

# **Protection of Refugees in Bangladesh: Towards a Comprehensive Legal Regime**

**Mostafa Mahmud Naser  
Tanzim Afroz**

## **1. Introduction**

Refugee is a person who has left home to seek refuge from war or persecution on the basis of his or her race, religion, nationality, membership in a particular social group or political opinion, who is outside of his or her country of nationality and unable or unwilling to return.<sup>1</sup> Refugees are forced from their countries as a result of war, civil conflict, political strife, systematic discrimination, gross human rights abuses or other forms of persecution.<sup>2</sup> Absence of protection in one's own country and the tenuous nature of protection in the asylum country make refugee a subject of international concern. Refugee protection begins in the form of admission of persons to the territory of a state and granting of asylum followed by the determination of status by complying with the principles evolved under international refugee law. Generally speaking, the international refugee regime is a mix of international "universal" instruments and institutions, supplemented by regional arrangements, both of which are implemented at the country level through national laws and procedures. The juxtaposition of national and international law is of particular significance because of the cross-border nature of the refugee problem, affecting at least two states, and also because the refugee, having fled his/her country, has lost national protection and has become an object of international protection. The term "international protection" signifies the responsibility of the international community to ensure that states respect the basic human rights of a refugee, including his/her right to return home voluntarily and safely.<sup>3</sup> States are obliged for protection of refugees under international law on account of their membership of United Nations and

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1. Oxford Dictionary Definition, See, Soanes Cathrine & Stevenson, A, Oxford Dictionary of English, Oxford University Press, 2005.
  2. Majumdar, Sumita Das, 'Refugee Management in India: Policy Introspection, ISIL Yearbook of International Humanitarian and Refugee Law', ed. by Lakhmi Jambholkar & C. Jayaraj, vol V, ISIL, New Delhi, 2005, pp. 142-173, p. 142.
  3. Khan, Irene, 'Protecting the Rights of Refugees', "Peace Studies: An Introduction to the Concept, Scope and Themes", ed. Samaddar, Ranabir, South Asian Peace Studies, vol. 1, Sage Publications, New Delhi, pp. 190-205, p. 191.

signature or accession to international refugee instruments. The legal basis for this international protection may either be customary international law or conventional international law. The basic customary international laws applicable to them are those pertinent fundamental human rights found in the International Bill of Human Rights.<sup>4</sup> Hence, it is submitted that all states should protect the fundamental human rights of refugees under customary international law. International refugee law is coming of age.<sup>5</sup> The refugee regime has generated a serious body of law that elaborates basic human rights norms and has important implications in and beyond the refugee context. There are a number of universal, regional and domestic human rights instruments and mechanisms which can be employed to enhance the protection of refugees and asylum seekers. The most important are the United Nations Convention Relating to the Status of Refugees of 1951 (hereinafter the 1951 Convention) and its 1967 Protocol<sup>6</sup> which govern refugee status on the universal level.<sup>7</sup> It provides for basic human rights as well as surrogate protection.<sup>8</sup> Although there are international mechanisms and institutions for the protection of refugees, still, ultimately the protection of refugees depends on individual sovereign states who have to follow their respective national legislation.<sup>9</sup> Many factors are accountable in the protection of 'Refugees' in any country and Bangladesh is no exception.

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4. The International Bill of Human Rights consists of:
    - the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948,
    - the International Covenant on Civil and Political Rights, adopted by General Assembly on December 16, 1966 with its Optional Protocol, and
    - the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on December 16, 1966.
  5. Shashtri, V. Seshaiyah, 'Application of International Human Rights Principles and Standards for the Effective Refugee Protection', *ISIL Yearbook of International Humanitarian and Refugee Law*, The Indian Society of International Law, New Delhi, vol. V, 2005, pp. 174-192, at p. 174.
  6. These two international legal instruments have been adopted within the framework of the United Nations. As at December 2004, 142 countries had acceded to the 1951 Convention and/or its 1967 Protocol.
  7. *Refugee Protection in International Law*, UNHCR's Global Consultations on International Protection, edited by ERIKA FELLER VOLKER TÜRK and FRANCES NICHOLSON, Cambridge: Cambridge University Press, 2003, p. 1.
  8. See the Preamble to the United Nations Convention Relating to the Status of Refugees, 1951.
  9. *Supra* note 2, at p. 142.

Bangladesh, being a developing country and not a party to the above-mentioned instruments relating to refugees, has been hosting a large number of refugees and displaced persons on humanitarian grounds since inception. Being a responsible member of the United Nations (UN) she is conscious of her role in the promotion of and respect for human rights and also committed to undertake humanitarian aid to the refugees whenever necessary. Paradoxically, it does not have its own legislation relating to refugees. But the existence of a legal normative framework is essential in order to ensure constitutional rights to refugees who are for the time being in Bangladesh. Scholars and professionals in the field believe, based on their wide experience, that establishing such a framework is vital for two reasons; firstly, to enhance the protection of genuine refugees, and secondly to enable the state to manage the refugee and migratory flows properly.<sup>10</sup> According to Abrar, the framing of law on refugee protection can be done in three ways: by acceding to international refugee instruments, by developing a regional instrument for South Asia, and/or by framing a national legislation.<sup>11</sup>

This paper stresses the urgent need for developing a legal regime for refugees in Bangladesh. Following a brief introduction to the international refugee regime, the paper advocates for accession by Bangladesh to the international refugee instruments. It also examines the existing legal framework for the refugees in Bangladesh, which is not based on international refugee instruments. It concludes with the proposition that improvement of the protection of refugees as well as achieving viable solutions to the refugee problem will require a fresh look at current strategies and actions at three levels: international, regional and national.

