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REFUGEES IN ARMED CONFLICTS AND INTERNAL DISTURBANCES : PROTECTION AND ASSISTANCE

I. INTRODUCTION

The refugee problem has its roots in the earliest history of mankind. This century of the "homeless man" has witnessed the mass movements of millions of people who have fled their homes due to deprivation arising on account of race, religion, nationality, political or social opinion, etc. People often flee from their homes owing to fear of persecution and other inhumane treatment accounting to a gross violation of basic human rights. Armed conflicts, both internal and international, military or political conflicts, natural disasters, etc., bring in their wake a countless number of uprooted people desperately in search of new homes. The concern of states regarding refugee situations can be treated from both humanitarian as well as political perspectives. It is humanitarian because it reflects the dignity and value of human life and the fundamental rights to life, liberty and security. The asylee or the refugee has to lead an exiled life in isolation in a country where he is regarded little more than an alien. On the other hand, such exile can present problems of political nature, the avoidance of which is a major concern to states.

In this paper an attempt has been made to present a general analysis of the refugee situation and its protective machinery in

armed conflicts and internal disturbances. It also makes some positive recommendations aiming at improving the position of refugees with the help of international and municipal law.

II. THE CONCEPT OF REFUGEE

The concept of refugee is age old and even before the First World War people were found seeking sanctuary to avoid racial, religious or political persecution in their homeland. The basis on which refugee law developed was purely 'humanitarian' initially because refugees were originally protected under the religious concept that a sanctuary, as a sacred place, was barred to the secular authorities.¹ It was only in this century that the refugee problem advanced widely mainly because of the expansion of communications. The generations after 1918 and 1945 witnessed the massive influx of refugees when wars and many other military and political conflicts have brought in their wake a countless number of uprooted, including millions of refugees in search of new homes. Thus, ours is sometimes called the century of the uprooted.²

A refugee is commonly defined as a person who is obliged to flee his habitual place of residence and seek refuge elsewhere. The reasons dictating his flight may be varied : flight from oppression, persecution, threat to life and liberty, deprivation, poverty, war or civil strife; flight from the consequences of natural disasters, earthquake, flood, drought, famine, etc. Thus the reasons for flight

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1. Richardo C. Puno, "Basis and Rationale of International Refugee Law" *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons* (International Institute of Humanitarian Law, University of Philippines, Law Center) 1980, p. 69.
 2. Sadruddin Aga Khan, *Lecture*, United Nations High Commissioner for Refugees on Legal Problems Relating to Refugees and Displaced Persons, Hague Academy of International Law, 4-6 Aug. 1976, p. 1.

may be characterized as either natural disasters or 'man-made' disasters.³

In the legal sense, the use of the term "refugee" is confined to any person who flees his country due to man-made disasters, e.g. political reasons. It is in this sense that the Statute of the Office of UNHCR⁴ defines a refugee as any person "who is outside the country of his nationality, or if he has no nationality, the country of his former residence, because he has or had well founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable, or because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."⁵

There are three essential elements in the legal definition of the term "refugee" : (a) the person is outside the country of his nationality, or in the case of stateless persons, outside the country of habitual residence : (b) the person lacks natural protection; and (c) the person fears persecution.

Because of the second element, a refugee is a stateless person, either *de jure* or *de facto*.⁶ Having severed all contacts with his country which he has been compelled to leave because his life or liberty was in danger, a refugee no longer enjoyed the protection normally granted by a state to its nationals abroad. In the country of refuge he is an unprotected alien in the absence of the usual

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3. Guy S. Goodwin-Gili, *The Refugee in International Law*, Clarendon Press, Oxford, p. 1.
 4. Adopted by United Nations General Assembly of 14th December 1950 as Annex to Resolution 428 (v).
 5. Article 6 (B) Statute of the Office of the UNHCR.
 6. P. Weis, *Refugee and the Law*, Working paper submitted to the Abidjan World Conference on World Peace Through Law, 26-31 Aug., 1973, p. 2.

