

**REFUGEES, INTERNALLY DISPLACED PERSONS
AND THE STATE: A CONCEPTUAL STUDY**

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PRIYANCA MATHUR

**CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI-110067**

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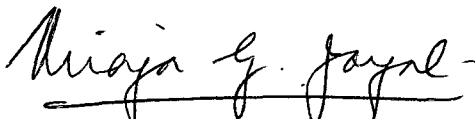


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We recommend that this dissertation may be placed before the examiners for evaluation.


Dr. NIRAJA GOPAL JAYAL

(Supervisor)


Prof. KIRAN SAXENA

(Chairperson)

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

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INTRODUCTION

The twentieth century has been known as the age of the homeless person and the past decade has also witnessed the emergence of many new international boundaries on the world's political landscape. The present study seeks to explore the parameters of the state-refugee relationship essentially through an understanding of the rights guaranteed by the state to refugees and to internally displaced persons (IDPs). It attempts to argue for transcending the limitations of the concept of refugee to a more expanded conception of forced migrants, which could include not only refugees but also the internally displaced. The state-refugee relationship underlies this study as its foundational premise on which inferences and arguments for and against refugee and IDP rights; conceptual understandings and comparisons of the definition of the term refugee and IDP; and also the possibility of a conjoined approach towards refugee and IDP protection are derived.

The variable that continuously accompanies all these deliberations is the notion of state sovereignty. A state enjoys sovereign authority as long as it can ensure the basic needs of its citizens. When that is denied and a person fearing for life runs across the border of his state, a refugee is born. It is simply the absence and presence of national protection that distinguishes a refugee from an internally displaced person. It is the procurement of sovereignty during self-determination exercises like nation building, state formation, inter-state conflicts, and ethnic conflicts that generate refugee flows. It is the exercise of the state's sovereign authority to open or close borders on which arguments for and against refugee rights are posited in political theory. It is the absence of the inviolable and sacred

principle of a state's sovereign authority that forbids international assistance to those displaced within the states.

The commonsensical understanding of the term refugee denotes anyone who is forcibly uprooted from his home. But international law makes the crossing of an international border and the flight being induced by any of the given grounds of persecution as mandatory for the recognition and granting of refugee status. The first chapter of this study seeks to sharpen our vision of who a refugee is by peeling off overlapping identities of voluntary or natural disaster migrants. While the former are not 'forcibly' removed, the latter are not so 'persecuted' as classified in the 1951 UN Convention Relating to the Status of Refugees. The internally displaced too are singled out as they are neither deprived of national protection nor politically persecuted on grounds of race, religion, nationality, membership of a particular social group or political origin.

Current deliberations on refugee studies have assumed that addressing the root causes of conflicts that generate refugees is a better approach than focussing on palliative measures. The second section of the first chapter thus tries to calibrate the various categorisations of causes of refugee flows. Tarzi attributes refugee creation to the secular transformation of nation-states; Arendt hypothesizes it on the relation between state building and ethnic conflicts; Aristide, Zolberg and Suhrke trace it to the internationalisation of the formation of a political community and amidst patterns of social conflicts; and Newland marks out ethnic conflicts as an important causal factor.

When a refugee crosses the border of his homeland to seek shelter in a neighbouring state, he loses the protection of the country of his nationality and so

also all his rights as very simplistically protection translates into rights. So the second chapter explores what rights refugees can and do enjoy as founded on the essential proposition of the hitherto outlined state-refugee relation. A refugee, in theoretical terms, is understood as a person who has been deprived of his membership in a political community. So, fundamentally, the right that is indispensable for him is the right to immigrate or the right to enter another community. Counter to this is the state's discretionary right to regulate entry at its borders. The paradox that continuously stymies and thrashes all following arguments is the question whether refugees enjoy only those rights and only to the extent that the states allow. The newborn sapling of refugee rights in this study first tentatively tries to dig its roots into the soils of political theory to get a hold on itself. Here, while trailing Gibney's exploration of refugee rights in liberal democratic states, it encounters the view of Carens (who derives his argument from Nozick and Rawls), Dummet, Singer and Singer, all of whom argue for an impartial role of the state in keeping its borders open.

The rights claims of the refugee thus are sought to be located within the broader discourse of group rights of displaced persons. This is in opposition to the customary liberal claims of individuals, and libertarianism which centres around individual rights and liberties and argues strenuously against redistributive state policies. Yet, the Nozickian right to property's principle of original acquisition, justifying the right to private property is seen to uphold the state's right to exclusion. The cultural embeddedness of individuals and the privileging of the community's ways of life as expressive of the common good in communitarianism, can at first glance appear sympathetic to refugee rights but in Walzer's position while the right of the community to self determination can be

used to justify the state's right to exclusion, his argument for equal treatment of individuals in the public sphere can also be extended to the right of the refugee to immigrate.

The norm of refugee rights and duties in international law lies embodied in the 'Great Charter' of refugee rights, namely the 1951 UN Convention Relating to the Status of Refugees. The sapling of refugee rights now seeks to draw air and water from the provisions outlined herein. But only signatory states are bound by these obligations, while customary law can hold on non-signatory like India. Being foreigners on the land of a host state, refugees are entitled to special rights and provisions to facilitate their recharting of an entirely new way of life. How well the sapling of the refugee rights will flower will depend on which provisions of the Indian constitution refugees can invoke and this is investigated in the next section of the second chapter.

Whereas refugees have an established system of international protection and assistance from the meta-state community that also serves as the normative source of its rights, internally displaced persons lack any legal or institutional basis for the international community to provide them with protection or assistance as they fall within the domestic jurisdiction and under the sovereignty of the concerned state. Is it not ironical that while refugees can invoke a host of special entitlements in their favour despite being outside their own state of nationality, IDP's are deprived of many of their existing fundamental rights in their own nation-states. While the definition of refugee is well established in international law, that of IDP's is loose, disparate and ill-defined. Only recently, after much deliberation, has a working definition been arrived at. The final chapter explores this realm of these IDPs.

The same conflicts, persecution and violence, human and natural disasters, and human rights violation displace IDPs within their states as they do refugees across the boundaries of nation-states. But while the latter cross over to seek the succour of another state, the former lay trapped at another relocated site within the borders of their own country. It is a paradox that while international assistance is reluctant to reach out to them lest it sacrilege state sovereignty, it is the very abuse of its sovereign powers by the state that leads to the creation of IDPs. The model of development adopted by states like India in its insatiable desire for economic growth through projects like dam construction, legitimised the indiscriminate appropriation of land on the principle of its eminent domain and expected sacrifices from a section of its citizenry for the 'greater good'! The third chapter after defining what IDPs are, and examining whether they are really so distinct from refugees, explores the actual conditions of the people internally displaced by the development projects in India; what are the constitutional rights that get violated; how inadequate rehabilitation policy has been to address to their needs; and how outdated the Land Acquisition Act 1894 has been in upholding their property rights.

Under international law, IDPs have no single international agency to protect them but with the UN's recently formulated guiding principles on internal displacement, a norm is visible and the final chapter also shows how ideally its principles may seek to redress the grievances of IDP's in India and ensure both a fuller recognition and enjoyment of their rights. Thus, while the states 'right' to development displaces them the individuals 'right' to development may serve to be ultimately their most cherished ideal.

1.

THE STATE AND REFUGEES

Structural & Theoretical Perspectives

It is a curious paradox that the relationship between the state and the refugee is simultaneously a mutually exclusive and an interconnected one. It is largely state policy which leads to the creation of refugees and the state again which decides who a refugee will be, whom to accord refugees status to, and what rights to grant to the refugees that it hosts. Once a refugee, a person is dependent on the rights guaranteed to her/him by/within the host state and/or those by the refugee protection regime comprising of the international community of states. In turn the relocation and resettlement of refugees are often found to create new conflicts among states. When suddenly inundated with refugees, states can become victims too: their fragile economies can be disrupted, unemployment can be exacerbated and ethnic tensions can be highlighted.

Thus, if the state and the refugee are placed on either ends of a straight line, from a distance it will be viewed as the diameter of vicious circle connecting the two.

A state enjoys the right to sovereign authority over its people only when it can guarantee to them a dignified life wherein basic needs are met, respect for a sphere of freedom prevails, and there is sharing of resources for this purpose. This notion of sovereignty is central to an understanding of the role of states in influencing international migration (Weiner, 1985: 441). But it is when a person no longer feels assured of the safety of his life in his homeland and is forced to flee that a refugee is born.

The word refugee has been frequently used to denote anyone who has been obliged to abandon his or her usual place of residence. In common parlance, little effort is made to distinguish between people who have had to leave their own country and those who have been displaced within their own homeland. Nor is much attention paid to the causes of their flight. Whether people are escaping from persecution, political violence, communal conflict, ecological disaster or poverty, they are all assumed to qualify for the title of refugee.¹ This chapter seeks to examine both who a refugee is and how he becomes so.

I. THE REFUGEE DEFINITION

Conceptually one can understand a refugee clearer through comparisons with other concepts like a migrant or an internally displaced person. A refugee is essentially an involuntary migrant.² Here, the distinction between the term refugee and migrant needs to be understood. A migrant is one who leaves his home for opportunity while a refugee does so out of fear; a migrant travels to escape stagnation and poverty while a refugee travels to escape persecution, conflict and perhaps death; a migrant seeks opportunity while a refugee seeks haven; a migrant does not 'wish' to return home – a refugee cannot 'dare'.³

Migrants again have been variously classified. A voluntary migrant is one in whose decision to move there is an element of choice and who is sometimes referred to in refugee literature as an 'economic migrant'. A natural disaster migrant is one who is forced to flee his home area at the onset of a natural disaster or calamity. A refugee, on the other hand is considered as an involuntary migrant for whom because of the onset or threat of some externally imposed conflict it is impossible to continue life as he/she had known it to be if he/she remained back home (Hugo and Bun, 1990: 21).

Refugee flows can also be identified as population displacements but those which cross an international border. So a refugee is one who is externally displaced i.e. one who has had to leave his state of nationality and seek asylum in another state. An internally displaced person (IDP) on the other hand is dislocated from his original habitat and shifted to another site, which however, is within the same state. So conceptually refugees are considered as a separate category distinct from internally displaced persons because they have the important quality of being outside their country of origin and IDPs do not meet this qualification.

Thus who is and is not a refugee remains a topic of continuous debate and deliberation. The principal and current international legal definition of a refugee as contained in the 1951 United Nations Convention Relating to the Status of Refugees outlines that a refugee is one who

“..owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...”

The scope of this basic definition was expanded by the Organization of African Unity’s 1969 Convention on Refugee Problems in Africa to include more flight-inducing factors like ‘external aggression or occupation, foreign domination or events seriously disturbing public order..’ and the 1984 Cartagena Declaration’s additional criterion of ‘massive violation of human rights’.

This recognition of refugee status can also be seen to have expanded across three stages. The first stage was marked by the 1951 Convention which endorsed that people who have a well founded fear of persecution have a right to leave their country, have international status, and cannot be forcibly returned to their country of origin. The second stage came when specific refugee crisis like

the 1957 exodus of the Chinese to Hong Kong began creating legitimate grounds for international action and use of the United Nation's High Commission for Refugees' (UNHCR) mandate to act on behalf of people in situations or whose status as refugees is challenged by states. The third stage came when the defining criteria of the 1951 Convention were evidenced by the 1969 OAU Convention. In recent years many states, especially in western Europe have created new categories of refugee protection such as 'Humanitarian Refugee Status' and 'B Refugee Status' that seeks to accommodate persons fleeing their homeland for compelling reasons other than individual persecution. Until 1980 the United States had enacted legislation which, by definition, identified refugees as persons fleeing communism.

These definitions are crucial in distinguishing between people who are commonly called refugees and those actually accorded such status, and thereby determining the latter. Loosely speaking, refugees are people in flight, searching for improved security; they may be seeking a new home or a way back to the old one. But whether they are accorded the status of refugees has always been for host states to decide. Here there is the great divide between, on the one hand, emotion and ethics (which argue on behalf of refugees as victims, usually regardless of the cause of their flight) and, on the other, politics (which measures the entitlements of refugees to a government and space on the state's territory). For it is states and not refugees, that determine which among the many reasons for a person's flight are the most valid to support (Gurtov, 1991: 485). Thus throughout the twentieth century defining the term refugee has itself been a serious political and conceptual problem for states and international organisations.⁴

But if one regards this 1951 Convention Relating to the Status of Refugees, the only recognised cause of refugee flows in international law is persecution of the individual. So this definition is, at first glance, inappropriate to handle either mass trans-border influxes or people fleeing the ravages of war. Besides persecution, being undefined in the 1951 Convention, (and its subsequent 1967 Protocol) can be interpreted flexibly to suit the needs of any given situation. Nevertheless, it is based on the idea of the state of origin having breached fundamental rights, as set out in international instruments. So it is legitimate for an individual to seek protection from another state.⁵ But it may be necessary to broaden the grounds for persecution to include violations of economic, social and cultural rights as well as civil and political rights (Gilbert in Spencer, 1994: 20).

Refugees are considered as distinct from natural disaster migrants by the fact that the overt force impelling migration has human rather than physical environmental origins. But beneath the immediate causes are deeper long term determinants; many natural disasters have their root causes in long term political, social, economic, or agricultural policies (Hugo and Bun, 1990: 23).⁶ People all over the world are being forcibly displaced because of large-scale development initiatives such as dam construction, urban development and transportation programmes. But the legal definition of a refugee does not include 'developmental' or 'environmental refugees', as they are also loosely called, who are forced to flee their homelands because of such developmental or environmentally induced factors. The phrase 'environmental refugees' was first coined by Essan Hinnawi in a report prepared for the United Nations Environment Programme in 1985 as "those people who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption, natural and/or triggered by people that jeopardize the existence and/or seriously affect the quality of their life"

(Ghosh, 1997: 7). But neither environmental nor developmental factors are put down as legitimately accepted reasons for a refugee's cross-border displacement in the 1951 definition.

Ironically, this UN refugee definition also does not include internally displaced persons within its domain though the UNHCR's mandate is often extended to cover them. Today the UN has come up with a new working definition of an IDP, but there is a continuous debate whether IDPs deserve the same protection to be extended to them as refugees.⁷ These issues shall be discussed in the third chapter.

II. CAUSES OF REFUGEE FLOWS.

Before we explore how states can (and do) determine who a refugee is, one needs to widen one's understanding of how states create refugees in the first place. The very formation of states have ironically been accompanied by refugee flows. Conflicts within states, once falling within the purview of traditional concepts of state sovereignty, are now regarded as an issue for the larger international community – in part because of humanitarian concerns over the loss of civilian lives, in part because of the risk that violent disputes within states may spill across international borders, and in part because these conflicts generate migration and refugee flows across borders (Weiner and Munz, 1997: 27). Among the various kinds of conflicts, ethnic conflicts deserve special attention as a separate category of refugee generating factors. The causes of refugee generation, widely denoted and connoted, have been intra and inter state conflicts of various kinds viz., ethnic, political, religious and tribal; creation of new states, anticolonial wars, wars of independence; self-determination movements; revolutions within and expulsions from the state; coup d'etat; changes of

government; partitions of states; international conflicts, state police action; and under- and over-development in the state.

Tarzi's argument is that it is the "secular transformation of nation-states" (1991: 442) that results in, as a by-product, the persecution of targeted refugees or 'victim-groups' as he calls them. He outlines five primary causes behind the large scale refugee flows in developing countries viz.

- a) the economically motivated refugees who migrate within developing nations.
- b) Insurrection, civil war, revolutionary upheavals, and forms of international conflict which create displaced homeless people.
- c) droughts and other natural disasters which create environmentally motivated victims.
- d) individuals who are persecuted for their political beliefs.
- e) classes of people persecuted for their ethnic, religious, or national affiliations.

Hannah Arendt's thesis on minorities and stateless persons gives a brilliant analysis of the relationships between state-building and victim groups. It provides some observations that further illuminate certain contemporary refugee flows in the third world viz.

- a) Whenever a state chooses to forge a collective identity on the basis of race, religion, nationality, or even ideological categories, it produces target minorities. A mono-national integration formula in a multicultural environment creates negative categories of people that are subject to exclusion via segregation, expulsion, or repression.
- b) b) The pursuit of a mono-national formula and/or a target strategy of 'unmixing' populations in circumstances wherein the target group is regionally concentrated, may lead to separatism. Similarly, the pursuit of a

mono-national objective by two or more states that are comprised of shared ethnic or religious groups, and in circumstances where the ethnic groups are interspersed across geographical borders, tends to produce interstate disputes and conflicts. These situations in turn create refugee flows out of the targeted victim groups.

- c) Non-democratic states are more likely to use a cultural formula, founded on religion, ethnic ascendancy, or other categories of national identity, than are democratic states. Accordingly, religious or ethnic persecution may be more likely to occur in these non-democratic states. Political structures and policies of moderation that are associated with liberal-democratic traditions, therefore, are better suited for reducing violence and conflict in these multi-ethnic and multi-cultural environments (cited in Tarzi 1991: 444-5).

Interestingly, state formation alternatively termed as 'failure in nation-building leading to civil war' has been cited as a refugee-generating factor. Ghosh (1997 :2) categorises the exodus of the millions of East-Pakistani refugees fleeing the suppression of Bengali nationalism by the Pakistani junta in 1971 to exemplify the above.

