CHAPTER-II

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Although refugees have existed since time immemorial, refugee law is a relatively new branch of international law. The earliest manifestations of international concern for refugees can be traced back to the immediate aftermath of the First World War, when the League of Nations created the office of the High Commissioner for Refugees which was responsible for defining the status of refugees and providing them with assistance. However, it was not until after the devastation of the Second World War that the international community came together to create a permanent and comprehensive legal regime for the protection of refugees. In 1950, the present-day office of the High Commissioner for Refugees (UNHCR) was created by the United Nations General Assembly by Resolution 428 (V) and began its operation on 1 January 1951. Its mandate was to 'provide international protection' to refugees and to seek 'permanent solutions' to the problems of refugees. The year 1951 also saw the drafting of the convention relating to the status of refugees. A protocol to amend certain provisions of the 1951 Convention entered into force on 4 October 1967.

While the above international instruments remain the cornerstone of international protection for refugees and are the strongest expressions of international concern for the plight of refugees, it has become increasingly clear that they are not sufficient to deal with the magnitude and complexity of today's refugee problem. Indeed, the emergence of new refugee problems has seriously strained the existing international regime relating to the protection and treatment of refugees by exposing various manifestation
of ethnic nationalism gives rise to overt conflict when other constraining factors are removed. The lifting of imperialist rule or the end of a totalitarian system of government may precipitate latent conflicts that have been held in check by the superior military power and ruthlessly suppressive measures used by the previously governing parties. Sectarian violence, communal conflict, civil wars, and independence movements may assert themselves under these conditions².

Clearly, the modern nation-state is currently experiencing an acute crisis. Apparently unable to come to grips with the aspirations and expectations of its diverse population groups, many nation states have descended into ethnic conflict, forcing millions of peoples to flee their homes in countries such as Rwanda, Sri Lanka and Somalia. The scale and intensity of such ethnic conflict must not be underestimated. In 1992-93, there were already more than 65 ethnic conflicts raging in the world, with varying degrees of severity on different continents³. Two-thirds of these were ongoing conflicts, responsible for a thousand or more combat-related deaths. Others were of a lesser degree and involved civil wars, terrorist activities, ethnic or national identity issues and more than a third had secessionist goals⁴.

A third factor that has challenged the traditional approaches to the refugee problem is the growing complexity of the movement of people across the globe. International migration has become a multidimensional and interrelated process, generated by wars, including civil wars, human rights deprivations, natural calamities and poverty. While the causes of some international migrations and refugee movements can still be isolated, most are the result of diverse and inextricably intertwined factors⁵. Because of the complex interaction of political, economic, environmental and human
right factors, it is becoming increasingly difficult to make a clear distinction between 'voluntary' and 'involuntary' population movements, between people who are fleeing from threats to their life and those wanting to escape poverty and social injustice. The United Nations acknowledged this dilemma in a recent report which stated that "many people are prompted to leave their own country by a mixture of fears, hopes and aspirations which can be very difficult, if not impossible, to unravel."  

The United Nations High Commissioner for Refugees, Mrs. Sadako Ogata, also referred to the varied and numerous causes of migratory influxes and refugees when she spoke about the changing reality of refugee issues in a lecture at Georgetown University in June 1991.

The refugee issue has become part of a much larger movement of people across frontiers and within them. The mass exodus of migrant workers, evacuees, refugees and internally displaced represents in a microcosm the kind of movements with which we are increasingly confronted as we come to the twentieth century. The process of political and economic adjustment which we are experiencing today, the widening economic gap between the North and the South, the pressures of poverty and the aspirations of a better life, coupled with technological advances in transport and information have led to massive movements.

The apparent inability of the international refugee law instruments to account for and accommodate the aforementioned developments and changes represents for many critics a crisis that goes to the theoretical and conceptual foundations of the present international legal regime. They point out that the 1951 Convention was simply not designed to provide answers to today's refugee problem and thus should not be expected to resolve problems which it was never intended to deal with. As one author has
pointed out, "not even the most prescient of the drafters of the 1951 Convention could have anticipated the magnitude of today's refugee problem."

It can be argued that the 1951 Convention is too bound up with its unique historical context to be able to adapt and offer its gaps and conceptual inadequacies. It is now said that international refugee law is at a crossroad. Clearly, new realities demand the creation of new principles and new approaches. Yet, we must be careful not to sacrifice the existing principles of refugee law, which are already being undermined in our contemporary global landscape.

