

# **THE POLITICS OF ASYLUM: A STUDY OF CONTEMPORARY THEORETICAL DEBATES ABOUT REFUGEE ADMISSION**

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**MASTER OF PHILOSOPHY**

**SADDAM HUSSAIN SHAH**



**Centre for Political studies**

**School of Social Sciences**

Jawaharlal Nehru University

**New Delhi-110067,**

**India**

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### DECLARATION

I, Saddam Hussain Shah, hereby declare the dissertation entitled **The Politics of Asylum: A Study of Contemporary Theoretical Debates about Refugee Admission** submitted to Jawaharlal Nehru University by me for the award of the degree of **Master of Philosophy** is my work own work. The dissertation has not been submitted for any other degree of this University or other University.

Saddam Hussain Shah

### CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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अध्यक्ष / Chairperson  
राजनीतिक अध्ययन केंद्र / Centre for Political Studies  
सामाजिक विज्ञान विद्यालय / School of Social Sciences  
जवाहरलाल नेहरू विश्वविद्यालय  
Jawaharlal Nehru University  
New Delhi - 110067

for Dr. Rakesh Lamba

Supervisor, CPS

SUPERVISOR  
Centre for Political Studies  
School of Social Sciences  
Jawaharlal Nehru University  
New Delhi - 110067

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# INTRODUCTION

People have been moving, and hence crossing great geographical barriers for a very long time. It will not be wrong to suggest that moving is perhaps the most primitive form of human activity. It is therefore agreeable that people in fact have been crossing borders. People have moved alone as well as in groups in search of distant lands. If one were to narrate history, in one sense it could be done through the perspective of the migrants, the travelers who left their familiar lands to explore the unknown. The idea of amazement, sheer zeal of finding new pastures, better climates, fruits, and delicacies has propelled people to scale the heights of mountains, sail through harsh seas. The world is in fact a constantly moving entity. And yet movement has not always been a pleasant occurrence, on an activity only taken up as pure choice. People have also been forced to leave the places of their birth and those of their dwelling. Hostile climates, wild beasts and many a times, powerful neighbors have pushed groups out of their lands. Human history has also therefore been a history of coercive movement, of banishment and exile. In conquest, new people have occupied a foreign territory and the original inhabitants have been rendered homeless. And if migration is in fact as natural as is being then how does the question of the refugee occupy the concern it does at the moment. This raises an allied question and more particular one of how the circumstances of a refugee those who seek asylum and also those who have been displaced from their places of origin, whether dislocated internally or externally have changed from that of the similar people in past? What is the new in seeking refuge? As suggested above the people in case refugees often did enter the territories owned by, or belonging to others. It is actually the distinction between the pre modern understanding of property relations and those that developed in the aftermath of westphalian state system. The globe as we know today is divided into distinct territories and the modern nation state has emerged as the one with a definite territorial claim. (Kayaoglu 2010). Many of the states that claim territoriality over the world surfaces are also known to be democratic states. The definite territorial claims are strongly guarded by the notion and practice of boundaries. Certain countries, for example

Germany in 1993 have amended their constitution to reduce the intensity of arrival of those who seek asylum in their territory. In our times, in the year 2017 itself, the president of United States passed an order which has banned the entry of citizens of eight countries on to its territory. In spite of all these efforts, the Western states have been facing a huge number of diverse people standing at their shores asking for entrance.

This dissertation aims to take up the issue of asylum and look at it through an ethical lens. Asylum is a category which brings forth the conflict between the refugee plight and desperation, and hence the question of their claims as homeless people as opposed to the rights of citizens, who act in their best interests to secure their limited resources for themselves.

All the Western states have put a great deal of effort in putting a great number of measures to restrict and prevent those who seek asylum seekers to reach their boundaries and shores as the case may be. These measures include the expensive visa rules, sanctions on carrier services and scrutiny by the airport officers as well as “detention, dispersal regimes and restrictions on access to welfare and housing” (Gibney 2004: 2).

Quite ironically these measures are operated in the context in which states continue publicly to acknowledge the legal responsibilities (as defined by UN convention relating to the status of the refugees) to refugees and others who are in the need of the protection. And they publicly call for the importance of the ethical moral principles of asylum. While on the one hand a lot of importance is accorded to the principles of asylum, on the other enormous efforts are carried out to ensure that refugees are prevented from reaching their territory.

The condition of those who are stateless or refugees that is the people who cross merits some serious attention because, “the condition of undocumented aliens, as well as refugees and asylum seekers [...] remains in the murky domain between legality and illegality”. Refugees are located in this “murky domain” (Benhabib 2006: 46) and in “holes of oblivion” (Arendt 1973: 459) which puts them in a peculiarly vulnerable position. It is not the first time that refugees have been captured in government and media attention. In 1951, Hannah Arendt speaks of refugees as “the most symptomatic group in



contemporary politics.”(Arendt 1973: 459) For Arendt the emergence of the refugees across Europe since the turn of the century symbolized the triumph of the nation state.

“The use of national and ethnic criteria to determine who did and who did not belong to a particular political community led to groups of people who were not only forced to flee their traditional homeland but simultaneously deprived of any reasonable prospect of attaining a new one” (Arendt 1986: 293). She further argued that “in spite of the lofty rhetoric of human rights. The implications of lack of citizenship in a world divided into nation states were devastating”. She says, “Those who lost the protection of the state were denied not only specific rights but the protection ‘of a community willing and able to guarantee any rights whatsoever” (Arendt 1986: 297). So loss of citizenship leads to the loss of humanity. Where states refuse entrance or protection to the refugees, they are left rights-less. It is precisely this problem that Hannah Arendt addresses in her discussion on statelessness. “*We as human beings have the right to have rights*”, which means “to live in a framework where one is judged by one’s actions and opinions” and includes “the right to belong to some kind of organized community” (Arendt 1973: 296-297). “In an international system where each sovereign state claimed the right to fashion their entry and citizenship policies according to their own national and ethical criteria, no state accepted the responsibility for the refugee”. Refugees were reduced as Arendt calls “the scum of the earth” (Arendt 1986: 269)

A lot has changed in the aftermath of World War II. International law has developed. It has tried to counter this problem through establishing of institutions like UNHCR and also the NGOs have come into place which is specifically concerned about the issue of refugees. But it must also be noted that the times since Arendt arrived at the shores of United States having suffered the worst forms of holocaust have changes. Bodies such as the UNHCR also have to work in a space where they rely on states. The treaties and protocols accepted by the states are definitely binding on them, but it cannot be denied that states are sovereign entities which more often than not decide quite independently on the matters of what happens within their territories.

The current refugee crisis primarily has its driving forces outside Europe. It is related directly to the civil and ethnic conflicts which play out violently in places outside of

Europe. This violent conflict involves citizens and also military conflicts that raise serious problems building or preserving just and humane state institutions that could intervene. This situation it is argued is made worse by economic under development, poverty, disease and hunger. The context of the present crisis is much different from the Europe of the time, when Arendt had herself arrived at the shores of United States. The situation in Europe during and after the World War II was different from the Europe today. Thus Present refugee problem is not the same.

So in the changed circumstances “Controversy over asylum in liberal democratic states must therefore be understood as a part of a much broader international problem in which refugees and asylum seekers are merely the precursor of a world where life chances and economic opportunities are distributed with great inequality” (Gibney 2004: 5)

Because of globalization this reality is made more obvious. New challenges have come up like, in the presence of obvious scarcity in the places of entrance and more crucially with the existence of different categories of people in need, How does one decide who and which category must be given entrance and how is one to be given priority over the others? Therefore what is the extent to which the rights of the citizens be curtailed to assist and admit non-citizens like refugees? Can states put in place a generous policy who do not receive an overwhelming number of applications hoping to move not because of the threat or reasons of persecution but for others reasons such as for economic reasons? These are the questions which the Western states and the states located near the refugee hotspots are engaged with. In this background, the aim of this dissertation is to study the politics of asylum and the theoretical debates prevalent in our times about the refugee admissions. This work is divided into three chapters. I have drawn on literature in contemporary political theory to build the understanding on various issues in this work.

The first chapter of this dissertation, “*Who is a Refugee*” attempts to give an account of the refugee definitions, the approaches in which the category of the *refugee* is defined in the literature and the category is different from that used to define other asylum seekers. The chapter discusses two approaches employed to define the *refugee*. First is the International Law approach. It discusses how the refugee is defined in the international law and statutes. Second, how the *refugee* is defined outside the framework of law, it

discusses the philosophical approach of defining *refugee*. In the end, the chapter discusses the limitations and advantages of both the approaches.

The second chapter “*Theoretical debates: Partialism and Impartialism*” discusses two ethical perspectives that speak albeit differently on the responsibilities of states in the policy of admission, or entrance. In the first place arguments in favor of closed borders (restricting admission) under the broad ambit of partialism are to be considered and secondly arguments in favor of open borders (allowing access) under the broad ambit of impartialism will be discussed. The chapter will weigh the case for both closed and open borders equally along with their limitations and advantages.

The third chapter “*Ethical and practical response to the issue of asylum and refugee*” attempts to discuss how a balance between partialism and impartialism is necessary to develop an ethical and practical ideal on the basis of which states should act towards the issue of asylum in general and refugees in particular. It discusses humanitarianism as a superior policy response towards refugees which is ethical, practical and politically relevant for the states to deal with the problem of refugee admission. This chapter also discusses the practices which the states should incorporate in their conduct to create an environment in which the refugee protection is enhanced and made effective.

# CHAPTER I

## Who is a Refugee?

In 2015, the devastating images of Syrian boy washed up on a Turkish shore made international headlines. There indeed was outpouring emotional response globally as the image showed desperation of refugees. Last few decades have seen more people crossing borders in desperate need to save their lives and there stands a serious issue of internally displaced persons. The world at this very moment is witnessing unprecedented levels of displacement ever put to record. By one estimate there are close to about 65.6 million human beings who are now not in their home owing to forced evictions. Of this total number, 22.5 million people are refugees, half of whom are not even 18 years old. “There are also 10 million stateless people who have been denied a nationality and access to basic rights such as education, healthcare, employment and freedom of movement. We are now in a world where nearly 20 people are forcibly displaced every minute as a result of conflict or persecution.” (UNHCR)<sup>1</sup>.

Human beings have moved for survival and livelihood and also for fun, food and adventure. They have moved for glory and greatness. Some have moved for faith and religion. As it is in the nature of human to settle down, to domesticate and strive for certainty. It is also in the nature of human beings to move around and explore nature and make it their own.

But refugees don't really move out of choice; they do it out of compulsion and fear. They are forced to move. When they move, they become no-lands people. People who belong to a common lost history; a place that once was theirs but no longer is now. Refugees in one sense become repositories of loss, despair and at the same time of hope and humanity. Why one may ask do refugees matter? They matter because they are human. What are nations, if not its people?

And yet even when Refugees are human, it is perhaps not enough knowledge about those pushed to marginality, anonymity and even desperation. It is therefore crucial for anyone who puts pen on paper on this subject to ask a more pertinent question which is '*who are refugees?*' What constitutes a refugee? This chapter deals with what we already have on refugees. There is in place an international regime of refugees. This involves the definition and categories that make up the international refugee while fixing shared responsibility on the states. There are of course obvious limitation within the framework of law which I have discussed. I have then tried to look at the definitions that go beyond law and have discussed the category of refugees that include more variables and possibilities. I argue therefore that Refugee as a category is coiled around several other concepts of state and sovereignty, around ideas of economic cost to the receiving nation. The very definition in international law of persecution along race, religion and ethnicity throws up issues that create their own complexities. Human rights regime has opened up several questions across the globe with respect to livelihood and what constitutes a good life. This chapter focuses on, in the first part how refugees are defined in the international law, and in the second part how they are defined outside and as opposed to the framework of international law.

### *1. Refugee in International Law*

Modern refugee regime like other human rights instruments (Universal Declaration of Human Rights) was formulated in the second half of 20<sup>th</sup> century, after the refugee crisis

of interwar period. Article 14 of UDHR guarantees the right to “seek and enjoy asylum in other countries in accordance with the municipal law of the recipient state and international conventions.” The central legislation controlling the affairs of refugees is the 1951 Convention related to the status of refugees (1951 Convention), and Optional Protocol relating to the status of refugees (1967). The 1951 convention related to refugees define the ‘refugee’ and the rights of those who are displaced and the legal obligations which states owe to those who are displaced. The legal space of refugees in international law is reflective of the efforts of balancing between the interests of state sovereignty, territorial supremacy on the one hand and humanitarian principles emerging out of general international Human rights law on the other hand. Originally the scope of convention was limited to the Europe and persons fleeing before 1st January 1951. The protocol of 1967 has removed these limitations and made the scope of 1951 convention universal. Since then it is supplemented by other subsidiary protection regimes in various regions and also by the substantial development in the International Human rights law. The convention of 1951 provides a comprehensive and detailed codification of rights of refugees by consolidating the earlier instruments related to refugees. Unlike the earlier instruments which applied to specific sets of refugees, 1951 convention establishes single universally applicable definition of the term ‘Refugee’. The convention underpins the principle of ‘*Non Penalization*’, ‘*Non-refoulement*’ and ‘*Non-Discrimination.*’ Article 1 of the convention defines the refugees as,

“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 is unable or, owing to such fear, is unwilling to return to it.”<sup>2</sup>

This definition emphasizes on three important features for the attribution of refugee status. Firstly you must have crossed the borders of the state of which you are a citizen and where there are chances of your persecution. Convention does not consider those who are internally displaced as refugees and hence they cannot be provided with the assistance which is meant for refugees. Secondly he/she is “unable to return to the country because of existence of persecution or a perception of it”, in other words the

person is not provided the protection of the state due to reasons may be of unwillingness or inability of the state to provide protection. Thirdly the reasons for which a person faces persecution are holding of a particular political opinion, belonging to a particular race, religion, nationality or holding membership of a community or social group. The convention does not provide any procedure for the determination of refugee status; individual governments set up the status determination procedures to decide the person's legal standing and rights in accordance to their own domestic legal system. The agency that supervises the implementation of the UN convention of 1951 is the United Nations high commission for refugees (UNHCR), it can only advise the governments to protect refugees and supervise the implementation of UN convention. The agency advocates "that the governments should adopt a speedy, flexible and liberal process, recognizing the fact that how difficult is it to document persecution." In countries which are not parties to the refugee related instruments, but who ask for UNHCR assistance, in that case the agency may define a person's refugee status and provide protection and assistance as well "Given the nature of the definition, the assessment of claims to the refugee status thus involves a complex of subjective and objective factors; --- interpretation of an international instrument with fundamentally humanitarian objectives ---implies certain ground rules." (Gill, 2007:54). The ground rules to be followed while interpreting any international instrument are established in the Vienna convention on law of treaties.