Conflicts associated with the formation of new political communities have, as stated earlier, been major sources of refugee flows in the Third World, mostly Asia and Africa. In the ensuing process of nation formation, attempts to develop a common culture by reducing existing diversity when compiled through violent means, have caused target groups to flee or face expulsion. State formation in early modern Europe had witnessed flows of religious refugees e.g., that of Jews and Muslims from the Iberian Peninsula in the fifteenth and seventeenth centuries; Catholics specially Irish, from the United Kingdom in the fifteenth and seventeenth centuries; and Protestants from France before and after the revocation

of the Edict of Nantes (1685). In this context Zolberg, Suharke and Aguayo (1986: 163) make the very interesting observation that ethnic conflict alone does not indicate refugees but that *the formation of refugees flows is much more likely when the process of constituting a political community gets internationalized.* Ethnic conflict is one of the various kinds of conflict which, when associated with the process of state formation, has been found to generate refugees e.g., recurring ethnic conflict within India typically does not produce refugees, but ethnic conflict within Pakistan, involving the establishment of Bangladesh, produced millions of refugees within a few months. The East Pakistani refugees thus were the result of ethnic conflict, which got internationalized, and culminated in the formation of a political community.⁸

Armed conflicts also lead to population displacements. Gilbert (in Spencer, 1994: 22) considers them as the single largest cause of refugee flows. But ironically only when the invading forces have persecuted people can the latter apply for refugee status under the 1951 Convention because the UNHCR Handbook clearly states that “People compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees.”(1979: paras 164-6)

Here one should also take note of “refugee-warrior communities”,⁹ that can get created by the internationalization of social conflict e.g. Eritreans in Sudan, and Afghans in Pakistan. When refugees are in exile they depend heavily on local, international and humanitarian relief to survive, and when associating their hosts in an act of war, they receive diplomatic and material assistance from external patrons they begin to be used as pawns in foreign relations. The Palestinians constitute the contemporary archetype of the refugee-warrior community. Others are the Khmer on the Thai-Kampuchean border, Nicaraguan

'contras' operating out of Honduras and Costa Rica. Here, the refugees move from the category of mere displaced persons into that of the politically active and conscious. Again, in this case, violence which becomes a means of survival tends to feed on itself and creates a war lord system as in Chad, and perhaps also now in Uganda, and the destructive impact of civil strife has a multiplier effect on refugee flows – the vicious circle keeps rotating.

In fact, the nation-state formula of state building has a very deep and direct relationship, with ethnic diversity when it comes to generating refugee flows. As Tarzi says "there are various refugee generating dynamics that manifest themselves in the conflict between ethnic diversity and the nation-state formula".¹⁰ First when state-building occurs in countries where ethnic systems are designed hierarchically, confrontations are likely to be very violent and the refugee flows generated massive e.g., Tutsi over Hutu in Rwanda and Burundi (Weber uses the term 'caste structure' to refer to these ethnic hierarchies, 1958: 189). Second, when absolutist states seek to form a collective identity based on religion, or other cultural formulae of ethnic ascendancy, targeted victim groups are produced e.g., the extremist nationalist Khmer Rouge government upon coming to power in Kampuchea in the 1970s targeted all Khmer minorities for persecution. Thus, to avoid repression, and resort to massive exodus becomes the most effective weapon against an exploitative state.

An exceptional observation made by Tarzi here is that there are numerous instances of recurrent communal conflicts that predate the formation of modern nation-states among interspersed communities which do not involve a state but where the Government may act as a neutral protector e.g., the role of the Indian Government in trying to dissuade the communal confrontations between Hindu and Muslim religious communities. Urvashi Butalia (1998) also makes repeated

note of the role of the Indian State in handling the conflict during the 1947 partition.

Gurtov categorises them under the following heads. Refugees, he argues, should be broadly defined as victims of one or another kind of violence and he recognizes the global refugee problem as a symptom of several inter-linked and large-scale crises in the international system that are rapidly eroding the foundations of security. These may be recognized forms of conflicts like civil war, foreign intervention, revolutions and international displacements; state police action like repression, deportation, fear of government retaliation and ethnic/religious persecution; and underdevelopment in the state leading to environmental degradation, labour migration etc. It is interesting to note here that categories of state action like environmental degradation and internal displacement are noted as 'refugee' producing ones when usually the former two categories and the latter are not considered as mutually exclusive. A closer examination will reveal that Gurtov's classification of the East Pakistani exodus to India in 1971, and Afghans in the 1980s under the category of the internally displaced perhaps exemplifies his understanding that the East Pakistanis, and Afghans were first internally displaced within their country and when, under compulsion, they crossed over to India, they became refugees. Otherwise a lot of Afghans are still internally displaced within Afghanistan, and the Bangladeshi 'refugees'¹¹ are categorized as having been created by others due to factors like partition of states, persecution etc.

Table No. 1.
SOURCES OF REFUGEES

CONFLICT

Civil War: Afghanis to Pakistan and Iran; Ethiopians to Somalia and vice-versa; Central Americans to Mexico and the United States; Muslims, Hindus and Sikhs after India partition and independence, 1947-48; Cambodian in 1975; Angolans in 1980s; Israelis and Palestinians after partition in 1948; Tamils from Sri Lanka.

Internal Displacement: Greek Cypriots in 1974; East Pakistanis to India, 1971; Palestinians in West Bank and Jordan; Salvadorans, 1980-present; East Africans in 1970s and 1980s; Afghanistan, 1980s.

Revolutions: Zimbabwe, Iran, Nicaragua, and Vietnam.

Foreign Interventions: Hungarians and Czechs after Soviet interventions of 1958, 1968; Chadians after Libyan intervention; Lebanese after Syrian, Israeli Interventions; Vietnamese, 1954-75.

STATE POLICE ACTION

Repression: Filipinos under Marcos to United States; Cubans under Castro to United States; Haitians under Duvaliers to United States; Tibetans to India; Sino-Vietnamese to China; Ugandans under Amin; Chinese to Hong Kong in 1960s black South Africans to bantustans; Germans in Central Europe to West Germany, 1989-90.

Ethnic/Religious Persecution: Soviet Jews; Baha'i in India; Palestinians from Israel, Israelis from Arab countries; whites from Africa; Asians from Uganda; Poles from Baltic states; overseas-Chinese from Africa; Hutus from Burundi; Christians in Sudan; Armenians from Azerbaijan.

Fear of Government Retaliation: Chinese to Hong Kong in 1970s; Hungarians and other Eastern European to West; Chileans after Allende; Paraguayans under Stroessner; whites from various newly independent African states; Chinese intellectuals abroad after Tiananmen, 1989.

Deportation: Cubans, Salvadorans by United States; Palestinians by Israel; Ghanaians by Nigeria; Mauritians by Senegal and vice versa.

UNDERDEVELOPMENT AND OVERDEVELOPMENT

Labor Migration: Mexicans, other Latin Americans to United States and Canada; Colombians to Venezuela; southern European (Turks, Italians, Portuguese, Algerians) to northern Europe.

Environmental Degradation: Forced (internal or external) resettlement due to: land inequality and degradation (e.g., migrants to cities from throughout rural Latin America and Caribbean); drought and overgrazing (e.g., African Sahel); soil erosion (e.g., Bangladesh in 1988 floods); use of Third World as pollution or waste 'havens' (e.g., Italian shipments of PCBs to Koko, Nigeria, 1987-88; Union Carbide in Bhopal, India, 1984; Chemical or other contamination (Pemex explosion in Mexico City, 1984); deforestation (e.g., Amazon Indians by Brazil and World Bank; Indonesians in outlying islands under Transmigrasi resettlement program); pollution (e.g., India's rural poor by World Bank-funded thermal power plants, 1988).

Loss of Opportunity: Indians and Pakistanis to North America; Hong Kong Chinese to United States, Canada.

Overdevelopment: The use of inappropriate technology, as in Chernobyl and Love Canal.

Source: Gurtov, 1991: 490

In fact the Bangladeshi and Afghan refugee flows had been typified as having arisen out of the partition of states and international conflicts respectively by Kliot (1987: 109-113). Within the period 1970-84, Kliot classifies six causal agents which have created refugees flows viz.

- a) Anti-colonial wars, wars of independence and self-determination movements;
- b) International conflicts;
- c) Revolutions, coup d'etats, changes of government;

- d) Ethnic and tribal conflicts;
- e) Partition of states;
- f) Population transfers and population expulsion;

These six categories are not mutually exclusive; the first four deal mainly with overt conflict, while the last two are concerned with governments' political decisions to remove people and were often found to be the result of one of the other four causal agents.

- a) Anticolonial wars, wars of independence and self-determination struggles.

Here refugees are created when a new state is struggling to be born e.g., the wars of national liberation against the Portuguese in Angola, Guinea Bissau and Mozambique (more than 400,000 Angolan refugees moved to Zaire, refugees from Guinea Bissau crossed to Senegal, and those from Mozambique to Tanzania and Zambia) Zimbabwe's struggle for independence created refugees. The long struggle against the white minority rule in the Republic of South Africa and Namibia created tens of thousands of refugees in Southern Africa (mostly in Botswana, Zambia, Tanzania, Angola, and Mozambique). The Eritrean struggle for independence that began in 1962 by 1982 had pushed 400,000 Eritrean refugees into Sudan.

- b) International conflicts

When states fight among themselves, whether in a region or on a wider international arena, refugees flee from one to another. Ethnic Somalis fled their country when war between Somalia and Ethiopia over Ogaden started in 1977. The Russian invasion of Afghanistan in 1978 is still pouring Afghan refugees into Pakistan and Iran. Thousands of Kampuchean refugees were created when Kampuchea was invaded by Vietnam in 1978. In Lebanon, the Syrian and Israeli invasions of 1976 and 1983 respectively, created mass refugees. The civil war in

Chad with French and Libyan intervention, though ended in 1984, nonetheless generated thousands of Chadian refugees.

As Kliot notes here, "Many of these international conflicts added new refugees to areas that were already burdened by refugees as an outcome of other causes. South-East Asia still had hundreds of thousands of refugees brought about by the earlier communist takeover; Ethiopia had the Eritrean struggle in addition to its war with Somalia; and Lebanon was torn by both endless communal conflict and foreign occupation".

c) Revolutions, Coup d'état., and changes of government.

When during revolutions, changes of governments and coup d' etats political instability is created within a state it is the feeling of insecurity that causes people to flee and generates refugees. Cubans fled to USA after Fidel Castro's victory in 1959; the communist take over in Laos in 1975, the rise of the Khmer Rouge regime in 1979 created more than 5 million refugees by the mid-70's. One million refugees left Indo-China during 1975-79. Around 100,000 Nicaraguan refugees fled to Honduras and Costa Rica with the Sandinista to regime coming to power. In Africa revolts against the Idi Amin's tyranny created 200,000 Ugandan refugees; 320,000 Guinean refugees fled to neighbouring countries during and after the repressive government of Macie Nguema Biyogo in Guinea Bissau; thousands of Chileans left after the 1973 coup which overthrew Allende.

b) Ethnic and tribal conflict.

Intra-state conflict between tribal or ethnic groups or for the cause of ethnic homogenisation is also a major cause of refugee flows. The formation of independent states in Africa was usually accompanied by ethnic wars and the expulsion of minorities. The Hutu-Tutsi ethnic conflict has generated refugees on

both sides. The ethnic conflict in Sudan in the 1960's and 70s' dispersed more than 200,000 Udanese refugees in Uganda, Zaire, the Central African Republic, and Ethiopia. Nigeria was torn by the war against the Ibas in Biafra, and Ewe tribesmen fled from Ghana to Togo. In Sri Lanka, violence between the Tamil minority and the Sinhalese majority continues to generate a stream of Tamil refugees to India.

e) Partition of States

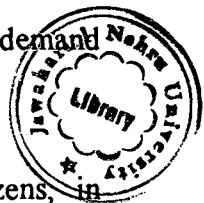
The partition of states has always generated population movements. The UN Resolution of 1947 decided that Palestine be divided into a Jewish and a Palestinian state and Palestinian refugees were generated. The division of Vietnam into separate sectors in 1954 resulted in the movement of 1 million refugees from North Vietnam to South Vietnam. The Pakistan–Bangladesh division as well as the preceding India-Pakistan partition generated massive refugee exoduses. Since the Turkish invasion into and *de facto* partition of Cyprus in 1974, Greek Cypriot refugees have moved from the northern Turkish part to the south and so have Turkish-Cypriots to the north of the island.

f) Expulsions of minority groups and population transfers

Governmental actions of the state also force people to leave and turn into refugees. 40,000 Indians and Pakistanis were forced to leave Uganda, Kenya and Tanzania. In 1983, Nicaraguan authorities, had expelled more than 2-3 million foreign workers who had entered the country during the oil boom. The same year an economic squeeze by the Republic of South Africa led to the expulsion of around 3,000 African National Congress activists.

Amongst all the state-oriented refugee generating factors discussed and classified above, ethnic conflict is one that has by itself generated the most interest. To quote Kathleen Newland (1993: 83-84), "it is this relationship

between the refugee and the state, in which the refugee claims nationality, that makes ethnicity such a salient factor in refugee problems.” In many cases, ethnicity is used to define who is entitled to nationality. When struggles for power degenerate into violence, supporters of particular contenders identified by their ethnic affiliation may be targeted for persecution or violent attack – and flee as a result. “The relationship between states and ethnic groups is central to the consideration of the role of ethnic conflict in generating refugee movements because refugees are defined by their relationship to the state which they are citizens of or, if stateless, in which they normally reside.... In many refugee crisis of the modern era, ethnicity has been one, if not the major, criterion according to which people have been denied the protection of their own governments”. Ghosh cites the Sinhala-Tamil ethnic conflict as the only example to illustrate refugee flows arising from inter-ethnic conflicts as he opines that although in most of the conflict in South Asia ethnicity is at the core in no other situation is the demand for a separate nation-state so strident. (1997: 4)



The idea of the state as the protector of the rights of citizens, in combination with the ideology of ethnic nationalism (in which ethnicity defines nationality), leads to the denial of state protection for ethnic minorities e.g., Serbian nationalists have denied rights to ethnic Albanians in Kosovo, which they insist should be accorded to ethnic Serbs in Croatia on the grounds that the Serbs in Yugoslavia are a nation, whereas the Albanians are merely a minority group. This raises another question, as to whether refugees have or are entitled to rights as a minority group? This issue shall be taken up in the second chapter. The Kosovo crisis had been boiling for some time. The UNHCR had been involved since 1993 in the discreet preparation of contingency plans¹² and today the international community is witnessing another refugee flow.

Ethnicity itself, as a factor in refugee generation, has been widely categorised and classified. Newland identifies three patterns of how ethnic conflict impacts refugees movements – a) when members of groups other than the dominant one are exposed to discrimination, forced assimilation, persecution, expulsion or violence and the state takes no responsibility b) when state mechanisms are captured by a single ethnic group or coalition and used by it to further its own interest at the expense of others. c) when the state fails to mediate conflict among ethnic groups because it is incapable of or uninterested in doing so or because it is in sympathy with one of the contenders. Zolberg, Suhrke, and Aguayo (1989: 236-45), have also identified four types of ethnic conflict viz.,

- a) Explosion of Ethnic Hierarchies – when social class and ethnic affiliation coincide, as either a ruling or a trading minority, which either exploits its privilege to extract resources from the ruled or acts either as an exploitative bourgeoisie or an unpopular intermediary between rulers and peasants – it leads to revolution, a massacre, expulsion and coerced flight e.g., attacks, against the Arabs in Zanzibar and ethnic Chinese in Indonesia, overthrow of Tutsi in Rwanda and Buganda in Uganda.
- b) Target minorities – when particular minorities or groups (would also be indigenous peoples) are perceived as obstacles in the construction of a unitary, national identity by the state e.g., Jews in Nazi Europe, Armenians in the Ottoman Empire of the late nineteenth and early twentieth century, ethnic Turks in Bulgaria and Bahais in Iran.
- c) Communal conflict – When the state is either too weak or not willing to mediate in recurrent conflict between groups (not necessarily hierarchically related), ethnic cleansing, or other forms of coerced separation of populations may be the result, e.g., Bosnia – Herzegovina, Palestine, and Punjab in 1948.

d) Separation – When the state works against the interest of large groups that may be regionally concentrated, separation arises marked with refugee flows e.g., Bangladesh in 1971; Northern Sri Lanka; Eritrea; Sudan. Here, refugees may be fleeing the violence of secessionist wars or the aftermath of a failed secessionist move if they become target minorities as a result.

In the state-refugee cyclic relationship ethnicity can be perceived as a concentric circle, because while ethnic relations within a state may create refugee flows, it is ethnic kinship again which motivates host states to accept refugee populations. In fact, in the third world, the remarkable receptivity to refugees like the Afghans in Pakistan and Iran, to the ethnic kin from Bulgaria in Turkey, the Ethiopians in Sudan, Ogadeni Ethiopians in Somalia, to the Southern Sudanese in Uganda has been much facilitated by the ethnic and linguistic characteristics which they share with their hosts (Loescher, 1991-92: 42). In India again it has been ethnic affiliation that has caused Sri Lankan refugees to flock to Tamil Nadu, the East Pakistani refugees to West Bengal, and the Burmese to Tripura.

Besides, these very refugees in turn can also play a role in adding to the very ethnic conflict that created them e.g., fighting between the Ethiopian Gari and Borana tribesmen in camps along the Kenyan border. This occurrence is visible not just in ethnic conflict but in all other kinds of conflict or factors that generate refugees e.g., Afghan refugees forming the Mujahiddin; Sri Lankan Tamil refugees being suspected of instigating terrorist activity in India etc. “There is no doubt that mass influxes of migrants and refugees, if not addressed adequately, can endanger social and economic stability and security, particularly in countries where ethnic rivalries may already be virulent, where the central

government is weak, and consensus on the legitimacy of the political system is lacking, and where essential resources are very limited.” (Loescher 1991-92: 42).

Refugee production is attributed to different factors by different people. Though most overlap, the choice reveals their prioritisation. Zolberg, Suharke, and Aguayo on the basis of their case studies of principal refugee flows generated in Asia, Africa and Latin America (from 1960 to the present) concluded that international factors often intrude both directly and indirectly on the major types of social conflict that trigger refugee flows i.e. that they are produced by conflicts that are manifestly international but which are themselves often related to internal social conflicts among the antagonists. Theoretical frameworks for the analysis of the causes of refugee movements must therefore reflect the transnational character of the processes involved.

According to them refugee movements reflect a fundamental characteristic of the contemporary world, namely its transformation into an interconnected whole within which national societies have been profoundly internationalized. These effects do not constitute a collection of random events but occur in the form of distinct patterns which can be related to the patterns of social conflict that foster refugee movements. When this contemporary world seeks to transform into an interconnected whole, its units first seek to create their own borders – the process of state formation precedes inter-state relations. It is this process of state generation wherein they seek to “unmix their nationalities...”¹³ that refugees get generated. The assumption that countries ought to be organized as nation-states is the key to understanding the political basis of refugee production (Keely 1996: 1046). Within largely agrarian societies marked by extreme structural inequality, rapid and radical redistribution of economic, social and concomitant political power leads to social revolutions, and all such successful revolutions, as well as

most attempted ones have produced major refugee movements, e.g., the American Revolution where Tory refugees went mostly to England; the Mexican Revolution of 1910 which created a substantial flow towards United States; in 1949 Chinese Kuo Min Tang supporters took over an entire island which had only recently been returned to China after half a century of Japanese rule. Here, according to strategic interests, international intervention usually follows and refugees are generated by the generalised violence and dislocation which typically accompany the onset of the revolutionary process (Zolberg, Suharke and Aguayo, 1986: 159) e.g., refugees flows from the Soviet Intervention in Afghanistan.

