SUGGESTOPAEDIA

Traditionally the main reason for granting asylum was the abuse of state power *vis a vis* individuals who were regarded by the state authorities as their opponents. Therefore, many asylum states linked refugee protection to persecution attributable to the state and some still continue to do so. They perceive international protection as a substitute in situations where the authorities of the country of origin are unwilling to provide adequate protection to their citizens at home or abroad. In recent years, however, there has been a significant increase in situations where very serious harm is inflicted by various kinds of non-state actors and where state authorities no longer are in a position to provide adequate protection to those under their jurisdiction. The breakdown of public order, internal strife, civil war, ethnic cleansing and genocide are increasingly the cause of refugee movements.

Asylum states have reacted to this challenge in three different ways-

1. Many countries in Africa and Latin America continue to apply the regional refugee instruments, which cover such situations.
2. Countries in North America and some in Europe and the Pacific have expanded the traditional reading of the refugee definition as contained in article 1A para 2 of the 1951 Refugee Convention, to include persons fleeing persecution in situations where the country of origin is unable to provide effective protection or no longer exists.
3. Other European countries including India insist that a 'refugee' is a person who is fleeing his country because of harm that can be attributed to the State. They recognise that this requirement is met where state authorities encourage, tolerate or acquiesce in violations carried out by private actors or, in the absence of legitimate state power, by *de facto* governments exercising control over a particular territory in a stable and permanent manner. They maintain. however, that persons fleeing situations where the authorities of the country of origin are unable to control private actors or where governmental structures have collapsed are not refugees in terms of the 1951 Convention.

Therefore, reason that refugees find it increasingly difficult to obtain international protection in Europe and India in this manner in which some European states interpret the refugee definition. As a result,

refugees and their advocates turn increasingly to human rights treaty bodies and courts in order to find alternative forms of protection after rejection of their claims to refugee status.

Human rights bodies have had to assume a role they were not initially meant to play, as they are now dealing more frequently with cases relating to asylum. Given the different procedures 'available and the length of these procedures, persons in need of international protection are forced to apply to various bodies until they eventually find protection against *refoulement*. When they do find protection, this is not always asylum. At the same time, persons not deserving international protection also use the same bodies --- in effect misusing the human rights system as much as the asylum system. Consequently, some governments and courts continue to apply a narrower interpretation of who is entitled to refugee status, in full awareness that many persons who are not refugees will remain in any event and eventually be granted some sort of status. As a result, they are depriving persons who otherwise would qualify as refugees of the full range of benefits guaranteed by the 1951 Refugee Convention and other instruments.

Rejected asylum seekers are increasingly resorting to regime/forum shopping. Human rights bodies are finding themselves overburdened and under-resourced. This compromises the effective and fair functioning of their procedures and increases pressure on them to apply stricter tests, higher evidentiary standards and stricter doctrinal positions. This essentially negative cycle does not serve the interests of eligible asylum seekers, human rights bodies or the governments themselves, and it is governments, which risk public censure for policies that are incompatible with their human rights commitments. They must also bear the financial, political and other costs incurred by protracted and inefficient procedures. In addition, the narrower approach adopted by certain European states and

India sends inappropriate messages to states in other regions that might be tempted to emulate these practices.

"Non-state agents" and how refugee law and human rights law can protect them from *refoulement* must rivet the particular focus on those people who feared persecution. This question has become increasingly important in Europe where some governments and national courts maintain that not everyone who fears serious harm because of nationality, race, religion, and membership in a social group or political opinion is a refugee. Rather, only those who fear persecution by public authorities or in situations where the public authorities condone or acquiesce in the persecution by others, can receive refugee status --- in other words, the police, the army or other groups supported or condoned by the authorities or whose conduct the authorities have acquiesced in --- such as paramilitaries.