## 2. Refugee situation in Bangladesh

The refugee phenomenon has been an integral part of the state formation process in Bangladesh, simultaneously a refugee-generating and a refugee-receiving state. The people of Bangladesh had been subject to genocide and crimes against humanity in 1971 by the Pakistani military *junta*. Around 10 million Bangladeshi nationals had to leave for India to escape the atrocities of the Pakistani army. Many of the Bangladeshi nationals became refugees in India for a nine-month period till Bangladesh emerged as an independent country on 16th December 1971.

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10. Sunnah, MM, 'Advantages of Accession to 1951 Refugee Convention', *Udbastu*, A Newsletter on Refugee and Migratory Movements, Issue 14, October-December, 2000, pp. 2-4, at p. 2.

11. Abrar, Chowdhury R, 'Legal Protection of Refugees in South Asia', *Forced Migration Review*, Vol. 10, p. 1.

Upon independence, about three hundred thousand *Biharis* became refugees who proclaimed themselves as 'Stranded Pakistanis'. A section of this community preferred to be integrated into the new State, Bangladesh, while the other section opted for Pakistan. An agreement in 1974 facilitated repatriation of 170,000 *Bihari* refugees to Pakistan. It could be argued that the "*Biharis*" in Bangladesh are not to be considered as refugees and so they do not come under the purview of 1951 Convention since they identified themselves as "Pakistanis" by choice. It is also alleged that many of them collaborated with the Pakistani military regime. Another pertinent point is that one of the principal criteria for a person's status of refugee is that he/she must cross the frontier of one state to another. But the "*Biharis*" lived and remained in the same territory before and after the independence of Bangladesh. However, after some initial movements, no serious initiative for their repatriation to Pakistan was undertaken. While the issue remains to be sorted out by the governments of Bangladesh and Pakistan, tens of thousands of people languish in sixty-six squalid camps around the country in a 'state of statelessness'.<sup>12</sup> Although a High Court Division judgment in 2003 mentioned that those who born after 1971 in camps are Bangladeshi citizens,<sup>13</sup> the issue of the citizenship of *Biharis* in Bangladesh is still waiting for a policy decision of the Government of Bangladesh (GOB).<sup>14</sup>

Furthermore, Bangladesh has been confronted with the flow of refugees from Myanmar. Thousands of refugees came in 1978 from *Akyab* (now named as *Rakhine*) and took shelter in Chittagong and its adjoining areas. These refugees are commonly known as "*Rohingya*" refugees. They were housed in refugee camps in co-operation with UN High Commissioner for Refugees (UNHCR). Ultimately, they were sent back in accordance with 1978 Agreement between Bangladesh and Myanmar. In 1991-92 another flow of refugees numbering about 2,70,000 came to Bangladesh and they were accommodated in 17 camps. These refugees received "*prima facie*" refugee status, obliging UNHCR to protect and assist them. Refugees fleeing similar conditions following the mass repatriations in 1994 and 1995, however, were less fortunate, having been labeled "*economic migrants*", who have no legal right to UNHCR's protection and assistance. Today Bangladesh hosts approximately 28,000 *Rohingya* mandate refugees in the two camps of *Kutupalong* and *Nayapara* in its

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12. Das, Uttam Kumar, 'Refugee Rights: Legal Position and Practices in Bangladesh', in Human Rights and Domestic Implementation Mechanism, ed. Rahman, Mizanur, ELCOP, Dec 2006, pp. 151-174, at p. 157.

13. *Abid Khan and Others v. Government of Bangladesh and Others*, 55 DLR (HCD) 318.

14. *Supra* note 12, at p. 157.

southern Cox's Bazar district. The *Rohingya* currently living in these two camps refuse to go back to Myanmar citing fear of severe reprisals. There is also a large *Rohingya* population living outside of camps, estimated to be between 100,000-200,000. It is believed that many among this non-camp population returned to Bangladesh after being repatriated to Myanmar. The *Rohingya* who have come to Bangladesh after the large exodus of the early 1990s are denied entry to the camps and are not recognized as refugees by the Government of Bangladesh. The Government is not allowing the fresh group of *Rohingyas* to enter on the ground that it could not shoulder the burden indefinitely. Whoever have been able to enter into Bangladesh are not in the camps and are unable to receive any assistance or protection from UNHCR. This is indicative of both aid and compassion fatigues of the hosts, and poor checks and balance prompted by the absence of standard national instruments.<sup>15</sup>

While Bangladesh has received "*Biharis*" and *Rohingya* refugees, extending maximum assistance to those who have been compelled to flee their homes and countries and seek refuge, is also responsible for producing influx of *Chakma* refugees from Chittagong Hill Tracts (CHT) to North-East region of India. The *Chakmas*, Buddhist Tribals of the CHT in Bangladesh, have been fighting for development autonomy since the British period. This discontentment was heightened by the *Kaptai* Dam project (1957-62) in which 10,000 tribal people lost their land (40% of arable land) as it submerged over 40,000 *Chakmas* left for India and settled in many parts of her North-East region including Arunachal Pradesh. After independence in 1971, the declaration of the then Bangladeshi Prime Minister Sheikh Mujibur Rahman that '*Chakmas* are also as Bengalis' with an aim to crush their protracted demand of autonomy brought about a serious identity crisis among the *Chakmas* and deepened the process of their alienation. Being Buddhists they also had genuine fears on account of the Islamisation drive. This was followed by a conscious attempt by the Bangladeshi Government to make *Chakmas* a minority in CHT by massive human settlement from plain lands including distribution of free lands among the new settlers and the deployment of military to enforce this objective. This injected a severe pressure on land and violation of fundamental rights including detachment from their common property resources.<sup>16</sup> As a consequence, fierce fighting had taken place between *Chakmas'* military outfit "*Shanti Bahini*" and the Government forces, sometimes leading to massacre of *Chakmas*. The

15. Lama, Mahendra P, "Managing Refugees in South Asia: Protection, Aid, State Behaviour and Regional Approach", Occasional Paper No. 4, Refugee and Migratory Movements Research Unit (RMMRU), Dhaka, April 2000, p. 36.