As per Vienna convention on the law of treaties, Article 31(1) "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>3</sup> As per Article 31(3) of Vienna convention shall be taken into account, together with the context: (a) Any subsequent agreement between the "There parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties."<sup>4</sup> So the treaty rules permit the recourse to the supplementary means (e.g. preparatory works or '*travauxpréparatoires*') of the interpretation only in cases where the language is ambiguous or obscure and which leads to absurd meanings and conclusions.

It is significant because it can be useful in clarifying the intentions of a treaty or instrument, it is the record of the negotiations and contain the documents, discussions, and debates occurred during the drafting of the convention, and these can be used as a secondary form of interpretation in order to clarify the intent of the makers. To interpret the 1951 refugee convention, in reference to object and purpose it means the assurance of “widest possible exercise of basic freedoms and rights.”<sup>5</sup> At the most basic level a refugee is the one who has been a victim of persecution in past, or is in a position to prove through facts that his fear of persecution are valid. Earlier persecution could be cited as an original claim that it can happen in the future also, provided that any fundamental change has not occurred in the original circumstances.

Well founded-ness of fear combines both objective and subjective factors, the objective factors involves the empirical conditions in the person’s place/country of origin, like the state of conflict or catastrophe or civil war or any such thing which lead to his/her expulsion. The subjective factors involves the factors personal to the individual like the fear or perception of fear, threat, how safe he feels if he be sent back to the place from where he fled etc. Not much can be done about the precise quantification of subjective factors, specific to person or a particular community (for example minority) it may be exaggerated or understated. James Hathaway argues that the concept of well-founded fear is inherently objective and has nothing to do with the state of mind (except the testimony about the conditions in the country of origin) of the applicant for refugee status, this depend on the objective conditions in the country of the origin. He further argues that:

“[this concept was] intended to restrict the scope of protection to the persons who fear on in the sense that they anticipate it may occur- that is who can demonstrate a present or prospective risk of being persecuted, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past” (Hathaway 2012: 179).

It is not clear up to what extent subjective element plays a part in the estimation of the risk. As long as the applicant statements are steady and plausible then little more can be required in the way of formal proof. Subjective aspects of individual’s life like faith religion commitments etc. are required this help to contextualize and locate the person in



his social context. The circumstances surrounding the case should be ascertained such that what is the real chance of actual persecution in comparison to the nature of persecution being claims. It is not difficult to understand that this exercise is too abstract. Especially due to lack of solid evidence, the statements of claims and their credibility is judged based on pre existing general ideas and knowledge that comes from a number of sources (like the geo-political situation the region, nature of regime in the state(some states conspicuously adopt such polices that result into the creation of refugees, there are core areas where these practices are common like middle east, Africa) , human rights situation in the state regarding conditions in the country of origin. The UN convention relating to the status of refugees also list the reasons, at this point it is important to have a discussion on persecution and grounds of persecution.

### 1.1 Persecution

The Oxford English Dictionary defines persecution as “action of persecuting or pursuing with enmity and malignity; especially, the infliction of death, torture or penalties for adherence to a religious belief or an opinion as such, with a view to the repression or extirpation of it.” What can be inferred from this definition is that persecution at the most basic level involves (a) pursuing an act with an intent to cause harm,(b) doing it for adherence to a particular belief or opinion with an aim to repress it or its adherents as well, this involves conscious selecting of the targets to hunt. In the most common reading of ‘persecution’ what is assumed is that it entails an act of intentional threat and imposition of harm.1951 convention confirms it and also made it clear that refugees are mean to be those persons who fear persecution on “account of” or “for reasons” of race, religion, political opinion, social grouping and nationality.

Historically persecution is concerned with Persecution first of all with religion, then political opinion, then race, then nationality and final social group. There has been gradual increase in the grounds of persecution. Persecution per say is not defined in 1951 convention or its 1967 optional protocol, however the term ‘*torture*’ is considered near to the term ‘persecution’. UN Convention against torture (1984) defines torture as

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.”<sup>6</sup>

Acts amounting to persecution includes those covered by the prohibition of cruel, inhuman or degrading treatment or punishment or disproportionate punishment to the offence committed. General notion of persecution should be understood within the broad framework of human rights. In an attempt to provide guidance on what constitutes persecution, EU Qualification Directive Article 9(1) and (2) provides a non exhaustive list of the acts that can be considered as the acts of persecution,

1. “In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
  - a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
  - b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:
  - a) acts of physical or mental violence, including acts of sexual violence;
  - b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
  - c) prosecution or punishment which is disproportionate or discriminatory;
  - d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
  - e) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

- f) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
- g) Facts of a gender-specific or child-specific nature.”<sup>7</sup>

Persecution is directly related to the violations of human dignity, and the plain meaning of the word persecution makes it clear that it doesn't exist apart from a prohibited reason for the suffering it produces. It means that persecution will be counted as persecution if the person is persecuted and harmed on the grounds that are generally prohibited, like racial discrimination, inflicting harm on person because he/she holds particular religious or political belief, or any such thing which is prohibited in general human rights law. Contrary to this Alexander Alinkoff argues that the term persecution has a meaning independent of the grounds on which it is imposed, it is linked with five grounds in the definition just to connote the “ unacceptable, unjustified, abhorrent or intolerable infliction of harm” (Alinkoff 1991: 12 and he further suggests that the “persecution might well be given a 'free-standing' meaning, that requires judgments about both the degree of and justifications for the harm, but not one that necessarily invokes the five grounds as the test of the qualitative aspect” (Alinkoff 1991: 13).

The conceptual separation of persecution from the reasons for its infliction broadens the definition's scope but it raises new issues, persecution is generally accepted as involving the serious harm, and it has a quantitative element to it, which means that the magnitude of the harm inflicted on a person will be considered as criteria for deciding such to a harm be counted as persecution. In simpler terms it can be said that the every act of violence cannot be called persecution. If it is separated from its reasons there will be difficulty in differentiating between milder acts of harm from the more serious ones. The most important attempt to relate persecution to the human rights violations is done by James Hathaway in his book “*The law of refugee status*”. He defines “persecution as a sustained systematic violation of basic human rights that is demonstrative of a failure of state protection.” The attempts to link every sort of violation of basic human rights to

persecution have come under close scrutiny. The framework of basic human rights comes from the International Human Rights Law of which the Universal Declaration Of Human Rights (UDHR) is a key part, the drafters of 1951 refugee convention has deliberately linked the persecution with the reasons of infliction to separate the serious harm from the milder ones, they deliberately created a disjunction between the general human rights law and refugee law. Certainly the existence of the UDHR was well known to the drafters of the refugee convention, why have they not separated persecution from the reasons of its infliction? The answer is that the international human rights law is designed to protect the citizens within the states, and it provide very limited remedy in case of violation, so the disjunction between the international human rights and refugee law is logical. Refugee law on the other hand is remedial in nature, it provides the remedy to the certain specific violations of these rights, so to base persecution based on the protected grounds(race, religion, political opinion, membership of particular community or social group) mentioned in the convention are reasonable of the fact that only the serious harm amount to the persecution. The concern which is addressed here is that if every human rights violation be counted as persecution then in the presence of limited willingness of the state to provide assistance, many people who are genuine potential claimants for the refugee status and are in desperate need of refuge will be left out. “In light of the overall structure of international human rights and refugee law, and the limited willingness of states to provide refuge, it is not unreasonable to view refugee protection as affording relief to a designated subset of human rights violations.”

## 1.2 Race

Race is difficult to define. It is a social concept which divides people on the basis of somewhat arbitrary lines of descent, geographical origins and basis and apparent physical attributes like the skin color, hair texture, height, facial features etc. Race has much to do with the distribution of power, prestige and privilege. Sometimes race overlaps with the nationality or ethnicity, what counts as racial persecution is when a harm is inflicted on an individual on the basis of his/her membership of belonging to a racial group or when

there are such legislations which somehow deny the basic rights to a particular racial group as it was in case of apartheid in south Africa. To claim asylum and consequent refugee status applicant has to establish a link between his race and his persecution, that the incident of violence is not by accident and it is aimed at you on your perceived race.

### 1.3 Political opinion

At the basic level political opinion of a person or a group refers to the beliefs, views, judgment pertaining to the state, government or to the general policy of the government. Article 19 of universal declaration of human rights states that “everyone has a right to freedom of expression; the right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” the typical political refugee is one who is wanted by the state on the basis of his/her political views, and who is perceived as a threat to the state or its institutions. Persecution on the grounds of holding a political opinion is protected, but how the opinion is expressed or the conduct based on that opinion is not protected. To practice their political opinion one cannot use the generally prohibited means, the accepted means of expressing political opinion are speech, writing, peaceful demonstration for expressing an opinion. “The most controversial issue over persecution on account of political opinion concerns the circumstances in which the harm is a response to *acts* by the refugee claimant.”<sup>8</sup> Like for example the situation about those who want to overthrow the undemocratic government or the situation in which one refuses to do military service in order to avoid committing atrocities, when the concept of political opinion is translated into actions and we move beyond belief, it gives rise to the situations in which the literal interpretations are not sufficient to establish the purpose. Problems arise in the assessment of the political acts and holding them as the reason of persecution and making them as a plausible basis of refugee status.

There is no definitive treatment in the drafting process of 1951 refugee convention of the words like race, persecution, religion, nationality, social group. The drafters were operating under the ordinary meaning of the interpretation, the language is descriptive rather than definitional, the premise is based on the history and structure because the expulsion of people had already took place at that time on those grounds in Europe. The definition is based on the historical fact. The primary event in the mind of the convention drafters was the Nazi persecutions of 1933-45. Not only it had taken into account the people who had fled, but also, who were in the process of fleeing and to this day the people who are desperate to escape persecution. Here the discussion on the ‘persecution’ and the ‘grounds of persecution’ is over.

#### 1.4 Duty of Non-Refoulement and Taking up the Slack in International Law

Refugees are seen as a consequence, a kind of an end product of circumstances arising in a particular kind of rule. In such a rule, normal relations between the state and its citizens is violated and severed and due to one or the other reason. And the State is unwilling or unable to protect or provide the other services to the citizen, and when the individual has no other option but to leave the country and seek refuge elsewhere. The single important provision convention contain is the principle of “non-refoulement” which provides that none shall be expelled or returned against his/her will, in anyway whatsoever to a land where they can be persecuted.

International refugee law is incomplete in the sense that refugees still can be denied the right to asylum, refuge or safe returns to their homes. But nonetheless it has reduced the plight of persons fleeing their lands if not in the exceptional cases. To protect the human rights of its citizens is the first duty any state has towards its citizens. We inhabit a world where some states don’t have the capacity to perform this duty and some are unwilling to do it, and some are actively carrying out the violation of the human rights of their own citizens. In this situation of partial compliance towards the duty of justice, there are some

states that are able and are willing to help those who are unable or unwilling to secure the human rights of their citizens. There are two ways of doing this, firstly by building the capacity of the state so that it can protect human rights of its citizens (in-situ protection). Secondly by providing the temporary refuge to the people who have fled their lands (citing some reasonable fear of persecution) for the time being until an adequate capacity for protection of human rights can be built in the home state. Similarly when a state is not disposed to protect the human rights of its people, or is actively involved in the violation of their rights the international order of states has a duty to control and guide its conduct so as to secure the human rights of its citizens. For a practice to become a universal norm depends on how often states behave in a particular way.

“The existence of a clear and consistent acceptance of states is a precondition to recognition of a standard as a customary law or as a general principle of law. A universally binding human rights regime cannot be brought into existence by a simple declaration” (Hathaway 2005: 18). Through the Practice of a particular pattern of conduct by the states among themselves (custom) and by granting the rights to its citizens within the territory (general principles of law) a universal norm can be established. The commitment of the states is important in the establishment of universal norms, once such norms are established; the practice of non conformity is seen as a violation of universal norm.

The International legal status of refugees obliges the states of certain responsibilities and it brings certain consequences upon them, like the principle of non-refoulement, “Article 3 of the 1933 Convention relating to the International Status of Refugees contained the first mention of non-refoulement in international law”(Gill 2014: 39).The principle of non- refoulement was officially enshrined in the article 33 of 1951 convention related to status of refugees which defines it in two paragraphs.

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

2. “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>9</sup>

Apparently when principle is operated in practice political considerations of the state takes precedence over the humanitarian concerns or for that matter over the logic of justice. What states do in practice is, they try to reduce the chances of an asylum seeker reaching their borders. This is done by limiting the access to the asylum seeker, by adopting restrictive visa regimes, high transportation cost.