UNHCR has always maintained that this is an inappropriate interpretation of the 1951 Convention. In recent years situations have increased where very serious harm is inflicted by various kinds of non-state actors in circumstances where the state authorities are not able to provide adequate protection to those under their jurisdiction. The international protection is used as a substitute to national protection in situations where the individual concerned is no longer protected in the country of origin, irrespective of the identity of the persecutor or the reason for the failure of national protection --- whether it was caused deliberately, inadvertently or simply because of a collapse in the formal structures of government in the state.

Generally that this interpretation is consistent with the traditionally neutral character of the granting of asylum, with the express wording of the 1951 Convention itself and with the Convention's object and purpose. It was also compatible with recent developments in international criminal law (i.e. the 2 *ad hoc* Tribunals of Rwanda and the former Yugoslavia, the

Statute of the International Criminal Court and the International Law Commission's draft International Criminal Code) and in the jurisprudence of several human rights treaty bodies which relates to the prohibition of return of people to situations where they are at risk of very serious harm – amounting to torture or other forms of cruel inhuman or degrading punishment or treatment –irrespective of the perpetrator of the harm.

The narrow interpretation of the 1951 Convention was driving rejected asylum-seekers to procedures offered by other human rights treaty bodies –notably, the European Court of Human Rights (ECHR), the UN Committee against Torture (CAT) and the UN Human Rights Committee (HRC). This resort to other procedures could have a serious impact on States' asylum policies in Europe, Equally, there was a risk that the human rights treaty bodies, themselves, could become overwhelmed if States and the Office of the High Commissioner for Human Rights (in the case of CAT and HRC) do not give them adequate resources to deal with these claims fairly and expeditiously. This would be to the detriment of vulnerable individuals, to the States parties and to the integrity of the human rights treaty system itself. Therefore, there was an urgent need for States to develop and rationalise refugee and human rights procedures nationality and regionally, if they were to comply fully with their obligations under both refugee and human rights instruments.

Although many of the issues and recommendations need more implication, it is hoped that they will have some positive influence on Indian policy and practice in both areas of law and that this will contribute to a more rational and humanitarian approach to the protection of refugees in the future.

Whether during partition in 1947, or later during the 1971 liberation of Bangladesh, India has hosted some of the largest refugee populations in the world. But, strangely enough, in India the refugee issue often tends to get confused with economic migrants. This is partly out of

ignorance, and a global trend to politicise the refugee issue. According to the international definition, a refugee is a person who owing to well-found 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 unable or unwilling to avail the protection of his country.... Refugees also leave their country for reasons of insecurity arising out of armed conflict or civil strife. No person becomes a refugee of his or her own volition. A refugee should not be confused with an economic migrant; the latter seeks to improve his livelihood, a refugee to save his life.

Though India has been a very generous country in hosting refugee populations, the country, like the rest of South Asia, has no domestic law on refugees, nor is it a party to the 1951 Convention on Refugees and its 1967 Protocol. One of the thrust areas of UNHCR's advocacy efforts in India has therefore been to highlight the absence and the need for laws to protect the rights of refugees. In this endeavour, UNHCR has over the years built an institutional relationship with the judicial community in India. In this endeavour, UNHCR has over the years built an institutional, relationship with well-known lawyers; UNHCR has held several seminars and workshops on Refugee Law and International Law relating to refugees. One of the key partners in this effort has been SAARC LAW, together with whom UNHCR held a major seminar in 1997. UNHCR has also sought the services of PILSARC, an implementing partner, to provide legal assistance to refugees facing protection problems.

The Indian Centre for Humanitarian Laws & Research (ICHLR), another implementing Partner of the UNHCR in India, has been conducting seminars, workshops and conferences on refugee issues throughout the country. ICHLR, in collaboration with the *Informal Consultations on Refugees and Migratory Movements in South Asia*, has also brought out a draft National Model Law on Refugees for countries in

South Asia. To disseminate the draft National Model Law, UNHCR plans to support NGO efforts to translate it into the national languages of various South Asian countries. UNHCR is also supporting NGO efforts to bring out a handbook on well-known court cases in India relating to refugees. This will serve as a useful reference in future cases relating to refugees.