The aim of this research is to give an overview of some of the factors which are presently challenging the orthodox approaches to refugee protection as embodied in the 1951 Convention and the 1967 Protocol. Firstly, it will discuss the scale and complexity of the contemporary refugee problem, in order to illustrate the radical transformations that have occurred in the area of coerced population movement. This will also serve to highlight the need to change our understanding of what we perceive to be the 'refugee problem', particularly in relation to and as defined in the 1951 convention and the 1967 Protocol. Secondly, this will assess some of the theoretical and conceptual shortcomings of the 1951 Convention. To do so, it will review the allegations of Eurocentrism, and definitional ambiguities and defects. Thirdly, it will document the gradual erosion of the asylum principle, particularly in the western countries. Issues of national sovereignty, immigration policies and the rise of a global apartheid will also be discussed.
The most striking feature of the current refugee problem is its scale and spread. When the office of the UNHCR was established in 1951, the world refugee population was estimated at just one million. Today, UNHCR cares for more than 28 million refugees, returnees (refugees who have returned to their own country but are yet to be integrated) and internally displaced persons (IDPs) across five continents. The issue of IDPs alone is indicative of the changing nature of forced human displacement. IDPs are "persons or groups of people who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violencé, violations of human rights, natural or human-made disasters, and who have not crossed an internationally recognized state border." Although statistics are difficult to obtain estimates of IDPs can reach between 15-30 million worldwide. Critics, as an example of how the 1951 Convention fails to accommodate the new dimensions of coerced population movements, cite the fact that IDPs do not fall within the ambit of the 1951 Convention (because they have not crossed an international border).

The causes of refugee flows have undergone extensive transformations that have served to highlight the shortcomings of the present international regime for refugee protection. During the 1960s and 1980s massive refugee movements could be attributed to the proliferation of national liberation struggles, the decolonization of the Third World and the proxy wars of the Cold War in Indo-China, Central America, Afghanistan and Southern Africa. While the end of the Cold War has facilitated the resolution of a number of refugee-producing conflicts in countries such as South Africa, Namibia, Cambodia, Vietnam and Mozambique, new conflicts and new refugee movements have emerged. The New World Order, so anticipated after the end of the Cold War, has not created space for a New
Humanitarian Order. Rather, we have witnessed the explosions of new ethnic conflicts within states in which human displacement is not just an ‘unfortunate’ by-product, but frequently, the very objective of the conflict. The breakup of the Soviet Union and Yugoslavia, and the dramatic political transformation in Eastern Europe have unleashed a series of violent ethnic struggles, leading to the production of more refugees and IDPs than ever witnessed in history. Many of the conflicts can be traced back to the end of the Cold War context, which served to suppress historical, ethnic, tribal and religious identities and hatred. After all, the international legal regime for the protection of refugees was originally developed and adopted in the context of post-World War II. Indeed, the temporal limit to the 1951 Convention was only removed with the adoption of the 1967 Protocol. The close ties between the Convention and the European context has led to allegations of Eurocentrism, particularly in view of the fact that out of the 26 states which participated in the drafting of the Convention, 17 were from Europe and four from a North American persuasion. The criticism that the Third World did not participate in the drafting of the Convention is part of a broader concern that non-European countries have not enjoyed the same access to international law-making process, which in the absence of a Third World agenda continues to perpetuate the dominance of European subjectivity’s and concerns on the international level.

Definitional deficiencies have also been cited as evidence of the conceptual weakness of the 1951 Convention. The Convention defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to 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”. Having been devised at the height of the Cold War, this
definition clearly favoured the protection of the 'political' refugees fleeing persecution. Consequently, it does not accommodate or recognize many of the emerging and largely non-political causes of refugeehood which include unbalanced development, environmental degradation, corrupt government, natural disasters, and diminishing resources. Orthodox interpretations of the 1951 Convention definition also exclude people fleeing civil wars and general unrest, those not specifically 'singled out' for persecution and those not persecuted by state agencies. The latter category is of particular concern to feminists, who note the absence of gender as an enumerated basis for fear of persecution in the refugee definition. They regard this omission with suspicion and argue that it fails to account for the fact that women face unique forms of persecution in the private sphere.⁹

The UNHCR has acknowledged the limitations created by the emphasis placed on political persecution in the refugee definition:

In many parts of the world refugees are victims of civil war and political conflict rather than of persecution. Africa, burdened with its colonial past, provides many grim examples of ethnic tensions, exacerbated by poverty, population explosion and environmental degradation, leading to repression and violence. Communal strife and civil war intensify famine and food shortages, forcing people to move in search of safety and survival.¹⁰