The following part discusses how the refugee is defined outside the framework of law and the philosophical approach of defining refugee. As has been discussed, persecution based on prohibited grounds of race, religion and political opinion et cetera remains the only lens through which refugee-hood is established. This is however a limited view and in the next part, the contestations have so been discussed.

## 2. ‘Beyond Persecution’, Philosophical Approach to Define Refugee

In the normal circumstances there is this assumption of existence of bond of allegiance and dependence, shelter and support between the state and its citizen. Refugee is the result of the severing of this bond, and this severing of bond manifests itself in the form of persecution, and this is what is assumed in the legal definitions for determination of refugee-hood as both necessary and sufficient conditions. What is argued by those who call for the broad definition of refugee is that the normal bond between the citizen and the state can be severed by number of factors and ‘persecution’ is just one of them. Article 1(2) of Organization of African unity (OAU) goes a step further of the UN convention and states that:



“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 of 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.”<sup>10</sup>

This definition covers a lot more number of people which are not covered within the definitions of the convention. Both the UN convention definition and the OAU definition can be placed in their respective historical context from where they emerge; Definition of the convention is the result of the totalitarian horrors that emerged from within and after the Second World War. OAU definition on the other hand emerged out of fragile states in the African nations with conditions of civil wars and unstable political systems. OAU definition attempts to establish that the normal bond between the state and citizen can be severed in variety of ways, and that those cannot be limited to the persecution only.

Like for example the victims of natural disaster like earthquake can be granted refugee status if OAU definition is followed. Majority of academic discussions on the refugees argue that the definition of UNHCR is too narrow and restrictive. Michael Dummett for example says that “All conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to be the grounds for claiming refugee elsewhere”(Dummett 2001: 37). This is indeed is the broadening of the definition where the extent of the expansion is from ‘persecution’ to something as broad as ‘minimal conditions for a decent human life.’

He also argues in favor of extending the right of admission not only to those who are facing the immediate threat to life but also those who are fleeing “the poverty that afflicts much of the third world” (Dummett 2001: 25). Andrew Shacknove argues that “an overly narrow conception of refugee will contribute to the denial of international protection to countless people in dire circumstances whose claim to assistance is impeccable” (Shacknove 1985:276). He further says that:

“Conversely, an overly inclusive conception is also morally suspect and will, in addition, financially exhaust relief programs and impune the credibility of refugee’s privileged position

among host populations, whose support is crucial for the viability of the international assistance programs” (Shacknove 1985: 276).

A broad conceptualization of who is a refugee is presented by Andrew Shacknove in his famous work *‘who is a refugee.’* Shacknove’s work is oriented in the direction of broadening the definitions of as to who could be called a ‘refugee’. He argues that a proper conception of refugee-hood is important and the ad-hoc responses of the states do not suffice. He attributes these half-hearted, ad-hoc responses to the states reluctance that the flow of the refugees may conflict with their other foreign policy objectives. It is not only the political conflicts or resource scarcity which is responsible for the problem but also the “conceptual confusion about refugee-hood that contributes to the misery of both the refugee and that of the host and to the inflammation of the international tension” (Shacknove 1985: 276). So a proper definition of the refugee will help the state and other assistance agencies to decide who will get what and also help in distributing the burden and aid international cooperation. The implicit argument in Shacknove’s disagreements with both the restrictive definition and overly broad definitions is that they are not in consonance with material realities prevailing in the world.

On one hand there are too many people who are in the dire circumstances crying out for help and yet they are not under the ambit of persecution. On the other hand the aid and assistance capacity and willingness of the states is too less to work on the basis of any broader principle of refugee-hood.

The central point in the broader refugee definition, according to Shacknove is neither persecution nor alienage but the ‘absence of state protection of citizen’s basic needs.’ He is arguing that the most basic obligation which a state has towards its citizens is the providing the basic minimum subsistence means of living. If the state fails to do that then the citizen may become the claimant for refugee-hood. What he argues is this that the persecution only accounts for the absence of state protection in the tyrannical conditions where the state itself carries persecution but not the other extreme where there is chaos, and state in its doing losses the capacity to protect its people or in his words ‘ceases to exist’. For him persecution is sufficient but not the necessary condition for severing the bond between the state and the citizen.

He tests both persecution and alienage to suggest that there is no linkage between persecution and refugee-hood. He rather argues that “Persecution is but one manifestation of a broader phenomenon: the absence of state protection of the citizen's basic needs. It is this absence of state protection which constitutes the full and complete negation of society and the basis of refugee-hood. The same reasoning which justifies the persecutee's claim to refugee-hood justifies the claims of persons deprived of all other basic needs as well” (Shacknove 1985: 277). Similarly regarding alienage he argues that:

The refugee need not necessarily cross an international frontier to gain such access. Thus I shall argue that refugees are, in essence, persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible(Shacknove 1985: 277).

He is voicing a concern against essentialization of persecution and alienage as criteria for establishing the refugee-hood of a person. He argues that persecution is just one form of absence of physical security. The most basic threshold of the state exists in protecting its citizens from physical harm, “Beneath this threshold there is no state and the bonds which constitute the normal basis of citizenship dissolve” (Shacknove 1985: 279). What is assumed in the Westphalian state system is the relationship of ‘rights’ and ‘duties’ between state and the citizen that the state will protect the interests of its citizen and citizen will perform the legitimate and just duties required by the state.

Before defining the refugee Shacknove discusses the logic of the state system and the logic of civil society. Regarding state, he says:

“A political commonwealth is formed on the premise that people experience a generalized condition of insecurity when outside the protective confines of society...And the primary purpose of civil society is to reduce each person’s vulnerability to every other” (Shacknove 1985: 278).

State and civil society come together and align with each other in togetherness enable them to put a cooperative effort against the transgressor.

Three basic threats to individuals are enlisted in refugee policy circles, namely persecution, vital subsistence (economic) and natural calamities. Shacknove argues that there is no clear distinction between these and they overlap with each other and that “all

of them can equally violate the citizen's irreducible rationale for entering society, and that each may constitute a sufficient condition for refugee-hood” (Shacknove 1985: 278). It is not enough for the state to only protect its citizens from physical harm but it should also create necessary conditions “to provide a minimally mild environment free from the dual extremes of tyranny and chaos, both of which are rife with violence” (Shacknove 1985: 279).

He further suggests that in determining who is a refugee and who is not, cases of natural disasters like flood, droughts are not regarded as justified claims. Since they are considered as the events beyond social control, it is believed that the government has no inherent obligation to secure a remedy. This argument rests on the basic premise that the legitimate duty of the state is to control human actions rather than controlling natural force. Shacknove discards this view and argues instead for that which has already confirmed by AmartyaSen, Lofchie and others that many a times what are dubbed as natural disasters are frequently the outcomes of human actions. The social policy and political efforts can be instrumental in minimizing the chances of natural events to occur and to reduce their impacts after they have occurred. He is basing the fulfillment of basic needs of citizens by the state as the bedrock of relationship between the state and citizen, and when this bond is severed “the basis for a legitimate claim to refugee-hood is generated” (Shacknove 1985: 280).

Shacknove believes that it does not require big capital investment, specialized knowledge or any heroic effort on the part of the government to provide subsistence to its citizens. Shacknove while arguing the case for the lack of fulfillment of the basic needs as a basis of defining refugee is aware of the problems that can emerge out of it that those concerned with refugee affairs would argue that:

“Conception of refugee-hood tied to basic needs is surely too broad. Half the world will become bona fide refugees overnight, refugee programs will be indistinguishable from development programs, and the international machinery which now protects thousands of people will become so overburdened that all stand to lose” (Shacknove 1985: 281).

He defines refugee “In essence, a person whose government fails to protect his basic needs, who has no remaining recourse than to seek international restitution of these

needs, and who is so situated that international assistance is possible”(Shacknove 1985: 282). It is important to note here that every person whose basic needs are unmet cannot be categorized as refugee. To be called as refugee one has to be in a position that if they turn to their state for protection, they find that the state is unwilling or unable to provide for an in that sense unable to meet their basic needs and their effort to have protection of their basic needs from their states go futile. The other important thing is that one must be situated in a way that the international assistance is possible. Nowadays international assistance is possible even within the states also, so those who are receiving international assistance within the state can be categorized as refugee, here the classical criteria of ‘alienage’ is challenged.

Shacknove doesn’t differentiate between the internally displaced persons and refugee. For him refugee-hood status does not depend upon whether a person travels across border or does not cross it. If the normal bond between him and the state is severed, and his basic needs are unmet by the state and if there is no other way to protect himself other than to seek international assistance, then such a person is a refugee. Crossing of the border may be important for the diplomatic or logistical purposes but Shacknove notes “refugee-hood is unrelated to migration. It is exclusively a political relation between the citizen and the state, and not a territorial relation between a countryman and his homeland. Refugee-hood is one form of unprotected statelessness” (Shacknove 1985: 283). So alienage is one reason for the lack of protection from the state, a person can be deprived of his/her basic needs even at home. Now where international assistance can be possible, how the citizen is situated so that international assistance becomes possible. For one to have access to the international community, he claims, is for one’s state to be willing to allow or unable to prevent international assistance. What distinguishes the refugees from the similar people whose basic need is that “either the willingness of the home state to allow them access to international assistance or its inability to prevent such aid from being administered” (Shacknove 1985: 283).

Both the narrow and broad conception of refugee has their advantages and disadvantages. The convention is a very narrow instrument protecting a very definite group of people. There is existence of duality even a kind of hypocrisy , where at one side states appear to

be vocal about protecting human rights and human interests of the people who are seeking refuge. On the other the hand they are vehemently reluctant about permitting entry or recognition to those who are seeking refuge.

When we broaden the definition on the basis of humanitarian motivations, we witness partial state compliance. In narrowing down the definition too much, we end up leaving out many who are desperate for help. Practically in operational terms the UN definition has advantage over the broad definitions, because it deals with a particular set of people through a defined methodology, i.e. allowing them to enter the territories where they are safe on the principle of non-refoulement.

Lister argues that ‘consider those whose basic needs are not met and are suffering because of severe poverty on one hand and on the other hand those who are facing persecution on the basis of some protected ground. Two different approaches can be adopted to fulfill the needs of these two kinds of the sufferings. Even when the underlying principle of obligations is same in both the situations, those whose basic needs remain unmet because of severe poverty can be best helped not by allowing them in different country, but helping them in their place first by providing them emergency assistance. And then efforts can be put in for the political and economic development.’ The best way to help the global poor is to help them in a place where they are situated.

Thomas Pogge points out that aid development approach is preferable to the refugee program. Firstly they are cost effective, and there are less chances of political backlash which has happened in the western countries. If the Shacknove account is followed and refugee approach is extended to the problem of global poverty, it may result in the loss of the necessary skill due to the migration of the people. The skill which is most needed for the development of that country. However it cannot ignore the fact that the narrow conception of the refugee is leaving millions of people who are in desperate need of the help out of the refugee framework. It is not in consonance with the prevailing conditions of the world, surely the definition is going to be broadened with time, and a corresponding responsive infrastructure develops with time.

## Chapter II

### Theoretical Debates: Partialism and Impartialism

After having discussed what a refugee is in the first chapter, I will now move onto the other pertinent issues on this subject. This chapter is going to discuss the debates around immigration and control over borders. There are two dominant ethical perspectives on the responsibilities of states towards allowing or restricting the entrance of foreigners. One is called “partialism” and the other is “impartialism.” The question of immigration and control over borders are intricately linked with the question of private property, feelings of belongingness and a sense of individual and collective identity. All these aspects of present human existence have a history since these have developed over a period of time. So it is important to go a little back to see when the “wanderer” who was surviving by gathering and hunting in the wilderness, has settled by clearing the forests, how after settling, he built families, societies, demarcated territories and raised borders over them and at last developed a consciousness of who he is and where does he really belong.

To better understand the location (which is fixed) and the locomotion (which is not fixed) in human beings, it is worthy that we trace the history of both location and locomotion. In this chapter I have briefly discussed the historical moments associated with human settling. From that discussion, it comes out that as we have evolved, and we are now at the stage where the notion of nation state is central to modern life and the concept of sovereignty is in turn central to the nation state. The first section is on sovereignty which looks at the concept in its own right and tried to understand the immense capacity of nation states to exercise control, not only over borders but also over the real physical tangible bodies and lives of its citizen. In doing so it foregrounds the larger discussion on the dominant ethical perspectives on the responsibility of the state.

Being the repository of sovereign power the state holds with itself the prerogative of opening, ceiling or keeping its borders semi permeable. The obvious question therefore

arises as to what guides the state in taking such decisions? What are the frameworks and perspectives for this? The chapter therefore looks at two dominant ethical perspectives on responsibilities of states in allowing entrances into their territory. The second part takes up the first dominant ethical perspective is what is known as Partialism which is making a case for closed borders. Partialism argues that states are morally and legally entitled to privilege the interests of their citizens over foreigners. Communitarians, conservatives, and nationalists seem to be making a case for partialism. In the third part the second dominant perspective called Impartialism is discussed. As the name suggests this perspective call for freedom of movement and open borders. In this approach the distinction between citizens and non citizens with respect to borders is not there. It works on the imagination of states being cosmopolitan moral agents and therefore agents that would take into account the interests and claims of both citizens and foreigners.