UNHCR also collaborates with the National Human Rights Commission (NHRC) of India to strengthen the protection of refugees, who are very often victims of human rights violations. The NHRC has been very supportive of the need for domestic laws on refugees. In fact, NHRC has played a stellar role in protecting the rights of refugees when it appealed to the Supreme Court of India and stopped the forcible eviction of Chakma refugees from Arunachal Pradesh. In that landmark judgement the Supreme Court of India stopped the forcible eviction of Chakma refugees from Arunachal Pradesh. In that landmark judgement the Supreme Court ruled that Article 21 of the Indian Constitution – Right to Life and Liberty can be interpreted to protect the life and liberty of all people living in the country. and by that definition, of refugees. There are other lesser known cases that the NHRC has taken up with the courts to protect the rights of refugees.

Stressing on the importance of a legal framework, UNHCR has also endowed a Chair on Refugee Law in the National Law School of India University (NLSIU), in Bangalore, in 1996. Similarly, UNHCR supported the Centre for Refugee Studies, Department of international law, Jadavpur University, Calcutta, in conducting several short courses for lawyers and law professors. UNHCR also interacts with the Department of Rehabilitation in Chennai. Under an agreement with the Government of India, UNHCR monitors the voluntary repatriation of Tamil refugees returning to Sri Lanka.

One of the main partners in spreading information and awareness of refugees has of course been the media, whether print or electronic. UNHCR has responded to queries from journalists, and has from time to time motivated them to take up refugee issues to a broader audience. Since the subject is one of human interest, the press has consistently taken a deep interest in the plight of refugees. For instance, Doordarshan, Calcutta, had collaborated with UNHCR in producing a 55-minute programme on Refugees in 1997. The programme featured, among others, eminent former refugees like Mrinal Sen, Sunil Gangopadhya and Jogen Choudhury, all household names in Bengal.

The *Statesman* in Calcutta and the West Bengal Federation of United Nations Association have been UNHCR's partners for the last two years in conducting an annual inter-school debate on refugees. Similar debates and essay writing competitions have been organised in Chennai also. Children being future citizens, UNHCR feels it important to foster in them a spirit of tolerance and acceptance of people seeking refuge. After all, refugees do not leave their homes willingly, but under threat of persecution, and to save their lives and beliefs.

The accountability view holds that there can only be persecution when the country of origin can be held accountable for the human rights violations. The protection view on the other hand, stresses the concept of international protection as a substitute in situations where the individual concerned at risk of persecution is not protected for any reason whatsoever by the country of origin. Hence, the following suggestions and recommendation are submitted for any legislative arrangement/ incorporation for refugees' protection in India.

The *definition* of refugee as provided by the 1951 Refugees' Convention is couched ion general terms and does not meet the contemporary requirements and needs. It only protects international refugees. Although, the UNHCR and other organisations are exerting

tremendous pressure on India and South Asian Nations to accede to and sign 1951 Convention with its Additional Protocol of 1967.

The definition of refugee must be revisited de-nova for a better understanding and appreciation of their problems and visualising an equipoised mechanism for ameliorating their plight for all times to come. I, therefore, propose two new definitions based on *natural* and *non-natural grounds* and these are inclusive by nature. First part of the definition one contains natural grounds and later part enumerates non-natural grounds. First definition is pretty comprehensive and runs as under:

- *"Any person who is rendered homeless or stateless owing to well established fear of being persecuted or displaced, on the grounds or reasons of gender, age, caste, creed, race, social origin, ethno-religious, language, nationality, natural calamity, indigenous existence, membership of a minority, membership of a social group, economic status or environmental conditions, militancy, insurgency, terrorism, organised & generalised violence, cultural intolerance, communal riots, internal & external armed conflicts or aggression, out of country of origin or domicile, shall be a refugee".*