Dissatisfaction with the current refugee definition has engendered a number of reforms aimed at extending the system of international protection normally reserved for refugees. For example, successive United Nations General Assembly resolutions have extended the competence of to deal with wider category of displaced persons, including IDPs. Also, in 1969, the Organization of African Unity (OAU) and the 1984 Cartagena Declaration—both designed to meet regional exigencies—broadened the refugee definition.
to include groups fleeing wars and generalized violence. The decision was mainly dictated by pragmatic considerations because countries in the respective regions found themselves unable to deal with massive waves of people in refugee-like situations on a case-by-case basis. Some critics have called for a similar expansion of the international refugee definition, in order to make it sufficiently elastic to encompass new categories of displaced persons. However, other commentators believe that the 1951 Convention is full of unrealized potential and that it could be interpreted more liberally to provide protection to many individuals currently denied its benefits if the international community possessed the political will to do so.\textsuperscript{11} These commentators also point out that the problem is not so much of conceptual weakness of the Convention, but of proliferation of restrictive measures which "test the minimum threshold of protection required by the 1951 Convention."\textsuperscript{12} These measures generally undermine the most fundamental provisions of the international regime for the protection of refugees and present new obstacles to those seeking asylum and protection from a forcible return to a country where they face persecution.

Many critics are observing what they have called the gradual erosion of the asylum principle around the world, particularly in the western world. Many industrialized states, which have traditionally welcomed migrants and refugees, have more recently shown a reluctance to open their borders. With the end of the Cold War, the main political and ideological motivation for accepting refugees, namely to embarrass and discredit communist regimes, has disappeared. The 'open door' period or 'golden age of asylum' of the 1960s and 1970s in which African countries accepted hundreds of thousands of asylum seekers fleeing from armed struggles against colonialism, racial domination and apartheid has also come to an end.
The contemporary unwillingness of states to accept and protect refugees is motivated by a number of factors: concern over dilution of national sovereignty, spread of international terrorism, rise of illegal immigration, and changes to the ethnic and religious composition of society. To alleviate their fears, many states have undertaken radical changes through legislative and interstate arrangements, which have had the effect of blocking access to refugee status determination procedures and restricting the rights of refugees once they have arrived. For Richmond, this is indicative of what he terms "the creation of system of global apartheid based on the discrimination against migrants and refugees from poorer developed countries".

The end of apartheid coincides with growing fears elsewhere in the world concerning the impact of mass migration and consequent conflicts in polytechnic and multiracial societies. New hedges are being built. Increasingly repressive and restrictive measures to restrain the migrant workers and refugees form Africa, Asia, the Caribbean, and Latin America are being imposed. Today, we guard airports, interdict undocumented travellers, build electronic fences, maintain coastguard's patrols, and use computerized data banks to ensure that our borders are not infringed. Armed guards patrol frontiers and gunboats, turn back ships loaded with asylum seekers and so called 'illegal' immigrants. Advanced technologies, including infrared surveillance, fingerprinting, and computer data banks are being used to exclude unwanted persons. In some countries, voting rights and citizenship are denied, even to long term residents, unless they are of the same ethnic origin as the majority groups. The predominantly 'White' and wealthy countries of North America, Europe, and Australasia endeavor to protect themselves from what they believe are imminent threats to their territorial integrity and privileged lifestyles, as economic interdependence
encourages transnational movements of capital and tends towards a 'borderless world', political and social pressures pull in the opposite direction. It now seems that the generous policy towards refugees was a Cold War luxury and even then, one mainly reserved for Europeans. That is why new policies can be described as a form of global apartheid.\textsuperscript{13}

Sovereignty

It is becoming increasingly clear that many states are finding it difficult to reconcile the need to control their borders with their international obligations to assist and protect refugees. This is a modern manifestation of the classical dichotomy between states claim to sovereignty and their participation in the international society. The international instruments providing for the protection of refugees are seen as restraining states jurisdiction to control the admission of foreign nationals onto their territory. The idea of policing one's borders to control the entry and residence of non-citizens plays an important role as the primary symbol of sovereignty, both in terms of the separation of independent states exercise of jurisdiction, and in the general perception of independence and nationhood.\textsuperscript{14} The imperatives of immigration control go to the very core of a states symbolic function and are motivated by a number of factors, namely,

- the maintenance of law and order,
- the prevention of crime,
- the protection of national security, particularly in the context of international terrorism,
- the protection of national markets, labour and housing, and
The growing preoccupation with state sovereignty, particularly in the area of immigration, must be analyzed in conjunction with the growing trend towards globalization and integration. At a time of significant and widespread deterritorialization and erosion of state authority and legitimacy, immigration control is often viewed as one of the last remaining symbols of national security.