Along with various kinds of conflict - ethnic/social, revolutionary and national, refugee generation has also grown in specific manifestation when there is separatism or secession, decolonisation, and irredentism. Demands for separation may have many causes: when an authoritarian state adopts a mono-national formula in a multi-ethnic environment: or where the minority group is geographically concentrated. In more liberal regimes, minority groups can achieve some power through coalitional arrangement or redress their grievances through the established political process e.g., India and Nigeria. Thus, in those authoritarian regimes where reformist action is blocked, demands for self-governance will be louder e.g., Biafra, Bangladesh, Southern Sudan.

Decolonisation has at times been the result of an insistence on self-determination and equality of rights to political independence and statehood. But when/if on independence, on the very grounds of state sovereignty, the governing stratum denies rights to a variety of ethnic groups or nations residing within the state, targeted victim groups are created e.g., Kurds who are so persecuted by both Iran and Iraq.

When/if an ethnic group straddles two states because of the historical demarcation of boundaries of the new states, and ethnographic regions do not coincide with the struggle for people's reunification, the result is irredentism e.g., Somalia's claim in relation to the Ogaden; Libya's demands regarding Northern Chad. Where irredentism does break into violence, the state-to-state character of the conflict creates tremendous flows of refugees e.g., the flights of population from Eritrea and Ogaden.

Thus it is interesting to note how the state and its creation generate refugee flows which in turn shake the foundation of the very systemic structure of the state. In the contemporary geopolitical system, statelessness is normatively deviant. In an ideal system of formally equal states, with mutually exclusive territories, everyone belongs somewhere – all territory is ruled by states representing the collective interests of a constituting people or nation – and all nations have the right to a state. Each state, in turn, ideally should contain only one nation. But the real world is not so. As a political organizing principle, the nation state contains opposing tendencies; tensions in the nation-state model yield refugees. And ironically, states, which begin hosting major refugee groups in turn, incorporate more 'nations' within themselves! Today the world refugee population itself has changed from a transient to a semi-static population.

Besides, if a refugee movement is caused by people who lack their state's normal protection, then it shows that a serious failure of the state system has occurred because a state is not behaving as a state should when people flee or are forced out because of racial, ethnic, religious or political reasons.

Myron Weiner had complained that there had been too little attention paid to questions like (1985: 441), "how do state actions shape population movements, when do such movements lead to conflicts and when to cooperation, and what do

governments do in their domestic policies to adjust to or influence population flows.....” The above-cited views on the varied relationships between the state-system and refugee generation form the sub-structure on which further arguments and deliberations on the state-refugee relationship will form the superstructure.

Refugees, thus, are perceived as a system-induced threat to be supported in turn again by states along with multilateral agencies and the NGO community. The state of origin expels refugees while the host state becomes responsible for minimum standards of treatment and rights. On what theoretical grounds and spaces can they expect refugee rights? Further, can the refugee receive a recognition of these rights from the refugee protection regime of meta-state organisations and their conventions and correspondingly from the host state? The next chapter seeks to examine these questions.

2.

REFUGEES AND RIGHTS

A refugee is defined as a person who has been deprived of the right to membership in a political community because he is unable or unwilling to avail of the protection of the country of his nationality. It is these notions of 'membership' and 'community' that form the rallying points around which are centered theoretical arguments for and against the rights of refugees. Violations of human rights in states cause refugees to flee from their country of nationality and ironically the states which host refugees then incur the responsibility to ensure membership among other rights for these refugees. Human dignity is valuable and cherished by man, and it is this fundamental and basic right to a dignified life that a person loses when he becomes a refugee. Hannah Arendt had recognized the suffering of such people in noting that adaptation of the national model by highly heterogeneous states had generated enormous tensions, out of which had emerged the minorities and the stateless, "two victim groups whose sufferings were different from those of all others in the era between the wars", in that they, "lost those rights which had been thought of and even defined as inalienable namely the Rights of Man" (Arendt, 1973: 268 quoted in Zolberg, Suhrke, and Aguayo, 1986: 162). So in the host state a refugee virtually stands like a non-person without any entitlements whatsoever. What rights does he stand deprived of, which rights he can expect, and is entitled to are the crucial concerns that this chapter seeks to address, both at the theoretical as well as international and national legal levels.

The previous chapter had discussed, among various other causes, state actions of forcible expulsions as an important factor in generating refugee flows. Within a broad framework here, refugee rights can be perceived as in conflict with state rights. A refugee's claim is limited by contrary rights of the state and vice versa e.g., a refugee may demand a right to enter but the state may assert its right to exclude. It is accepted that states have the right, well established in human rights covenants and other international instruments, to keep out dangerous undesirables such as criminals and threats to public health.¹ It is when certain 'target' or 'victim groups'² get so identified for expulsion that refugees are created.

In fact the rules of entry and of exit are important variables influencing the magnitude, the composition, and the directionality of international migration.³ The right to seek to secure one's own life is basic to every human being and when his very life is in danger in a state, a person (now a refugee) "votes with his feet"⁴ and flees. Thus, refugees have the right to exit from the state they are fleeing, but that state often denies that right and persecutes those who seek to leave. Refugees want to seek and enjoy asylum, but only host states have the prerogative to grant it. While many refugees fear even being able to return home, or being forced to return against their will, states fear "keeping the unwanted.... and losing the wanted"⁵. A sympathetic voice for the states' position may, however, also insist that we should not be insensitive to the prerogatives of states that face a sudden inundation of refugees. States can become victims too: their fragile economies can be disrupted, unemployment within them can get exacerbated, ethnic tensions can get heightened.⁶

The refugee's claim for rights is legitimately posited within the state-refugee paradigm. The question of refugee rights arises when ethnic groups that seek a separate state find themselves entrapped in a political condition or arrangement that is somehow hostile to their sense of status and their aspirations.⁷

The human rights discourse has grown over three 'generations' viz., the first, comprising of civil and political liberties that emerged during U.S. and French Revolutions; the second, including economic and social rights that emerged from the working-class struggles of the nineteenth century and the Russian Revolution; and the third generation of collective or "rights of peoples".⁸ This last category has found embodiment in international instruments like the United Nations Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, Rights (ICCPR), and the International Convent on Economic Social, and Cultural Rights (ICESCR). The foundations or the structural formations of refugee rights can be said to be contained in these instruments. Later it has been the 1951 UN Convention Relating to the Status of Refugees and its subsequent 1967 Protocol that has extensively given body to these structural outlines.

I. THE STATE AND RIGHTS OF A REFUGEE IN POLITICAL THEORY.

Refugee rights can be conceived as being subsumed within the claims of displaced persons for collective rights.⁹ Rights of displaced persons can be claimed under people's rights only when we are speaking exclusively of tribal peoples, either displaced or potential victims of displacement. However it should be noted that the claim for group rights of displaced is premised on the prior logical exercise of determining and defining what sort of a collectivity displaced

persons constitute (Jayal, 1998: PE 30). It needs to be determined whether refugee rights carve out a space for themselves under and within the deliberations of group or collective or individual rights. Can they be perceived as minority rights?

Liberal theory basically supports claims for the rights of individuals. Yet its premises have argued the case for refugee rights and outlined a sphere for them. The claim for refugee rights thus digs its roots into the soil of political theory. Its embryonic form then grows shoots and leaves in the light of the provisions outlined in International Conventions. Finally, how far these rights are guaranteed to the refugee population hosted by states for e.g., India, will determine how well the tree will flower.

The seedling of refugee rights first sends down roots into the soil of rights of immigrants and asylum seekers to create a base and gently draws out the refugee position therein. Along with it come the corresponding arguments for and against state responsibility to allow immigrants and regulate entry. Gibney classifies the views of Carens, Dummett, and Singer and Singer under the head of 'Impartiality' which gives equal credence to the claims that refugees have or make on their host state, and that of Walzer under the title of 'Partiality' which is more favourable to the host state's prerogative to close its borders.

Carens explicates his stand drawing from Nozick, Rawls, and the Utilitarian. He also discusses and criticises Walzer's challenge to his assertion of free migration as an ideal. Finally Walzer's own position, specially on refugees, is enunciated and evaluated. It is amidst this crowded scenario of various viewpoints, assertions, and counter criticisms that the outline of the 'sphere' of refugee rights become visible and finally coloured with many overlapping shades.

The liberal theory of rights, rights of minority cultures, rights of immigrants, and collective or group rights versus individual rights are the basic premises on which an argument for the right of refugees can be constructed. While doing so, certain fundamental questions get debated on such as what claims do refugees have, what rights are they granted, and what responsibilities do states have towards them. At the onset of this exercise, the basic facts which already exist are firstly, that refugees are involuntary migrants; secondly, that they are generally perceived as a minority group in their host state; thirdly, that the refugee status determination procedure under international law treats refugees as individual cases whereas the Indian state, for instance, recognizes them as a collectivity.

Minority rights, says Baubock (1996: 203) have generally been regarded with suspicion by libertarians because they put the collective above the autonomous individual. Liberal republicans put the ethnic community above the political one. As far as rights of newcomers are concerned (and refugees are newcomers in the host state) liberals are mostly seen as being pro-immigrant. They have defined the idea that admission policies should not only be guided by national interest, but must respect certain standards of fairness. They have also broadly agreed that, once admitted, immigrants ought to be offered secure residence, economic opportunities, basic liberties and a fair prospect of becoming citizens.¹⁰

In fact, Baubock in his discussion on cultural minority rights for immigrants raises some very pertinent and fundamental concerns to any argument about/on refugee rights. He says, that "if liberal democratic government must treat all citizens with equal respect and concern, it has to recognise their different

cultural memberships. In the language of politics, recognition translates into rights". Refugees are not citizens (though second generation refugees, like children of Tibetan families, settled in India for decades can apply for citizenship on the basis of their place of birth) yet in the Host State, their struggle to ensure for themselves a dignified life demands recognition and hence rights. Secondly, "The seeking of opportunities alone also does not prove that a migrant is not a refugee. After all, in the receiving countries, refugees turn into immigrants who have to make a living too". (1996: 214,221). Definitional criteria have, and do, strictly exclude people fleeing for purely economic reasons from being termed as refugees. But rights of immigrants cannot be so severely divorced from rights of refugees. A refugee in the host state also has to look after his own economic needs. "Immigrants in the most general sense of the word are those who live in a country different from that of their birth. How relevant is the place of birth to a person's claim to cultural rights?... The right to equal respect and concern, identified by Ronald Dworkin, as the abstract egalitarian principle of liberalism, does not allow us to differentiate rights within a political community because of circumstances of birth." (1996: 214-15). The painful reality of a refugee is that he is deprived of the protection of the country of his nationality, and is unable or unwilling to avail of it. Where one is born does not necessarily determine where one lives – in the case of a voluntary immigrant this choice is exercised but in the case of an involuntary migrant like a refugee there is no choice. Therefore, is the fact that the refugee was not born on native soil, reason enough to deprive him of basic human rights? (Gibney, 1999; Carens, 1987).

Once a refugee enters a receiving country, a new dilemma - of the rights that he is entitled to, and the reciprocal duties of the state towards him - emerges.

But, before that, stands a larger and perhaps even wider question to be addressed – do states have a responsibility to admit refugees and asylum seekers for entrance? Is this merely an ethical or moral question? This initiates the reader into the debate with regard to ‘open or closed borders’, and it is within the arguments of this larger debate that the standpoints of various political theorists vis-à-vis refugee rights and state duty gets outlined.

Mark Gibney locates the responsibility of states within a wider context of refugee generating factors than outlined in the previous chapter. “.... (T)here are reasons for believing that the current crisis symbolizes something very different from the situation of Arendt’s’ time”. For, unlike the refugees of the 1940’s and 1950’s, most of whom were the result of relatively transient forces (international conflict, totalitarian regime) the present crisis is fuelled by a range of factors, including the flourishing of violent civil wars, the deliberate targeting of civilian population, and the problems of maintaining durable and humane state structures in conditions of poverty, which are extremely difficult to address, let alone solve. Moreover, while most of the refugees Arendt described came from Eastern and Central Europe, the rise of frequent and inexpensive air travel and the spread of international communications have resulted in a situation in which those claiming entry to Western states are now more likely to be fleeing African or Asian or particularly in the case of the United States, Central and South American States than European ones (Gibney, 1999: 169).

Nonetheless, states do have a responsibility towards refugees, though to what extent they are acceptable as morally ideal is debatable. Translating the morally ideal into practice is not always possible, and may not yield desirous consequences in the long run e.g., since the 1980s the Federal Republic of

Germany lived up to an inclusive ideal with relation to asylum by receiving almost two thirds of the European Unions asylum applications. But the burden sparked an intense domestic backlash, manifested in widespread hostility to the country's asylum laws from the far right, and more alarmingly, from the general public, the capacity of which to accept and integrate asylum-seekers and refugees is reduced. Thus Gibney advises that along with concerns of value, the challenges of agency viz., the socio-political and economic considerations that effect the implementing of morally defensible practices of states towards refugees, should be incorporated within prescriptions regarding how states should respond to refugee issues.

The conventional assumption behind every state's policy towards its refugees is that the power to admit or exclude aliens is inherent within sovereignty and is essential for any political community; every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful and needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so. The best theoretical defence of this conventional assumption is provided by Michael Walzer.¹¹ On the other hand global liberals and utilitarian represent articulations of the 'impartial' perspective, stressing the universal moral claims of human beings to equal consideration by states. A voice which stands out loud here is that of Joseph Carens. Arguments of both sides shall be looked into.

Along with Carens, Gibney draws from the views of Anne Dummett (1992; a liberal operating within the rights based framework) and Singer and Singer (1988; a utilitarian approach) as proponents of the 'impartial' perspective towards state responsibilities and refugee rights. According to Dummett (1992)¹² support for the impeccably liberal right to exit one's state logically entails a

corresponding individual right to enter a new state if the former right is to be effective. Robert Goodin (1992)¹³ goes farther, says Gibney, and adds that there is also something ethically inconsistent in the way liberal states support the free international movement of goods and services while restricting the free movement of people. Singer and Singer (1998)¹⁴ suggest that in a conflict between the interests of refugees and those of citizens, the more fundamental interests should take precedence over the less fundamental. Liberal democracies are, therefore, obliged to increase their intake of new entrants, taking into account both the benefits to them and the costs to residents, until there exists an equilibrium between the marginal utilities gained through extra immigration by both residents and potential entrants. States might be obliged to accept refugees upto the point that “tolerance in a multicultural society was breaking down because of resentment among the resident community..... and this loss of tolerance.... was a serious danger to the peace and security of all previously accepted refugees”.¹⁵

Joseph Carens, expounding the universalistic implications of liberalism, essentially rallies for the argument that the right of a community to fashion its own entrance policy is morally circumscribed by the right of all individuals to reside where they wish. He asserts that “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.” (1987: 332) an assertion which he believes is strongest when applied to the migration of people from countries of the third world countries to those of the first. To develop and qualify his argument, he draws from the approaches of Robert Nozick, John Rawls, and that of the Utilitarians, to finally conclude that there is little justification for restricting immigration. Each of these

three sources, says Carens (1987: 332) treat the individual as prior to the community, consider the equal moral worth of individuals, and converge to strengthen the case for open borders.

The right to property¹⁶ could be used as a basis for the right to exclude aliens, the analogy being – ‘It is our country, we can let in or keep out whomever we want’. Following the Lockean property rights tradition, Nozick too assumes that in the state of nature, all individuals have the same natural rights, including the right to acquire and use property. But when the exercise of these rights results in conflict, a minimal state is created to protect people against the violation of their basic inviolable rights. But this minimal state is neither justified in making redistributive policies, nor justified in restricting immigration, because, other than enforcing the rights which individuals already enjoy in the state of nature the state has no other right. Its only obligation is to protect the rights of citizens and non-citizens equally, because citizenship gives rise to no distinctive claim and the state only enjoys a *de facto* monopoly over the enforcement of rights within its territory.¹⁷

Nozick’s theory thus suggests that the actions of non-citizens or aliens would be none of the state’s business as long as they were peaceful, did not steal, trespass on private property or otherwise violate the rights of other individuals. To be very specific, Nozick’s theory states that neither the state nor individuals have any basis to exclude aliens that could not be used to exclude citizens as well. Refusal of any rights to aliens, or any discrimination against them, should not be confined to aliens alone; similar deprivation or discrimination should be open to be meted out to fellow citizens too. Individual property owners could refuse to hire aliens, to rent them houses, to sell them food, and so on, but in a Nozickian.

world they could do the same things to their fellow citizens. Thus individuals may do whatever they wish with their private property and exclude whomsoever they want; but they have this right to exclude as individuals, not as members of a collective. (Carens, 1987: 333-4). And, as Carens cites, Nozick implies that when you can't restrict an individual's liberty to free movement you can't restrict or exclude aliens from your territory. In constructing an argument for refugee rights and drawing out their space in political theory, it is this Nozickcan denial of closed borders as state-policy that can be used to strengthen the right of a refugee to save his life and seek refuge in another state, his right not to be subject to such discrimination or deprivation that is not extended to the citizens of the receiving country too, and in defence of the principle of non-refoulement that obligates states not to turn away refugees if their life is at risk.

If according to Carens, Nozick outlines as to what a state should/can not do to a refugee, Rawls delineates what it should/can do. The closed system assumed by Rawls in *'A Theory of Justice'* does not provide much scope for questions of immigration to arise. But Carens deliberates within it to apply to a broader context and questions on immigration (1987: 334). In the Rawlsian, 'original position' of a 'veil of ignorance' people are oblivious of their own personal situations like class, race, sex, natural talents, religious beliefs, individual goals, values etc., and the state is guided by two principles which ensure equal liberties to all and allow social and economic inequalities only when these work to the advantage of the least well off. Rawls also distinguishes between ideal theory, wherein after the lifting of the 'veil of ignorance' people accept and abide by the guiding principles no historical obstacles exist in the realisation of just

institutions, and non-ideal theory, wherein unjust actions of others and historical obstacles are considered and accounted for.