16. *Ibid*, at p. 10.

protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it.

The 1951 Convention provides the most comprehensive codification of refugee rights and is to be applied without discrimination according to race, religion or country of origin and is known as the 'Magna Carta' of international refugee law. The Convention sets standards for the treatment of refugees, covering issues such as their legal status, employment and welfare.<sup>21</sup> Five categories of rights are provided to refugees under the Convention.<sup>22</sup> First, the refugee has a right to be treated in the same manner as other aliens generally, except where the Convention contains more favourable provisions; Second, the contracting states are to accord to refugees within the territory the same treatment as that accorded to their own nationals, in matters of artistic rights and industrial property, access to courts<sup>23</sup>, rationing, public benefits<sup>24</sup>, labour legislation and social security, fiscal charges, and conditional wage earning employment<sup>25</sup>; Third, the right to be treated at least as favourably as local nationals in relation to religion<sup>26</sup>; Fourth, the right to be accorded the most favourable treatment according to nationals of a foreign country, by the contracting state, in the same circumstances, such as the right of association, freedom of movement<sup>27</sup> and general wage earning employment; and Fifth, the right to be accorded treatment as favourable as possible and in any event not less favourable than that accorded to aliens generally in the same circumstances, with regard to rights to movable and immovable property, self employment, to have a liberal profession, to housing, and to education<sup>28</sup> other than elementary education.<sup>29</sup>

Complementary to the above mentioned rights guaranteed to refugees, certain principles of primary importance are established by the 1951

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21. Article 7(1). See also Articles 5, 6, 13, 18, 19, 21 and 22(2).

22. Muntarbhorn, Vitit, 'Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances', *International Review of the Red Cross*, July-August 1988, no. 265, p. 359.

23. Article 16, of the 1951 Convention.

24. Article 23 *ibid*.

25. Article 17, *ibid*.

26. Article 4, *ibid*.

27. Article 26, *ibid*.

28. Article 22, *ibid*.

29. Das, Bharat B, 'A Refugee Problem- Humanitarian Approach', *ISIL Yearbook of International Humanitarian and Refugee Law*, The Indian Society of International Law, New Delhi, vol. V, 2005, pp. 193-214, at p. 206.

Convention; such as that the contracting states shall not impose penalties, on account of their illegal entry from a territory where their life or freedom was threatened, enter or present in their territory without authorization,<sup>30</sup> that the contracting states not to expel refugees against her will to a territory where s/he may be exposed to persecution save on grounds of national security,<sup>31</sup> the principle of *non-refoulement*. World community's concern for refugees being the fundamental human element, the Convention contains provision for international cooperation, burden sharing and active presence of an international body i.e. UNHCR, to mobilise and organise global efforts for the protection, rehabilitation and welfare of refugees. Furthermore, according to the Convention those who have committed war crimes, crimes against peace and humanity as well as those who have committed serious non-political crimes cannot be accorded asylum.

### 3.1. Real and imaginary reasons for non-accession to 1951 Convention

The alarming growth in the number of refugees, the altered geographical distribution of origin and asylum, the problems of reception capacity and willingness in the countries concerned and limits to the possibilities for financial aid — all establish the fact that the theory and practice of refugee policy, as they exist in international refugee instruments till now are no longer adequate to meet the challenges of this century. It is also pertinently true that the human rights context of the refugee problem is losing its focus and asylum as a main basis of refugee protection is increasingly under challenge. These developments pose a series of pertinent questions concerning the effectiveness of the present international legal regime for the protection of refugees. The most controversial questions that have been raised globally are: (i) How apt is the 1951 Convention for resolving today's refugee problems? (ii) What role does this Convention play at a time when asylum-seekers are arriving in growing numbers from all parts of the world? (iii) Is it still a valid instrument or should it be replaced by new rules and concepts? (iv) To what extent should national sovereignty shield governments who disregard or are unable to fulfil their responsibilities towards their own citizens? (v) Does the UNHCR have the capacity to play the role expected of it?

Apart from these common issues, the Government of Bangladesh often poses the following reasons for non-accession to the 1951 Convention.

#### 3.1.1. Euro centrality

There is a perception that the Convention is a European invention. During the years immediately following the end of the Second World

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30. Article 31, 1951 Convention.

31. Article 33, *ibid*

War Europe enjoyed an economic boom and a shortage of labour. There was also a perceived compassion for those impoverished, displaced and deprived by the war then recently ended. When the Convention was drawn up, the architects had in mind what had happened in Europe and those displaced by such events – not anyone else – thus it was limited both in terms of geography and time.<sup>32</sup> It is also argued that the 1951 Convention is a product of cold war and has been used politically by the West Europe to absorb political refugees from the East Europe and is now incapable of dealing with mass influx situation. End of the cold war has uncovered the real intentions of the original parties to the Convention, and there are signs of non-compliance with the provisions of the Convention by the West itself.<sup>33</sup>

### 3.1.2. Narrow legal regime

Although the majority of the world's countries are state parties to the 1951 Convention and its Protocol, it is extremely difficult for the international community or UNHCR to challenge the practices of some states who take a restrictive approach to refugees through administrative arrangements. Unlike the human rights treaties, no supervisory committee exists in international refugee law, to enforce implementation of the 1951 Convention or its 1967 Protocol through a formal process of inter-state scrutiny.<sup>34</sup>

### 3.1.3. Definition of refugee is too restrictive

The criteria used for the definition of a refugee in the 1951 Convention are too restrictive. The eligibility of international protection as we have seen, could arise from various reasons, besides traditional notion of "persecution". The definition does not include situations, such as foreign aggression, armed conflicts or civil wars, escape from extreme poverty, mass uprooting of a population resulting from ruthless government policies, wrongful prosecution of a person, natural disasters including the leaking of radiation from a nuclear plant, general violence in the community and massive violation of human rights.