The second definition is quite important, brief and equally practicable, if accepted and implemented, which is as follows:

- *"A person shall be a refugee if abused or deprived of life and personal liberty and rendered homeless or stateless contrary to his/her free will except according to the procedure and due process established by law".*

These two definitions can cater to the present day needs of refugee problem and encompass every refugee movement or refugee-like situation. Moreover, these definitions do not recognise any geo-political boundaries nor have any specific character whether national and international but aim to achieve universalisation of international refugee law. Though legal persons, experts, lawyers and jurists at various levels can further debate premise of these definitions.

But, the other side of the argument, of course, is that there are certain advantages too of not having a law because having a law means to act within the parameters of stipulated legal framework which incurs & casts upon the governments certain liabilities and accountabilities which may have political dimensions. Refugee laws were also needed not merely for the protection of refugees, but also for the benefits and convenience of the countries in identifying between refugees & illegal immigrants.

- India has always been and is very magnanimous in bestowing shelter and asylum to the people who are fleeing conflict. Nevertheless, as India and Pakistan had become members of the UNHCR Executive Committee in 1995 and have since been playing a pivotal role must strive to get present international legal instrument – 1951 Convention – on refugees reformulated and re-defined while incorporating present day realities of refugee situations as well as arriving at a Regional Legal Regime and domestic laws on refugees that balance human and state concerns.
- The entire edifice of refugee protection gyrates around the institution of asylum and non-refoulement, which must, therefore, be re-visited and preserved, protected, promoted and strengthened in tune with the existing needs and realities of refugee situations. No country of refuge is capable of facing great difficulties in handling refugee influxes at its own so that *principles of burden sharing* is there which implies that the international community will help to relieve the burden placed on the country of reception.
- The modalities of burden sharing may have political, economic and social predilections and distinctions based on peace and development. The burden sharing may be through international funds or re-settlement opportunities available in the countries of origin or refuge.
- Institution of and promotion of *preventive action* must further be developed in accordance with humanitarian philosophy. Preventive action does not men building barriers to stop refugees but tackling the causes, which compel people to move from one place to another within the country and from one country to another. The philosophy of *preventive action* has envisioned that human needs like poverty alleviation, education, job creation, and health care etc. must be fulfilled by the national governments otherwise denial of these needs may result in refugee flows.

- The administrative machinery should be more sensitive and humane at borders and ports. Legalities of entry should be determined on the entry spots itself by simplifying procedural hassles. There may be chances when refugees may not have valid passport, visas and travel documents. But that does not mean allowing surreptitious crossing. A way-out should also be evolved on this score.
- Refugee status must cease whenever any refugee is found violating civil or penal laws of the host country or indulging in smuggling, drug trafficking, narcotic substances and general crimes including human rights abuses.
- The rationale and justification for international protection to refugees is the denial of national legal protection. It is made available under the *Statute of the Office of the UNHCR* and 1951 Refugee Convention. But national governments raise a boggy of sovereignty and territorial integrity while refusing international humanitarian intervention mandated by UNO's agencies like UNHCR. Therefore, national legislation must be enacted by way of *general incorporation or special incorporation* of international treaties on refugees in municipal system.
- The stratification of refugees on economic, environmental, humanitarian and political grounds must be incorporated in the scheme of existing refugee definition whenever it is re-formulated. Definition must also be grounded on natural and non-natural foundations of persecution and displacement.
- Refugees are being regarded as subjects of international law, therefore states should not perceive refugee flows, exoduses, influxes, migration and transmigration as a threat to the sovereignty, integrity and national security of the host country.
- Refugees must also be treated as minority groups as they move representing discernible and distinguishable entities, which are enumerated, as grounds of persecution and displacement in the definitional clause of refugee law. Protection of Article 27 of the *UN Convention on Civil and Political Rights* must be extended to refugees while suitably amending the impugned Article.
- International instruments on refugees and international Human Rights Conventions must be devoid of any ambiguity, repugnancy, and overlapping so that principle of *unity of action* could be evolved through an *integrated international, regional and national humanitarian action* for the refugee protection. Moreover, language and vocabulary of international conventions should not have masculine tinge but must be based on equality and gender equilibrium.