But even in such an 'ideal' world people may want to move from one state to another. Thus the issue emerges whether freedom of movement is a basic liberty in a global system of equal liberties or whether states have the right to limit entry and exit. A right to free movement can be derived by extending the 'original position' of Rawls to cover the whole of humankind. Individuals in a global contract situation would support a right of free movement between states for exactly the same reasons that individuals in Rawls' original contract support free movement within states – both are usually essential to individuals' life plans to the realisation of other liberties (Gibney, 1999: 171).

But unrestricted immigration could lead to chaos, so Carens invokes Rawls' argument allowing space for public order restriction whereby liberty is restricted for the sake of liberty. But this restriction is justified only if there were a 'reasonable expectation' that unlimited immigration would damage the public order, and if this expectation is based on evidence and ways of reasoning acceptable to all (Rawls, 1971: 212-13 quoted in Carens, 1987) only those restrictions necessary to preserve public order are just and not any threat to public order by unlimited immigration caused by antagonistic reactions from current citizens. Besides, in an 'ideal' world of just states with an international difference principle, it is unlikely that mass migrations threatening public order in any part of a state should arise.

However, in the non-ideal world, state sovereignty has a strong base, national security is a crucial concern for public order, and deprivation of basic rights and liberties of citizens do occur. So states have a justifiable right to prevent

the entry of people if they are armed invaders or subversives intending the overthrow of just institutions. Besides, if immigrants come in from societies where liberal democratic values are weak or absent then the threat to public order gets deepened.

But here Carens makes a pertinent objection on the limitations to the state's obligation to allow immigration as permissible in the Rawlsian picture. He points out that one should be able to discriminate between real and hypothetical threats that states use to curtail entry, as Catholics and Jews from Europe were perceived as a threat during the nineteenth century. These hypothetical threat perceptions could get resurrected in another guise, he warns ominously (1987: 337). Though a massive flow, even of peaceful and safe immigrants could perhaps prove to be destabilising, limitations on a refugees's right to entry have to be based on broader arguments for/against restrictions on immigration in a state.

Besides, restrictions should not mean any level of restriction whatsoever or restriction for other reasons, but only that level essential to maintain public order. Rawls specifies public order restrictions to be prioritised for those seeking immigration having been denied basic liberties over those who do so for better economic opportunities. Also, at times restricting liberty to improve the economic position of the worst off, is justified. But Carens wonders whether analogically restricting immigration for the sake of the worst off would be beneficial, because at times more open immigration does help some of the worst off. (e.g., when people earn money and sent it back home). If states earnestly want to help the worse off, they could do so through giving financial aid and reforming economic institutions, rather than restricting immigration. It is not necessary that those who come are the worst off i.e. that the economic status of the refugee is a threat to the

stability or equilibrium of the host state. Carens also strikes down further restrictions on immigration within the Rawlsian non-ideal world and argues that restrictions on the grounds of birth place or parentage are unjustifiable; that restrictions on the grounds that immigration reduces the economic status of citizens are irrelevant; and the argument that allowing in refugees or immigrants will dilute the cultural make-up of the state is flawed.

Thus, through an examination of and engagement with the Rawlsian argument Carens strengthens his defence for open borders of states. This discussion highlights how restrictions eat into the space for rights, and more importantly, how threat perceptions to refugee flows are heightened more theoretically than they exist in reality i.e. when entry of refugees is restricted on illusory or invalid grounds. Objections like the threat to the economic status of citizens are not always redundant, as when refugee populations in host states begin gnawing off the residents' share of resources like jobs xenophobia sets in e.g., in the North-East in India. Still the gap between hypothesis and reality so illuminated needs to be kept in mind while formulating and implementing refugee policy.¹⁸

The Utilitarian defence (that of Singer and Singer) of the right of a refugee to be admitted into the state at whose border he stands seeking refuge was also incorporated by Gibney in his elaboration of the 'impartial' views towards aliens, Carens too takes up the Utilitarian position on the ground that it gives more weight to reasons for restricting immigration than Rawls does. The Utilitarian framework of the cost-benefit equation can be used to evaluate restrictions on immigration on grounds of hurting citizens economically or affecting their culture undesirably in a wider and deeper light.

If more immigration would hurt some citizens economically, then Utilitarian theory would normally discount a more closed immigration policy. But other citizens might gain economically from more immigration and that would favour a more open policy. One would also have to consider the economic gains or losses of non-citizens. From the Utilitarian point of view the best immigration policy would be one that maximized overall economic gains – so within it current citizens would enjoy no privileged position, as the gains and losses of aliens would also demand accounting. Classical and neo-classical economists would prescribe free mobility of labour and capital for maximisation of economic gains – and free mobility of labour requires open borders.

The Utilitarian perspective could find immigration undesirable because it affects the existing ways of life or culture of a society so that pain is increased and pleasure decreased e.g., a white racist may be unhappy at having to associate with immigrants of other colours. Different Utilitarians have addressed this issue differently by giving either long term, rational, or otherwise refined pleasures preference. Carens favours the reconstructive or filtering approach to utility but insists that the concerns of aliens must be counted too. (1987: 340-41).

Opposed to the argument for open borders and the right of the refugee to immigrate is perhaps the conservative and especially the communitarian viewpoint that states have the right to regulate entry. In particular, the communitarian emphasis on the role that cultural communities play in shaping the lives of men and women has important implications for state claims to control entrance. 'Partialists', as exponents of this claim are termed by Gibney easily (1999: 172) argue that to respect the integrity of the choices and life plans of individuals, peoples right to live in independent national communities must be

acknowledged. People “have the right to demand that others respect whatever is indispensable to... (their) being full human subjects (Taylor, 1993: 53 quoted in Gibney Ibid) and thus national communities have the right to be sovereign states. The entry of new members thus introduces the threat of changing the internal character and environment of the state. So control over entry becomes an important and essential feature of any independent community. Citizenship implies not only the sharing of legal status and territorial residence but also membership in a rich cultural community that transcends the diverse conceptions of the good which characterise liberal politics – thus ‘partialists’ claim that states have the right to distribute membership.

However Gibney finds flaws in this claim. Individuals can advance claims to some autonomy from the demands of impartial morality as they have their own projects and commitments to pursue. But states’ analogous claim to autonomy in admission decisions based on the right of cultures to flourish is more dubious, because today identities of citizens are shared by both communities within and beyond the state and by the state to itself. States themselves host different national groups and national communities which do not always exactly overlap. Nonetheless, in the modern state today citizens have a strong ethical right to live in and reproduce independent political communities characterised by bonds of solidarity. The value attached by citizens to the state in which they claim membership cannot be invalidated by different interpretations of a state’s identity and history. Its members share an idea of collective solidarity that outsiders do not. (which, for example allow for provisions like public goods).

Besides ‘partialism’ is not intrinsically hostile to relatively open entrance policies. A particular state’s refugee policy may be ethically legitimate if it

reflects the shared understandings of citizens, which again principally could perhaps be more inclusive than current practices. But then again different communities would have different understandings of how many and which refugees they have a responsibility to or wish to assist. So the implications of this approach could be indeterminate (Ibid: 173).

Perhaps a more comprehensive and worthy claim for the state's right to restrict immigration is Michael Walzer's '*Spheres of Justice*' (1983) where bonds between citizen are asserted as crucial to the instantiation of social justice. Walzer sees the responsibilities to refugees and asylum seekers as limited by the foundational right of citizens to protect their national culture, "their shared sense of what they are about" (1983: 50).

Walzer's basic approach is a concern with "the particularism of history, culture and membership" (1983: 5) not universal principles. This concern with membership is asserted simply "across a considerable range of the decisions that are made, states are simply free to take strangers in (or not)." (1983: 1). In Walzer's view it is not from behind a 'veil of ignorance' but from that of the perspective of membership in a political community in which people share a common culture and a common understanding about justice, that distributive justice should be viewed. In his rich and subtle discussion of the problem of membership, the basic claim is that the right of communities to self-determination is that it justifies the state's right to exclusion.

However, this right to exclude may be restricted by firstly our obligation to provide aid in the form of resources or even territory to needy strangers in dire need whom we may not even know, secondly, the principle of justice which demands that the right to acquire citizenship must be extended to those people

admitted as residents and participants in the economy, and thirdly the refusal to allow new states to expel existing inhabitants even if they are regarded as alien by most of the rest of the population (1983: 33, 45-48, 55-61, 42-44).

Walzer claims that open states are like a form of open association where a particular state's distinctiveness depends on its formal closure¹⁹. But Carens argues that distinctiveness is not just contingent on political control of admissions (Carens, 1987: 3)

Walzer compares states to clubs (1983: 39-41), but within the former the right to equal treatment is applied, while in the latter the right is associated with the right to freedom of association. While the former obtains in the public sphere the latter belong to the private. Private clubs may admit or exclude whomsoever they chose but states need appropriate admission standards, which treat individuals equally. Carens points out that Walzer ignores this distinction between the private and public (1999: 344). Extending the flaw in Walzer's argument to strengthen his own, he states that the extension of the right to immigrate reflects the same logic: equal treatment of individuals in the public sphere. It is the same liberal democratic principle that insists that our society should admit guest workers to full citizenship, that also decries a restrictive policy on immigration. Besides aliens cannot be excluded merely on the grounds that they belong to a different moral tradition and culture than 'ours' while 'we' are the products of a liberal culture.(!)

Recognition of the particularity of our own culture should not make our views appear more enforceable. "The general case for open borders is deeply rooted in the fundamental values of our tradition" (Carens, 1987: 346) as in the assumption of the equal moral worth of all individuals that is the basic

argumentation principle. So any restrictions on immigration to be justified must be based on arguments that respect this principle. In Carens' opinion Walzer's theory does not adequately argue for a state's right to exclude. James Hathaway (1991: 124-25) too expresses dissatisfaction that Walzer, while analysing the concept of membership in national communities, does not explicitly address the international context but suggests a plausible construction of the status quo framework within which states consider issues of immigration policy. In his opinion, Walzer's view accurately reflects the dominant view of states, and is a helpful point of reference in designing a protection structure for refugees which is reconcilable with national self-interest, and may also be challenged for its implied equation of the nation with the state. In fact Walzer himself points out that refugees have a special entitlement to be taken into a national community because their claims "cannot be met by yielding territory or exporting wealth;..... only by taking people in (because their) need is for membership itself, a non-exportable good. The liberty that makes certain countries possible homes for men ~~and women whose politics or religion is not tolerated where they live,~~ is also non-exportable; at least we have found no way of exporting it. These goods can be shared only within the protected space of a particular state. At the same time admitting refugees does not necessarily decrease the amount of liberty the members enjoy within that space. The victims of political or religious persecution.... If you do not take me in, they say, I shall be killed, persecuted, brutally oppressed by the rulers of my own country. What can we reply?" (Walzer, 1983: 48-49).

At this point after an examination and evaluation of Walzer's position with regard to the right to immigrate and the state's right to close its borders, one needs

to analyse and go into the specific provisions he outlines for refugees within his discussion of membership. Among the normally acceptable options that he outlines to address the claims of refugees, the first one he extends to is “any group of people whom we have helped turn into refugees”. On the grounds that “the injury we have done them makes for an affinity between us”. e.g., the Vietnamese refugees thus had a moral claim on America. But this persecution need not be self-generated to oblige a host state as “we can also be bound to help men and women persecuted or oppressed by some one else.... because they are like us”. Ideological and ethnic affinity is also accepted as legitimate ground for refugees to seek entry. Grounds of affinity are stretched to “every victim of authoritarianism and bigotry”. But Walzer is quick to realize that this would be an unnecessary burden. He is practical enough to allow for mutual aid only to small numbers as when they increase “we are forced to chose among victims, we will look rightfully, for some direct connection with our own way of life”. In the absence of such connection, he denies them the requirements to be chosen over other people equally in need.

Very subtly he insists that refugees should be able to relate. “Communities must have boundaries; and however they are determined with regard to territory and resources, they depend with regard to population on a sense of related and mutuality. Refugees must appeal to that sense. One wishes them success; but in particular cases, within reference to a particular state, they may well have no right to be successful. He also accepts the lacunae in his dependence on ideological affinity as creating room for political choice being a matter of mutual recognition. “Hence it may be said that my argument does not reach to the desperation of my

refugees. Nor does it suggest any way of dealing with the vast numbers of refugees generated by twentieth century politics”.

Walzer admits of practical difficulties in implementing rights and the need for a neutral overseer and enforcer. “Everyone must have a place to live, and a place where a reasonably secure life is possible... (but) this is not a right that can be enforced against particular host states. The right can be enforced in practice until there is an international authority capable of enforcing it, and were there such an authority it would certainly do better to intervene against the states whose brutal policies had driven their own citizens into exile”. So he prescribes addressing the refugee generating factors at their roots. He also realizes the value of the policy of asylum but is not blind to the limitations on its being generously granted to large numbers of refugees. His sensitivity, torment and anguish is confined not only to those who seek asylum at the borders. “Why be concerned only with men and women actually on our territory who ask to remain, and not with men and women oppressed in their own countries who ask to come in? Why mark off the lucky or the aggressive who have somehow managed to make their way across our borders from all the others?” Walzer’s observation here raised vital questions about the futility of addressing the causes of refugees flows and attending to immediate human rights violations in conflict and violence-ridden refugee generating states. But Walzer himself accepts his limitations – “once again, I don’t have an adequate answer to these questions... if we offered refuge to everyone in the world who would plausibly say that he needed it, we might be overwhelmed actually to take in large numbers of refugees which is often morally necessary; but the right to restrain the flow remains a feature of communal self-determination. The principle of mutual aid can only modify and not transform

admission policies rooted in a particular community's understanding of itself." (Walzer, 1983: 48-51).

Besides Walzer's approach might seem to offer a way of balancing the claims of citizens and refugees, but by granting broad rights of cultural maintenance it risks conceding to states virtually unlimited discretion in entrance. Protecting a culture (or a "way of life") is, in the absence of criteria to determine which aspects of a culture are integral and which dispensable, an extremely plastic standard for critically appraising state entrance policies. Besides citizens may often have different views of what their state is about. (Gibney, 1999: 1973)

Still it may perhaps be more appropriate to view most refugees simply as 'necessitous strangers' (Walzer, 47) with no place to go, rather than as persons with a special entitlement in a new community. From Walzer, two conclusions can be drawn viz., a) that refugees would have a legitimate claim based on principles of mutual aid to surplus territory or wealth to the extent necessary to meet their needs (Walzer, 83-86) b) account should be taken of the preferences of states to admit national or ethnic relations, or those who are otherwise affiliated to the asylum state, and whose admission may therefore be seen to be less of an intrusion of a state's right to communal enclosure. These two principles offer the foundation for a new system of conceptually broadened refugee protection which is both consonant with the claims of sovereign states to exclude most aliens, and formulated on the basis of each state's resources and absorptive capacities.

Most of the above stated views and arguments on the rights of refugees, primarily the one to immigrate and enter a new state, and that of the state to control entry and exit or 'open and close borders' is premised on various strands of the liberal tradition. This foundation itself is not without flaws as Carens point

out. Liberalism, it might be said, emerged with the modern state and presupposes it. Liberal theories were not designed to deal with questions about aliens. They assumed the context of the sovereign state. These criticisms have historical validity but not necessarily normative force too. Liberal theory is often indicated to be inadequate and unable to give sufficient value to the community, says Carens . But his findings on immigration rest primarily on assumptions that no defensible moral theory can reject; “that our social constitution and public policies must respect all human beings as moral persons and that this respect entails recognition, in some form of the freedom and equality of every human being.” (Carens, 1987: 342)

He opines that current restrictions in Western democracies like Canada and the USA, on immigration are unjustifiable as they protect against privilege. It does not mean that there is no room for distinctions between aliens and citizens, no theory of citizenship, no boundaries for the communities but that the exclusion of those who want to join is not readily compatible with the idea of equal moral worth. Besides, if immigrants are few in number, they can always be absorbed without changing the character of the community. Open immigration would change the character of the community but it would not leave the community without any character. It might destroy old ways of life, highly valued by some, but it would make possible new ways of life, highly valued by others. (Carens, 1987: 346 –7).

II. REFUGEE RIGHTS IN INTERNATIONAL LAW AND IN THE INDIAN STATE.

After this exploration of the various layers of soil (comprising of the view points of various political theorists and basic issues), that the reading of refugee

rights digs deep roots to draw nourishment from, we proceed to an enumeration of the various 'rights' provided for refugees in International Covenants and the examine how far and how many of these rights are made available to refugees by the Indian State.

(A refugee is an alien on the territory of the state, but one who has neither a nationality nor national protection. He is provided international protection under conventional and customary international law but they need to be transformed into national legislation by the host state) While conventional international law binds all of the more than 130 states which are signatories to the 1951 Refugee Convention and its subsequent 1967 Protocol, customary international law applicable to refugees pertains to those fundamental human rights which are found in the International Bill of Rights. Thus, states accept the responsibility to protect refugees because they have acceded to international instruments, because of being bound by customary international law, because of political or moral commitments, or by reason of their own national legislation. In fact, by the exercise of their sovereign authority to control borders, states may take responsibility for refugees from which certain rights flow.

So while the entire gamut of theoretical propositions, arguments, and debates on the states right to open or close borders, to control exit and entry, form the structural skeleton of refugee rights it is international covenants that give flesh to those claims and give them a formal legal body. Of these international instruments the 1951 UN Convention Relating to the Status of Refugees is held as the Magna Carta – the great charter of rights which signatory countries agree to confer upon the refugees they host. A uniform code of rights and duties – ranging from the simplest to the most elaborate – the 1951 Convention embodies certain

minimum international standards that the state has to respect with regard to a certain category of people like aliens. The 1951 Convention contains numerous rights provisions like protection from refoulement, or forced return, protection against unlawful expulsion or detention, the right to employment and education, access to the courts and freedom of movement. With regard to many of these, refugees are supposed to receive the same treatment as nationals in the country of residence.