The first momentous step in human history was the Neolithic revolution; it was the cognitive achievement of first order. It witnessed a wide scale transition of many human cultures during the Neolithic period (4500-2000BC) from a lifestyle of hunting and gathering to one of agriculture and settlement. The second great leap forward in human history was industrial revolution. With the help of original invention (agriculture) the problem of population pressure and resource scarcity was temporarily solved. What happened after that was the imitation of agricultural practice throughout world. The natural consequence of the process was that the societies began to take form, per capita income increased and the conditions of living became better. The challenge which the history presented before humankind was this, with the rise of population, the per capita income can be maintained only if there was an increase in production. This challenge required new, innovate and efficient tools in the field of production. It required humankind to bring forth new dimensions of intelligence in their being. Without such level of intelligence, the production process and human progress would have halted. Out of this necessity emerged the breakthroughs in the field science and technologies which resulted in the industrial revolution. A minute thing like compass showed the Europe that there are worlds beyond their shores (borders).



The third monumental event in the history of man was the invention of state. The emergence of state as a territorial monopolist of ultimate decision making and its transformation from monarchial to democratic form were the major turning events in human history. Never before in the history of humankind, was the idea of territorial ownership pursued more strongly than under the ambit of modern state. In this chapter I have discussed the state and its control over borders and what justifications the leading theorists provide for opening and closing down of the borders. In the first part I have discussed the arguments in the favor of closing down of borders and in the second part I have discussed the case for open borders. Since the idea of sovereignty is most central to the operation of modern state, so it would not be out of place to have brief discussion on it.

### *1. State and Sovereignty*

Legitimate states have the moral right to control their borders. It includes the right to formulate and enforce their immigration policies. These states have a right to decide the inclusion and exclusion of the people. The state is the final authority over a set of population in a well-defined and demarcated bounded territory. States especially the liberal democratic states draw their legitimacy from the people located in a circumscribed area and over which it has the final and absolute authority. When we say that liberal democratic state draws its legitimacy from the people, it generally means that the state should reach at collective consensus while formulating decisions and it should aim at enforcing those decisions.

The conception of sovereignty formulated for the first time in ancient Rome. Later in the 16<sup>th</sup> and 17<sup>th</sup> century it reappeared in Europe to consolidate the power of monarch. Thomas Hobbes made a decisive contribution in the development of the concept of sovereignty through his popular work 'Leviathan'. He held that sovereign has the absolute power and is not bound by anything except itself including religion. In his

conception of social contract, the sovereign authority is created through a covenant and sovereign himself is outside and is not part of the covenant.

“I authorize and give up my right of governing myself, to this man, or to this assembly of men, on the condition, that thou give up thy right to him, and authorize all his actions in like manner. This is the generation of that great Leviathan or rather (to speak more reverently) of that Mortal God, to which we owe under the immortal God, our peace and defense” (Hobbes, 1651:106).

Individuals have to surrender all their rights, before sovereign in return of the protection of life. The sovereign power is unlimited, illimitable and above the law, essentially concentrated and armed with teeth. Individuals give up their natural rights to all things and through a common consent institute a sovereign enforcing the contract by using the force and keeping all of them in awe and authorizing all his actions as their own.. Covenant rests on the promise of future performance of rendering the service of preservation of society. The Sovereign is the source of positive law and it has right over everything within the state.

Before him Jean Bodin (1530-1596) defined sovereignty as that which “is most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth” (Bodin 1962 :84). The sovereign is the highest authority and it has the sole competence of making law in a defined territory and it cannot be limited by the positive law and it cannot tolerate any other lawmaking agency beside or above it.

Hobbes’s absolutist conception of sovereignty did not go well with the later developments in the political theory, the idea of an individual without having rights conflicted with the democratization of politics. Later theorists like John Locke propounded the idea of an individual who is the source of all power and who has certain inalienable rights and which includes right to life, liberty and property and since people as a whole cannot become ruler, their power need to delegate to an authority which becomes bearer of the executive.

Stephen Krasner (Krasner 1999:3-4) identifies four different ways in which the term sovereignty is used. They are (a) Domestic sovereignty, (b) interdependence sovereignty, (c) international legal sovereignty and (d) western sovereignty. Domestic sovereignty is

related to the organization of authority and the amount of control enjoyed by the state within its territorial limits. Interdependence sovereignty refers to the ability of the state to control of movements across its borders be it of people, goods, ideas, services, information etc. International legal sovereignty is related to mutual recognition of states through formal juridical process. Westphalian sovereignty is based on two factors, first is territoriality and the second is the exclusion of external factors from domestic authority structures of a given territory.

The Westphalian sovereignty can be compromised both through the intervention (from external agency) and invitation (when a state voluntarily subjects internal authority structures to external constraints by signing protocols, conventions, agreements etc.). The treaty of Westphalia recognized the equality of states as the central basis of global organization. The equality of states was recognized irrespective of the fact that the state is Catholic or Protestant, Monarchy or Republican. The earlier notion of the society of the states which was based on the principle of hierarchy was removed. The duty to cooperate was combined with the sovereignty of the state. It obliged the states to defend and protect the peace.

However where refugees are concerned the cooperation obliged for peace is limited, as the treaties, conventions etc. which the states have signed are not enforceable to the same extent as the positive law, and the agencies and organizations which enforce them also have limited power and capacity. So, it is up to the states to enforce these laws in their own territories.

## 2. Partialism and Defense of Closed Borders

*“Do we want people to be virtuous? Let us then start by making them love their fatherland. But how are they to love it if the fatherland is nothing more for them than for foreigners, and accords to them only what it cannot refuse to anyone”*(Rousseau).

Syla Benhabib makes an assessment of the thinkers who made extreme arguments concerning sovereignty; she calls them '*sovereignist territorialists*'. What is central to their argument is the loyalty to territoriality, national politics and resistance to international law as a constraint on national sanction. She further divides these sovereignist into two types, "National sovereignist and democratic sovereignist" (Benhabib 2009: 693). Nationalist sovereignist assumes people as homogenous and the law as an expression of collective will which is legitimized by the state. Nationalism has the capacity of repressing of the differences (imposition of homogeneity) and creation of otherness. Democratic sovereignist do not see people as homogenous, but as demos, they argue that laws are legitimate only when people are the creators and subject of those laws and those laws are formulated by following well established procedures, and also if there is well defined limit up to which the authority of those laws extends.

Democratic sovereignist are also against the creation of a global legal system, arguing that it will jeopardize the preservation of culture and national interest and the right of political self-determination. So what is central to the arguments of sovereignist is the assumption that the state is a distinct cultural entity which has the right of political self-determination and it is the justification for granting priority to the interests of citizens over the refugees in the matters related to the deciding entrance policies.

Mathew Gibney calls those arguing in favor of the closed borders as "partialist." He argues that "in the partial view, the claim that states, in their role as representatives of communities of citizens, are morally justified in enacting entrance policies that privilege the interests of their members is defended" (Gibney 2004: 23). He further argues that this view is the characteristics of the communitarian, conservative, constitutionalist and realist strands of political theory. These writers have ignored the question of responsibility of state towards refugees and entrance policies. Their primary focus of attention has been the reciprocal duty citizens have towards each other, for them who is a member of a

political community is not a question. For them state as distinct cultural community has the moral right to shape their collective life.

The question is that on what justification does the right to self-determination grant on states the right to control entrance? For partialists the answer is that from the right of the state to self-determination stems out an entitlement of its citizens to give public expression to their shared culture. The other argument is that participation in a culture is necessary for individual autonomy. Will Kymlicka (1995) argues that the culture provides the options for the exercise of choice. It is in a particular cultural context these choices attain meaning and significance. Culture creates orientations so much so that it provides with the language and vocabulary and it fixes the standards of right and wrong. The belonging to a culture gives the men and women a secure and reliable source of identity across time and historical circumstance. So it would not be out of place to say that culture in the modern world is foundation of self- identification.

Communitarians being the most Arendt representatives of the partialists side argue that identities of individuals are constituted by virtue of them being belonging to a culture or national community. The culture where individual is born and raised shapes the values, relationships, and all our subjectivities can be located in a cultural context. Men and women at the most basic level are cultural beings. For Michael Walzer, open borders are a threat to cultural heritage. No stable culture can be formed or maintained if there is free movements across the borders. The cultural distinctiveness is maintained only through the closed borders. The sovereign state is the only entity that is making the preservations of the culture possible. He argues that the state preserves the “communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life” (Walzer, 1983: 62). There is a shared sense of common good in this bounded community. It becomes obvious that the argument that flows from this is, that:

“What citizens share is membership in a rich cultural community constituted by common social practices, cultural traditions and shared ethical understandings. This kind of political community, moreover, provides the necessary context for collective political projects in pursuit of the common good of the nation. It offers the largest feasible site for a politics of the common good – a politics that transcends the diverse and idiosyncratic conceptions of the good that characterize liberal politics and looks to the good of the citizen community as a whole” (Gibney 2004: 26)

The political community is a bounded community and the right of distribution and inclusion or exclusion is solely the prerogative of those already the members of it. Even for Aristotle the destiny of aliens and slaves was to be shaped by the citizens, because they exist in the realm of necessity as against the citizens who exist in the realm of choice. The decisions about war, about public expenditures were taken by the citizens.

It cannot be entirely doubted that when cultures come in contact with each other they affect each other. But this logically cannot be made a reason for closing down the borders, because what the history of evolution of the different cultures suggests is that, cultures developed through intermingling of people, religions, and basically through the exchange of ideas. Culture has always been something that is open, changing and evolving and hence alive, as against what Walzer assumed of it as being something ‘essential’ or ‘pure’ to it. The assumption of culture being static and fixed entails stagnation and blind obedience to tradition and it has the dangers of perpetuating the unacceptable and abusive practices like patriarchy. It is better for any world to remain open to external influences and feedback.

Now where do the refugees fit in the partialist’s picture? The primacy which partialists accords to bounded communities doesn’t mean that they don’t give due regard to the issues and interests of refugees. Partialism is different from political realism. So it is important to look at the basis on which they propose the defense of bounded communities and also the basis on which state should respond to their issues. How much emphasis is to be given to the issues of refugees.

What is central to the partialist's belief is that any refugee policy or any response to the issue of refugees must reflect the values and interests of the citizens. However the values and interests are available to be interpreted in different ways.

“In one view, the question of what constitutes a legitimate response to the claims of refugees is answered simply through the results of democratic politics. What the demos of a particular state choose through fair and democratic processes that respect civil and political equality is the legitimate response for the government to pursue “(Gibney 2004: 32).

In other words what serves the collective consciousness becomes legitimate, and what the electorate rejects is simply relegated to the illegitimate. The argument that follows is this that any immigration policy should not be decided on the basis of right and wrong, but on the basis of balancing the divergent interests within the state. “The US has the sovereign right, if it constitutionally reflects the majority view, to exclude others from coming here. It is that simple; it is that awkward. The essence of sovereignty remains the power to exclude” (Clad 1994 : 150). The implication of this viewpoint is that it has the potential of conferring the moral legitimacy to the actions of state which may disregard the interests of refugees.

If we take this assumption that what the electorate decides is legitimate and the most acceptable way of determining the state policy towards refugees, there is not much to complain about this way keeping in view the current restrictive measures in the world.

Some partialists don't endorse this view; they argue that it is important to move beyond current mood and electoral results while formulating the entry policies. The focus should be on the understanding of the shared values and norms, what separates citizens from the foreigners is not just the legal bond but a whole gamut of values, sensibilities and understandings and common shared history which makes it a site of special importance. The task of identifying the responsibilities of the states towards refugees requires an act of cultural interpretation, an assessment of distinguishing practices and institutions of political community in question. Only through understanding the characteristic practices and values we can understand what it means to be the member of said political community.

Concerning refugees Walzer argues that the needs of refugees cannot be met unless we grant entry; entry is a non-exportable good. He further suggests that the liberty which makes certain countries the potential destinations in the eyes of refugees have not yet found a way to other countries, what we have is the inability to export those conditions and liberties. So the only way to fix it is to let them enter. Only within the protected space of a state these goods (liberties) can be shared. He in fact considers that we have an obligation towards strangers, but that in thinking about the responsibility towards them, it is needed to be determined that how urgently the help is needed and what is the cost of such help. Only in such circumstances, when the help is urgently needed, concerns can thus be understood in terms of situations like, ‘if you don’t let me enter I shall be killed’) needed and the cost of such help is relatively low that I am supposed to stop and help the stranger wherever I meet him regardless of whatever my membership or his membership. This duty to help the stranger can be applied large at collective level. He says:

“Groups of people ought to help the necessitous whom they discover somehow in their midst or on their path. But the limits on the risks and costs in these cases are sharply drawn. I need not take the injured stranger into my home, except briefly, and I certainly need not care for him or even associate with him for the rest of my life. My life cannot be shaped by such encounters” (Walzer 1983: 33).

He further argues that we may have responsibilities towards refugees only when a) “we helped to turn them into refugees, or b) if there is some affinity (cultural, religious, and historic) between us and them.” For him, “a democratic state, therefore, has no obligation toward refugees who come from non democratic states with a culture vastly different from its own, if it did not have a hand in making them refugees.” He argues that “the injury we have done them makes for an affinity between us” (Walzer 1983: 49). The other case which generates responsibility (on us) is when women and men are “persecuted or oppressed because they are like us” (Walzer 1983: 49). It is assumed that political and ideological affinities can create bonds across political lines. And if someone is being persecuted or oppressed because they hold those values dear to them which we hold dear, and which embody the essence of our communal life then case for responsibility holds true. For example the cases for fighting for the right to basic liberties in communists’ countries or fighting for women rights in Saudi Arabia.