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32. *Supra* note 11, at p. 2

33. Alam, M. Shah, "1951 Convention Relating to the Status of Refugees: Need for Accession by Bangladesh", key-note paper presented at the seminar on The 1951 Refugee Convention : Need for Accession by Bangladesh organized by Bangladesh Bar Council, Dhaka, November 4, 2000, p. 2

34. Gorlick, Brian, 'Legal Regime for Refugee Care', "Peace Studies: An Introduction to the Concept, Scope and Themes", ed. Samaddar, Ranabir, South Asian Peace Studies, vol. 1, Sage Publications, New Delhi, pp. 92-102, p. 99.



### 3.1.4. No provision for voluntary repatriation

The 1951 Convention is based on the concept of durable asylum or permanent re-settlement. It puts emphasis on protection and resettlement of the refugees and does not refer to their voluntary repatriation. This line of approach seems to be outdated and presumably conceived during the cold war on the principle that no person should return to a communist country in Europe.

### 3.1.5. Advantages of bilateralism

There is also a feeling in South Asia that accession to an international treaty or regional agreement on refugees, would internationalise the refugee issue and aggravate tensions among neighbours. South Asian states have always tended to use the bilateral channel to settle their differences within regionally recognized and historically accepted constraints.<sup>35</sup> Even where international assistance for refugees has been sought, solutions have been pursued on a bilateral basis, e.g., Sri Lanka/India, Bhutan/Nepal and Bangladesh/Myanmar. In the case of *Rohingya* refugees, the bilateral agreement between Myanmar and Bangladesh was supplemented by separate bilateral agreements between UNHCR and the two governments respectively.

### 3.1.6. It might invoke unbearable responsibility

There is a fear that accession may put strain on limited resources of the country. The apprehension of policy makers that the consequences of signing the Convention might entail obligations that they may not be able or prepared to meet in terms of resource mobilization. For Bangladesh, setting up of administrative and legal machinery for dealing with refugees/asylum seekers issue is not a priority because it requires huge quantity of resources which is not possible to mobilize for a poor country like Bangladesh.<sup>36</sup> There is also an apprehension of bureaucratic wariness of the perceived undue 'interventionist' activities of UN and other international agencies.

### 3.1.7. Security concern

There is also the perception that the Convention might be abused by the refugee groups who collect funds for terrorist activities in their countries of origin. New dynamics of people's migration like human smuggling may also emerge which the Convention is not able to address.

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35. Supra note 3, at p. 197.

36. *Ibid.*

### **3.1.8. No SAARC countries acceded to the Convention**

There is a perception that even states who have signed the Convention ignore it when it suits their interests. More importantly, no country in the SAARC region has so far acceded to the Convention and the Protocol.<sup>37</sup>

### **3.2. Advantages of accession to 1951 Convention**

Despite the fact that the 1951 Convention cannot cope with the ever-increasing dimensions of the refugee problem and its many facets, it is the principal instrument of universal application in relation to the refugees and has been accepted by almost all countries in the world. When a state signs, ratifies or accedes to any treaty or Convention, usually it considers that the Convention is not contrary to the state's national interest rather it serves its national interest; that the Convention is not opposed to the state's fundamental constitutional principles, government policies and people's aspirations and beliefs; that the Convention does not place such burden that the state cannot bear.<sup>38</sup> There is widespread consensus that none of the principles for the protection of refugees contained in the Convention is contrary to the national interest, constitutional norms, government policies, people's aspirations, beliefs, tradition and culture of Bangladesh. Perspectives based on the existing geo-political scenario and continuing refugee-producing events, there are several advantages of accession to the Convention. Firstly, accession continues and undertakes to apply the minimum humanitarian standards of treatment in respect of refugees; Secondly, it contributes to improvement of relations between states, i.e. country of origin and country of asylum of a refugee; Thirdly, it underlines the importance attached by the acceding state to co-operate with the international community and UNHCR in their efforts to find a solution to the refugee problem; and Finally, it facilitates UNHCR's task to mobilize international support to address a refugee situation that may arise in any country.

## **4. Existing legal framework for refugees in Bangladesh**

The legal framework concerning refugees in Bangladesh is devoid of any consistent and organised development. On the one hand, Bangladesh has a liberal constitutional framework that guarantees certain fundamental human rights even to foreigners. On the other hand, the statutory regime in Bangladesh dealing with foreigners refuses even to acknowledge refugees as a special class of people deserving its consideration. In this part of the paper an attempt is made to find out existing legal provisions in Bangladesh, if any, which could be translated for the protection of refugees and asylum seekers. In the absence of any

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37. Afghanistan became a party to the 1951 Convention and its 1967 Protocol in 2005. Other State Parties in Asia are Cambodia, Philippines, South Korea and China.

38. *Supra* note 33, at p. 2.

protection by national statute or governmental policy, one has to look at the constitutional safeguards and the international instruments which are in consonance with constitutional principles in order to provide a concrete benchmark.

#### 4.1. Obligation under International Instruments

Though not a party to the 1951 Convention or the UNHCR Statute, Bangladesh has ratified a number of major international human rights instruments. Among them the significant ones are the Universal Declaration of Human Rights (UDHR); Four Geneva Convention of 1949 and their two Additional Protocols of 1977; International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture (CAT) etc. All of these instruments have a bearing upon Bangladesh's obligation to protect refugees.