But the application of the 1951 Convention is left to the contracting states and only when they convert its provisions into national law can the asylum seeker claim his rights before competent municipal authorities and tribunals. The contracting states also are under no obligation to admit a person who qualifies as a refugee under the terms of the Convention – they may still refuse entry. The Convention in its time perhaps had not expected that the events of the preceding years could be repeated. So it sought to achieve its primary objective of resettling and integrating the dislocated persons without the need for any obligation to admit refugees. But this expectation proved to be wrong.²⁰ The obligations under the Convention were confined to European refugees alone as it was limited temporally to events before 1951, and geographically to those in Europe. The definition of a refugee outlined in it confined protection to those who feared persecution because of their political or civil as opposed to their socio-economic status and this allowed it to be used as a political weapon against the former socialist states.²¹

It is not surprising that none of the South Asian countries have acceded to the international refugee instruments. According to some there are complex historical and political reasons peculiar to the region which account for this non-

participation.²² The 1951 Convention is not held to be relevant to the situation prevalent in South Asia or for that matter much of the developing world. Refugee flows in India and its neighbouring countries have been mass exoduses but the Convention outlines a legal regime of individual determination of refugee claims.²³

It has also been held that acceding to international conventions could be an additional economic burden specially if certain provisions like access to education and employment are to be implemented. Anyway refugee relief is quite costly; the total expenditure incurred by the Indian State on the relief of East Pakistani refugees alone upto the end of 1959 was 60 crores. Najma Heptullah, the Deputy Chairperson of the Rajya Sabha in India had said that, "We believe that humanity cannot be legalised..so we have not signed the Refugee Convention". So the Indian State is neither under any treaty obligation to admit the activity intended for the international protection of refugees nor can its record in complying with the refugee-specific rights in the Convention be examined.

States not party to the Refugee Convention or any international instrument concerning refugees are then bound by customary international law to provide the minimum standard of treatment which should at least respect the fundamental human rights of the refugees. And being a member of the international community the Indian State is also expected to respect its international obligations.²⁴ Article 51C of the Indian Constitution states that the state shall endeavor to foster respect for international law and treaty obligations in the dealings of organised peoples with one another". But being a Directive Principle this obligation is legally non-enforceable. Nonetheless, India has played a positive role in protecting refugees from within the SAARC region and outside.

States not party to international refugee instruments are still expected to fully enforce and implement generally accepted practices and rules regarding refugees, particularly the minimum standard of treatment to which they are entitled under customary international law through proper and appropriate legislation. But none of the South Asian countries have either enacted a domestic legal framework in the form of a refugee or asylum law or even least a determination procedure. In India, the Union legislature has sole jurisdiction over citizenship, naturalisation and aliens. But it has not passed any major refugee specific legislation to regulate the entry and status of refugees that it hosts on its territory with the exception of the 1948 Refugee Finance Administration Act which dealt with the post-partition flow of refugees. In the Indian context, the influx of refugees has been handled by administrative decisions rather than by specific legislative enactments.²⁵ To handle the awesome post –partition load of refugees the Government of India had also set up the Rehabilitation Department.

Refugees, by definition, are victims of human rights violations and the Indian State has legislated to establish a human rights commission. The National Human Rights Commission (NHRC) was set up by the Protection of Human Rights Act in 1993. It has investigated a number of complaints involving refugees. Besides, for non-signatory states, if customary rules are still vague and unclear then national courts have come forward to give an authentic interpretation. In the Indian case the judiciary has been helpful when approached with individual cases. The Supreme Court case of the NHRC v State of Arunachal Pradesh and another (1996SCC295) is hailed as landmark judgement in the area of refugee protection in the context of India and underlies the usefulness of engaging a human rights machinery for refugee protection.²⁶ There is a clear judicial trend towards

protecting the life and liberty of refugees in India.²⁷ Thus, despite the uncertainty occasioned by the absence of law, the courts have granted relief by stretching the laws.

The Supreme Court, in a landmark judgement had upheld the rights of the Chakma refugee to certain facilities entertained to them in the state of Arunachal Pradesh.²⁸ It had held that "Our country is governed by the Rule of Law. The state is bound to protect the life and liberty of every human being be he a citizen or otherwise, and it cannot permit any body or group of persons e.g., the AAPSU to threaten the Chakmas to leave the state, failing which they would be forced to do so."²⁹

In the absence of specific legislation in India, refugees are treated as 'alien refugees' under Entry 17, List I, Schedule VII of the Indian Constitution. Refugees are treated under the law applicable to aliens or foreigners who leave their homes in normal circumstances.³⁰ While an alien on Indian territory has to show valid grounds for his stay if he wishes to extend it to more than 90 days, an 'alien refugee' is given a residential permit. The official policy of the Government of India is to allow all refugees temporary refuge on Indian territory. But permanent resettlement is not offered to refugees granted temporary asylum elsewhere.

The UNHCR has no formal status in India and is usually permitted to deal with nationals from countries not bordering India. The Afghan, Iraqi, Irani, Sudani, Somalese, and Myanmarese refugee populations that the UNHCR Office in New Delhi grants refugee status to are those not officially recognised by the Government of India. Still, the Indian Government also grants renewable temporary residence permits to UNHCR recognised refugees.³¹ India, in fact,

accepts a large group of refugees who are fleeing not just for reasons relating to 'persecution' but also due to generalised violence, which means that (India *defacto* accepts the definition of refugee as found in the 1969 OAU Convention) rather than the narrower definition provided by the 1951 Refugee Convention. But what is not clear is what legal rights or status accrues to a person as a result of registration by the Government of India as a refugee, not the relationship between refugee status granted by the Government and corresponding national laws governing the entry and stay of foreigners.³²

While some of the fundamental rights outlined in the Indian Constitution are granted only to citizens, some, on the other hand, are available to any person on the soil of India – citizen or foreigner. Under Article 14 of the Indian Constitution, equal protection of the laws is available to all persons including non-citizens. So the Indian state attempts not to discriminate between refugee groups with regard to benefit or rights enjoyed by virtue of their refugee status.

The Right to Religious Freedom, under Article 25 of the Indian Constitution, is also extended to all persons equally. This right is contained in Article 4 of the 1952 Convention. The Indian Constitution also guarantees the right to life, personal liberty and free access to the courts under Articles 21 and 22 to every person concerned, be he an alien, refugee or a citizen of India. So, as desired in Article 15 of the 1951 Refugee Convention, in India, a refugee has free access to the courts of law as permitted under the Constitution. But Subclause (3) of Article 22 says that nothing in clause (1) and (2) shall apply to any person who for the time being is an enemy alien. Thus, after the former Indian Prime Minister Rajiv Gandhi's assassination, many Sri Lankan refugees suspected of terrorist links were subjected to arbitrary arrest, detention and coercion.³³

Providing free and compulsory education under Article 45 of the Indian Constitution is a Directive Principle and has no legal guarantee for its enjoyment as a right even for Indian citizens. Yet, India has attempted to provide free and primary education to all recognised refugees. But only Tibetan refugees are given the privilege of enjoying higher education.³⁴)

Articles 17-19 of the 1951 Refugee Convention seek to assure gainful employment to refugees. In India, no foreigner has a right to wage-earning employment, self-employment or profession though he can do that with the permission of the Government of India. Refugees on Indian soil face no formal restriction on wage earning or self-employment but in view of the large population of unemployed in India their undertaking any work is viewed with hostility. The Union Government instead provided them with some subsistence allowance and rations. Exceptions to this are the Tibetans who are allowed to engage in wage-earning employment in agriculture, agro-industries and handicrafts specially set up for their rehabilitation and also to engage in small businesses such as selling of handicrafts and winter clothes.

Refugees are given the right to choose their place of residence and to move freely within the territory of the country concerned under Article 26 of the 1951 Convention. In India, only citizens are granted that right under Article 19(d)(e) of the Constitution. This freedom is also available to refugees in India subject to restrictions necessary for the safety of the state or its international relations. Refugees who can afford to live on their own are given this freedom subject to conditions such as national security or public order. But the large number of Chakma refugees in Tripura and Sri Lankan refugees in Tamil Nadu are totally dependent on the Government, confined to camps, and need permission from

camp authorities to move outside. After Rajiv Gandhi's assassination movement in and out of camps for inmates was further restricted. Those with suspected terrorist links were housed in prison like conditions in 'Special Camps'. All those living outside the camps were ordered to register with the local police. Housing is provided to refugees under Article 21 of the 1951 Convention. The Government of India has always accommodated refugees in camps and shelters, but not prohibited those able to live in private residences from doing so.

Article 13 of the 1951 Convention seeks to guarantee to refugees, treatment as favourable as possible as aliens with regard to rights to movable and immovable property. But this right had been scrapped as a fundamental right in the Indian Constitution. So refugees in India may be using agricultural lands and houses on lease for decades but still have no property rights over them.

Under Article 15 of the 1951 Convention, refugees are ensured the most favourable treatment as accorded to nationals in a foreign country with regard to the right to non-political, non-profit making associations and trade unions. Under Article 19C of the Indian Constitution however only citizens are granted the fundamental right to form associations, yet refugees in India also enjoy the right to form peaceful associations e.g., Myanmarese and Chakma refugee communities have formed student and welfare refugee associations.

Exemption from penalties has been one area where the Indian State has been very apathetic towards refugees. While Article 3(1) of the 1951 Convention forbids contracting states from imposing penalties on refugees, under Section 144 of the Foreigners Act of 1946, a foreigner is liable to the punishment and imprisonment and fine. Because of the lack of a sufficient legal differentiation between a refugee and a foreigner, and in the absence of a procedure for

considering asylum claims all individual asylum seekers who entered illegally or stayed in India without authorisation were prosecuted and punished under this section. However, in the case of large-scale influx, India has always acted according to the principle laid down in the 1951 Convention and not imposed penalties on refugees.

Contracting States to the 1951 Convention are obliged to issue identity papers to refugees on its territory who do not possess a valid travel document under Article 27. In India, all refugees who are so recognised were given identification certificates showing their refugee status. The state of Tamil Nadu issued identity cards to the head of every refugee family. (But only Tibetan refugees have had the privilege of getting travel documents enabling them to even travel abroad and return.

From the above explorations of the theoretical and practical plane of refugee rights claims, this study goes on to reconnoiter the ground of the internally displaced and their own position vis-à-vis their rights in the next chapter.

3.

THE STATE, INTERNALLY DISPLACED PERSONS (IDPs) & RIGHTS

Displacement is a symptom of a serious crisis in nation-building which has international ramifications. Displaced people (DPs) are a microcosm, a sample of the wider community devastated by the indiscriminate violence and destruction characteristic of most internal conflicts, often compounded by ethnic and religious animosities that provide political entrepreneurs with tools for manipulation. Developing an effective system of protection for the DPs is as much a humanitarian and human rights concern as it is an imperative of regional and ultimately international peace and security.

With the end of the cold war, a system of formal stability was removed, latent antagonisms came out into the open, and internal conflicts increased. In the past, there were more intra-state conflicts fought normally by regular armed forces. Here non-state actors like the militia and paramilitary forces were responsible for displacement and those displaced could count on the support of the government or of their fellow citizens. But with the increase in inter-state conflicts the spirit of solidarity has decreased considerably. Particular groups within the population are characteristically identified with the enemy and deliberately targeted – which causes not only displacement but also destruction of the enemy. Between 1989- 1994 there have been 94 conflicts in 64 locations across the world, yet only 4 of these have been classic inter-state mode

So displaced persons within a state have come into being, commonly referred to as Internally Displaced Persons or IDPs . Other major causes behind their emergence are unequal distribution of wealth, under-development and poverty leading to increasing competition for access to scarce resources. From this follow ethnic tensions, religious intolerance, persecution of minorities and mass violations of human rights. Besides environmental degradation, technological disasters and large-scale development projects carried out without proper attention to the negative impact on the directly affected population also create IDPs. The United States Committee of Refugees (USCR) (Washington May 1997) has described how IDPs often murdered, starved, raped, enslaved, arrested, tortured, forcibly conscripted, forced to provide labour, made to move repeatedly, denied identity documents and abused in other ways. Thus at the conceptual level IDP reinforces sovereignty and human rights issues. IDPs evoke two sets of potentially contradictory concerns of viz. a) ensuring international protection of human rights and upholding state responsibility b) legal provisions for the protection of IDPs and state's capacity to apply these provisions.

When the state becomes incapable of protecting its own people IDPs get created, and their numbers increase when the state itself directly attacks selected communities or insurgent groups. Only legal provisions can place permanent obligations on the state. If/when a supervisory interest is maintained over the domestic jurisdiction of other states, a collective inter-statal responsibility to guard over the protection and promotion of human rights can be exercised. Still, more often than not the international legal system is not strong enough to stipulate state responsibility..

I. DEFINING AN IDP – ARE REFUGEES AND IDPs SO DISTINCT?

A refugee and an internally displaced person, as stated in the first chapter, are differentiated by a single concept viz., an international border. When a refugee is forced to flee, he loses the protection of the country of his nationality as and because he takes refuge in another country. An internally displaced person (IDP) is forcibly uprooted from his traditional habitat and resettled in another area which, however, is within the borders of his nation. Both are displaced – the former across the borders of his nation state, the latter within them. The factors generating flows of refugees and IDPs may largely overlap, but it is the position of their relocated site that is the fundamental difference between the two.

Although the recent spate of activity and analysis may suggest contrarily, internal displacement is not a new phenomenon (Bennet, 1998: 4). But over the past decades, while world refugee figures have declined, those of the internally displaced have dramatically increased (despite continuous increases of refugee-sending countries from 50 in 1990 to 633 in 1994) peaking at around 27 million in 32 countries in 1994.

Table No. 2

REFUGEES AND IDP STATISTICS

	1982	1994
Refugees	9 million	3.5 million
IDP	12 million	26 million

Source: Recent studies by Susanne Schmeidl (for the Global IDP Survey, published in "Internally Displaced People: A Global Survey, 1998").

Although after 1995 estimates of IDPs dropped markedly, the gap between the two has actually increased with almost twice as many internally displaced (19

million) as refugees (around 10 million) in 1996 (Scmeidl, in Hampton, 1998: 27). In June 1994, the UN High Commissioner for Refugees, Sadako Ogata, in her address to the World Bank said that internal conflict force about 10,000 persons every day to flee their homes and either cross international borders or become displaced in their own countries.

The definition of refugees in the 1951 Convention applies only to persons who are outside their country, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or opinion. This definition does not provide protection to those who have been internally displaced because of law and order problems, denial of human rights and insecurity of food, land and water caused by forces beyond their control. The 1969 OAU Convention covers persons displaced by ethnic strife, civil disorder, religious riots and persecution. However, it does not apply to persons who have been displaced by natural and man-made natural disasters or by the denial of food, land and water security. So the UNS special representative on IDPs over time developed a working definition for IDPs (which has also been used by the Global IDP survey). This current working definition describes an IDP as.

“Person or group of people who have been forced to flee or to leave their homes or places of habitual residence as a result of, or in order to avoid, in particular, the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border”.

The qualifier in particular allows circumstances other than those listed to be taken into account: for instance, development induced displacement where coercion is involved. Generally, the definition would not include economic migrants, refugee returning under UNHCR programmes or those receiving adequate state compensation and protection following natural disasters or

relocation for development purposes. This is a cumbersome definition, but it tries to encompass all aspects of internal displacement because the debate on the definition of IDPs is ongoing. People may be forced to flee their homes because of war (civil or international) ; disasters (natural or man-made); development (construction of dams or urban clearances); and changes in the economy (industrialisation or famine). But while in Chechnya displacement is caused by armed conflict, in Nigeria development is a greater problem; a person forced to migrate from war in Afghanistan is no less desperate than a family displaced at less speed by drought in Haiti. However, if everyone who ever fled their homes for whatever reason was included then the global figure for IDPs would probably exceed 100 million (IDPs Global Survey 1998). So the boundaries of the category IDP are still fluid and its numbers even more.

The growing number of IDPs also results from changing priorities within the international humanitarian regime. The current preoccupation with limiting refugee flows and avoiding long-term settlement has resulted in a policy shift towards 'internalising' displacement. Thus greater efforts are made to keep people within their own countries, even if they are away from their original homes. In the post-cold war period, containment and conflict management are beginning to replace reception and sanctuary in another country. Beside the category IDP is an uncomfortable one for aid organizations to work with, for there is no institution that deals specifically with the phenomenon of internal displacement and no discrete set of laws which apply to the IDP's situation. For the UN specialised agencies, refugees are the responsibility of UNHCR, children of UNICEF, food of WFP, and so on . IDPs are 'internal refugees' whose plight highlights the gray areas of international law and assistance. (Bennet, 1998: 4)

From the legal point of view refugees and IDPs are two separate conceptual categories. The essential difference between the two groups, regarded as a *sine qua non* for defining refugee status, is the crossing of a national boundary. Even the 1951 Refugee Convention had singled out providing protection and status only to the externally displaced persons.¹ A refugee is a persecuted person, alienated from the persecutor state, and thus in need of surrogate protection from the host state and other members from the international community. But an IDP too is displaced because of fear at the hands of his own state and is equally deserving of surrogate protection.

Governments are ultimately responsible for the protection of their own citizens including IDPS. But while refugees can avail of the special provisions that states grant them, the reality is that IDPs are frequently victimised by their own state, denied even fundamental human rights and thus fall through the gaps in international law defenseless and isolated. Over the past few decades while refugee figures have declined, those of IDPs have been rising alarmingly. This perhaps is indicative of the absence and thus growing need for appropriate protection for the IDPs. In fact academic debates since the 1990's have begun to question the relevance of this distinction between refugees and IDPs, and to encourage similar forms of protection for all victims of displacement.

The existing legal regime is definitely inadequate for IDPs. Besides the legal distinction is frustrating in operational realities of return. Perhaps the cumulative experience of refugee protection can be seen as a valuable resource of principles and concepts that can be adapted to address the shortcomings of protection to IDPs. A set of protection measures specific to IDPs which simply reconfirm

existing national and international law could be the answer, and the Guiding Principles on Internal Displacement should be seen as a positive step in concretising that idea.

There is the fear that attempting to bring IDPs within the refugee regime may have negative consequences on refugees such as reinforcing non-entrée policies or resulting in the decline of protection standards for refugees. There is hesitation in diluting the UNHCR's traditional mandate to encompass only refugees. But in reality the office of the UNHCR has been extended to cover IDPs in special situations. Thus if the necessary resources are made available and proper guidelines are applied, there should be no problem in dealing with the plight of refugees and IDPs together.