To conclude the discussion let the element of democratic and liberal justification of coercive apparatus (borders) be brought in. In the literature on Democratic theory, the basic assumption is that people have a right to self-determination, and as soon as a community establishes itself by exercising this right, it immediately places boundaries by determining who does and who doesn't belong to the community. At the center of both democracy and liberalism is the issue of personal autonomy and freedom is meaningful only when it serves the personal autonomy. Joseph Raz in 'Morality of freedom' argues in this context that the idea of personal autonomy involves "the vision of people, controlling to some extent their own destiny" (Raz 1986:154) in the ways that they see themselves as the "creators of their own moral world" (Raz 1986: 155) as against being "subjected to the will of the other" (Raz 1986: 369).

And we know that the state is an instrument of coercion and the coercion is only justified if it results into the greater benefit in its absence. Both liberalism and democratic theory give different justifications for coercion (state, institutions, borders) as Arash Abizadeh argues that liberalism "interprets the autonomy principle to require that the exercise of political power be in principle justifiable to everyone, including the persons over whom it is exercised, in a manner consistent with viewing each person as free (autonomous) and equal" (Abizadeh 2008: 41) and that:

"The democratic theory of popular sovereignty, by contrast, holds that the exercise of political power is legitimate only insofar as it is actually justified 'by' and 'to' the very people over whom it is exercised, in a manner consistent with viewing them as free (autonomous) and equal" (Abizadeh 2008: 41).

So there is a tension between the liberalism and democracy in terms of viewing borders. Liberalism in ideal sense may require open borders and democracy requires the bounded communities who exercise self-determination and controlling of borders. It is also true that a large number of states have recognized the rights of foreigners (asylum) but they generally see these human rights as some sort of constraints on their unilateral right to control the borders. Abizadeh argues that:

“Liberalism is satisfied by a hypothetical justification and the establishment of just institutions and laws which exercise the political power. Democratic theory requires actual participation in practices of discursive justification which establishes the legitimacy of the institutions and laws” (Abizadeh 2008: 41).

Democracy requires people be divided into distinct people. I would like to end this argument that:

“Democratic theory either rejects the unilateral right to close borders, or would permit such a right only derivatively and only if it has already been successfully and democratically justified to foreigners. This is because the demos of democratic theory are in principle unbounded, and the regime of boundary control must consequently be democratically justified to foreigners as well as to citizens” (Abizadeh 2008: 38).

Now I will move in my next discussion, the impartialism and defense for open borders.

### *3. Impartialism and the Case for Open Borders*

In the previous section I have discussed the arguments in the defense of closed borders and restrictive entry which is generally called as the partialist view, and also the limitations of those arguments. Now in the section I will discuss the case for open borders. The theoretical alternative to the partialist perspective is referred to as the ‘impartialist’ view. Partialists worked with the idea of state as cultural community exercising the exclusive right of self determination and deciding the entrance policy on the behalf of its members. “Impartialism, in contrast, works with an ideal of states as cosmopolitan moral agents, and sees states as morally required to take into equal account interests or rights of citizens and foreigners in entrance decisions. It requires, in other words, that states consider impartially the claims of members and strangers alike” (Gibney 2004: 59). Global liberalism and utilitarianism are the two perspectives that expound this view. Impartialism challenges not only the partialist view but it also questions well established practices of the state. Many stands of impartialists ignore the questions of entrance and asylum; those who have argued on these issues have called out for the radical changes in the existing policies of the states.

Joseph Carens in the 'Aliens and citizens; the case for open borders' argues that the right of individual to move and settle in any country they wish, and "that the borders should generally be open and that people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country" (Carens 1987: 251). He argues that three main approaches in the contemporary political theory are related with the idea of open borders and all three comes to the conclusion that restricting the borders cannot be justified.

The three approaches are that of the Rawlsian, the Nozickean and the utilitarian. All the three approaches start from similar assumption that every individual has the same moral worth. Carens argues that in today's world, the citizenship in the western states is equivalent to the feudal privilege of the past, where the chances of betterment of life are more. Like feudal birthright privileges, restrictive citizenship is hard to justify. He argues that with the existence of inequalities in the contemporary world the case for liberty of free movement is strongest, because citizenship of a country doesn't offer just a space, but it offers a lot of other things that are detrimental for the quality of life a person would have.

Rawls in '*A Theory of Justice*' argues that basic structure of the society should taken to be just if they are consistent with the principles chosen by the individuals in the hypothetical situation of veil of ignorance, in which the participants don't possess the knowledge that enables them to create the policies that result into their personal benefit. Rawls describes the veil of ignorance as a space where individuals are in such an ignorant state to ward off the selfishness and to ensure the decision (social principles agreed upon) which comes out will be impartial, just and fair. The basic question which Rawls ask is that what principles people would choose for the governance of the society if they have to choose from the veil of ignorance being ignorant of their personal situation, like sex, race, class et cetera.

Rawls argues that people in the situation of original position will agree to or choose two principles. The first principle would guarantee equal liberty to all i.e. what is known as the liberty principle. The second is the ‘difference principle’, which implies that the social and economic inequalities would be justified only when they result in the betterment of least advantaged. In other words it means that the fruits of socio economic progress would be distributed in such a way that it leads to the betterment of the least advantaged group of the society. Rawls principle focus on the single closed society, he assumes a closed system in which immigration is not an issue.

Joseph Carens suggests that the logic of original position can be extended to the global level. According to Carens “the reasons that make the original position useful thinking about questions of justice within a given society make it useful for thinking about justice across different societies” (Carens 1987: 255) which implies that people in the global original position will choose to move across the states for exact same reason as they would support free movement within state. The movement between the states and movement within the state both are essential for the liberties of the person. The reason for the movement of an individual within the state and between the states might be same.

The purpose of original position as an abstraction is to nullify the effects of contingencies which put men at odds. Rawls argues that “the natural and social contingencies are arbitrary from a moral point of view” and these contingencies shouldn’t influence the choice of principle of justice. The contingencies that can set people at odds are aspects like whether one belongs to a poor country or to a rich one. Justice can only be fair if the knowledge of one’s membership or lack of that knowledge is also excluded.

On this basis Joseph Carens argues that the original position should be extended at the global level. By assuming the original position in the global context, the original position through the veil of ignorance prevents the individuals from knowing their place of birth or their citizenship. Carens argues that “they would presumably choose the same two principles of justice” (Carens 1987: 257). Now I will move to the Nozick’s justification of free exchange and open borders from his theory of property.

Now where do the question of property fits vis-à-vis aliens and foreigners. Natural law Writers of 16<sup>th</sup> and 17<sup>th</sup> centuries like John Locke started the conception of right to property by basing their argument on the Christian assumption ‘ that God gave the world to mankind in common and God haven’t created the world for the man to spoil.’ And that an individual is allowed to occupy and use the natural resource only to the extent as long as there is good and enough is left for the others. The possession of property is fair and just if it fulfills this principle of necessity and proportionality. But if the consequence of exercising the exclusive right to private property is death and loss of other person who needed the protection then in that case this natural right lapses.

If one looks at the western states, almost all of them possess more territory and consume more resources than what their members need. So the right to ownership of private property cannot be made a basis for denial of basic necessities of life to a (another) person. Because banishment or exile cannot take away from a person their personality or their right to seek a place to live elsewhere. They have this right from nature and no human law can take away this.

Robert Nozick can be considered as the modern representative of John Locke. Individuals in the Lockean state of nature are in the perfect state of freedom to order their lives as they deem fit within the bounds of natural law. As per the requirements of law of “nature no man should harm another in his life, health, liberty or possession” (Nozick 1974 : 10). But some men transgress those bounds and the remedy which Locke suggests to deal with such inconvenience is the establishment of civil government.

Following the same line Nozick argues that the rights of the state are minimalist and its sole purpose is to protect the rights of the individuals. Nozick never answers the question that whether this minimalist state is justified in controlling borders and regulating the immigration.

“Nozick argues that other than enforcing only those rights of individuals which they enjoy in the state of nature, state has nothing to do with anything. And state has the duty of protecting the rights of citizens and non-citizens equally within its territory. Rights are not because of being citizens but because of being individuals. For Nozick citizenship is not a special claim “the state may not interfere with such exchanges so long as they do not violate someone else’s rights” (Carens 1987 : 253).

What it implies for immigration is this that let us suppose a company in India wants to hire workers from say Nepal, for Nozick Indian government would have no right in preventing the company to hire the worker. If it does then it violates both the right of company and of the worker. Even when the entry of foreign worker may be disadvantageous for Indian workers, to Nozick it seems right. For Nozick no one should be protected against the competitive disadvantage, because it would undermine individual’s property right. The entry in the state do not need a pretext, in case one is not offered an opportunity for employment or any such thing, still the individual has full right to enter. No government will be justified in preventing him for entering the state.

It should not be assumed that Nozick provides no basis for the exclusion of aliens. Rather Nozick’s theory “provides no basis for the state to exclude aliens and no basis for individuals to exclude aliens that could not be used to exclude citizens as well” (Carens 1987:253) Individuals have the right to do whatever they want with their individual property. They may refuse to hire a worker, but “in Nozickean world they could do the same things to their fellow citizens” (Carens 1987: 254) and “they have this right to exclude as individuals, not as members of a collective. They cannot prevent other individuals from acting differently (hiring aliens, renting them houses, etc)” (Carens 1987: 254)

The question arises whether there is a collective right to control entry in Nozick’s theory. He makes a distinction between nations and small face to face communities and argues “a face to face community can exist on land jointly owned by its member, whereas the land of a nation is not so held. The community will be entitled then, as a body, to determine

what regulations are to be obeyed on its land; whereas the citizens of a nation do not own its land and so cannot in this way regulate its use”(Nozick 1974: 322).

So the control which state exercises over the individuals is limited to the enforcement of the rights of individual owners only. “Prohibiting people from entering a territory because they did not happen to be born there or otherwise gain the credentials of citizenship is no part of any state's legitimate mandate. The state has no right to restrict immigration” (Carens 1987: 254). The next discussion is the utilitarian defense of open borders.

Greatest happiness of the greatest numbers (maximization of utility) is the most central tenet of utilitarianism. The happiness is understood in varied terms, but the logic of calculus (quantifying the costs and benefits) is always and ever present. The fundamental commitment of utilitarianism to the moral equality is reflected in the principle of each is to be counted as one and none as more than one. From an economic perspective the best utilitarian immigration policy would be the one which maximizes the economic benefits of both immigrant and host. The benefits and losses of both the citizen and non-citizen would be considered equally. Both the classical and neo classical economists believed that overall economic gains can be maximized by ensuring the free mobility of capital and labor. And free mobility is possible only when borders are open. Liberal democratic states should increase their intake until the cost to the residents; outweigh the benefits accrued to the immigrants.

Peter Singer and Renata in their article ‘The ethics of refugee policy’ (1988) have examined the legitimacy of current immigration policies from the utilitarian perspective. They argue that the current immigration policies give inflated privilege to the economic, political and social consequences. And they argue that immigration policies should take into account the interest of all those affected and the more pressing and more fundamental interests should take precedence over the less pressing and less fundamental interests. They argue that the current asylum policies ignore the questions as important as question of life of an individual itself. They argue that “the claim of refugees for entrance is often based on interests as fundamental as the interest in life itself” (Singer 1988: 128).

By giving consideration to all the interests along with economic, political, and social interest, state will invite a 'varied compositions' of applications for asylum and also it will increase the volume of such applications as Michael Walzer once said that, western states are like universities which are besieged by asylum applications. In the context of refugees which is the most disparate group they argued that states should accept them until there comes a point that "the resident community had eliminated all luxuries that imperiled the environment, and yet the basic needs of an expanding population were putting such pressure on fragile ecological systems that a further expansion would do irreparable harm" (Singer 1988: 127). The other reason is when the inclusion of new refugees, causes serious breakdown in the tolerance of the resident society, that the security and survival of refugees already admitted refugees comes in danger. Michael Dummett asserts that a national group has the right to exclude when it is 'in genuine danger of being [culturally] submerged' by foreigners or when more migration would result in 'serious overpopulation" (Dummett 2001: 73). This is hardly applicable to the western states which are heavily under populated and culturally diverse. Utilitarians seek transformations in western attitude towards immigration. And they too don't acknowledge any special rights emanating out of being member of a political community.

To conclude this discussion, it can be safely said that views of both global liberals (Rawls, Nozick, Carens etc) and Utilitarians represented as 'impartialist account' in political theory despite their methodological differences are united in demanding open borders. For these theorists the demands of morality are universal, owed to human beings qua human beings. So the strength of the impartialist account of state responsibility towards entrance and borders lies in its inclusiveness. Impartialists only justify those reasons for restricting the entry which would apply both to citizens and non-citizens equally. By propounding such arguments they have tried to capture human commonality, the commonality which suggests that we suffer equally in the event of denial of liberty, regardless of from which community we belong.

Impartialists are aware of the fact that current state boundaries do not only demarcate different cultures, but these mark a world divided up amongst state in most uneven



manner. They consider that the current restriction policies stand as a barrier for the creation of an egalitarian world. And these measures protect the privileges of rich and less populated western states. For them exclusion has to be justified. The arguments that flows is that individuals might have equally compelling reasons for moving across the state as they have for moving within.

In the concluding remarks it could be said that, both the partial and impartial approach points to the conflict between the claims of citizens (represented by partiality) and larger claims of humanity (represented by Impartialism). The conflict is explicit, if we ask a western state to adopt policies which give equal consideration to the non citizens as to the citizens; such a policy in all likelihood will undermine the practices and institutions that are meant for social justice and equality within the state. And it would erode the meaningfulness of claim of democratic autonomy of any political community. But on the other hand if we give too much weight to this argument, it will be like tolerating and celebrating the fact that the differences in citizenship correspond to the erogenous differences in the quality and span of life. Neither of the two approaches represents an adequate view, both the impersonal and personal claims, but both approach touch upon the issues related to the current crisis.