consular and diplomatic protection which aliens may claim from the state of its nationality. The need to provide a substitute for such protection is a fundamental element of the refugee concept⁷ and the difficulties faced by the refugee prompted the international community to assist this category of refugees. The need for international action on the refugee problem was first recognized after the First World War, when faced with a wave of Russian refugees, certain European countries found it necessary to introduce special legislation to overcome the problem created by lack of identity paper, travel documents, etc. which made it impossible for the refugees to perform the most elementary acts of civil life (e.g. marriage, contracts, etc). To prevent the recurrence of such problems on 27 June, 1921, the Council of the League of Nations decided to appoint a High Commissioner for Refugees mainly to assist the Russian refugees. The High Commissioner's mandate was extended in 1924 to Armenian refugees, and in 1928 to Assyrian, Assyro-Chaldean and Turkish refugees, and subsequently refugees from Germany and Austria. To complement the High Commissioner's assistance to refugees from Germany and Austria, an international conference in 1938 set up an Intergovernmental Committee on Refugees (IGCR) which mentions the causes of the flight of these persons who "must emigrate on account of their political opinions, religious beliefs or racial origin". In 1943 the Allied Powers created the United Nations Relief and Rehabilitation Administration (UNRRA) which assisted millions of refugees in Germany, Austria, Italy and certain areas of North Africa and Near East.⁸

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7. Gilbert Jaeger, *Status and International Protection of Refugee*, International Institute of Human Rights, Ninth study session, July 1978, p. 1.
 8. Jovica Patronogic and Mirlam Defensor Santiago, "Dissemination and Teaching of International Refugee Law", *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons* (Under the auspices of UNHCR), Philippines, 1980, International Institute of Humanitarian Law, University of the Philippines, Law Center, p. 50.

Historically, the refugee definition used in various instruments normally referred to ethnic or territorial origins of different uprooted groups and to their loss of national protection. The first formal reference to persecution as part of the refugee definition was made in the 1946 Constitution of the International Refugee Organization (IRO), a predecessor of UNHCR. This definition spelt out not only the reasons which make a person a refugee, but also associated those reasons with a "fear of persecution on reasonable grounds owing to race, religion, nationality or political opinions". IRO's constitution also made reference for the first time to "displaced persons" as well as refugees - a concept to be extensively applied to UNHCR's mandate quite a number of years later. The United Nations Declaration of Human Rights in 1948 similarly referred to everyone's right to seek asylum from 'persecution' and this concept was to continue to prevail in 1950 when the Statute of the UNHCR was drawn up. It was repeated in the 1951 Convention Relating to the Status of Refugees the applicaiton of which was limited to victims of persecution as a result of events occuring before January 1st 1951. However, this restriction was removed by the Protocol of 1967 for, as new groups of refugees emerged, this restriction became more and more discriminatory and unacceptable.⁹

The definition of the term "refugee" in UNHCR Statute and in the 1951 Convention contains certain restrictions designed to exclude persons who are not deemed worthy of the United Nations protection. Those specifically excluded are persons who enjoy the protection of their own countries or persons who are recognized by their country of residence as having the same rights

9. Denis McNamara, "Determination of the Status of Refugees : Evolution of the Definition" *Symposium on the Promotion, Dissemination and Teaching of Fundamental Human Rights of Refugees, Collected Proceedings*, Tokyo, 7-11 Dec. 1981, Published by the UNHCR, Division of International Protection, Geneva, Feb. 1981, p. 76.

and obligations as nationals of that country. Equally excluded are persons receiving assistance from other United Nations organs or agencies, e.g., the Palestine refugees who are the concern of the United Nations Relief and Work Agency for Palestine Refugees in the Near East (UNRWA).¹⁰ However the 1951 Convention and the 1967 Protocol are considered as the basic components of the present day international refugee law.

In 1969 the OAU Convention Governing the Special Aspects of Refugee Problems in Africa contended that : " 'Refugee' shall also apply to every person who, owing to extremal aggression, occupation, foreign dmination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".¹¹ It seems, though, that by this extension of the term 'refugee' only victims of man-made disasters are covered, leaving out victims of natural disasters. However the OAU Convention is a great step forward in the development of refugee law globally where a much larger group of persons are offered protection.

III. STATUS OF REFUGEES

The core elements in general international law define a refugee as a person outside his country, who is unable or unwilling to return there owing to justified fear of being persecuted on grounds of race, nationality or political opinion. A person fleeing from persecution faces insurmountable difficulties where friends are few and the world is indifferent. He is considered an alien on account of language, customs and laws.

10. Lectures by Sadruddin Aga Khan, *op. cit.* p. 6.

11. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, Article 1 (2).

