylum systems, including in particular countries with limited resources.
- Measures to prevent human rights abuses, destabilization and armed conflict which can lead to forced displacement are fundamentally political issues, which require international attention and cooperative resolve.

India and Bangladesh have not ratified the UN Convention on Refugees. Both the states do not have a legal framework for dealing with political asylum seekers, waves of conflict-induced refugees or the migrants, and consequently, they are categorized as “illegal aliens” and dealt it with under the ‘Foreigners Act’. While in many cases these states have adopted flexible and accommodative policies towards refugees, the lack of a

legal regime has meant that they are subject to arbitrary and ad hoc policy responses, and rendered vulnerable to manipulation for reasons of ‘vote politics’. The absence of a legal regime not only harms the rights of refugees and asylum seekers, but also affects the social and political stability of host countries by undermining the rule of law, human rights, and democracy. The recent trend towards securitization of the refugee –migration discourse has increased further their vulnerabilities.

In both the countries of the region, the powers to grant residential permits have been relegated to administrators at district and sub-district levels. They grant and revoke these certificates at their discretion. The refugees have no legal protection against expulsions as they are treated as illegal immigrants and not as refugees fleeing persecution. As a result, the UNHCR has not been able to provide effective and meaningful protection to most of the refugees in the region. Even international humanitarian agencies are often not allowed to assist meaningfully the refugees in most of these countries. The absence of national laws for the protection and the ad hoc manner of the states while dealing with the refugees has created problem for the states as well for the asylum seekers. The states should enact laws concerning the protection of refugees. The international regime for the protection of the refugees is inadequate for South Asia. So the definition of the refugees should be expanded. While creating a law the states must take into account the historical context of South Asia and the limitations of the government. The South Asian states should ratify the 1951 Convention and its protocol, which will create a better image in the international community that would help the state and the NGOs to campaign against the violation of the refugees around the world.

The governments of both countries follow different policies towards the refugees or asylum seekers. 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. It all depends on political motivations and ethnic and religious linkages. An analysis of the treatment of refugees by different states of the region shows how important it is for the states to enact laws. It will benefit both the states and the refugees.

Like all South Asian countries, both Indian and Bangladesh states that the Convention of 1951 was drafted in a different political environment and that there is every need to review the Convention. The speech delivered by Ms. Arundathi Ghosh, India's permanent representative to the U.N. at the EXCOM very clearly indicates the same. Although the states have reposed confidence in the UNHCR, they are hesitant, for one reason or the other, to ratify the Convention or the Protocol relating to the Status of Refugees.

In spite of the initiative taken by the Eminent Persons Group from Bangladesh, India, Nepal, Pakistan and Sri Lanka in developing a draft regional declaration as well as a Model National Law relating to the refugees, still the law is far away. The efforts taken by Asian-African legal Consultative Committee (AALCC), both in the areas of human rights and refugees should also be projected effectively to achieve this end. The South Asian Association for Regional Co-operation could also be the platform to project this view. In getting the regional declaration accepted by all the states.

Initially, in the second half of the 1990's some initiatives at a unofficial level towards developing a regional refugee protection regime in South Asia took place. The constitution of the Eminent Persons Group (EPG) for South Asia by UNHCR in November 1994 was an important step in this direction. At its first meeting, the Group agreed to hold annual regional Consultations to promote public awareness and identify mechanisms and strategies for moving towards accession or, alternatively, formulating a regional instrument adapting the Convention to the needs of the South Asian region (Chowdhury, 2010). The Colombo Consultation of 1995 underscored the need for a South Asian regional legal regime for refugees and a common Declaration reconfirming the validity and relevance of the definitions contained in the international refugee law instruments as well as the 1969 OAU Convention and the 1984 Cartagena Declaration. The principal focus therefore was on the development of a regional normative framework that would address the needs of refugees, stateless persons and Internally Displaced Persons.

Both India and Bangladesh have acceded to the Convention for the Elimination of Discrimination against Women, the Child Rights Convention and the International Convention for elimination of all forms of racial discrimination. Accession to these

conventions obliges states to uphold and protect the rights of women, children and racial and ethnic minorities in refugee situations. So both states should also consider signing the Convention Relating to Status of the Refugees.