“In the face of the huge numbers of official and unofficial refugees in the contemporary world, accepting the full logic of the impartial approach would lead to policies that undermine the conditions necessary for communal self-determination and the provision of public goods” (Gibney 2004: 83).

But if we accept the partial logic completely it “risks legitimating the current actions of states in paying scant regard to the claims of millions of aspiring entrants, many of whom are in great need, on the grounds of a right to communal autonomy” (Gibney 2004: 83).

Abiding by completely to any of these approaches, it appears is yielding no solution. Both the partialism and impartialism represent somehow extreme positions. The pressing question therefore is that what should be the ideal response. It can be sufficiently suggested that any response that is should attend to both partial and impartial claims.



## Chapter III

# Ethical and Practical Responses to the issue of Asylum and Refugees

“Migration, whether voluntary or forced, has always been a characteristic of individual and collective human behavior” (Newman 2003: 3). Refugee movements generally put as ‘refugee flow’ has been the cause and consequence of conflict within and between societies. However what has changed in the last century is the qualitative upturn in the pattern of human displacement and refugee flows throughout world. As a consequence “governments have moved in the direction of regulating migration, in particular the immigration, and towards defining those who were to be granted the special status of refugees” (Newman 2004: 4). How governments regulate immigration and define those who want to enter their territories has led people to view migration as an issue related to the security and prosperity of the state and of those who are legal residents of the state. There have been changes in the nature of the state and socio-economic organization within the states and in the international realm. The socio economic environment at the international level is globalization. “Many scholars have asserted that changes in economic organization and the reduction of state capacity have contributed to poverty and inequality and that this is an underlying explanatory cause of migration” (Newman 2004: 4). Due to the modernization of economic systems in the third world, the traditional social support systems have been eroded. In many areas the high population density coupled with environmental degradation and resource scarcity has rendered areas unfit for human support. Urbanization on the massive scale has led to the changes which made the rural socio-economic structure unviable has also been cited as an explanation for the migration. The most visible and most demonstrative of all the explanation is that the violent conflict and persecution are the root causes of present refugee flows and displacement within and across borders. The ethnic and civil conflicts within the

societies, the phenomenon of state building, the failure and collapse of the state, the deliberate persecution by the state in the form of genocide and extermination are all inherently violent which lead directly to mass and forced migration. The purpose of this chapter is not to discuss the causes of the mass and forced migration, but how states should and societies deal with the phenomenon of refugee flow, what constitutes an effective and ethically defensible practical response. The chapter focuses the issue of asylum policy with special emphasis on refugees. It prescribes the liberal democratic states to adopt certain policies and practices to deal with the issue of asylum and refugees which arise out of the phenomenon of mass migration.

Any policy response to the issue of entry should possess an ethical strength and it should be sensitive to the practical limitations of the states. There are challenges in moving from the ideal theory towards the practical prescriptions for the liberal democratic states in dealing with the refugees and other asylum seekers. The two dominant theoretical standpoints namely (partialism and impartialism) are discussed in great detail in the second chapter. None of them answer the question of state responsibility convincingly if any of them put in practice in its entirety. Both give the opposing and contrasting view of the state's responsibility towards refugees. The partial view gives importance to the right of the people to act collectively in sustaining cultural communities. And that states have a moral right in deciding the membership criteria and granting asylum on its own. Impartialist account on the other hand argues that states should give equal consideration to the outsiders and should consider the interests and rights of human community in its entirety. And people should be allowed to move freely and settle wherever they want to settle as long as in doing so the total global utility is not diminished. The first part of this chapter therefore suggests that there is certainly a difficulty in spelling out a compelling ideal for state responsibilities in entrance. Mathew Gibney argues that the compelling ideal will be one which reduces the tension between the two standpoints and it will be one:

“That would see states as justified in restricting entry only in order to protect the institutions and values of the liberal democratic state, defined quite broadly to include not only civil and political rights, but also the kind of social rights associated with a generous welfare state that

ensures economic justice. This state would prioritize refugees in the distribution of scarce entrance places because of their pressing need” (Gibney 2004: 195).

The cost of such a response should not be so high that the existing institutions and the values of the liberal democratic state are compromised. As long as the cost is within this limit, it is to be taken as practical and ethical. However there are challenges in spelling out a practical ideal. Because the situation in the real world involves a whole lot of actors and interaction among them creates a lot of dilemmas and peculiar situations which are not so simple to be addressed.

Having laid out the limitations inherent in the available dominant perspectives in first part, the second part of the chapter moves onto discussing the practical limitation of the modern state in implementing the two ideals of allowing and restricting entry. From limitations, the next section attempts to lay out an ethically defensible asylum policy which is both practical and politically relevant. The chapter makes a case for humanitarianism as morally defensible policy response to the graving plight of refugees as well as to the political problems that the refugee-hood status raises for nation states. Humanitarianism calls for the duty of the states to challenge the existing constraints through taking part in sharing the state’s responsibility in resettlement and playing active role in reshaping of public opinion, calls for dealing with the issue of forced migration, also discusses ways to deal with national security concerns and the perception of threat associated with refugees.

### *1. Challenges towards the realization of a just and practical ideal*

There is large gap between what is ethically ideal and what the current states are actually doing. Ethical ideal require far more inclusive response towards the refugees and other asylum seekers, and what is present in the current state practice is the very restrictive measures which are specifically designed to restrict the entry of those who are in

desperate need. In the practical scenario the aspects of agency (citizens, society, state, international structure) comes into play along with their capacities and limitations. The states have to take care of the interest of its citizens and society groups. The practical conduct of the state involves the interaction of the institutions, individuals and groups and also taking care of its interests of foreign policy. So all of this creates a complex situation for the state to deal with too many stakes and stakeholders and it limits the capacity of the state towards doing any genuine effort for the foreigners. And “in ideal theory, the question of what is morally desirable is usually considered independently of questions of agency” (Gibney 2004: 196). The agents which are involved in the realization of the ethical ideal are generally left unspecified. The question of agency requires much accuracy when we look to examine the behavior of already existing states. The governments which are the pathways through which the will of the states is put in place, “governments are, above all else, the agents of most import; they are the actors that typically initiate and oversee the implementation of policies towards refugees” (Gibney 2004: 77). So the prime agent concerned is governments which face the moral and practical constraints while formulating the policies towards refugees. So the practical ideal of states responsibility must take into account the issues of practical and moral limitations. Let us briefly look at the practical limitations of the modern state.

## *2. Practical Limitations of the Modern State*

Since the tumultuous period of seventeenth century, the state has been the answer to the problem of political obligation. Hobbes believed that “if there is to be any prospect of attaining civil peace, the fullest powers of sovereignty must be vested neither in the people nor in their rulers, but always in the figure of an artificial man” (Skinner 1989: 121). As the time passed the states acquired the ever encompassing role of regulating and propelling the lives of its citizens for the better. From development role to the security role, state is doing it all. There is a sense of an established trust and hope that no other institution has the capacity to perform such diverse roles and deliver such diverse

services. However, Hobbes' assumption of an intimate relationship between state and the citizens has been challenged throughout twentieth century, not least by the huge number of refugees across all parts of the world. Because there are enough cases where state not only failed to protect and provide for the people, but also actively became the prime agent of uprooting people.

“The existence of so many people who need to flee their state of normal residence is indicative not merely of states' neglect in catering for the basic security requirements of their residents, but of the brutal fact that the perceived interests of many states seem to lie in the persecution, or worse still, the elimination of those sections of its human community which are deemed to be of the wrong race, religion or political persuasion.” (Gibney 2004: 201)

So there is this phenomenon when the sole provider (state) fails to provide the security and prosperity to its citizens, and more specifically it turns against the very people who assume themselves to be state's beneficiary. The situation turn out to be following; either the state fails to prevent the harm done to citizens or it itself becomes the source of that harm. So in practical world both these scenarios exist.

Since the state is seen as an answer to the question of who is responsible to whom. States are responsible to their own citizens. The legitimacy of the state depends on its ability to convincingly portray itself as a responsible entity. The consequence of it is that the claims of the outsiders are assessed by the states through a logic that prioritizes the interests of the citizens and depreciates the needs and interests of the outsiders. This aim of this logic is to manage the potential damage which may happen to its own authority, if it forces its own citizens to incur the costs to fulfill the needs of strangers. Let us look at the current refugee regime and analyze how the interest of the citizens and outsiders play out.

The current refugee regime which we have is structured around the norm of non-refoulement. The duty of non-refoulement is binding obligation on any state to which a claim to asylum is made not to return those who come at their shores and borders in desperate conditions. More formally the duty of non-refoulement is mentioned in the article 33 of the 1951 convention related to the status of the refugees it defines it as "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." So it is legally binding on the state that it does not send the seeker back to the place from where he had fled. What non-refoulement encompasses is that:

“any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect refoulement” (Feller et al. 2003 : 178)

The implications of this principle are that the current regime does not place any restriction on the number of refugees to whom state owes the duty of non-refoulement. But it should not be taken as that refugee has the right to asylum in the state to which they have applied. It means that as long as the duty of non-refoulement is not breached states among themselves can make arrangements among themselves bilaterally or multilaterally concerning the distribution of refugees with each other and share the cost of refugee protection. If they fail to do so, the duty of non-refoulement entails that the state to which the application is made bears the responsibility of providing the asylum.

Now the question is when it comes to the operationalization of this normative structure of current refugee regime, what effect does it have on the states? Two things come out of this, first is the normative claim of discharging the duty to refugee protection takes precedence over fairness and distribution among states the responsibility for refugee protection. The other thing that comes out is a practical dilemma,

“The practical dilemma is that, to the extent that refugees are perceived as burdens on the states that protect them and the costs of protecting refugees become significant, the current regime gives rise to a situation in which states, collectively, have an interest in effective and fair refugee protection, but states, individually, have an interest in minimizing their burden” (Owen 2016: 147)

Since states have the responsibility towards their citizens and the whole survival of the state rests on its ability to convince its citizens that it is working in their interests and needs, and it is giving precedence to their interests and needs. So first of all it does provide a reason to think that even if those states that acknowledge their responsibility



towards refugees; are susceptible to the perceptions of unfairness in the distribution of the responsibility. And secondly since there is no agreed and established schema or criteria for the fair distribution of responsibility, states tend to perceive that their fair share is open to being twisted by their interest in minimizing the burden placed on their own citizens. To put it in other words, under non ideal situations, states reasonably conceive their primary duty as securing the human rights of their own citizens and any obligation towards outsiders depend on this.

The practical dilemma constructed under current regime in which, if the cost of refugee protection becomes heavy, there is a possibility of emerging out of a collective action problem in which although states collectively, have prudential interest in an effective refugee regime, they also have a prudential interest in minimizing their own contribution. In the absence of an established criteria or scheme for acquiring a reasonable degree of fairness, this dynamic affects the readiness of the states to engage in the provision of effective refugee protection.

So the commitments of the state towards its citizens; the commitment of ensuring prosperity (state as economic agent) the commitment of balancing out of the diverse interests of the citizens (political agent) and the commitment of giving precedence to the needs (to maintain culture, national values etc.) of citizens over foreigners (as a national agent) and in the absence of an agreed criteria of fair distribution of responsibility towards refugees. The issue of addressing the problem of asylum becomes complicated. In the ability to balance between these lies the strength of a sound asylum policy.

### *3. Ethically Defensible Asylum Policy*

If the protection of the refugees is its central objective then the system of asylum in the western states is in deep crisis. The western states over last few decades has erected barrier after barrier to prevent the entry of refugees and also of the other types of asylum seekers. These barriers may be justified in the case of economic migrants. But they also

prevent the entry and arrival of those who are fleeing persecution and danger of death. In some cases some individuals manage to enter these states and subsequently get refugee status, and western states use it as an evidence to prove that their asylum system is well alive and functioning. They use the exceptions as norm.

An ethical ideal is required to improve the things. An ideal which will balance not only the interests of the partial and impartial claims, but also takes into consideration the current limitations of the modern state, i.e. It should take into account the range of ethical, political, structural challenges faced by the state while formulating the asylum policy. Mathew Gibney proposes that the principle of “Humanitarianism” be made a basis of thinking about the responsibilities of the liberal democratic states towards refugees. He argues that it is both ethically informed and politically relevant way of thinking about the responsibilities of liberal democratic states to refugees. Humanitarianism is an old and, in many respects, conservative principle is seen as the best way of capturing current responsibilities to refugees.

The principle of humanitarianism demand respect for the principle of non-refoulement and asks for boosting of efforts to resettle refugees. In terms of long term goals the principle of humanitarianism requires that the state to enhance efforts to create harmonious international environment and asks for the change of public attitudes in positive direction and ask for securing the international consensus and cooperation on asylum issues. In this section I will discuss humanitarianism and its implications if made a basis of thinking about the responsibility.

### *3.1 Humanitarianism*

The task of moving towards better policies to refugees should start from identifying and defining a suitable principle that can direct the actions of the liberal democratic states. Humanitarianism if simply stated holds the idea of promotion of human welfare, providing of assistance to the needy. It is an active belief in the value of human life. The

principle holds that, it is duty of all peoples to promote human welfare. In relation to the states it requires that “states have an obligation to assist refugees when the cost of doing so is low” (Gibney 2004: 231). It also holds that all human beings have intrinsic worth and have dignity and respect and should be treated as such. It is an antithesis of “Us versus them” mentality.