The country of refuge is unable to deal with the problems presented by alien as her legislative and administrative machinery are ill-suited for special problems.

In the common law countries personal status is that of the country of domicile whereas in Europe or even Latin America individual status is governed by the country of nationality. The 1951 Convention provides that "the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence".

The next paragraph specifies, however, that "Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee".¹² Thus, the rule established in the interest of persons who have severed all relationship with the country of their actual or former nationality does not affect the rights previously acquired by them in the latter country.

When large numbers of people cross a frontier the facilities for determining the status of individuals simply do not exist. Moreover, there may be political or other constraints on providing anything less than an "Open-door" for all who seek to enter. If sympathy is felt for the persons concerned they are usually termed as "refugees" and if not, they may all be labelled "illegal immigrants". Although the determination of status under the 1951 Convention is the prerogative of the territorial state, the United Nations High Commissioner for Refugees has a responsibility to

12. Article 12 (1) (2), Convention Relating to the Status of Refugees, 1951, Geneva.

determine who are persons of concern to him. Even groups designated "illegal immigrants" by the receiving state may be of concern to the United Nations High Commissioner for Refugees.

Moreover, the international community has an interest in the status and well being of the persons requiring protection because the refugee is a person of concern to the international community.¹³ While states are conscious of the potential threat to their own security which a massive influx may pose, none can, however, claim to return a refugee to persecution. States may designate asylum seekers as "displaced persons" "stateless persons", "illegal immigrants", "aliens", "boat-people", "stowaways", etc., and thus, assert a greater freedom of action.¹⁴

The first reference "displaced persons" came in 1975 with a General Assembly resolution requesting the High Commissioner to continue his assistance to Indochinese "displaced persons". In 1976, the General Assembly resolution endorsed ECOSOC resolution 2011 of that year, in which UNHCR's assistance to "displaced persons", the victims of "man-made disasters requiring urgent humanitarian assistance" in addition to its aid to refugees was approved. By 1980 UNHCR's involvement with displaced persons became a part of its regular activities and millions of uprooted victims of external wars or civil strife were benefitted by the current activities of the UNHCR.¹⁵ Some distinction may be drawn between the term "refugee" and the term "displaced person". A person forced to flee abroad to avoid political persecution is more likely to require resettlement than a civilian who is simply escaping an armed conflict or a natural disaster.

13. G. J. L. Coles, *Problems Arising from large Numbers of Asylum Seekers : A Study of Protection Aspects*, International Institute of Humanitarian Law, 1981, pp. 13-14.

14. Guy. S. Goodwin-Gill, *op. cit.*, p. 19.

15. Denis McNamara, *op. cit.*, p. 77.

Once the conflict is over and normal living conditions prevail, he may return. On the other hand, the refugee is subject to a longer exile.

Any legal distinction between a "refugee" and a "displaced persons" should not, however, be carried too far as both persons suffer from a common element i.e., danger. The form of the danger may be different but its nature may be the same and a displaced person who flees his country on the basis of well-founded fear of danger to his life, physical integrity or liberty should enjoy the same humanitarian consideration applicable to a refugee.¹⁶

Statelessness and refugee status are by no means identical phenomena. A stateless person has been defined by Art 1 of 1954 Convention relating to the Status of Stateless Persons as "a person who is not considered as a national by any state under the operation of its law". Again two conditions are essential for the quality of a refugee : residence outside the country of nationality or former nationality and lack of diplomatic protection by any state. Where a person is deprived of diplomatic protection, it is immaterial for him whether he is stateless or still holds the nationality of the country from which he fled. So refugees may be stateless or not, Statelessness is a purely legal concept - it connotes lack of nationality. On the other hand, refugees are deprived of diplomatic protection by a state but they do not necessarily lack nationality. It is perhaps appropriate to speak of "unprotected persons" who may be classified as *de jure* unprotected persons, i.e., stateless persons and *de facto* unprotected persons, i.e., refugees. It should be understood that there are also *de jure* unprotected refugees, i.e., stateless.¹⁷

16. G. J. L. Coles. *op. cit.*, p. 17-18.

17. P. Weis, *Legal Aspects of the Convention of 28 July 1951 Relating to the status of Refugees*, Reprinted from the British Yearbook of International Law, 1953, p. 480.