- Theories of *push back* and *imposed repatriation* must at all levels be eschewed rather principles of *non-refoulement* and institution of *asylum* must be promoted and preserved as required under Article 14 of Universal Declaration of Human Rights and same must be the part of national laws. Human Rights Sensitisation and Education Programmes for officials and armed forces dealing with refugee problems and issues should be initiated at all levels of administrative and military hierarchy. Institutionalisation of human rights culture in South Asia and particularly in India must be promoted and endorsed.
- Stateless persons must be encouraged to contribute their professional skills, expertise and dexterity coupled with intellectual wisdom to the welfare of the country of their reception while ensuring their socio-economic upliftment by the host states. Moreover, dissemination of information and awareness about their rights must also be pursued.
- Nothing moves in this world without money, therefore, minimum financial contribution by the national governments to the UNHCR for meeting its international humanitarian obligations and commitments must be determined and decided for a stipulated period but that should be revisable at the end of agreed time-frame by a committee of plenipotentiaries.
- It can be better reconciled with the traditionally neutral character of the granting of asylum. The 1951 Refugee Convention is not an instrument for evaluating the responsibility of countries of origin but rather a device for identifying those in need of international protection.
- If, as was held in 1993 in *Ward* by the Supreme Court of Canada, 'the international community is meant to be a forum of second resort for the persecuted, a surrogate, approachable protection upon failure of local protection', then such protection should respond to actual needs. These protections needs today often stem from situations where harm is inflicted by non-state actors.
- States which deny refugee protection in situations of an inability of the state to protect or the absence of state power do not take into account the ordinary meaning of the terms of the definition in article 1A2, providing that 'any person who....owing to well-founded fear 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'. They also do not take into account the object and purpose of the 1951 Refugee Convention.

- They also do not sufficiently take into account recent developments in international criminal law, which increasingly attach international responsibilities for certain acts to actors other than the state. The International Criminal Court Statute for instance recognises that persecution can be carried out by private actors as part of an organisational policy.
- To adopt the protection view when dealing with asylum seekers fleeing harm inflicted by non-state actors.
- To consider the fact that the 1951 Refugee Convention is closely related to other international human rights instruments and should, wherever relevant, be interpreted in the light of modern human rights law as well as actual protection needs.
- To affirm the humanitarian nature of the granting of refugee status and to avoid politicising the issues.
- To permit all claimants to access asylum determination procedures and to refrain from directing cases to manifestly unfounded procedures solely on the basis that the risk of persecution in the country of origin comes only from non-state actors.
- To permit access to asylum determination procedures to those who are nationals of countries which have already been deemed to fall under Article 1C5, in order that a review can be made of any change of circumstance.
- To create national procedures for identifying those who are protected by ECHR art. 3, CAT art. 3 and ICCPR art. 7 --- in particular fact-findings.
- To rationalise the relationship between asylum procedures and any procedures for determining issues related to human rights prohibitions of forcible return – in particular fact-finding.
- To ensure that:
    i. All procedures are based on good administrative practises for a fair and expeditious identification of those in need of protection.
    ii. Human and economic resources are saved through an improvement in the standard of decision-making by the provision of appropriate advice and assistance to all asylum seekers.
- To train officials at all levels in international human rights law, and to ensure their awareness of the views and comments adopted by the treaty bodies. All officials should be familiar with the approach adopted by the CAT Committee which considers that discrepancies in statements made by victims of torture are not uncommon as long

as the inconsistencies do not raise doubts about the general veracity of the application.