In so far as the Universal Declaration of Human Rights (UDHR) 1948, is concerned, all persons are guaranteed the right to life, liberty and security of person<sup>39</sup>; freedom from slavery<sup>40</sup>; freedom from torture and cruel, inhuman or degrading punishment<sup>41</sup>; the right to be recognised as a person before law<sup>42</sup>; equality before law.

Even though the refugee are foreigners in the country of asylum, by virtue of Article 2 of the ICCPR, 1966, they could enjoy the same fundamental rights and freedoms as nationals. The right to equality before law, equal protection of law and non-discrimination which form a cornerstone of international human rights law appear to ban discrimination against refugees based on their status as such.

The Declaration and Programme of Action of the World Conference on Human Rights also reaffirmed the right of every person to seek and enjoy asylum. Furthermore, the CRC also obliges the state party to take care of the interest and rights of the refugee children including their birth registration.

In addition to the above instruments, Bangladesh ratified, through the General Assembly, the United Nations Declaration on Territorial Asylum, which strengthens her obligations of protection, asylum and *non-refoulement*. She is also a party to the International Labour Organization's Convention No. 118, which provides for social security to refugees and stateless persons in addition to other persons in the territory of the signatory state. Additionally, Bangladesh has been a member of the

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39. Article 3, UDHR, 1948.

40. Article 4, *ibid*.

41. Article 5, *ibid*.

42. Article 6, *ibid*.

Executive Committee of the High Commissioner's Programme (EXCOM) since 1995. EXCOM, a body composed of 53 governments, oversees UNHCR's budgets and advises on refugee protection. Bangladesh's membership in the EXCOM is certainly indicative of its particular interest and greater commitment to refugee matters.

#### 4.2. Obligation under constitutional framework

The legal system of Bangladesh is grounded in the Constitution of Bangladesh. At its core, the Constitution upholds the dignity of the individual. Its central plank is the guarantee that the life and liberty of the individual are protected. Not only is the life of a citizen of Bangladesh guaranteed, but also everyone who inhabits the terrain of this country is assured of protection in respect of life and liberty.

The Fundamental Principles of State Policy of the Constitution essentially reflect international law and the principles enunciated in the UN Charter. Article 25 of the Constitution states that "the State shall base its international relations on the principles of respect for .... international law and the principles enunciated in the United Nations Charter". The UN Charter, in its preamble, specifically refers to the reaffirmation of "faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. The Charter in its Articles of 1, 55 and 62 reiterates the observance of human rights for all peoples of the world.

Part III of the Constitution guarantees a series of fundamental human rights, drawing heavily from the international human rights discourse. For example Article 27 of the Constitution provides equal protection of law for all. Article 31 provides that not only the citizens are entitled to have the protection of law but the foreigners (non-citizen) who for the time being are staying in the country are also entitled to have so. Furthermore, Article 32 states that "no person shall be deprived of life and liberty save in accordance with law". It is to be noted that the word 'person' and not 'citizen' has been used in the Article and therefore it is argued that any person, irrespective of whether she or he is a citizen of Bangladesh, she/he cannot be deprived of her/his life or liberty once that person is on the soil of Bangladesh. The Constitution also guarantees right to life and personal liberty<sup>43</sup>; safeguards from arbitrary arrest and detention<sup>44</sup>; prohibition of forced labour<sup>45</sup>; right of fair trial<sup>46</sup>; freedom of movement<sup>47</sup>, assembly<sup>48</sup>, association<sup>49</sup>, freedom of expression<sup>50</sup> profession

43. Article 32 of the Constitution of Bangladesh.

44. Article 33, *ibid.*

45. Article 34, *ibid.*

46. Article 35, *ibid.*

47. Article 36, *ibid.*

48. Article 37, *ibid.*

49. Article 38, *ibid.*

50. Article 39, *ibid.*

or occupation<sup>51</sup>, religion<sup>52</sup>; right to property<sup>53</sup> etc. However, for the translation and execution of these constitutional provisions in the interest of the refugees, needs comprehensive legal interpretations and proactive initiatives from the government. Till now, there is no significant indication in this regard.

In regards to statutory framework, there is no domestic law or specific national policy governing the protection of refugees in Bangladesh. In practice, foreigners, irrespective of asylum seekers or simply visitors are treated here under the purview of aged old laws which are inadequate to meet the need of the time. The inadequate statutory framework dealing with refugees in Bangladesh offers a stark contrast to the fundamental rights in the Constitution and increasingly evolved norms and principles under international refugee law. The statutory framework does not even acknowledge refugees as a separate class of people deserving separate treatment.<sup>54</sup> However, the relative success of Bangladesh's policy of dealing with refugees in an *ad hoc* manner<sup>55</sup> without committing itself to a general statutory framework has silenced demands for a law concerning refugees as a separate class. To understand the law governing refugees, it would be useful to examine the respective regulatory framework to deal with refugees.

The legislation which are used for dealing with refugees are:

- The Foreigners Act, 1946;
- The Foreigners Act, 1946;
- The Foreigners Order, 1951;
- The Registration of Foreigners Act, 1939;
- The Registration of Foreigners Rules, 1966;
- The Passports Act, 1920;
- The Passport Rules, 1955;
- The Bangladesh Passport Order, 1973;

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51. Article 40, *ibid.*

52. Article 41, *ibid.*

53. Article 42, *ibid.*

54. Dhavan, Rajeev, "Refugee Law and Policy in India", PILSARC, New Delhi, 2004, p. 37.

55. During 1978 and 1991-92, the asylum seekers from Myanmar, mostly the Rohingyas from the Northern Rakhine state were provided refugee status by the Government of the People's Republic of Bangladesh under 'executive orders.' They were granted prima facie refugee status (on a group basis). Refugee law experts are of the opinion that these measures do not address the need of an individual asylum seeker/refugee and are also not consistent. This results in differences in authority's approaches- such as varying criteria for solutions and varying standards of treatment to the refugees.