Thus, it is likely that migration control is and will continue to be used by governments to express and assert their positive sovereignty when their sovereignty is in serious doubt in so many other areas, and demonstrate representative democracy when the whole basis of democracy appears in dire trouble in many crucial policy areas. This largely explains the tendency for immigration and asylum issues to dominate national political agendas in Western Europe around election time.\textsuperscript{15}

Reactions against globalization and its homogenizing tendencies provoke powerful nationalist, regionalist or localist sentiments which rest on an explicit rejection of the global and other 'outside' forces, and nostalgically for a return to 'old' or 'traditional' values, including 'national' governmental promotion and the protection of the 'national interest'.\textsuperscript{16} The ensuing xenophobia is a manifestation of insecurity experienced by many when faced with a rapidly changing global society. In most countries refugees are considered 'undesirables' or dangerous strangers who threaten the social cohesion of their host country. Official documentation linking refugees with international terrorism, drug trafficking and general criminality has led to the institution of exclusionary practices towards refugees. The increasing blurring of the distinction between refugees and economic migrants in the
public mind has also led to the popular sentiment that refugees have not really fled from persecution but merely to improve their economic status. Many governments and politicians have focused on the way in which ‘economic migrants’ or ‘bogus refugees’ are cynically and unscrupulously ‘abusing’ asylum procedures, thereby competing with genuine community members for already diminishing resources. The last concern is particularly expressed by Third World countries, which are unable to provide the basic social and economic rights to their own populations even in normal circumstances. Economic hardship and the austerity programmes imposed by the International Monetary Fund (IMF) and the World Bank, which have forced governments to curtail free services to their populations, have made it difficult, if not impossible, to extend such services to refugees. This has led many critics of the 1951 Convention to pronounce its provisions relating to the medical, educational, economic, clothing and food entitlements of refugees as practically irrelevant to developing nations.

Types of measures employed to restrict asylum

States have developed and institutionalized a number of practices and measures designed to restrict access to asylum. The first category of these measures consists of ‘non-admission policies’ which aim to prevent the asylum seeker from entering a given territory. To this end, many states have imposed valid visa and passport requirements, sanctions on transport companies carrying passengers without the required documents, and posted immigration officers at the airports or embassies of countries known to produce many seekers. Other more radical examples of non-admission politics include interdictions at sea. In 1991, thousands of refugees fled Haiti after the overthrow of the democratically elected President Jean-Bertrand Aristide. The US Coast Guard interdicted over 40,000 Haitians in the two-
year period from 1991 to 1992, sending approximately 34,000 to Guantánamo Bay after a temporary court order had prevented their immediate repatriation. In 1992, a Supreme Court ruling upheld the right of the US government to forcibly repatriate those interdicted at sea since they had not `entered' the United States territory and could therefore not invoke protection against refoulement.¹⁹

Attempt to limit the numbers of asylum seekers has also produced a shift from an `exile-oriented approach' in refugee law to a `root-causes' approach. This approach attempts to identify and remedy the causes leading refugees to flee so that refugee situation can be contained at their source. In other words, the protection of refugees is increasingly seen in the context of prevention, return and attention to the root causes. This has been accompanied by a shift from emphasizing the responsibility and role of the country of asylum to the responsibility and role of the country of origin. Accordingly, concepts such as `safety zones', `in-country protection' or `safe heavens' have emerged, aiming to provide protection within the country of origin, thereby obviating the need for persons to seek refugee and protection abroad. Many critics have observed that these concepts are poor alternatives to the practice of facilitating access to refugees seeking international protection to leave their country of origin and often have the effect of returning or containing refugees to areas where they face persecution.

Other new concepts include `temporary protection' and `safe third countries'. The former emphasizes the temporary nature of refugee-hood. The latter has led to the deportation of refugees to other countries perceived to be safe. This approach has been particularly utilized by Nordic countries which, concerned about the great numbers of asylum seekers which might
arrive via Estonia, Latvia or Lithuania, have provided generous assistance to these states in order to make them 'safe', thus allowing for the return of asylum seekers to their territories. In addition, assistance programmes are also aimed at the establishment and reinforcement of border controls.