For some time now, India's concerns about security have had a more restrictive impact on asylum space in the country. Mixed migration flows have further complicated the identification and protection of refugees and UNHCR has significantly modified and increased its registration activities to cope with this and provide the necessary support to the Government. Indian law and practice provides a distorted and incomplete protection to refugees. Indian law even fails to recognize refugees as a distinct category of persons and treats them at par with all other foreigners. Thus, it fails to appreciate the special circumstances under which a refugee leaves his or her country of origin and the consequent incongruity in applying the requirements of valid travel that the general Foreigners Act regime mandates. The absence of a special law on protection, rights and entitlements of refugees has resulted in the denial of basic protection to the large number of refugees. This denial runs against the spirit of India's human rights commitment under the international law and its own Constitution.

According to Dhavan South Asia requires India to review its ambivalent refugee law policy, evolve a regional approach and enact rules or legislation to protect persecuted refugees. This is one step towards supporting a humanitarian law for those who need it. As a refugee-prone area, South Asia requires India to take the lead to devise a regional policy consistent with the region's needs and the capacity to absorb refugees under conditions of global equity.

As a country of asylum for the refugees, Bangladesh has not created any policy. Earlier, they look it sympathetic way but from 2009 the situation is going to be worse. Since 2009, the government takes various actions against the refugee presence in Bangladesh. The present government tries to say that, the refugees are decade-long burden and security concern for Bangladesh. This argument and the government way of dealing with the refugees do not reflect the spirit of international human rights standards. As a result, the present GoB policy can not justified the basic rights and ensures the human security for the refugees.

The Bangladesh authorities, those are hosting Rohingya refugees for more than decades, have to realize that denying their basic rights does nothing to resolve the problems posed by their presence in the country. Now it is time for the Government of Bangladesh to prioritize and protect the rights of Rohingya refugees in their territory.

In the name of security and economic concerns, the Bangladesh government cannot justify their position on refugees. Their sub-standard life also threat for human security. Because, the concept of human security covers, the security of individuals and groups rather than narrowly focusing on threats to states. This displaced people are vulnerable both host and country of origin due to their identity. The essences of human security perceive that this group of people should be protected from the State. However, the way of dealing with refugee- like situation did not meet the international human rights standards.

International community also highly criticized the present government's inhuman and discriminatory policy on undocumented Rohingya refugees. In addition, current government refused to allow international community assistance for undocumented refugees. According to international human rights standards, this group of people is entitled to get protection from the host country.

UNHCR Bangladesh has made its position very clear that the status quo is simply weak. The provision of external assistance for a period of 16 years without progress to, and attainment of, self-reliance is contrary to the principles of refugee protection, human rights and human dignity. The need to engage in dialogue with the Government of Bangladesh and other stakeholders to discuss durable solutions for the Rohingyas continues. It is too early to predict the outcome of discussions but what is extremely positive at this stage is that both UNHCR and the government agree on the importance of taking a more holistic longer term perspective to resolving the plight of the Rohingya refugees.

A brief observation on refugee situation in these regions reveals that most of the refugee influxes are a result of direct state persecution or the state failing to accord national protection to its people. Refugee observers in the region attribute a myriad of factors as

being the causes of refugee influx. Mahendra P Lama catalogues six different factors as being the root causes of refugee generation, ranging from the fight for political independence, Human Rights violation including social discrimination and de-citizenship, Economic alienation including poverty, forced colonization and landlessness, Religious persecution, cultural discrimination and population transfer, Environmental dislocation by high dam projects, deforestation, desertification and natural disasters, to armed conflicts and violence. So both the countries should try to avoid these situations for the better environment.

While states have the right to control entry and enforce their borders, they are bound by international refugee and human rights legal instruments to do so without infringing the right of persons in need of protection to seek asylum. The restrictive measures that have come to dominate policy-making and recent immigration enforcement initiatives in India and Bangladesh do not sufficiently discriminate between asylum seekers and other kinds of migrants, thereby failing to safeguard the right of refugees to seek protection.