- The Citizenship Act, 1951<sup>56</sup>;
- The Bangladesh Citizenship (Temporary Provisions) Order, 1972;
- The Bangladesh Control of Entry Act, 1952<sup>57</sup>;
- The Extradition Act, 1974<sup>58</sup>;
- The Naturalization Act, 1926<sup>59</sup>;
- The Code of Civil Procedure, 1908<sup>60</sup>;
- The Children Act, 1974<sup>61</sup>;

These Statutes make no distinction between refugees and other foreigners. Using the wide discretionary powers derived from Section 3 of the Foreigners Act of 1946, the Ministry of Home Affairs may issue residential permits to any foreigner, and it is on this basis that a large number of UNHCR-recognised mandate refugees have been able to secure "stay" facilities which are issued to mandate refugees on the basis of an informal recognition of the UNHCR-issued refugee certificates.

However, the constitutional laws and ordinary laws through judicial process alone are not sufficient and adequate to deal with the refugee problem in Bangladesh. Arguably, these laws are not made for such specific purposes. The traumatic conditions of flight from country of origin, accompanying hardships, vulnerability and insecurity require specific treatment. Hence specific legislation relating to the treatment and welfare of refugees is necessary. Considering the huge size of refugee population inside Bangladesh and recurrent history of refugee phenomenon in the South Asian region due to number of reasons, it is also necessary to enact a national law which would provide specific guidelines to the implementing agencies to uphold the refugee cause.<sup>62</sup> The need of the hour is to have a well-defined national refugee law.

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56. Act II of 1951

57. Act LV of 1952

58. Act LVIII of 1974

59. President's Order No. 48 of 1972.

60. Act No. V of 1908.

61. Act No. XXXIX of 1974.

62. Most of the countries that have ratified the Convention have put legislation in place consistent with the provisions of the Convention. Some (such as Germany) have incorporated the definition of refugees in the constitution of the country. Even those which have not ratified the Convention (such as India & Bangladesh), the determination and acceptance of refugees are exercised as a prerogative of the sovereignty of the country and these powers are largely discretionary having regard to the humanitarian aspect of the case in question.

## 5. Possibility of a Regional Convention in South Asia<sup>63</sup>

The countries of South Asian region are greatly afflicted with the refugee problem. Pakistan has the problem of Afghan refugees; Nepal is facing the problem of refugees mainly from Bhutan; Bangladesh is struggling with problem of refugees from Myanmar; Sri Lanka has her own problems arising from internal displacement.<sup>64</sup> Despite the fact that none of the South Asian countries has signed the international refugee instruments, viz, the 1951 Convention and 1967 Protocol and also failed to enact a domestic refugee law or procedure, the region have some interesting success stories in refugee management. For instance, over 150,000 Tibetan refugees have integrated into India and Nepal. Over 10 million Bangladeshi (East Pakistani) refugees went to eastern and north-eastern India on the eve of Liberation War in Bangladesh. Bangladesh is still providing shelter to Rohingya refugees despite its limited resources.

It is, therefore, a paradox that while the countries in South Asia including Bangladesh have always risen to occasions to come in aid of refugees, they have always been reluctant to accept formal legal obligations to do so. Consequently, they have neither enacted national laws, nor have adopted any regional declaration of policies concerning refugees, nor have they acceded to the 1951 Refugee Convention or the 1967 Protocol. Whatever rich cultural heritage they may have inherited, and however spiritually enlightened they may be in extending assistance to suffering humanity, complexities of modern life and norms of international law demand that a legal framework be devised to guarantee minimum standards of treatment of the refugees. This is for transparency in the treatment of refugees, to check administrative lapses and bureaucratic arbitrariness and to provide greater opportunity to civil society to monitor compliance with traditions, standards and norms for the safeguard of the refugees. It has been rightly argued that the South Asian countries have to codify their good practices as regards the treatment of refugees in order that their good tradition and culture do not fall prey to the whims of any bureaucratic organ or person.

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63. The refugee population in South Asia constitutes roughly about 12 percent of the world's total refugees. Some of the South Asian States like Bangladesh, Bhutan and Sri Lanka are gradually coming under the category of principal sources of world's refugees and asylum seekers. On the other hand countries like Afghanistan, Sri Lanka and India have substantial number of people who have been displaced within their homeland (IDPs) as a result of persecution, war, human conflict, human rights violation or forced relocation.

64. Sinha, Manoj Kumar, 'Protection of Refugees through Human Rights Instruments', "Forced Migration in the South Asian Region: Displacement, Human Rights and Conflict Resolution", ed. Omprakash Mishra, Centre for Refugee Studies. Iadavpur, India, 2004, p. 435.

Initially, the second half of the 1990s saw some initiatives at an unofficial level towards developing a regional refugee protection regime in South Asia. The constitution of the Eminent Persons Group (EPG) for South Asia by UNHCR in November 1994 was an important step in this direction. At its first meeting, the Group agreed to hold annual regional consultations to promote public awareness and identify mechanisms and strategies for moving towards accession or, alternatively, formulating a regional instrument adapting the Convention to the needs of the South Asian region.

The Colombo Consultation of 1995 underscored the need for a South Asian regional legal regime for refugees and a common declaration reconfirming the validity and relevance of the definitions contained in the international refugee law instruments as well as the 1969 OAU Convention and the 1984 Cartagena Declaration. The principal focus therefore was on the development of a regional normative framework that would address the needs of refugees, stateless persons and Internally Displaced Person (IDPs).