Like impartial theories this principle recognizes the duties that stem out of being a member of single human community. However the impartial theories are not as comprehensive in their scope as impartial theories. They lay emphasis on the obligation towards those who desperately need help and assistance. The notion of ‘low costs’ leaves both the states as well as the individuals to have the option of protecting their most valued interests.

The humanitarianism principle is not new. It has found its best historical expression in the biblical parable of Good Samaritan. The parable mentions that a stranger was lying hurt and vulnerable on the side of a road, the priest and Levite simply passed by ignoring the stranger, but the Good Samaritan does not simply pass, he lends the assistance to the stranger by dressing his wounds and taking him to a place to convalesce there. This Biblical expression is formalized in the principle that there is a duty incumbent on all of us to assist and offer help to those who are in the desperate need and great distress and suffering when the cost of providing the help is low. This is the principle that can hold strangers together when they share nothing more than being human.

This principle has not only been formulated in terms of the obligations between individuals but also between states and foreigners. Humanitarianism has great implications for relation between states and refugees. Refugees are referent of a hurt and defenseless stranger lying on the side of the road. The idea of humanitarianism has informed the work of almost all the great natural law theorists like John Locke, Hugo Grotius and Vattel. John Locke has argued that “it would be sin in any man of estate, to let his brother perish for want of affording relief out of his plenty” (Locke 1964: sec 42). Even the early theorist of international law like Hugo Grotius has argued that humanitarianism has implications for those who are vulnerable because they lack political community. He argues that if foreigners are expelled from their homes and are seeking

refuge, a permanent resident should not be denied to them as long as they submit themselves to the established government and are observing regulations which are necessary to avoid strife.

The belief that states have the responsibility of alleviating the suffering of refugees when costs of providing so are low provides a realistic alternative to the more onerous demands of both Utilitarian and global liberals who demand free movement. Humanitarianism represents a minimal statement of responsibilities in comparison to those who view state as entitled to complete will to entrance. Humanitarianism asks for helping those who fight for bare minimum.

### *3.2 Why Humanitarianism*

It is prudent to ask why humanitarianism, first of all it offers a very significant lead in incorporating the competing moral claims of citizens and non-citizens. It proposes that the states responsibilities towards the outsiders are owed exclusively to those who are in desperate need (Refugees). To elaborate it further with an example, when we apply humanitarianism to entrance, it provides reason for attaching the priority to the claims of refugees, as instead global liberalism which would call for free movement and will not differentiate between the neediest ones and less needy ones. The moment the idea of humanitarianism requires that states owe assistance only to the most needy, it harmonizes with the idea that the state have interests and priorities of their own which should be recognized and states have moral right to give them priority. The duties which humanitarianism puts on the states are not big constraints. The duties which it asks from the states are not so demanding that they can overwhelm the commitments that governments already have towards their citizens. I think in this, lies the strength of this principle, that it does not overwhelm the interests and commitments of the government and yet can fulfill the need for helping the neediest.

Secondly there is a generality attached to the principle of humanitarianism. It is flexible enough that it can be applied to very different states, for example if we understand the “low costs” as a way of keeping the expenses required of the citizens at the minimum to reduce the likelihood of backlash, humanitarianism is able to align demands upon states with what politics make possible at any particular point in time. So it has the flexibility to mitigate the potential backlash. Low costs depend on the context, the meaning of low cost and be adjusted keeping in view the capacity of the state and its current situation. For example the low cost for US should be different from what is low cost for say for example Somalia. The interpretation of low costs is to be taken as proportionate to the capacity of the state.

Finally humanitarianism makes cautious demands from the states; it demands that the states should allow new entrants as long as the costs incurred are low. Unlike ideal theories the costs it incurred are not very huge. It does not require the states to go out of the way that their whole existence or existence of any their liberal democratic institution gets threatened or challenged. So the principle is less prone to the unintended consequences arising out of changes in social economic and political forces.

### *3.3 Putting Humanitarianism in Practice*

Mathew Gibney argues that humanitarianism requires that the “governments scrutinize their own policies to search for ways that, subject to the political environment they currently face, more protection could be provided to refugees at low cost” (Gibney 2004 : 236). And also “the principle enjoins the states to work, over longer term, towards reshaping the political environment in ways more conducive to the protection of refugees” (Gibney 2004:237). What can be done more raises the question that, does the principle requires that states dismantle the preventive and deterrent measures they have erected in recent times to prevent the arrival of asylum seekers? If we dismantle all the barriers it would surely increase the access of a large number of people in the great need to the liberal democratic state. But that would not consistent with the logic of low cost

which is so central to the humanitarianism principle. If we look at the current situation in the world keeping in view the global inequalities and the lack of cooperation among the states to take up the slack, any western state if removes those barriers will definitely be overwhelmed. So in face of this uncertainty it is extremely difficult to argue that states have an obligation to abandon the restrictive measures, but this cannot definitely be made as an argument that states do not have an obligation to improve the current situation in the international system. To take into consideration the political constraints in the prescription for action, it is important to look for the ways in which refugees might be assisted that may minimize the costs associated with large scale movements. One such way is resettlement.

### *3.4 Resettlement*

Allowing the entrance to the refugees is the most common way of assisting the refugees. Another way of doing so is to arrange for refugees to be brought to their territory. Resettlement is the process of moving people to a different place to live, because they are no longer allowed to stay in the area where they used to live. This is done to the refugees who are situated in the refugee camps which are mostly established in the developing world, such accommodations are temporary. What happens is that few western countries like US, Canada and Australia have such schemes in which there is a fixed annual quota which is filled by the refugees from the refugee camps. But these acts are seen as acts of highest good which are seen as acts which are done by going out of way beyond the obligations.

How does the resettlement reduces the cost and risk is this first the status of those entering under the resettlement scheme is determined before they enter. This reduces the costs which is associated with the processing. The political debates whether the entrant is an economic migrant or the refugee is settled without much chaos and noise. The other significant benefit is that it allows the governments to manage their refugee commitments with greater predictability and less risk. As I have mentioned in the previous section of

the chapter that the non-refoulement does not put a limit to as how many refugees a state should take, and the natural consequence of that is that states deliberately cap it through the use of non-arrival measures. As opposed to this what resettlement does is that it allows precise determination of how many refugees will be taken in a particular year.

The other way is that the resettlement minimizes the cost and risk is by addressing some ethical problems associated with the principle of non-refoulement. The principles assume that there is an obligation to provide assistance to the refugees in need and that this obligation is owed only to those who have arrived within the territorial boundaries of the state. First of all it raises the point that why states have stronger obligation towards those who are in their territory than those people who are needy and are at risk far away from their borders. Humanitarianism on the other hand doesn't have this kind of bias, it has no consideration for the distance; it is owed to all refugees on the basis of need alone. It is important to mention here that none of these limitations undermine the practical importance of the non-refoulement. The point which I want to make here is that resettlement might be as much ethical and practical, if it is encouraged and observed by the states, it might under the right conditions result into the protection of those who are in need regardless of wherever they are located.

#### *4. Humanitarianism and Duty to Challenge the Existing Constraints*

In the matters of adopting and implementing the more inclusive policies the electoral considerations and the public opinion play a very determining role. Governments in these matters have largely been assumed as passive actors which are subject to the mood of public and also the actions of other states. Despite all of this, government can play an active role in shaping and changing the environment in which they are located. States cannot change things to afresh and new, but how does the leader and state responds to the refugees and the asylum seekers does influence the way in which the people are going to count the costs of responding to the refugees and also can impact how many and how much protection they are going to receive. The conception of the costs at the level of

humanitarianism is partly a social and political construct. So the point which comes out of this is that humanitarianism places another responsibility on the states. It is the duty of the state to reshape the 'political space' in such a way that it becomes 'more receptive' of the refugees and other asylum seekers. In simpler terms it can be said that the states not only have the responsibility of accepting the refugees when costs of doing so are low, but also along with this they have to make an effort to maximize the amount of protection provided to the refugees at low cost by reshaping the conditions and environment which is conducive to such effect.

Mathew Gibney outlines three ways in which "governments can work towards making responses to refugees and asylum seekers less hypocritical, more effective and more in tune with the moral significance of providing protection than current practice" (Gibney 2004 :244).None of them involves the states accepting more refugees. They rather are indirect ways of helping the cause, that is, they contribute to the creation of an environment conducive of the refugee cause in domestic and international politics. The ways are as follows (1) Reshaping public opinion (2) participation in the resettlement sharing (3) tackling the cause of the forced migration.

#### 4.1 Reshaping Public Opinion

Democratic and nationalist politics has lot to do with the public opinion; the cost which a government is willing to pay for refugee protection is generally affected to a great extent by the public attitudes. And these attitudes even to a casual observer more often than not are hostile and indifferent or insensitive to the claims of the asylum seekers and refugees.

Such attitudes exist partly because of the behavior of bigoted elite behaving in an irresponsible way. They are mostly ready to use every card from the box to stay or come in power. In the 2014 US election, the most visible and central tenet of Donald Trump's agenda was that of xenophobia. The xenophobia was presented to public disguised as '*America first*'; as if the existence of The United States Of America is threatened by some starving men lying naked on the streets of Yemen or Syria. The fact of American life is that the whole of US economy is sustained by the professionals coming from abroad.



In fact if we look at the entire of 20<sup>th</sup> century until now almost all the brilliant minds were foreigners which came and settled in US. The point that I am trying to make here is this, that perceptions are more powerful than facts, perhaps that is the reason the impressionistic media is so powerful. If this is reversed and general public is made aware of the ethical and moral value of the institution of asylum, and if they are made to see the ethical importance of saving the strangers from persecution and other dangers, it is more likely that they will get inclined to bear up the costs of doing so.

A sense of empathy so generated in the public that is how a suffering is presented on television does affect how one is going to think about it. “An imaginative reconstruction of the experience of the sufferer” (Nussbaum 2001:327) is an important method to understand the situation of the sufferer. An imagination in which we put ourselves enduring all the torments can help us get the idea of their sensations. So what I am trying to say is that an evocation of emotions of sympathy can be generated in the public to enhance the amount of protection given to the refugees.

The importance of compassion in politics is crucial not only for the distant sufferers but for one self also. The importance of the ethics of compassion in directing one’s own life should not be underestimated. So a government should conduct public campaigns and statements with sincerity and sensitivity to impress upon the citizens the moral importance of asylum. Leaders should commit themselves to combat xenophobia. There is no guarantee that these efforts will be successful, because one cannot expect everyone to stand in support of humanitarianism. But one would expect the governments committed to the humanitarian principle to at least try measures of this sort as a way of bearing witness to the importance of the claims of refugees.

#### 4.2 Resettlement Sharing

Along with the efforts to shape the public opinion, a state which is committed to humanitarianism should make efforts to encourage international cooperation in order to

enhance the efforts to boost the availability for the protection of refugees. There is no agreed upon criteria for the distribution of responsibilities in a fair way. In two ways the cooperation can boost the effectiveness of the international system.

First in the absence of an established criterion there is always a perception in the domestic environment that state is taking more than what is required. So if we have established criteria, it will add the necessary transparency and legitimacy of international arrangements for refugee protection, particularly in the eyes of general public.

The second is that it reduces the cost because the sharing will enhance efficiency and reduce unfair burdens. The element of clarity and consistency along with low transaction costs are the benefits which come out of cooperation in resettlement sharing.

#### 4.3 Tackling the Causes of Forced Migration

Ethnic conflict, fascist tendencies, nationalism, tribalism secessionism and destruction of state cause the phenomenon of mass and forced migration as I have mentioned at the start of this chapter. Unless the causes of the forced migration are not addressed the world will not save itself from floods of movement, which has the potential to alter the very functioning of the political system. The situation of displacement has changed. As Arthur C Hilton puts it:

Weak states permit the operation of criminal and terrorist enterprises which pose national security threats. Populations are increasingly at risk and demands to deal with them are growing. The traditional tools of humanitarian response—provision of basic material assistance, asylum, and resettlement—are just the beginning of a set of policy tools which decision makers need to respond to new complexities in this environment.(Heltonn 2002: 266)

The responses to forced migration are reactive and especially western states are not much interested to put in effort to invest in long term solutions for issue of forced migration. The focus is on the short term electoral gains associated with controlling asylum, illegal migration. It is imperative to bring peace to those parts of the world from where the

refugees are coming. The need of the hour is a focus on long term solutions. The targeted aid, control and ban on the small arms trade, enabling the provision of the trade for the third world producers in the western markets are the few ways that can be used to minimize forced migration.

“A wide range of actions, most of them far short of military action, can be taken to avert large-scale refugee crises. An intervention continuum now exists, ranging from the use of ‘good offices,’ diplomacy, and ‘shaming’ of states to the employment of sanctions and the use of military force” (Loescher 2003: 31-32).

Providing the development assistance, monitoring of human rights situations in authoritarian and weak political systems, strengthening of civil society through the help in building up the resilient democratic institutions are the ways which can help in preventing the outbreak of the violence and mass displacements of the populations. “Acting early to avert refugee crisis is demanding, but it is less expensive than dealing with a full blown out and protracted crisis” (Loescher 2003: 32).

It does not make much sense that the international community keeps pouring in the resources into the emergency relief and post crisis rehabilitation after the damage has been done and continue to neglect the causes that produce the storms of mass displacements. So the larger point here is this, national governments which constitute major part of international community cannot put a blind eye thereby ignore the brutalities committed onto people in civil, political, and communal conflicts. The severity human right abuses not only wipe out entirety of populations but it also causes deep sense of resentment in people. This sense of alienation is capable of becoming the fissile material for propelling terrorism, radicalism and violence. No amount of liberal asylum will solve problem effectively unless the causes of mass migration are addressed. The next section discusses the linkage of security interests with the asylum.