Another way of dissuading asylum seekers is to lower the standard of treatment of refugees by denying some of the important social, economic and cultural rights guaranteed by the 1951 Convention, such as gainful employment, welfare, including rationing, housing, education and social welfare. The most dramatic example of the deployment of this strategy can be found in the American State of California, which passed Proposition 187 in 1994 in protest against the numerous benefits that were available to both illegal and legal immigrants. The Proposition provided for the following changes in the treatment of illegal immigrants:

1. enrolment in public schools, colleges, and universities would be barred;
2. parents or guardians of all school children would have to show legal residence and school administrators would have to report illegal immigrants;
3. non-emergency public health care, including pre-natal and post-natal services, would be denied to those who could not prove legal status;
4. access to many state programs which dealt with troubled youths, the elderly, the blind, and others with special needs would be cut off;
law enforcement agencies would be required to co-operate fully with the US Immigration and Naturalization Service officials; and

penalties for the sale and use of fraudulent documents were to be increased.21

The Proposition was immediately challenged in the courts with at least eight cases filed by opponents hoping to block these measures. However, it was not until 1996 that most of the major sections of the proposition were declared unconstitutional in a federal district court ruling.

India also has a history of introducing restrictive policies towards its refugees. In 1971 India gave refuge to 10 million Bangladeshi refugees from East Pakistan but restricted their access to employment, fearing that it would lead to social and economic tensions. "The reason why the host country imposed restrictions is easy to discern. It tried to minimize the deleterious impact of an immigrant population of such magnitude on its own systems. Struggling to manage its own inner strains, the host system attempted to isolate the new problem rather than allow it to combine with the already existing complex problems. More specifically, the evacuees were allowed to remain as a noncompetitive group in the economy, keeping the balance of the labor market undisturbed".22

Other more recent examples of limiting the rights deterring future asylum seekers can be found in Tamil Nadu. In 1993, the government of that state restricted the movements of Sri Lankan refugee to 'ensure internal security' and provide for the 'proper maintenance of refugees camps'. Involvement in voluntary organizations in refugee camps was banned and a
curfew was imposed. 'Inmates' (as refugees were referred to) wanting to visit relatives in other places had to obtain written permission of the camp officer concerned. Measures to restrict refugee access to and admission into educational facilities, schools and colleges were also implemented.

The problem of non-accession

The fact that some countries, particularly those in South Asia, have not acceded to the 1951 Convention or the 1967 Protocol also serves to undermine the international legal regime for the protection of refugees. Although countries like India have questioned the value of the Convention and pointed to their own unique traditional culture of hospitality as an adequate substitute, lack of accession or development of national or regional refugee legal regimes is a cause of concern. Presently, India is host to over 300,000 refugees of various origin including 98,000 from Tibet, some 100,000 from Sri Lanka and approximately 17,000 refugees recognized under the UNCHR mandate. Formal recognition has only been accorded to certain groups of refugees, leaving some groups largely without legal protection. The differential treatment of refugees in India is a fundamental problem that arguably negates the provisions of non-discrimination in the Convention.

It is clear that the international regime for protection of refugees is presently facing a number of challenges. The ever-increasing numbers of refugees have made many governments reluctant to grant asylum. There are also concerns that the framework of the Convention and the Protocol may be inadequate to deal with the growing scale and complexity of the problem. Are we to discard the whole international protection system and look for new solutions which can accommodate the new dimensions of the
refugee problem. This may prove to be problematic and inappropriate. The 1951 Convention and the 1967 Protocol remain the strongest expressions of international concern and solidarity for persecuted people. Given the reluctance of states to implement the present provisions of the Convention, the establishment of a new international framework that is more generous to the needs of refugees is not a feasible option. Instead, we must urge nations to apply the Convention as liberally as possible, respecting its original spirit and aspirations. States must learn to balance the imperatives of their national interests with their internationally recognized obligations to protect and assist refugees. The two concepts need not be mutually exclusive. To address concerns about Euro-centrism, the Third World nations must play an active role in the international system for the protection of refugees so that their interests figure in future approaches. The causes of refugeehood must also continue to be addressed, albeit in a context that does not detract from the right of refugees to seek asylum in other states. In particular, we must encourage the growth of societies that respect minority rights and political, social, economic and environmental justice.
REFERENCES:

1. See the Guiding Principles on Internal Displacement.


3. Ibid., p.41.

4. Ibid.


8. Ibid., p.71.


11. Ibid., p.72.


16. Ibid.