It was at the New Delhi Consultation of 1996 that there was a strategic shift in favour of a model law for refugees that would be applicable at the national level. The Consultation also emphasised the need for better public awareness-building about refugees and IDPs and concluded that national legislations would permit a better understanding of commonalities in principles, policies and practices, and would eventually enable a regional legal framework to be drawn up. Finally, the Dhaka Consultation of EPG in November 1997 approved a model national law which was the first step in the process of building a regional consensus on preventing, managing and solving the problems accompanying refugee flows in a comprehensive and humane manner.

An important aspect of arriving at a regional regime is to debate the need for a body to oversee the implementation of the agreement. In case there is a need for such a body, its objectives, institutional structure, financial implications would need to be considered. In this respect there is a need to look, for example, at the experience of the OAU Bureau for Refugees. Likewise, a review of the manner in which the European Union countries have coordinated their policies on refugee and allied issues would be useful.<sup>65</sup>

The OAU Convention of 1969 reflected the frame of minds of political leadership of a continent engaged in anti-colonial movements. It broadened the scope of the definition of refugees to include those fleeing

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65. Chimni, B.S., "The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia" - (An earlier version of this paper was presented at the "Conference of Scholars & other Professionals Working on Refugees and Displaced Persons in South Asia" organized by the RCSS in Rajendrapur, Dhaka, Bangladesh, during February 9-11, 1998.), p. 2



apartheid, colonial oppression and generalised violence and emphasised voluntary repatriation as a solution to refugee problems in Africa. In Europe, the Schengen (1985) and Dublin (1990) agreements were directed to develop a common strategy to deal with asylum seekers within the continent. To address their own regional needs, Latin American states opted for a non-binding Cartagena Declaration (1984) which broadened the scope of the refugee definition to include foreign aggression, internal conflicts and those fleeing massive violation of human rights. Although the Declaration was formalised by the non-governmental sector; yet the governments of the region tend to follow it as a matter of policy.

Taking in view the present context of South Asia, efforts should be geared towards developing a comprehensive regional mechanism and institutions which would uphold the universal principles of international refugee protection while taking into account the distinctive traits of the region. A regional approach would allow South Asia to address its specific concerns on refugee issues, help improve cooperation and solidarity among countries, improve prospects for solution and help define a clear and useful role for UNHCR.

## **6. Formulation of a comprehensive national legislation**

Ratification of international refugee instruments may be merely symbolic unless enabling municipal legislation is enacted.<sup>66</sup> By national legislation is meant the statute or written law enacted by a sovereign state with the purpose of directing the actions of the government, the administration and individuals of and within the state.<sup>67</sup> Given the prevalence of the rule of law in Bangladesh, and as enunciated in the Bangladesh Constitution,<sup>68</sup> it is appropriate that refugee determination and treatment be accorded the same attention that other human rights protection issues receive. Despite explicit declarations in the Constitution of Bangladesh, Bangladesh is yet to develop a legal framework for refugee protection. There are several reasons why national law should be framed. The principal reasons are summarized below:

### **6.1. Judicious, fair and accountable procedures**

In the absence of refugee laws, there are no standard criteria or procedure to identify refugees or to clarify what rights they enjoy or obligations

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66. Wijeratne S.S., 'International Refugee Law And The Proposed Model National Law on Refugees for Countries in South Asia', "Towards National Refugee Laws in South Asia", edited by C R Abrar and Shahdeen Malik, Refugee and Migratory Movements Research Unit (RMMRU), Dhaka, October 2000, pp. 1-13, at p. 3.

67. Trakroo Regini, Bhat Aparna, Nandi Samhita, "Refugee and the Law", Human Rights Law Network, New Delhi, p. 140.

68. Articles 31, 32, 33, 34, and 44 of the Bangladeshi Constitution have provided for a number of rights for non-citizens as well. Article 31 states that apart from citizens every other persons for the time being within Bangladesh has "the right to enjoy law, and only in accordance with law...".

they bear. There is a need for appropriate legal and institutional structures so that refugees and asylum seekers can be dealt with in an organised manner. Structures based on law would mean better management, efficiency, transparency and accountability. A formal framework for refugees will provide clarity and guidance on many legal and administrative issues pertaining to the recognition and protection of refugees and the provision of assistance to them. It will also establish consistence and predictability in handling asylum seekers and refugees. Thus, national legislation is essential for ensuring the establishment of a regulated process of refugee status determination, reception, assistance which would guarantee fair trial and treatment to refugees and asylum seekers.

### **6.2. Enhanced administrative control by the State**

Putting in place a standardized mechanism for refugee status determination and treatment will also enhance administrative control by the state, leading to huge administrative gains. Among them will be the establishment of a database providing detailed information on asylum seekers, including their backgrounds in the country of origin and the precise reason for their departure or flight from that country. There will be record of current information, including present whereabouts, family profile and the activities of the asylum seekers. This will enable the government to distinguish between *bonafide* asylum seekers and migrants, terrorists, and criminal elements, etc. Asylum seekers who may not be deemed to be deserving of refugee status may be dealt with in accordance with the immigration procedures. Those who have been granted refugee status shall be treated in accordance with the accepted standards and principles. They may be required to keep regular contact with the concerned administrative authorities for location of residence, work, and movement to other parts of Bangladesh and any other issue that may arise.<sup>69</sup>

### **6.3. To distinguish between refugees and economic migrants**

As many political, religious, ethnic and linguistic problems remain unresolved in regions adjoining Bangladesh, forced migration is most likely to plague the country in the foreseeable future. In this backdrop, institutional preparations are essential to make distinction between people who cross borders for economic opportunities and those who do so for fleeing persecution. In order to make that distinction, necessary structures can only be attained through national legislation. Presently, the cases of individual asylum-seekers are bereft of any legal process of identification and determination. They get lost in the maze of stringent rules and regulations targeted at foreigners in general, with no established procedure for identifying and protecting genuine refugees. In the absence of a concrete legislative framework, vital decisions are often left in the hands of ill-informed bureaucrats. Not sensitised to the humanitarian

69. *Supra* note 67, at p. 143.

principles of refugee law, they are not sufficiently conscious of the responsibilities that accompany such decision-making processes.