In India and Bangladesh, adopting the model national legislation would be a first step toward a greater capacity to protect refugees. Both have restrictive laws governing the entry and stay of foreigners. Due to this legislation and the extensive discretion afforded to the authorities who implement it, a refugee may feel that s/he leads an uncertain life, unable to work or travel and protected only according to the whims of the government. A national refugee determination system and government-recognized refugee status would carry the attendant privileges of government-issued travel and identity documents as well as greater freedom of movement within and outside the countries. This status, in turn, would afford refugees greater protection from refoulement (involuntary return to their home country) and make their stay in host countries less precarious.

According to Ms Sadako Ogata Refugee protection is not a burden, but a value – a fundamental and universal one – to take pride in. Refugees are not just objects of compassion, but people with courage, energy and productive potential. Solutions to their problems are not impossible, but are within reach. She even said to promote the rule of law and foster international cooperation in the interest of those who need our protection.

Given the post-9/11 scenario, most of the developed countries tighten their borders. By the end of 2004, only two out of top ten receiving countries were developed ones, according to a report of Calcutta Research Group who runs an internationally reputed course on Forced Migration. Developed countries have already developed and implemented the concept of 'third country protection' or 'offshore asylum system'. These types of initiatives are contradictory to the spirit of the Convention.

Even senior officials of the UNHCR openly support modifications in the Convention. "... the Convention has to be looked into from different angles/perspectives considering the present scenario," says Ms. Carol Batchelor, Chief of Mission of UNHCR in India (former Head of agency's Stateless Unit in Geneva) in an international workshop on Forced Migration in Kolkaka.

In this scenario, none of the South Asian states is a signatory to the Refugee Convention, few citing 'certain biases in the provisions of the Convention. 'Dr. B. S. Chimni feel that before acceding to the 1951 Convention or 1967 Protocol, South Asian states should go ahead for adoption of a rights-based national legal framework to deal with asylum and refugee issues.

UNHCR should more actively apply its mandate on statelessness and nationality throughout the world without geographical limitation. It should address protection as a core element in the search for durable solutions to refugee problems, both in terms of governments who obstruct refugees' right to return on grounds of disputed nationality and also in terms of ensuring that refugee return is sustainable and that refugees can return with full respect for their human rights.

The existence of refugee is symptomatic of deeper social, economic and political problems. The challenge is not how to keep people away but how to meet the needs of the victims and the communities which receive them, how to manage the refugees in a way which satisfies their basic human rights while simultaneously addressing the country of asylum. Solving the refugee problems involves a complex array of other problems: human rights, charity, immigration services, religious services, economic development,

education, advocacy, and a host of support and other functions. So to deal with all these things the states should be obliged to protect and enact a separate law for the refugees.

The original refugee-protection regime was born of humanitarian desires to aid a suffering population, but the current system struggles to achieve this goal is not fulfilled. The refugee problem continues to challenge the international community. While refugee-receiving States should maintain their commitment to the protection of refugees and encourage tolerance towards diversity. The refugee-producing States should have the duty to prevent acts that produce mass exoduses of their populations. At the same time the world needs to reach an agreement on how best to prevent new flows of refugees. Refugees have rights, which should be respected prior to, during and after, the process of seeking asylum. Respect for human rights is a necessary condition for both preventing and resolving today's refugee flows.

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APPENDIX I

Convention Relating to the Status of Refugees

Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950

Entry into force: 22 April 1954, in accordance with article 43

Preamble

The high contracting parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

Chapter 1

GENERAL PROVISIONS

Article 1- Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) 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.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the

General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2- General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3- Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4- Religion

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

Article 5- Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6- The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7- Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.
2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.
5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8- Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9- Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential

to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10- Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11 - Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country

Chapter II

JURIDICAL STATUS

Article 12- Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13- Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14 - Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trademarks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15- Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16 - Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautiojudicatumsolvi* .
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

Article 17- Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18- Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19- Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV

WELFARE

Article 20- Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21- Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22- Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23- Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24- Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of

remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States

Chapter V

ADMINISTRATIVE MEASURES

Article 25- Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory

he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26- Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27- Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28- Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29- Fiscal charges

1. The Contracting States shall not impose upon refugees' duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30- Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31- Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32- Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

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

Article 33 - Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

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

Article 34- Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35 - Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in

the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) The condition of refugees,
- (b) The implementation of this Convention, and
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36- Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37- Relation to previous conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII

FINAL CLAUSES

Article 38 - Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39 - Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-

opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40- Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41- Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42 - Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.
2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43 - Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44 - Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45 - Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46 - Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

- (a) Of declarations and notifications in accordance with section B of article 1;
- (b) Of signatures, ratifications and accessions in accordance with article 39;
- (c) Of declarations and notifications in accordance with article 40;
- (d) Of reservations and withdrawals in accordance with article 42;
- (e) Of the date on which this Convention will come into force in accordance with article 43;
- (f) Of denunciations and notifications in accordance with article 44;
- (g) Of requests for revision in accordance with article 45.