#### 4.4 Security and Refugees

Movement of people on a large scale across national borders, under harsh conditions, brings the conflict from the domestic realm into the international realm. The dilemma that

pops out of it for western states equally for any state is this as Stanly Hoffman puts it that:

“There is no way of isolating oneself from the effects of gross human rights violations abroad: they breed refugees, exiles, and dissidents who come knocking at our doors – we must choose between bolting the doors, thus increasing the misery and violence outside, and opening them, at some cost to our own Well-being.” (Hoffman 1981: 111).

I am not arguing that the refugees are a source of threat not much to the states in the developed world but to the developing poor states, I am also describing the presence of a perception of threat which refugees are assumed to be posing. Usually the perception of threat and costs that refugees pose to host societies are exaggerated especially in western countries. It will not be out of place to mention that in some instances, the mass immigrations have caused threatening situations in the host countries. Some 90 percent of the world’s refugees are granted shelter in the developing countries, which are poor states with failing economies, massive unemployment and scarcity of resources. So the cost of hosting refugees falls disproportionately on already poor and weak nations. Sudden and large scale influx of refugees can threaten the socio-economic stability and security of the countries which are already at lower levels of economic development, along with the existence of weak and fragile political systems plagued by the weak institutional structure and social, ethnic and other divisions.

Since the concept of security has been widened over the period of time, it is no more conceptualized around the traditional military understanding of the security. Refugees have a devastating effect on the environment of the already marginal areas. Refugees bring down the wages when they compete for the jobs, when the resources are scarce they create inflation which creates a situation of too many people chasing too few goods. All this essentially creates a dangerous conflict between the host population and the refugees. What exasperate this situation is that the aid and assistance agencies focus on the refugees and don’t focus on the host population which too is suffering though less in magnitude. It reinforces the perception that refugees receive preferential treatment.

There is another apprehension associated with the refugees. It is widely believed that refugees threaten inter-communal harmony. They undermine the religious and societal

values of the host nations by altering the demography of the host region. It upsets the balance and can threaten the existing system:

“In countries with racial, ethnic, religious, or other tensions – that is, most countries – a refugee influx can place great strain on the system. Mass influxes can endanger social and economic stability, particularly in countries where ethnic rivalries may be virulent, where the central government is weak and consensus on the legitimacy of the political system is lacking, and where essential resources are limited” (Loescher 2003: 34).

Almost everywhere societies fear that their identity can be diluted by the uncontrolled migration of people into their societies.

What is interesting to observe is that the refugees tend to preserve their culture and identity in the host state partly because they have a hope of eventually returning to their homeland. And any effort aimed at integrating them into the host society becomes complicated. There is also the law and order problem for the host state so the question that comes before the host state (especially weak states) is that whether it has the capacity to maintain law and order and control the refugee population physically. Refugees more often than not are associated with the social problems of drugs, prostitution, alcoholism, banditry at the local level. Another interesting thing is that the refugees are often found in those areas of the host territory where the capacity or willingness of the state to maintain law and order is less. And “Refugees become the scapegoat for many of the host country’s ills, and governments and opposition groups are prone to use the refugees’ presence to encourage nationalistic and xenophobic sentiments” (Loescher 2003: 34)

There are indirect ways in which refugees can be a security threat to the host country. They can influence the policies of the host country especially its foreign policy especially its relationship with their home country. They can use the opposition in a democratic country to further their interest. Another potential threat they house is that refugees in most remain contained in refugee camps without hope and despairing of future, there is likelihood of them turning to violence and they becoming an easy and readymade recruits for the terrorist networks and organizations. There are also allegations that the refugee camps are used as sites of training and recruiting of terrorists. Sometimes the sending country uses mass expulsions to destabilize the strategic or political rival states or to turn

the regional dynamics in their favor. This could more simply be put as a tactic of dumping the refugees on the neighbors exporting mischief to them.

So there is a growing linkage between asylum, refugees and security. So why states and their citizens have come to perceive the existence of threat associated with refugees? Mathew Gibney points out three reasons for the creation of such perceptions (1) reasons of volume (2) reasons of character (3) reasons of anonymity. He argues that the threat by virtue of volume is generally of least concern to Western states. Because mass influx is not possible into these states, they are located far away from the sources of most refugee conflicts. And they can easily insulate themselves from such abrupt mass movements. The more powerful influence over the perceptions towards refugees and other asylum seekers stems from the 'reasons of character.' The general perception of foreigner as a threat has its roots in the Hobbesian understanding of the state. What is ironical here is that refugee by definition is a person who himself is a victim of insecurity:

“Their very search for protection vindicates the importance of security. But this is only one side of the coin of refugee hood. By virtue of being escapees from violent conflict and human rights violations, refugees are also (albeit unwilling) representatives of these phenomena. They are human examples of how states can sink into violence, torture and oppression” (Gibney 2004: 256).

They are seen as the carriers of instability and insecurity that led to their departure in the first place. The third reason is the anonymity. State also does not have the knowledge of their backgrounds. Under the urgent circumstances state is not able to vet them and is not able to establish their intentions.

In his model on how states should deal with the security concerns model Gibney argues that “For just as western states do not take an asylum seekers claim to be threatened at face value, so they should not take the act of exclusion on security grounds as self-justifying” (Gibney 2004: 258) So the determinations of individuals as security threats need satisfactory and independent examination to ensure that genuine claims for protection are not being overlooked..

To conclude this chapter, it can be said that a large amount of refugees can be provided protection if liberal democratic states satisfy all the requirements of humanitarianism. But there would still be many refugees whose needs for protection would remain unmet. World is witnessing an unprecedented volume of people who are forced from their homes. According to the latest data of UNHCR total of 68.5 million people are forced from their homes. Among them nearly 25.4 million are refugees, over half of them are under the age of 18. Under the principle of humanitarianism the cost of providing assistance to this bulk of people is near to impossible, if we keep the criteria of 'low costs' in mind. Let's suppose we manage to resettle all the refugees, still new ones will emerge. Unless the causes are addressed the generation of still newer refugees will continue. And it is important to note that there is no simple answer to address the deep rooted problems of ethnic conflict, war, military intervention etc. what makes the issue of refugees difficult is not that there is large number of refugees, but that their predicament is tangled with much larger problems of global inequality in terms of power, welfare and resources. Humanitarianism expects the governments and institutions within the liberal democratic system to seriously consider the responsibilities with the respect to the claims of refugees. In doing so it actually helps these democratic states to move much closer to the values and goals they seem to be believing and abiding by only in principles. So any sincere policy which I have argued must take into account the practical constraints a government faces to implement more inclusive refugee policy.

## CONCLUSION

What has been argued in this dissertation is that there are different ways to conceptualize who is a refugee? One is UN convention relating to the status of the refugees (1951), which has defined refugee as a person who flee from his resident state because of a well-founded fear of the persecution for the reasons of the race, religion, nationality or political opinion and owing to such a fear that person is unwilling to avail himself of the protection of that country. This conception of refugee is based on the implicit assumption that, there exists a bond of trust and loyalty and protection between the citizen and the state. And one becomes a refugee when that bond is severed; persecution and alienage are the physical manifestations of this severed bond. Other than UN convention this work has presented the definition adopted by Organization of African unity, which goes a step further and broadens the UN convention definition. Definition by the Organization for African unity also incorporates the persecution based phraseology and add more reasons like external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of individuals country of origin and the individual has no option but to leave the country of his habitual residence .

Both the OAU definition and UN Convention definition reflect different historical contexts. The OAU definition reflects the African states ridden with internal civilian and ethnic conflicts. The UN convention definition reflects the response to the European totalitarian experience. Outside this framework, the other conceptualization of refugee which I have discussed in the work is provided by Shacknove who argues that neither



persecution nor the alienage has been able to capture as to what is essential about refugee-hood. For him the persecution is sufficient but not the necessary condition for the severing of the bond between the state and the citizen. For him the persecution is only one manifestation of a broader phenomenon: the absence of the state protection of citizens basic needs. What he argued and have discussed is that that refugees are in essence the persons whose basic needs are unmet by the countries of origin and who have no remaining recourse other than to seek the international assistance for fulfilling their needs and who are so situated that international assistance is possible.

The first two conceptions especially the UN Convention definition is the narrow conceptions of the refugee because it leaves out the many possible ways in which the bond between the state and citizen can be severed and many other reasons can act as the ground of persecution (other than race, religion, political opinion etc.) an overly narrow conception of the refugees will contribute to the denial of the international protection to the refugees and overly broad and inclusive conception as offered by the Shacknove has the potential to exhaust relief programs. It can be argues that many important issues remain even once we know who is a refugee. The question of who is a refugee cannot be answered independently of 'what we owe to them'. Which I have discussed in *theoretical debates: "Partialism and impartialism."* Two perspectives have been presented, one is partialism which argues for restrictive entry regime and argued that the membership in the modern state involves the sharing of common identity and states does not owe anything to the foreigners more than what their citizens allow . They argue that state is more than set of legal institutions and it is more than a giant supermarket. Citizens share much more than just legal bond with the state and among each other. They emphasize on the collective identity of the state and seek for the protection and promotion of their identity and they assume that the foreigners (refugee) cannot become the part of their identity.

Partialism upholds the claims of people as members of political communities. It emphasize the entitlement of citizens to preserve their way of life along with the social and economic goods associated with this way if life, and this is done by restricting and denying the entry. This position creates an awareness of the potential dangers associated

with the inclusive policies towards outsiders. Partialism's claim of prioritizing the citizen's interest over the foreigners does not look unfair. But the cost of such a claim can be brutal fate of those who are fleeing from the persecution sites and seeking refuge elsewhere.

Counter to this perspective which I have is the perspective of the impartialism, which argues for the open unrestricted entry and open borders. It argues and I have discussed that the only good reason for restricting entry of foreigners into a particular state are the reasons that treat the citizens and non citizens like, impartialism believes in the idea of freedom and equality. It tries to capture human commonality it has its roots in the Christian idea of which says all human beings are the members of single human community. It asks for the justification of the exclusion. And argue that that state boundaries does not reflect the cultural boundaries. Instead they say that the current world which is carved up among states in the vastly uneven manner reflect not the cultural communities but the blatant inequalities of population density wealth and resources. It is being suggested that the current immigration and refugee movements are due to the inequalities in population density wealth and resources. Restrictions on the entry stand as barrier towards the creation of a more equal and open world which we know is more economically beneficial. Impartialists fail to provide the rationale for privileging the needs of refugees over the other entrants, because it does not differentiate between the different categories. "There is nothing intrinsic in the idea of a general right of free movement that lends support to prioritizing the claims of the needy"(Gibney 2004 :84)

So there is a conflict between these two perspectives and none of them if applied in full spirit seem viable and sufficient as a response to the issue of admission of refugees. If partialism is applied in its spirit it can restrict the entry of refugees to a considerable level and impartialism is applied to its full logic it can lead to the policies which could undermine the conditions necessary for communal self-determination and the provision of public goods. *The ethical and practical ideal response to the issue of asylum and refugees* rests on its ability to take into account the interests and claims both of the

citizens and foreigners. *Humanitarianism* is such principle which not only balance both the claims and but also is practically and politically viable.

Firstly it concentrates the responsibility of the states by specifying that positive duties of assistance are owed exclusively to those in great need, i.e. those of refugees. Secondly it is consistent with the belief that the states have their own interests and they have a right to prioritize them. This principle places some restrictions on the freedom of the states but the duties it mandates are not so demanding enough to overwhelm the commitments governments already have. It asks for the commitments of the state so long as the discharging those commitments do not create a bad state of affairs for the states. It also calls for and I have discussed the efforts on the part of the states to change public perceptions about the refugees and try to do away and break the stereotypes associated with the refugee, and also calls up for the issue of resettlement of the refugees. although the response in the form of humanitarianism is modest and has the potential of being effective, but we cannot blind our eyes to the evident truth that even if states put into practice this principle in full spirit, there will still be a huge volume of refugees whose needs will remain unmet. The cost of providing asylum to 25.4 million refugees would extend too far from what the principle of humanitarianism reasonably demands from the states. No matter how many of them we resettle there will always be more rising up. Unless the peace is brought to those parts of the world from where they are coming, no amount of policy formulation allowing admission is substantially effective. But humanitarianism can be a step forward in direction towards the realization of the values by which states claim to live by.

## Notes

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<sup>1</sup> See UNHCR Figures at glance, [Online Web], Accessed on 17 October 2017, URL: <http://www.unhcr.org/figures-at-a-glance.html>.

<sup>2</sup> Convention and Protocol related to status of refugees, 1967, Retrieved from <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

<sup>3</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, [Online Web], Accessed on 17 October 2017, URL: <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>4</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, [Online Web], Accessed on 17 October 2017, URL: <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>5</sup> Preamble of the Convention and Protocol related to status of refugees, 1967, [Online Web], Accessed on 17 October 2017, URL: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>.

<sup>6</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, [Online Web], Accessed on 17 October 2017, URL: <http://www.refworld.org/docid/3ae6b3a94.html>.

<sup>7</sup> European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, [Online Web], Accessed on 17 October 2017, URL: <http://www.refworld.org/docid/4f197df02.html>.

<sup>8</sup> Office Of The United Nations High Commissioner For Refugee, Handbook On Procedures And Criteria For Determining Refugee Status, Un Doc, Hcr/Ip/4/Eng. Rev.1 (1998) 80-86.

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<sup>9</sup> Convention and Protocol related to status of refugees,1967, [Online Web], Accessed on 22 October 2017, URL: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

<sup>10</sup> OUA convention governing the specific aspects of refugee problems in Africa,1969.

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