#### 6.4. Coordination among concerned agencies

The enactment of a national legislation that deals with the roles of government, judiciary, UN and other agencies in the determination, protection and treatment of refugees shall clarify the functions and responsibilities of the different agencies as well as provide scope for appropriate cooperation among them.<sup>70</sup> This would further provide a national transparent protection regime by creating new institutions such as National Refugee Commission.

#### 6.6. Less friction between States

A national law on refugee protection will help to avoid friction between the host country and country of origin. The act of granting asylum being governed by law rather than an *ad hoc* policy will then be understood by other states as a peaceful, humanitarian and legal act under a judicial system rather than as a holistic political gesture.<sup>71</sup> This would protect Bangladesh from likelihood of charges indulging in unfriendly acts by the states of origin of the person/s concerned.

#### 7. Model national Law on Refugees

The paper has shown that refugee protection is based primarily on an *ad hoc* determination that varies based on bureaucratic whims and regional politics as well. Hence there is a necessity for more secure and guaranteed protection of refugees that will ensure the *non-refoulement* of a refugee who has fled his country due to a well-founded fear of persecution. This concern is not unique to Bangladesh but also applies to neighbouring nations in South Asia that have been unsuccessful in their attempts to come up with a satisfactory regime for refugee protection. Therefore, a need was felt for a flexible statutory regime common to the nations in South Asia, but which could be modified to suit each individual country's specific concerns. The UNHCR took the lead in setting up an Eminent Persons Group (EPG) to look into this problem and to suggest a model law for refugee protection. Although there have been technical and political misgivings about the Model Law, there is a degree of unanimity on its acceptance as a framework for future discussion on refugee protection.<sup>72</sup>

The purpose of the model law was to establish a procedure for granting refugee status to asylum seekers, to guarantee them fair treatment and to establish the requisite machinery for its implementation. It provides a comprehensive definition of the term refugee suiting the needs of the region and seeks to recognize a refugee as deserving of statutory

70. *ibid.*

71. *Ibid.*

72. *Supra* note 54, pp. 76-77.

recognition and protection. It incorporates 'ethnic identity' in its categorisation of people who would qualify to gain refugee status and in a note establishes that membership of a particular social group will also include gender-based persecution. The model law reaffirms the principle of *non-refoulement* and lays down rules for application of refugee status (Section 7) elaborating the methodology to be followed for individual refugee status determination (Section 9). It also provides for setting up an implementing agency (the 'Refugee Commissioner') and an appellate body (the 'Refugee Committee'). It takes an important step in actually outlining the rights and duties of refugee (Section 13) which provides that a refugee would be able to move freely within the territory of concerned state; refugees would have access to education, health and other related services, thereby ensuring socio-economic support and rights to which they are not presently admitted. An important safeguard for those who enter illegally has been provided and, in order to ensure the voluntary nature of repatriation, the model law makes it necessary that refugees express their wishes in writing or through other appropriate means. Considering the security concern, Section 5(b) provides that a refugee or asylum seeker found guilty of a crime against humanity, a crime against peace, a war crime, or who is certified by a Minister as a threat to concerned country, may be asked to leave that country.

## 8. Conclusion

Although humanitarian instinct have often provided a considerable degree of protection for refugees in Bangladesh, there are also critical gaps and constraints, many of which can be traced to the lack of national laws and institutions and also non-accession to international refugee instruments. The legal framework for refugees in Bangladesh should make an institutional structure in order to provide, firstly, legal protection of refugees, including a definition, procedure for determining refugee status, and a set of standards for treatment of refugees ("rights and duties"); secondly, a mechanism to resolve refugee problems in a manner which encourages international solidarity and cooperation while respecting refugee protection; and finally, a strategy to prevent problems from arising in the future. The ideal institutional framework should be a combination of international, regional and national approaches.

It cannot be denied that international instruments promote international solidarity and commitment to global humanitarian principles. So, the value of adhering to international obligations through accession to international instruments concerning refugees should not be ignored. The shortcomings of the 1951 Convention, discussed in this paper, do not negate the universality and the continued relevance of the refugee rights it contains. Equally, regional mechanisms are an important means of strengthening refugee protection as well as finding solutions to refugee problems. Since there is no national standard for caring for refugees in the South Asian region protection is left to the states. As a result, there are wide variations in refugee treatment, reflecting politics, personality and

economics. The regional legal regime for refugees shall allow harmonization of refugee policies and practices in the region and encourage regional cooperation to solve the refugee problems. This would clarify the respective responsibilities of the country of origin as well as of the country of asylum thereby increasing the prospects for solutions and burden sharing. Furthermore, regional consensus on how to deal with refugee problems can help to de-politicise the issue, thereby reducing tensions between states.

In corollary with the international and regional approaches, domestic laws are also essential for refugee protection since they are a means of implementing international obligations following a state's accession to international refugee instruments. Accession to 1951 Convention shall, as the paper argues, lead to the development of a normative framework, which shall make it possible to distinguish between real refugees who are fleeing serious abuses of human rights and people who are escaping from poverty or from the course of justice. It can also spell out the rights and obligations of refugees who have been admitted by governments either on individuals or on a group basis. Quite apart from that, the other advantage is that a national law allows each country to respond in a manner most suited to its own circumstances and concerns. Otherwise, it will not provide refugees the protection they need. The proposed model law on refugees for the SAARC countries can be a good source of inspiration in drafting such legislation. Adoption of model law with necessary modifications peculiar to the specific nature of refugee dynamics, of course, would not exclude from the agenda the question of accession to international refugee instruments and establishment of regional mechanism.