In faith whereof the under-signed, duly authorized, have signed this Convention on behalf of their respective Governments.

Done at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

APPENDIX II

Protocol relating to the status of refugees

The states parties to the present protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons, who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I

General provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
2. For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.
3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

Co-operation of the national authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may

succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

- (a) The condition of refugees;
- (b) The implementation of the present Protocol;
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

Information on national legislation

The States Parties to the present Protocol shall communicate to the Secretary- General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

Settlement of disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute

Article V

Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI

Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

Reservations and declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII

Entry into force

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

Notifications by the secretary-general of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

Deposit in the archives of the secretariat of the United Nations

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

APPENDIX III

Model National Law on Refugees

1. Purpose of the Act

The purpose of this Act is to establish a procedure for granting of refugee status to asylum seekers, to guarantee to them fair treatment, and to establish the requisite machinery therefor. For the purposes of this Act the grant of refugee status shall be considered a peaceful and humanitarian act, shall not be regarded as an unfriendly act and does not imply any judgment on the country of origin of the refugee.

2. Terminology

In this Act, unless the context otherwise requires:

- i. 'Asylum seeker' means a foreigner who seeks recognition and protection as a refugee.
- ii. 'Refugee' means a 'refugee' defined in Section 4 and includes dependants of persons determined to be refugees.
- iii. 'Country of origin' means the refugee's country of nationality, or if he or she has no nationality, his or her country of former habitual residence.
- iv. 'Commissioner' means the 'Commissioner for Refugees', an executive officer, referred to in Section 8 of this Act.
- v. 'Commissioner' means the 'Commissioner for Refugees', an executive officer, referred to in Section 8 of this Act.
- vi. 'Refugee Committee' means the 'Committee' established as an appellate tribunal by the Government under Section 8 of this Act.

3. Non-Obstante Clause

The provisions of this Act shall have effect notwithstanding the provisions of any other law including The Foreigners Act.

4. Definition of Refugee

A refugee is:

- a. any person who is outside his or her country of origin, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because

of the well-founded fear of persecution on account of race, religion, sex, nationality, ethnic identity membership of a particular social group or political opinion, or,

b. any person who owing to external aggression, occupation, foreign domination, serious violation of human rights or other events seriously disrupting public order in either part or whole of his or her country of origin, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin.

5. Persons who shall be excluded from refugee status

A person shall be excluded from refugee status for the purpose of this Act if:

a. he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b. he or she has committed a serious non-political crime outside the country of asylum prior to his or her admission into this country as a refugee.

6. Principle of Non-Refoulement

a. No refugee or asylum seeker shall be expelled or returned in any manner whatsoever to a place where there are reasons to believe his or her life or freedom would be threatened on account of any of the reasons set out in sub-sections (a) or (b) of Section.

b. The benefit of the present provision may not, however, be claimed by a refugee or asylum seeker where there are reasonable grounds for regarding him or her as a danger to the security of the country or who has been convicted by a judgement of a crime against peace, war crimes or crimes against humanity and constitutes a danger to the community.

7. Application

a. Where an asylum seeker requests to be recognised as a refugee either at the point of entry or subsequently, the country concerned shall act in accordance with the principle laid down in Section 6 and refer the case to the Commissioner of Refugees for disposal.

b. Where an application is made by an asylum seeker for determination of his or her status as a refugee, pending determination of such status, no restrictions shall be imposed on the asylum seeker save and except those that are necessary in the interests of sovereignty and integrity of the State or public order.