International assistance can also seek to circumvent borders. The International Committee of the Red Cross (ICRC) does not distinguish between refugees and IDPs in its protection of civilians. Both refugees and IDPs need a safe haven. Is it therefore justifiable to use international border crossing as the sole or most important criterion for determining people's eligibility to international protection when they are compelled to leave their homelands?

The concept of refuge from which the term 'refugee' was derived referred to cultural factors rather than to territorial boundaries. The modern nation-state system, with its emphasis on territorial boundaries, emerged only after the 1648 Peace of Westphalia. During Japan's invasion of China in the 1930's and 1940's IDPs in China continued to be referred to as 'refugees' in American official communications. Prior to the 1951 Convention, there had been no agreement to define a 'refugee' as necessarily a person 'outside the country of his nationality'. During the 1950 Korean War, the United Nations did not differentiate between

'refugees' and internally displaced persons'. Commonsensical dictionary definitions of the term refugee also nowhere make mention of any border or boundary.² Besides, a national boundary being dependent on international recognition can be ambiguous, and in such cases a displaced person may be considered a 'refugee' and a 'nonrefugee' simultaneously by different states, depending on the recognition factor.³ In addition the present increasing trend towards regionalisation implies a corresponding de-emphasis on state boundaries in relation to regional boundaries.

The present refugee regime, by definition, is incapable of being extended to IDPs. It would make little sense if the 1951 Convention was transported wholesale into the world of internal displacement. But the global displacement of around 53 million people of which only 23 million are refugees, inevitably calls in question the soundness of a refugee definition that excludes more than half of them.⁴ Existing refugee definitions are neither sacrosanct nor immutable. Is persecution based only on the five grounds of race, religion, nationality, membership of a particular social group or political opinion – no more no less?⁵ For all legal purposes it may be needed to maintain this difference scrupulously. Some also fear that protection of IDPs may be liable to be a ruse for further restricting refugee protection. An attempt to extend the frontiers of refugee protection to that of IDPs too may need some caution, as one may be too hasty and too sweeping in drawing a connection between refugee protection and protection of IDPs.

Barutski also emphatically asserts that "principles are meaningless since the non-state actor that displaces communities as a political tactic or the state that displaces individuals through human rights abuse is not likely to abide by a non-abiding 'ideal'" (1991: 35). But this objection has been overridden as being

shortsighted. Difficulties in enforcement are true not just of principles but also of large sections of international law. If international law were articulated only for situations where states were expected to abide, then most international law as would know it would disappear. The point is to establish international as well as national law that is acceptable.

“Sovereignty is still a potent force that can deny international protection to internally displaced persons—no matter how degrading or genocidal their treatment.”⁶ But despite objections to violation of the principle of national sovereignty the international community has sought to extend protection to IDPs. Today, human rights violations can no longer be camouflaged behind the wall of national sovereignty. There should be a comprehensive approach to the problems of displacement, which without blurring the distinction between refugees and IDPS, can seek to address the protection and assistance needs of both IDPs and refugees.

Granted that a legal distinction between IDPs, refugees and other victims of violence are indispensable, but rights should be granted to all people who are victims of displacement and who need protection. All human rights instruments stress on equal rights for all individuals, be they nationals or aliens, refugees or IDPs. The expressions used are ‘all human beings’, ‘everyone’, ‘no one’ or ‘all’; not a single ‘right’ is specified or implied as belonging only to ‘refugees’ and not to ‘internally displaced persons’. So be they refugees abroad or IDPs within their own countries, to the extent that their basic human rights have been violated, they are rightly entitled to protection and assistance. (Rutinwa, Kingsley-Nyinah, Bennet, Vincent, Barutsciski in *Forced Migration Review*, No. 4, April 1999; Lee, 1996)

II. INTERNALLY DISPLACED PERSONS IN INDIA.

The Indian subcontinent has a history of displacement. National disasters like drought, floods, earthquakes and cyclones seem to have a special affinity for the South Asian subcontinent. At a conservative estimate 35 million persons are believed to have been displaced due to planned destruction of Indian industries in the nineteenth century by the colonial industrial policy of the British govt. (Fernandes and Paranjpye, 1997: 7). If causal factors are restricted to dams, mines, wildlife sanctuaries, industries then the conservative estimate of the number of people displaced from 1950-1991 is about 2,13,00,000 (Fernandes, 1994: 24).

Table No. 3

INTERNAL DISPLACEMENT CAUSED BY DEVELOPMENT PROJECTS, NATURAL DISASTERS, OR ECONOMIC MIGRATION (SELECTION ONLY)

Bangladesh	750,000 – 1 million
China	2-4m (natural disasters) 400,000 (development programmes) 120m (economic migrants)
Haiti	1 million
India	21.3 million
Mauritania	200,000
Nepal	150,000
Nigeria	800,000
Pakistan	200,000
Vietnam	48,000

Source : Global IDP survey 1998.

Table No. 4

CONFLICT-INDUCED INTERNAL DISPLACEMENT, 1997/98

Afghanistan	1.45 million	Mexico	6,000
Algeria	unknown	Mozambique	30,000-50,000
Angola	1.2 million	Myanmar	800,000- 1 million
Armenia	75,000	Nigeria	470,000
Azerbaijan	550,000-612,000	North Korea	unknown
Bangladesh	50,000-100,000	Pakistan	50,000
Bhutan	50,000-100,000	Peru	250,000
Bosnia-Herzegovina	450,000	Philippines	189,000
Burundi	551,000		
Cambodia	26,500	Russian Federation	
China	500,000 (usually as a measure against political dissents; figures highly speculative)	Chechnya	350,000
		Krasnodar	60,000
Colombia	500,000-1 million	Russia	90,000
Congo-Brazzaville	240,000	Stravropol	100,000
Croatia	174,000	Rwanda	180,500
Cyprus	265,000	Senegal	5,000
Dem Rep Congo	1 million	Sierra Leone	200,000
East Timor	unknown	Somalia	250,000 – 350,000
Eritrea	unknown	South Africa	20,000 +
Ethiopia	15,000	Sri Lanka	790,000 – 1 million
Georgia	280,000	Srpska	416,000
South Ossetia	13,000	Sudan	4 million
Ghana	20,000	Syria	200,000
Guatemala	250,000	Tajikistan	600,000 (but almost all returned by October 1997)
India	390,000		
Iraq	1.2 million	Turkey	330,000 (government figure). Most international organizations estimate ± 2.5. which includes economic migrants.
Iraqi Kurdistan	700,000		
govt. controlled	500,000		
Kenya	100,000		
Lebanon	500,000-800,000		
Liberia	725,000		
Mali	100,000 (+ 10,000) demobilized soldiers)	Uganda	400,000

Source : Global IDP survey 1998.

Besides ethnic conflict based on demands for secession or greater autonomy has generated significant internal displacement. The oldest IDPs in India perhaps have been the Kashmiri Pandits. Almost the entire minority Hindu community of the Kashmir valley was forced to flee when the region came under the control of many fundamentalist secessionist groups during 1989-90 like the Hizbul-Mujahiddin. With increase in militancy in the valley their return seems unlikely and instead a demand for a 'homeland Panun Kashmir' -- a separate

enclave. The displaced, largely Hindus, but also including about 3,000 Muslim and Sikh families have been residing in Jammu and Delhi. Out of a total of 49,760 registered displaced families, 28,561 are living in the Jammu region 19,339 in Delhi; and the rest in other parts of the country. However, there are also many unregistered families.

In Assam , in the Bongaigaon and Dhubhri districts in May 1996, large-scale violence against Adivasis, mainly Santhals rendered more than 150,000 people homeless. These non-Bodo communities were particularly targeted in the proposed Bodo Autonomous council area of western Assam leading to the exodus. However , since normalisation, from December 1996, more than half of the IDPs have returned to their villages while 45,000 still remain in rehabilitation camps and others in relief camps.

In Tripura, tribal militants of the National Liberation Front of Tripura (NLFT) and All Tripura Tiger Force have adopted the strategy of engineering internal displacement by targeting non-tribals, mostly Bengalis, to express their resentment of the 'domination of outsiders', and to bolster their demand to convert the Tripura tribal areas autonomous district into a full tribal state. Recent violence forced out about 30,000 non-tribals from their villages in the Khowai subdivision.

In parts of Manipur, severe ethnic strife between Tangkhul Nagas and Kukis has resulted in large – scale movements of the two population groups. Insecurity has forced Kukis to leave many Naga inhabited areas. Similarly, non-Kukis are migrating to Mizoram from the Churachanpur district, though, figures are not available.

Naxalite violence in Bihar and the killing of people by private armies of landlords leads to people fleeing fearing reprisals and further violence. Also in

Shillong, a slow but continuous outflow of non-tribals or outsiders is taking place because of intimidation and force by the local militant groups in urban and rural areas. During October 1997, about 15,000 Reang tribals, fearing persecution and threats to their life from a militant groups of the ethnic majority Mizos, fled from Western Mizoram and took shelter in North Tripura and border villages in Assam.

While the above stated IDPs in India are those, generated as the “effects of armed conflict and situations of generalized violence...” there also exist another vast category caused by “...violations of human rights or natural or human- made disasters”. Natural disasters and “planned forced eviction have created more than 21.3 million IDPs.

Table No. 5.

A CONSERVATIVE ESTIMATE OF PERSONS DISPLACED BY VARIOUS CATEGORIES OF PROJECTS, 1951-1990

No.	Type of project	Total DPs	No. Rehabilitated	Backlog
01.	Mines	25,50,000	6,30,000	19,20,000
02.	Dams	1,64,00,000	41,00,000	1,23,00,000
03.	Industries	12,50,000	3,75,000	8,75,000
04.	Wildlife	6,00,000	1,25,000	4,75,000
05.	Others	5,00,000	1,50,000	3,50,000
	Total	2,13,00,000	53,80,000	1,59,20,000

Source: Fernandes, 1994: 24

While the national disaster management division of the Agriculture ministry records specific information on casualties, crop loss and houses destroyed, the number of IDPs due to the disaster is not recorded. Tribals make up 40% of the total number of IDPs, though only 8% of the total Indian Population. No figures are available for the urban displacement caused by

building public services and infrastructure. When the Indian Government drafted a national rehabilitation policy in 1994, it accepted a figure of 15.5 million as the total number of development displaced people. It added that in the absence of a detailed subject-specific study, it is not possible to outline the problem of displacement in all its dimensions. It is not even possible to arrive at an approximate figure of displacement for the country as a whole.

Floods, droughts, cyclones and earthquakes strike various states of India, affecting an average of 63 million people every year. Floods alone displace more than 30 million people – the 1996 monsoon floods affected more than 50 million, flash floods in Rajasthan in June '96 affected more than 1.2 million people. In 1996/7 more than 29 million people were affected by drought in 33,357 village spread across 4 states, while more than 2.6 million were affected by cyclones and depressions. The government and other independent reports estimate casualties in terms of the total affected, but none of these estimates indicate the total number of IDPs (Hampton, 1998: 143-46).

III. IDP RIGHTS - IN THE CONSTITUTION, REHABILITATION POLICY AND LAQ 1894.

In India, the rights of internally displaced persons are dependent on the government for protection and guarantee because while refugees have an international legal and institutional system of protection to depend on, IDPs only have their own state's legislation and policy with regard to land, rehabilitation and resettlement to depend on (if any). In India the Draft National Rehabilitation policy and the Land Acquisition Act of 1894 are the only legal bases which make the state liable for compensation. The century old Land Acquisition Act has come

under much flak for being a bit too outdated. Along with the ministry of rural development's (MRD) policy (1994) second draft titled 'Draft National Policy for Rehabilitation of person's displaced as a consequence of acquisition of land' which is expected to be the national policy, there have been parallel policies drawn up by the National Thermal Power Corporation (NTPC'93 – the first displacing agency to have rehabilitation policy), Coal India (1994) and the Water Resources department (WRD 1994 - now at its third draft; the biggest displacing agency). Besides apart from the National Policy Draft states like Maharashtra, Madhya Pradesh, Gujarat, and Orissa have also indulged in policies and legislations for R&R on their own. However despite the flurry of activity on paper, "it is a cruel joke that for 50 years the (Indian) Government did not wish to promulgate a National Policy on R & R for serving its own people or discharging its constitutional responsibilities." (Fernandes and Paranjpye, 1997: 1).

Before we analyse the adequacy of the provisions undertaken by the Indian Govt. to fulfil its responsibilities towards the internally displaced persons created by its own planned activity we need to know what rights a person gets deprived of when he becomes internally displaced, due to planned developmental projects of the state. Post-independent India's project of nation-building, founded on extensive and rapid developmental projects found a convenient ally in the colonial Land Acquisition Act of 1894 which allowed compulsory acquisition of land from private citizens for the "common/public good also termed as 'national interest'. It is in pursuance of this principle of 'eminent domain' by the Indian state that property rights of the State came to infringe on the rights of the IDPs. A person whose land is acquired under the provisions of the LAQ 1894, who is forced to uproot himself and put down roots in an alien and hostile environment, has no

legally enforceable right except the right to be compensated for the land that he has lost.

Unlike refugees, IDPs are legitimate citizens of their state and are entitled to the fundamental rights guaranteed to them by the Indian constitution. Article 19(e) of the Indian Constitution guarantees to its citizens the freedom “to reside and settle in any part of the territory of India”. And Art 21 lays down that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Thus when land is acquired by the state Art 19 and 21 turn into paper rights (Vaswani in Thukral, 1992: 155-68).

The Right to Freedom in Article 19(5) grants the state the authority to curtail a citizens right to move freely and reside within the territory of India by “making any law which imposes reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. It is this “interest of the general public” that gives direction to the principle of eminent domain, and is cloaked variously even arrogantly as public/national interest/good. And this public purpose is not even vaguely or loosely defined in the LAQ 1894 (Dhagamwar in Fernandes & Paryanjpye, 1997: 113). When the state takes away land depriving CPR-dependent communities of their livelihood on the assumption that the natural resources are state property “... the right the state has appropriated to itself goes counter to the citizen’s fundamental rights” (Fernandes, 1997: 48). With regards to this right to habitation in any region of India it should also be noted that while in the case of displacement due to natural calamities and political interest, IDPs have the possibility of returning to their original domicile, but for project related IDPs this possibility does not exist. Besides it is ironical that while

Article 19(d) allows the state reasonable restrictions for the protection of the interests of any Scheduled Tribe, the 29th Report of the Commissioner of Scheduled Castes and Tribes had noted that 40% of those displaced till 1990 were tribals !

In Francis Coralie vs. Union Territory of India the Supreme Court had ruled that 'life and liberty' would include not merely animal existence but something more than physical survival. The right to life includes the right to live with human dignity and all that goes along with it. In addition to adequate nutrition, and clothing and shelter over the head, the ruling included facilities for reading, writing and expressing oneself in diverse forms. On personal liberty, the court said that the expression is of the widest amplitude and it includes the right to socialise with family and friends. But displacement causes complete disruption of the traditional socialization process (Kothari, 1996) To quote Michael Cernea "Displacement by its very nature is a disruptive and painful process. Economically and culturally it creates a high risk of chronic impoverishment that typically occurs along one or several of the following dimensions : landlessness, joblessness, homelessness, marginalisation, food insecurity social disarticulation". (1990: 20). The US Committee on Refugees (Washington, May'97) has described how, by internal displacement, families are torn apart, communities dispersed, people's cultures suppressed, normal support systems destroyed, and affected populations forced to depend on others for the basis of survival.

The right to life includes both the right to livelihood and the right to work (Olga Tellis vs. Bombay Municipal Corporation 1985 3SCC 545). Most of the IDP's are resettled in alien environments away from their traditional farmlands

when all the working skills they perhaps had was farming. Loss of work and therefore wages on other people's lands or loss of land-related work e.g., making plough carts etc is not considered, nor is the work of artisans who serve people living on the land e.g., tailors, cobblers, shopkeepers (Dhagamwar in Fernandes and Paranjpye, 1997: 113). Besides both the NTPC and the MRD drafted state that the displacing agency should create jobs for the DPs beginning from the construction stage but neither mention how the project authority will ensure that the DPs get even the unskilled jobs that, the drafts admit, go mostly to the outsiders. No preference is given to them and they cannot claim any legal right to be employed there (Fernandes, 1997: 43) Until recently landless labourers and artisans who lose their jobs because of development – induced displacement are not entitled to any compensation except for house plots. Also, as Thukral notes, “the process of rehabilitation is itself leading to more displacement” e.g., to rehabilitate the Sardar Sarovar oustees the Gujarat Govt. is buying private land from absentee landlords willing to sell; but in the process, labourers who were engaged in these fields for years have been rendered jobless (1992: 24).

For the LAQ 1894 payment of compensation seems to be only ancillary to the basic aim of taking away privately owned land for a public purpose Nehru's famous statement on the tribal policy had promised respect for culturally and socially vulnerable groups but in practice policy planning devalued and applied reductionist legal and economic categories to define, how the tribals and others who may get displaced, should be compensated. The LAQ 1984 makes only the state liable for cash compensation which legalizes the gross injustice and social violence in reducing rights and interests into claims and complex systems into monetary compensation (Kothari, 1996). The LAQ 1894 being a century old now

needs to be changed as India's population has increased dramatically to occupy almost every inch of land – there is no 'free' land to be had. The LAQ compensation is calculated on the market price of the land, on the price of the tree as wood, on the price of the house as it stands. It neither takes replacement costs into account like the value of the produce of the trees, fruits, fodder, fresh air, soil conservation etc. nor computes above the actual cost of the land i.e. damage to it by air, soil water pollution or loss of access. Thus the Government promises land but is unable to provide land, so in most cases the land allotted as compensation is of lesser value than its cost. Most of those affected are not even allotted the bare minimum e.g. the government's actual ability to fulfil its promise of a maximum of 2 acres of land to Tehri oustees and a minimum of 5 acres to those of the Sardar Sarovar is quite in doubt. The Maharashtra Government had openly admitted that it did not have revenue land for rehabilitating and had therefore released 2,500 acres of forest land. The Madhya Pradesh Government too has expressed its inability to find land for everyone. Besides, in the LAQ 1894 only the Government could acquire land but now the public sector can acquire it directly and the private companies through the government "with limited land and so many claimants, resettlement seems to have become a game of musical chairs (Thukral , 1992: 25). Even if land is available mere allocation is not enough. In the Koyna and Nagarjuna projects people were unable to subsist on the land for more than two generations. Moreover LAQ 1894 was enacted when the role of the state is promoting public welfare and economic development was negligible. It is not in consonance with present socio-economic realities as ironically the Welfare and Development Oriented State of today needs much more land than the colonial state of yesterday.