- To use as far as possible medical and other relevant expert evidence from professionals specially trained in the field of torture and other traumatic experience;
- To seek advice and technical support from UNHCR, OHCHR and relevant treaty bodies to ensure credible and rational procedures respecting international principles of refugee and human rights law.
- To adopt provisions to ensure that individuals who have not qualified for refugee status, but whose return would be in breach of international human rights obligations, are granted an appropriate status consonant with their situation and the dignity of the person and which respects their fundamental human rights.
- To continue to offer appropriate protection on humanitarian grounds to those whose return is not prohibited by international law.
- To strengthen universal jurisdiction and the mechanisms in criminal law and practice which provide that individuals who are accused of serious abuses of human rights are brought to justice even when they cannot be returned to the country where the crime was committed.
- To strengthen the mechanisms in criminal law and practice which enable individuals who are accused of serious abuses of human rights to be brought to justice without being returned to countries where they are at risk.
- To increase support for treaty bodies in order for them to perform their duties more effectively.
- To take steps to make their case law more accessible and more widely disseminated.
- To give more detailed and transparent reasons in their decisions so as to ensure a higher level of consistency in their views.
- To increase the dialogue between treaty bodies and Special Rapporteur and other specialised bodies dealing with common matters at both the regional and the universal level and to ensure greater co-operation between them.
- To strengthen the resource support which will enable the various treaty bodies to deal fairly and expeditiously with both state party reports and individual complaints procedures relating to the protection of refugees.

- To ensure that treaty bodies and other bodies dealing with refugee/torture/related issues, in particular UNHCR, are kept fully informed of important developments, decisions and practices to ensure a coherent and rational approach to common issues.
- To facilitate/co-ordinate dissemination of information between various human rights bodies and with outside entities, including governments NGOs, and GDs Committee for the Prevention of Torture (CPT) etc.
- To promote the need for coherent, rational and fair national procedures through advocacy, training and information –sharing.
- UNHCR should convene meeting between government representatives and experts on practices developed by treaty bodies relevant to the protection of refugees.
- To increase an overall knowledge of human rights within UNHCR by enhancing training and policy making in this field.
- To study further the interlinkages between refugee and human rights law.
- To continue to promote the protection view for the reasons included in the definition under Art. 1 of 1951 Refugee Convention.
- NGOs and academia must have a crucial collaborative role to play for the protection of refugees in India and elsewhere.
- The dichotomy between "*Internally Displaced Persons*" and "Refugees" must be obliterated at the earlier because a refugee is a refugee under all the circumstances, conditions and situations.
- The proposed National Model Law for Refugees must be adopted by India while incorporating the entire gamut of suggestopaedia of the instant study relating to substantive as well as procedural laws of refugees.
- Non-refoulement must be made a non-derogable human right of the refugees in the domestic legal system.
- To create and establish a "UNHCR Fund For Durable Solution" for refugees.
- To incorporate provisions in the administrative apparatus of UNHCR to maintain non-political character of the refugee relief.
- To respect the principles of inter-state obligation that should be legal basis for refugee work. At the same time.

- Dependence of UNHCR should be on international obligation rather than the humanitarian relations between governmental authority and the individual.
- The vulnerable groups of refugees like women, children, mentally challenged people (MCPs) and differently abled people (DAPs) must get special care, treatment and protection under any law to be enacted in future at all levels of executive, administrative and judicial hierarchy.
- Finally, the accountability view does not sufficiently take into account that the 1951 Refugee Convention already recognises the linkage between refugee protection and human rights by referring in its preamble to the Charter of the United Nations and the Universal Declaration of Human Rights as well as to endeavours 'to assure refugees the widest possible exercise of these fundamental rights and freedoms'. In this regard it is important to note that human rights case law on the prohibition of inhuman return also recognises that persons cannot be returned to situations where they are at risk of very serious harm, irrespective of the source of this harm.