8. Constitution of the Authorities

In order to implement the provisions of this Act the Government shall appoint:

- a. Commissioners for Refugees; and
- b. A Refugee Committee as the appellate authority.

9. A Commissioner for Refugees shall be of a rank not less than that of an Administrative Head of a District.

10. a. The Refugee Committee shall be the appellate authority and receive and consider applications for refugee status *suomoto*, or those made by the asylum seekers in appeal against the decision of the Commissioner.

b. the Refugee Committee shall consist of the following three members:

- i. a sitting or retired High Court or Appeal Court Judge designated by the Government in consultation with the Chief Justice of the Supreme Court as Chairperson,
- ii. two independent members, preferably gender balanced conversant with refugee matters.

11. Finality of Order

Every order of the Refugee Committee shall be final.

12. Determination of Refugee Status

a. Asylum seeker who wishes to claim refugee status under the terms of this Act shall be heard by a Commissioner for Refugees before the determination of his or her status.

b. During the Refugee determination process, the asylum seeker shall be given necessary facilities including the services of a competent interpreter where required, and a reasonable opportunity to present evidence in support of his or her case.

c. The asylum seeker, if he or she wishes, shall be given an opportunity, of which he or she could be duly informed, to contact a representative of UNHCR.

d. The Asylum seeker, if he or she wishes, shall be entitled to be assisted in the determination of the status by a person of his or her choice including a legal practitioner.

- e. Where an application by the asylum seeker is rejected, the Commissioner for Refugees shall give reasons for the order in writing and furnish a copy of it to the asylum seeker.
- f. If the asylum seeker is not recognised as a refugee, he or she could be given a reasonable time to appeal to the Refugee Committee as the appellate authority for reconsideration of decision.
- g. If the asylum seeker is recognised as a refugee, he or she shall be informed accordingly and issued with documentation certifying his or her refugee status.

13. Persons who shall cease to be Refugees

A person shall cease to be a refugee for the purpose of this Act if:

- a. he or she voluntarily re-avails himself or herself of the protection of the country of his or her origin; or
- b. he or she has become a citizen of the country of asylum; or
- c. he or she has acquired the nationality of some other country and enjoys the protection of that country, or
- d. he or she has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- e. he or she can no longer, because the circumstances, in connection with which he or she was recognised as a refugee, have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality.

14. Rights and Duties of Refugees

- a. Every refugee so long as he or she remains within this country, shall have right to:
 - i. fair and due treatment, without discrimination on grounds of race, religion, sex, nationality, ethnic identity, membership of a particular social group or political opinion.
 - ii. Receive the same treatment as is generally accorded to aliens under the Constitution or any other laws and privileges as may be granted by the Central or State Governments.
 - iii. Receive sympathetic consideration by the country of asylum with a view to ensuring basic human entitlements.

iv. Be given special consideration to their protection and material wellbeing in the case of refugee women and children.

v. choose his or her place of residence and move freely within the territory of the country of asylum, subject to any regulations applicable to aliens generally in the same circumstances.

vi. Be issued identity documents.

vii. Be issued travel documents for the purpose of travel outside and back to the territory of the country of asylum unless compelling reasons of national security or public order otherwise require.

viii. Be given the right of access to education, health and other related services

15. Situations of Mass Influx

a. The Government may, in appropriate cases where there is large-scale influx of asylum seekers, issue an order permitting them to reside in the country without requiring their individual status to be determined under Section 12 of this Act, until such time as the reasons for departure from the country of origin have ceased to exist, or the government decides that their status should be determined on an individual basis under this Act.

b. Every refugee shall be bound by the laws and regulations of the country of asylum.

16. Refugees Unlawfully in the Country of Refuge

The Government shall not impose penalties, on account of their illegal entry, or presence, on refugees who, coming directly from a place where their life or freedom was threatened in the sense of Section 4, enter or are present in the country of asylum without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

17. Voluntary Repatriation

a. The repatriation of refugees shall take place at their free volition expressed in writing or other appropriate means, which must be clearly expressed. The voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of safety to the country of origin shall be respected.

b. The states should frame guidelines to ensure safe return of the refugees to their countries of origin.

18. Rules and regulations

The Government may frame rules and regulations, from time to time, to give effect to the provisions of this Act.