Thus the 'land for land' policy of resettlement and rehabilitation is deeply flawed. Market value compensation is not only calculated at later and different rates but also insufficient as a medium of cost-benefit analysis for the IDP's. Besides the compensation is given at the rate prevailing at the time when the government issued notification. The IDP are unable to purchase alternate land of a comparable quality at the current spiraling prices. (Besides while many DP had been cultivating their land for centuries, they did not have any patterns or legal documents so were entitled to no compensation.) The costs would be much worse if the social and environmental impact on the DPs and the loss they suffer in their informal economy were considered. Cash returns anyway are useless in the hands of these vulnerable groups as they are unable to handle it and it is usually squandered or wasted in useless purchases. Cash payment is useless when the IDP is illiterate and incapable of wise investment. Besides the state is under no obligation or responsibility to rehabilitate or resettle the displaced with cash payment. It is anyway laughing stock that one be paid in cash for giving up a way of life! (Fernandes and Paranjapye, 1997) Most DP's are unable to make their voices heard despite the economic, social cultural and psychological dispossession that they suffer.

The principle enunciated for rehabilitation intends to provide a quality of life superior to that enjoyed by the displaced persons so as to reduce the trauma involved in displacement. But the subsistence allowance for the DPs is small and fixed below the poverty line so while the physical act of displacement occurs only at one point of time it sets of a spiral of social and economic impoverishment which is compounded by psychological trauma as the IDPs are now landless, jobless and foodless. Production system are dismantled, close knit kinship groups

scattered, long – established relationships disrupted, traditional sources of employment lost, market links broken, customs related to child-care, food security intra-community credit transfers dissolved, systems of social hierarchy and leadership lose credibility, and ancestral symbols, shrines, graves, monuments, an entire sense of history and cultural identity get lost. More than a decade after the completion of the Ukai Project there was nothing for the displaced to occupy themselves with. The death rate had increased among the Narmada oustees in Parvaeta in Gujarat. Also unless the displaced are rich or big landlords or politically powerful, without resettlement they find themselves in a state of pauperism and are forced to join the legions of migrant labour flocking to urban slums in search of work in the cities.

Displacement and impoverishment thus seeks to further weaker, already weaker groups in society. It is such an irony when sufferers are called ‘beneficiaries’ of the Resettlement and Rehabilitation package and their ‘sacrifices’ of their way of life are sought for ‘national interest’. Some private citizens give up their life and liberty for public good but this victim group is invariably comprised of tribals and forest and mountain dwellers whose interests are repeatedly sacrificed at the altar of development for the benefit of other classes. Power and class thus become major variables in displacement.

Even during natural disasters the more severely affected have been those who are weak and poor because they lack the economic stability, skills, and educational qualifications to migrate to safer areas. The reality of the oustees in both development induced displacement, and natural disasters, is the same for in both a whole generation suffers. The difference is that development projects are

planned in advance so displacement can be minimised and when inevitable rehabilitation can be planned. But in reality neither is done.

Among the vulnerable groups comprising IDPs women occupy an unenviable position. Most studies have shown that women are the worst sufferers as no special provision is made out for them. Women, being primarily responsible for household chores in rural India, like collecting food, fuel, water and fodder are most anxious about how to meet these needs after displacement e.g., in Singrauli they had complained that even though life prior to displacement had been hard at least at that time there was water available from the river. But now water is monopolised by the dam and is anyway polluted. Very few women own property or have land pattas in their name, therefore they are seldom entitled to compensation e.g., The Narmada Water Disputes Tribunal (NWDT) in its award defined the family to include husband, wife, minor children and other persons dependent on the head of the family, like a widowed mother, and that every major son would be treated as a separate family. What then happens to a woman who is the head of the family or a single woman or a widow with minor children?

This vulnerability of the IDP is further exploited when multiple displacement occurs. When each rehabilitation is undertaken project wise by independent authorities who have little or no co-ordination between them the same people find themselves displaced more than once, each time as the result of a different project e.g., Singrauli, Korba, Tehri (where the oustees were rehabilitated at Jolly Grant, from where they are again going to be removed for the proposed Dehradun Airport), those displaced for the New Mangalore port are again going to be displaced for the Konkan railway: the Kabini dam oustees to be

relocated again for biosphere reserve .The IDPs right to life, liberty and habitation is violated not once but repeatedly .

When project authorities become insensitive in their coordination responsibility and cause multiple displacement when a project is spread across two or more states responsible inter-state coordination can hardly be expected. In the case of the Pong Dam the states of Rajasthan and Himachal Pradesh played ping pong with each other and oustees were forced to shuttle between the two states in vain.

Public project authorities and the respective state governments. do not realize that the right to decide on matters of public interest cannot be taken for granted. Those displaced / to be displaced have a legitimate right to know what is going to happen to them and participate in the decision making of the project. But this rarely happens. “Neither draft recognizes the basic principle of the right of the DPs to be involved in the decision concerning the project that displaces them... not even the right on the DP’s to be involved in the policy concerning rehabilitation is recognised... much less is the peoples right to have a share in the ownership of the project recognized” (Fernandes, 1997:41). The drafts were not put forward for public debate but instead secured by the NGOs through informal channels.

Project reports contain minimal information concerning displaced persons. Ousteers of the Chaskaman in Maharashtra did not know why the dam site had been changed, nor were they clear about rehabilitation rights. In Hirakud the oustees had no idea how their lands had been evaluated or their compensation calculated. In the Sardar Sarovar Project in Madhya Pradesh, people were not only uninformed but often deliberately misinformed about the project and their

future. As Dhagamwar notes, "Independent India has become a socialist democratic republic. The government of such a state is required to consult people before taking major steps." (1997: 112). Problems of displacement begin well before the actual dislocation takes place. The knowledge of future displacement is enough to instill in the people a feeling of insecurity and a fear of the unknown. Moreover, IDP ignorance is often coupled with the middle class apathy, lack of awareness, and insensitivity in downplaying the trauma and having the audacity to say that it is an inevitable sacrifice (Fernandes and Paranjapye, 1997: 5). Thus one of the most important factors that tends to be overlooked is people's opinion. Do they want it? Do they see it as a solution to their problem? The study of the Baliraja Dam exemplifies one of the rarest cases where it is possible to construct a dam for irrigation with the full participation of the people and not leading to any displacement.

Naturally, thus, when awareness explodes within the IDPs they become conscious about their right to object and resist. In the 1920s Senapati Bapat had organized the first resistance in the state of Maharashtra. The oustees of the Thalvayshet fertilizer Project, villagers of Nhava Sheva whose lands were acquired to build the Jawahar Port, were able to organise themselves with the help of their leaders into a strong political lobby and have succeeded in getting reasonable compensation for their lands.

The state does grant a right to IDPs to object but it is a very concessional one LAQ 1894 confers on the displaced a right to object which however is limited as it needs to be exercised within one month of the receipt of the notice, and on the following objections viz., more land has been acquired than necessary; acquisition will destroy historical monuments or places of public interest or that it

will desecrate religious buildings; object to the omission of one's name from the list of persons having an interest in a particular land; later object to the low quantum of compensation etc. But these grounds are very difficult to evoke without knowing exactly how much land is acquired and for what purpose. If the landholders were to know of it in advance they may be able to object successfully. But he does not know and cannot know. Besides people have neither the right nor the time to object when the Government exercises power to take away land for emergency purposes.

Besides World Bank approval has become a major factor in formulating Resettlement and Rehabilitation (R&R) policies. As the IBRD is a major actor in supporting development projects and as India is beholden to it for credit her R&R policy drafts are sent to it for approval. The government of Rajasthan is reported to have sent its state policy draft to World Bank officials (The Hindu, 6th February 97). Also the R&R policy of India clearly admits that in view of the strict conditionalities imposed by the World Bank and other funding agencies it would be necessary to have a common National policy for Rehabilitation. The Ministry of Rural Development Draft mentions the gravity of a situation where funders withdraw support from projects like the Narmada. This exposes the possibility that the Government as a whole was moved not by the plight of the DPs but by pressure from the funders. So Fernandes questions – “Is this flurry of activity around a policy out of conviction or because of pressure from funders like the World Bank?”

The state is thus responsible for full and comprehensive rehabilitation as a precondition to displacement, and if it cannot assure this it is committing an unconstitutional act. The Ministry of Rural Development's first draft's tone was

sympathetic to the DPs though it did not recognize many of their rights. It recognized displacement as a reality and exhibited a sense of guilt about the price the DPs pay. But both these sense of sympathy and guilt missing in its second draft which clearly shows that the Govt. has taken displacement for granted. Also both the drafts are applicable only to the future DPs and not to the millions displaced and not to the millions displaced and not rehabilitated since 1951. Neither recognise the right of the DP to be rehabilitated.

The Oxford dictionary has defined Rehabilitation as “to restore to the original” and the Chambers dictionary defines it is “to reinstate, to restore to former privileges, rights, rank etc. But Rehabilitation is granted more often than not as an act of reluctant generosity not as an entitlement or a right (Kothari, 1992; Fernandes, 1994) The People’s Alternative drafted by the NGOs after consultation with thousands of DPs is based on this right (NCPR 1995). It insists that the displaced have a right to total rehabilitation. Its starting point is that a rehabilitation policy cannot take displacement for granted and instead should be the basis for a search for non-displacing and environmentally friendly alternatives. For this Displacement & Rehabilitation have to be understood as a continuum – a process that begins long before people are actually ousted and ends well after resettlement.

IV. RIGHTS OF IDPS IN THE UN GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT AND RIGHT TO DEVELOPMENT

The above study of the conditions of the rights and entitlements of IDPs in the Indian state shows that those who are displaced within their own borders have to rely on their own governments to uphold their civil and human rights. In many

countries it is the government or its military forces who have caused the displacement or prevent access to their citizens. When the state becomes incapable of protecting its own citizens IDPs get created and their numbers increase when the state directly attacks selected communities or insurgent groups. IDPs also often fall into a political vacuum where state responsibility for their welfare is derogated due to loss of control over vast areas of the country. Sovereignty is meaningless in a situation where primary governmental functions like security, economic management, selection and implementation of public policies cannot be minimally guaranteed or undertaken unless externally negotiated and financed. Worse still, an almost total disintegration of statehood in countries like Afghanistan has left the fate of thousands in the hands of various rebel groups or landlords.

No single UN agency is designated as responsible for the protection and assistance of IDPs. It is the doctrine of national sovereignty that prevents the UNHCR from extending its protection mandate to IDPs. As the UNHCR argues, “essential institutions of protection are ultimately only as strong as states allow” because the latter have an increasing tendency to “tip the balance towards state interests to the point where protection is seriously marginalised”. (Statement to the 48th to EXECOM by Dennis McNamara, Director of the Division of International Protection, UNHCR, 10 October 1997).

The UN Secretary General had noted in his July '97 Programme for Reform that providing protection and assistance to IDPs remains one of the humanitarian issues that often falls in the areas of silence within the existing mandates of the various agencies. However, in 1992, the Secretary General had at the request of the Commission on Human Rights appointed a Representative of

the Secretary General on Internally Displaced Persons (IDP). The gist of the approach of the representative is to uphold respect for state sovereignty but at the same time to highlight the responsibilities that sovereignty implies towards all those under state jurisdiction. If states are incapable of discharging those responsibilities, they are expected to request or at least accept international cooperation in providing assistance and protection. It is on this basis that states can best guarantee their sovereignty. Governments have generally responded well to this combination of respect and candor but visits take place only at their request. So the international community has sought to give expression to its responsibilities towards IDPs by attempting to consolidate into one document all international norms relevant to IDPs. Whereas refugees have an established system of international assistance and protection IDPs lack any legal or institutional bases for such external help. Entitled the Guiding Principles on Internal Displacement, they were presented to the UN Commission on Human Rights in 1998 by Francis M. Deng, Representative of the UN Secretary General on Internally Displaced Persons. Though not a legally binding document that creates a new legal status for IDPs, they are consistent with existing international human rights and humanitarian law and seek to address the special needs that IDPs have by virtue of their displacement. By restating norms they seek to address grey areas and gaps viz., to be protected from arbitrary displacement, to have access to protection and assistance during displacement, to be assured of durable solutions through safe return and reintegration or alternative settlement.

The first section of the principles makes clear that displacement should not be carried out in a manner that violates the rights to life, dignity, liberty, or the security of those affected. States, moreover, have a particular obligation to provide

protection against displacement to indigenous people and other groups with a special dependency on, and attachment to, their lands. It is made clear that IDPs have a right to return to their homes or places of habitual residence voluntarily and in safety and dignity, or to resettle voluntarily in another part of the country. Another necessary provision is the one providing for the recovery of property and possessions lost as a result of displacement and for compensation or reparation if recovery is not possible. It is made clear that IDPs have a right to return to their homes or places of habitual residence voluntarily and in safety and dignity, or to resettle voluntarily in another part of the country. Another necessary provision is the one providing for the recovery of property and possessions lost as a result of displacement and for compensation or reparation if recovery is not possible. Women are given equal rights to obtain documents and to have such documentation issued in their own names.

The Guiding Principles are of immense practical value in providing a yardstick for monitoring the treatment of IDPs. They further affirm the rights of IDPs to request international humanitarian assistance, the right of international actors to offer such assistance, and the duty of the states to accept such offers. The resistance of governments and non-state actors will continue to be serious obstacle to international involvement with IDPs and the challenge of securing protection for IDPs is one that requires a concerted effort not only by the international community but at the national and local levels as well. A combination of legal, institutional and practical measures, will be needed to address situations of internal displacements effectively. The Guiding Principles are an important step in giving expression to the norm of achieving that goal. Its provisions stated above are visibly the panacea to the ills of the internally

displaced in states like India but only when they get formalised legally and states like India undertake obligation to respect them. Nonetheless while the principles alone cannot prevent displacement or the violation of the rights of IDPs, They serve notice to governments that their actions are being monitored.

Till now discussions on the existence and creation of ‘developmental refugees’ and internally displaced persons have corroborated the existing relationship between displacement and development. Development initiatives by the state, to ensure a better quality of life or ‘the greater common good’⁷ for the masses have, ironically, deprived people of their traditional way of life. But if the state has a right to determine the well being of its people, does the individual human being have the right to develop his/her full being. This right to development was given formal international recognition in the UN Declaration of the Right to Development 1986. It states:

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for human rights and fundamental freedoms as well as duties to the community, which alone can ensure the free and complete fulfilment of the human being. (Article 2)

The idea inherent in the right to development traces back to the ILO Declaration of Philadelphia in 1944 which had affirmed that “all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity” and that “poverty anywhere constitutes a danger to prosperity everywhere”.⁸ Once displacement uproots people, while adjusting to their new

way of life, many get caught in a spiral of impoverishment; thus poverty too is a variable intrinsically associated with development induced displacement.⁹

So the right to development seeks to give expression to the people's war against want but this right is still caught in a controversy as to whether it should be a legal or a moral principle. Developing countries favour its legalisation, for then they would receive resources and expertise but ironically it is the state again which would be left responsible for its implementation and promotion. The vital question will always remain unanswered as to whether this right can percolate down to the deprived, specially the category of internally displaced persons who themselves are victims of the state programme for development.

If development is misinterpreted as economic growth at all costs then there is the danger of the right to development being used to legalise the actions of the state. Sadly, to that extent, self-contradiction becomes viciously inherent. The "right to development seeks to integrate all economic, social, cultural, and also civil and political rights.... It is the full development of every man in his community."¹⁰ However, as a norm it can be viewed as a cherished ideal, one that seeks to redeem the redeemer, and perhaps the ultimate right that IDPs can aspire for.

CONCLUSION

At the onset of the present study the state and the refugee were placed on either ends of a line and their relation was presupposed as a cyclic one. At the end of the course of the study that supposition stands widely and deeply illustrated and thereby validated. States create refugees and in turn refugees depend on them for rights. The problematic aspects of the legal definition of the refugee bring out quite distinctly the indispensable reliance of a refugee on the state. While clarifying the distinctions between various kinds of migrants and arriving at the legal conception of a refugee, it becomes clear that ultimately it is meta-state organizations which determine the eligibility criteria for refugees. Persecution is limited to five grounds and confining legal refugee determination to within those boundaries can in turn become another form of persecution! The realm of persecution in the real world however is much wider. Neither is the eligibility determination of individually persecuted persons possible during mass exoduses fleeing the ravages of war. Today there is an increasing voice to revisit the convention, expand the frontiers of this definition, move onto wider concepts of forced migration and absolve erected walls between different species under that genus.

It is also ironical that it is the state which determines who can or shall be granted refugee status. The international community of states may have laid down legal norms but ultimately the criteria of determination are in the hands of the host state. Besides, in the absence of a national determination procedure in states like India, there is ample scope for discriminatory treatment being meted out. In fact, in

India recognition of refugee groups has been arbitrary and *ad-hoc* dependent entirely on changing perceptions of the state's national interests. The debate between ethics and politics, as stated, is most suitably fitting to the Indian case where emotion and ethics have continuously amplified the state's image as a benevolent, large-hearted host but real politics have forced other compulsive behaviours.

An understanding of the various enumerated factors leading to refugee flows in the first section of the first chapter also corroborate the state-refugee interrelationship. Amongst all the causes, the recurrent and primary one, ironically, has been state formation itself. It is the interplay of state sovereignty amidst inter- and intra-state conflicts accompanying state formation which creates refugees. Interestingly, when 'external overt force', in the form of international assistance or the entry of another state actor occurs, the conflict intensifies and refugee flows get increased.

During state building efforts, as illustrated by Arendt, the state's efforts at imposition of a particular ideology or mono-national formula through acts of expulsion, segregation, ethnic cleansing or homogenisations are all abuses of its sovereign authority. This kind of religious or ethnic persecution is heightened if the state is non-democratic. Conversely, when self-determination interests are suppressed too, refugee flows arise.

This state-refugee connection is seen to turn a full circle in the creation of 'refugee-warrior communities', as cited, or the warlord system as they in turn feed the conflicts that created them and, on a wider scale, also result in an erosion of world

security. The state system as a part of this destabilising whole again stands on the brink of collapse - ready to feed more refugees into the world.

In this picture the link between ethnic conflict and refugee generation emerges as a concentric circle within the larger state-refugee cyclic relationship. The association between ethnic groups within the state, and with the state is vital as the sovereign authority of the state can be exploited to assimilate, persecute, expel or discriminate amongst these ethnic groups. On the other hand, a single ethnic group can also usurp state mechanisms and seek to transfer sovereign authority into its own hands. In all such situations refugee generation is an expected and accompanying corollary. Refugee creation is, thus, not just an apolitical process but one that also brings in factors like class and power into play. It is quite a paradox again when ethnic kinship in turn motivates host states to accept refugee groups!

Besides, the largest incongruence (visible in the first chapter) is that while 'environmental and economic motivations' (Tarzi), environmental degradation and internal displacement, underdevelopment and overdevelopment (Gurtov) are listed among the causes of refugees flows neither 'environmental' or 'developmental' refugees nor internally displaced persons are legally included in the refugee definitions in the 1951 Convention. This further reaffirms that there are many other actions of the state that also lead to refugee generation that must be accounted for.

States create refugees, they grant refugee status and in political language recognition translates into rights. The second chapter has sought to explore theoretical ground to answer questions such as whether refugees have only such rights as states allow them or whether their rights claims can be considered within the framework of

minority rights/group rights? While outlining the sphere of refugee rights, the state and the refugee in their interconnection are posited as contrary to each other - while refugees insist on the right to immigrate, the state upholds its sovereign authority to close its borders, while the former demands the right to enter the latter flags its right to control exit.

Nonetheless, the theoretical base created in this chapter portrays refugees as a minority group of involuntary migrants in the host state. Liberal theory essentially supports rights claims of individuals yet its premises are used to argue the case for refugees. The premises of libertarianism are inhospitable to collective group or community rights. Yet Nozick's theory has been creatively reinterpreted to suggest that neither the state nor individuals have any basis to exclude aliens that could not be used exclude citizens as well, and that an individual's right to free movement cannot be denied to aliens. Caren's attempt to extend the Rawlsian 'original position' to cover the whole of mankind also substantiates the refugee's right to immigrate.

The utilitarian proposition of the Singers upholds the more fundamental interests of refugees over those of citizens and advocates refugee intake till an equilibrium is reached between the marginal utilities gained through extra immigration by both residents and new entrants. It suggests that restrictions on immigration be viewed within a cost-benefit equation wherein the cost of hurting citizens economically or affecting their culture can be accounted against the economic gains of non-citizens - and immigration policy be accordingly tightened or loosened. Very broadly, the philosophy of liberalism can be upheld as being pro-immigrant as its essential egalitarian principle, the right to equal respect and

treatment, would not allow rights to be differentiated within a political community because of circumstances of birth. Why should a refugee be deprived of his right to membership of a community in a host state just because he was not born there is a very valid query.

The communitarian reply to the above question voiced through Walzer is that because the state has the right to distribute membership, because the right to exclude aliens is inherent in the state's sovereign authority. All states claim their right to pursue their own national interests and control is an essential feature of that. The rights of refugees are limited by a foundational right of citizens to protect the national culture and their shared sense of what they are about.. States are likened to open associations or private clubs whose distinctiveness depends on their formal closure.

Walzer admits that liberty and membership are non exportable goods yet his communitarian principles make significant contributions to strengthen the state-refugee relationship specially the provisions outlined for refugees by him in his chapter on membership. He allows refugees a legitimate claim on the principle of mutual aid to the state's surplus wealth and territory to the extent necessary to meet their needs. He allows space for states to admit national or ethnic relations so that the states right to communal enclosure are mildly encroached on. Yet these allowances actually serve as the first steps in the direction of substantiating a claim for refugee rights.

In fact these two principles conceptually broaden the base of refugee protection to the limit of each state's resources and absorptive capacities. But by granting the state broad rights of cultural maintenance, he perhaps hands over the

weapons of further persecution an incentive for ethnic homogenisation which could further generate refugees and turn the state-refugee cycle around once more. The space provided by him may allow the state to harbour selfish political choices. Yet his vision recognizes the importance of ideological and ethnic affinities in immigration policies. His sensitivity to the victimisation of refugees not only at our own borders but even those far away is a pointer to all the standards of the refugee protection regime and a direction to state policies to address the root causes of refugee flows.

The claims for refugee rights argued for in the soil of political theory, finds legal substantiation in the rights enumerated in the 1951 Convention. Along with the right not to be forcibly returned to the persecuting state, a host of other provisions are enumerated here to ensure to the refugee smooth resumption of his way of life in an alien environment. Here the international community's obligation to grant rights to refugees can be compared with the state's sovereign authority to control borders. The state-refugee relationship appears balanced but only for a moment. For while the provisions of the Convention bind signatory states they do not obligate non signatory states like India which can be expected, under customary international law, to hopefully ensure minimum fundamental treatment to all citizens and aliens alike on its territory. An element of pragmatism prevails as no state would turn refugees away from its borders lest tomorrow its own people may have to seek refuge. So all states formulate their own set of rules and allowances for refugees.

It definitely goes to the credit of the Indian state that it has respected its international obligations and treaties and, being a signatory to the International Bill of Rights, has sought to uphold basic human rights for all citizens and aliens alike on its

territory. In the absence of any refugee-specific legislation, there has been a remarkable judicial trend towards upholding the life and liberties of the refugees. The Indian Constitution treats them as foreigners and grants them temporary residence permits. It is indeed commendable that refugees are allowed to seek their own means of livelihood and to form peaceful associations but unlike citizens they are given no property rights. However, on par with citizens they are granted the right to life, liberty, the right to religious freedom, right to housing and freedom of movement.

But the state sovereign authority does not hesitate to grab its own space in the form of restrictions to certain freedoms on grounds of public order and national security. If and when refugees are deemed to be enemy aliens, their right to life, liberty and movement can be curtailed and they can also be subjected to arbitrary arrest and detention for e.g., the treatment meted out to Sri Lankan Tamil refugees suspected of terrorist links after Rajiv Gandhi's assassination. On the other hand, the Indian state has clearly shown preferential treatment towards Tibetan refugees only, for whom travel documents are issued and special educational facilities are arranged. The Rawlsian public order restrictions on the freedom of movement thus finds its expression in the Indian state's treatment of refugees. But one must heed Caren's warning and seek to distinguish between hypothetical and real threat perceptions lest the refugee claim to rights falls victims to the state's doctrine of sovereign authority.

While refugee rights are given normative content by meta-state organizations at the level of international law, rights for IDPs can be claimed from their own states as they are its citizens. Yet, perhaps because of this very reason, their rights are abused more widely and silently at the hands of the sovereign authority of their own state

which also often obstructs international assistance. IDPs are legally excluded from the definitional criteria applied to refugees, yet in the third chapter a case is made for considering refugee and IDP protection together. On this basis the state-refugee relationship finds resonance in the state-IDP relationship and the rights conditions of IDPs in India are examined in this context. The working definition of an IDP as enumerated formally identifies natural and human disasters as a cause behind IDP flows. This persecution-generating factor has been excluded in the refugee definition. Most of the IDPs in India have been generated as a consequence of development projects of the state. Such man-made disasters are strongly in need of enumeration.

Ethnic conflict had, in the first chapter, been noted as an important variable amongst state induced refugee-generating factors. Ethnic conflict is also recognized as the cause behind the displacement of sections of the population within the north-eastern states of India. This definition is loose enough to accommodate other causes too. So the scope of further increases in already increasing IDP numbers itself increases. Demographic data anyway show India as one of the highest IDP bearing countries. And in the last decade, the trend in the world figures point to a continuous rise. This only proves that greater accountability is urgently needed from the state.

In India, refugees have few constitutional provisions, but they have benefited from a judiciary sensitive to its cause, and norms under international laws that can serve as watchdogs of their rights. IDPs have only the state's rehabilitation policy and the Land Acquisition Act of 1894 as available legal basis of protection. But they are mere hard carapaces and actually hollow within. Justice delayed is no less than justice denied and the delayed awakening of the state to formalise its rehabilitation and

resettlement responsibilities to the people it displaces is anyway a mockery of its sense of obligation.

Refugees look towards their host state for rights but IDPs lose their right to their lands and their traditional way of life to their own state's sovereign exercise of the principle of 'eminent domain'. When a person becomes a refugee he loses his membership of a political community, when he becomes internally displaced his very community disintegrates. As a legal citizen of the state he has a fundamental right to freedom of movement and residence, but the state's conception and perception of national interests takes these very rights away from him. The complete destruction of the traditional socialization process that accompanies internal displacement make his right to life and liberty vanish into thin air.

The IDPs are paid in cash for having given up their entire way of life, so their rights are reduced to mere monetary compensation. The state, with its paternalistic attitude, grants them rehabilitation and resettlement but as an act of charity not as an entitlement. Converting land into cash is a terribly poor return. And when the same group is subjected to multiple displacement, entrapment in the spiral of impoverishment becomes inescapable. The state does not even incur the responsibility of informing the people to be affected by developmental projects in advance or giving them the correct details of their resettlement and rehabilitation package - how can it when more often than not its own calculations go haywire! The state's own sovereign authority is subject to ridicule when external non-state actors like the World Bank are found to influence the states own resettlement and rehabilitation policy.

Within the state-IDP relationship, two inner cyclic connections also emerge. There have been occasions when the state governments, to rehabilitate IDPs have sought to clear more land – so to counter the effect of displacement further displacement occurs! Secondly, the state tries to suppress and disallow any voice of dissent but when protest movements on the scale of Narmada Bachao Andolan scream themselves hoarse, and even make the World Bank retrace its steps, the IDP's do manage to turn around and destabilize the state.

Thus, as in the case of external displacement, which creates refugees, internal displacement within the state also brings into play power and class as important variables. Some sections of society are dissociated from their sense of community, land and traditional way of life just because the sovereign power of the state demands it in the name of 'public good'. A majority of these victims comprise of tribals while the condition of the IDP women is perhaps the worst. Today, along with the voices calling for the Indian state to formalize its commitment to refugees in some structured legal form, it is also time to add the weight of those asking for liberation from the colonial legacy in the form of the Land Acquisition Act of 1894, a national debate on rehabilitation policy and the according of the highest protection to the marginalised and those vulnerable to displacement.

END NOTES

i.

1. *The State of the Worlds Refugees, A Humanitarian Agenda*, UNHCR, OUP, 1997-98, p. 51.
2. While the term refugee migration is in some cases used as a synonym for involuntary migration, others apply it to a very restricted subset of all such movements. (Hugo and Bun, 1990:21).
3. See W.R. Smyser, 'Refugees: A Never Ending Story', *Foreign Affairs*, Fall 1985, pp.154-168.
4. John Kreiger (ed.), *The Oxford Companion to Politics of the World*, p.776.
5. Article 14 of the Universal Declaration of Human Rights expresses this proposition that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".
6. Jayal and Mathur have discussed how so called natural disasters like famine are man made (1993).
7. See *Forced Migration Review*, Issue 3, Dec.1998.
8. Aristide, Suhrke, and Zolberg classify the Bangladesh case as one "successful separation that might be associated with a distinctive pattern of short-lived refugee movement" (1986: 164).
9. *Ibid*, p-165.
10. Shah M.Tarzi, 'The nation-state, victim groups and refugees', *Ethnic and Racial Studies*, vol.14, no. 4, Oct. 1991, p. 446.
11. The East Pakistanis were given 'refugee' status by their hosts the Indian Government in 1971 but after the creation of Bangladesh they were repatriated. Today, as they can avail of the protection of the country of their nationality, and are not officially recognised as refugees.
12. 'Humanitarian Crisis in Kosovo', *Forced Migration Review*, Issue 2, August 1998, p.35.
13. Shah M. Tarzi, 1991, *op.cit*, p-442.

2.

1. Mel Gurtov, 'Open – Borders: A Global Humanist Approach to the Refugee Crisis', *World Development*, vol. 19, no.5, 1991, pp. 491.
2. See Shah M. Tarzi, 'The nation-state, victim groups and refugees', *Ethnic and Racial Studies*, vol. 19, no. 4, Oct. 1991.
3. Myron Weiner, 'On International Migration and International Relations', *Population and Development Review*, vol. 11, 1985, p.445.
4. See F. Ohaegbulom Ugbaaja, 'Human rights and the refugee situation in Africa', in George w. Shephard and Ved P. Nanda (ed), *Human Rights and the Third World Development*,(1985: 225) (Quote Lenin when he was in exile in Switzerland)
5. Dowty., (1987: 147) quoted in Gurtov (1991: 491).
6. Gurtov, 1991, *op.cit*, p.491.
7. Ian Brownlie, 'The Rights of Refugees in Modern International Law', in James Crawford (ed) *Rights of Peoples*, Clarendon Press, Oxford, 1998, p.13.
8. *Ibid*.
9. It should be noted here that in accordance with the UN Conventions refugee-status determination takes place at the individual and not group level.
10. Citizenship in western liberal democracies is the modern equivalent of feudal privilege-inherited status that greatly enhances one's life chances. Like feudal birth right privileges, restrictive citizenship is hard to justify when one thinks about it closely (Carens: 1987: 332).
11. Along with other communitarians like MacIntyre (1984), Sandel (1982), conservatives like Scruton (1990), and realists like Hendrickson (1992) Walzer is clubbed as a 'partialist' by Gibney (1999). His thesis is termed as the 'communitarian challenge' by Carens (1987) to the latter's own argument favouring open borders.

12. Mark Gibney, 'Liberal Democratic States and Responsibilities to Refugees', *American Political Scientist Review*, vol. 93, no. 1, 1999, p. 171.
13. Ibid.
14. Ibid.
15. Ibid.
16. Baubock while arguing for Cultural Minority Rights for Immigrants notes that "...the notion that even basic rights can be alienated derives from overstretching the analogy with private property. If Mary owns a plot of land she has the right to grow any kind of fruit (with possible exceptions for cocoa leaves and opium poppy). When she abandons the land and moves to the city she cannot carry with her the right to grow her fruit. However, even in a Lockean perspective, cultural rights should be regarded as an instance of individual property in one's own person, because cultural socialisation shapes our character as persons" (1986: 218-19).
17. Robert Nozick, *Anarchy, State, and Utopia*, Basic Books, New York, 1974, p.10-25, 88-119 (quoted in Carens, 1987: 333).
18. This would surely imply a much less restrictive policy than the one currently in force which is shaped by so many other consideration other than the need to maintain public order (Carens, 1987: 338).
19. The distinctiveness of cultures and groups depends upon closure and without it cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people seem to believe then closure must be permitted somewhere. At some level of political organization something like the sovereign state must take shape and claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants (Walzer, 1983: 39).
20. Manik Chakravorty, *Human Rights and Refugees, Problems, Laws and Prospects*, Deep and Deep Publications, New Delhi, 1998, p. 107.
21. B.S. Chimni, 'In International Law', in *Seminar*, no. 463, March, 1998, p. 19.
22. Ibid p20.
23. Ravi Nair, The Problem, in *Seminar*, no. 463, March, 1998, p.12.
24. India is a signatory to the International Bill of Rights, and other international instruments like Convention on the Rights of the child, Convention against Torture etc.
25. To facilitate the administrative handling of refugee care the Government of India had on occasions amended certain legislations to raise necessary funds. e.g., The Railway Passenger Fare Act, 1971 (Act 46 of 1971)-to impose a tax paid by every passenger upto the end of March 1973 and proceeds thereof go to refugee relief; Tax on Postal Articles Act, 1971 (Act 47 of 1971) to impose tax on adhesive stamps etc on which is embossed 'Refugee Relief' etc till March end 1973.
26. Chimni op.cit, 1998, p. 28.
27. In *P. Neduraman & Dr. S. Ramadoss v The Union of India and the State of Tamil Nadu* (1992) the Madras Court had emphasised the need to guarantee the voluntary character of the repatriation of the Sri Lankan Tamil refugees; In *Malvika Karlekar v Union of India* the deportation order of 21 Burmese was stayed and they were allowed to approach the UNHCR for refugee status (Vijayakumar, 1998: 5).
28. S. Mukherjee, *Indian Experience With Forced Migration: Its Lessons and Limitations*, 1998, p. 8; J.S. Verma in *Asian Age*, 4 May 1997.
29. Vijayakumar, op.cit, 1998, p. 5.
30. Unless it makes special provisions as it did in the case of Ugandan refugees (of Indian origin) when it passed the *Foreigners from Uganda Order*, 1972.
31. Ravi Nair opines that (1998: 12) the UNHCR gets a lot of undue mileage thanks mainly to the Government of India's to create a domestic legal regime for refugees.
32. Chimni, 1998, op.cit, p. 26.
33. Report of SAHRDC, 1997, p.12.
34. Higher education is a state responsibility for which Tibetan refugees need a domicile certificate and citizenship. Those born in India are eligible to take up Indian citizenship but it becomes an emotional issue for them as they forsake their cause. Besides in federal and central universities competition too is very high.

3.

1. Perhaps because of limited resources or the apprehension that shifting the responsibility of looking after their own population to other states would discourage states from participating in the Convention scheme or the anxiety that responding to the needs of the IDPs would constitute an infringement on the national sovereignty of the state. (Hathaway quoted in Rutinwa, 1999)
2. Luke T. Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis?', *Journal of Refugee Studies*, vol. 9, no. 1, 1996, pp.30-33.
3. Ibid, p. 34.
4. Ibid, p. 27.
5. Ibid, p. 35.
6. Ibid, p. 39.
7. See Arundhati Roy, 'The Greater Good, The Human Cost of Big Dams', *Frontline*, 4 June, 1999.
8. See U.O.Umozurike, 'Human Rights and Development', *Indian Social Science Journal*, 156, 1998, pp. 535-543.
9. See Christopher McDowell (ed), *Understanding Impoverishment: The Consequences of Development Induced Displacement*, Berghahn Books, Oxford, 1996.
10. Statement by President of Senegal's Supreme Court, Keba M'baye, while addressing the drafting committee of the African Charter on Human and People's Rights in 1979. (Umozurike, 1998: 541).

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