It has often been questioned whether aircraft hijackers can claim refugee status. Even if hijacking is not regarded as a political act, the hijacker may have a well-founded fear of being persecuted in the country requesting his extradition. As far as the Office of the High Commissioner for Refugees is concerned, refugee status may be conferred on a hijacker when the purpose of the hijacking is to enable the person concerned to escape from a country where he fears persecution and from which he has no other means of escape.¹⁸

IV. ASYLUM AND NON-REFOULEMENT

Generally speaking, the term "asylum" is used to designate the protection which a state grants to a foreign citizen. A major weakness of traditional international law was its failure to recognize asylum as a human right. The adoption of the UN Charter however, paved the way for emphasizing the humanitarian aspect of asylum, treating it as a right of the individual and the corresponding duty of the state to grant it. But the traditional international law regards asylum as a right of the state to be granted at its discretion. The discussions on the Declaration on Territorial Asylum indicated that although there was some support for the view that asylum should be treated as a right of the individual the traditional conception that asylum was a sovereign right of the state continued to prevail.¹⁹ The Universal Declaration of Human Rights provides in Article 14 that everyone has the right to enjoy asylum from persecution. States, therefore, remain under no obligation to grant asylum to refugees in the sense of lasting protection. General Assembly resolutions have often maintained that the grant of asylum is a peaceful and humani-

18. Sadruddin Aha Khan, *op. cit.*, 7-8.

19. J. N. Saxena, "Asylum and Non-Refoulement", See *Round Table of Asian Experts on Current Problems in the International Protection of Refugees op. cit.*, pp. 17-18.

tarian act which is not to be taken as unfriendly by any other state. The state granting asylum is also under a duty to take reasonable care to ensure that its hospitality is not abused to the detriment of other states.²⁰ Article 4 of the 1969 Declaration of Territorial Asylum directs states not to permit people granted asylum to engage in activities contrary to the purposes and principles of the United Nations. The Preamble to the 1969 OAU Convention distinguishes between a refugee in search of an ordinary and peaceful life and one who flees solely for the purpose of fomenting subversion from outside. The latter's activities are not to be encouraged. Art. (i) of the OAU Convention proclaims that member states shall use their best endeavours to receive refugees and to secure the settlement of those who are unwilling or unable to return. In Latin America the 1954 Caracas Convention ensured the territorial state's sovereign right to grant asylum, the duty of other states to respect such asylum and the exemption from any obligation to surrender persons sought for political offences or persecuted for political reasons.²¹ The Convention provides that the "state granting asylum is not bound to settle him in its territory but it may not return him to his country of his origin unless this is the express wish of the asylee".²² The 1951 Convention contains no direct provisions on asylum yet Art. 31 grants protection to refugees entering illegally, but at the same time maintains that no refugee can expect, as a matter of right, to regularise his stay in the state of first refuge. In the Preamble to the 1951 Convention parties admit "that the grant of asylum may place unduly heavy burdens on certain countries."

The most essential component of refugee status and of asylum is the protection against repatriation or return to a country where a person has sufficient reasons to fear persecution. This protection

20. Guy S. Goodwingill, *op. cit.*, p. 225.

21. Arts. 1-4, Caracas Convention on Territorial Asylum, 1954.

22. Art. 17., *Ibid.*

has found expression in the principle of non - refoulement which constitutes the very basis of the institution of asylum. However, non-refoulement is not equivalent of granting of asylum. The person concerned might have to move on to another country and even if he was allowed to stay in the territory of the state which did not return him, he would not necessarily enjoy the benefits accorded to an asylee. Article 33 (1) of the 1951 Convention on the Status of Refugees declares, "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion."

In other words, there may be "no return, no expulsion" to the country where the refugee's life or liberty is threatened due to specific circumstances. The state may expel him to any country where the refugee shall not come to any harm, but in practice such state may find it extremely difficult to expel such asylum seekers specially in mass-influx situations.

Thus, the principle of non-refoulment logically imparts an obligation to permit entry to asylum seekers at least for the purpose of granting temporary refuge pending a decision by the sovereign concerned to grant or withhold asylum and pending an effective opportunity to seek durable asylum elsewhere. To put it somewhat differently, the asylum seekers are protected by the rule of non-refoulement although they may have entered in violation of the immigration law and admission of aliens.²³

The principle of non-refoulement has been reiterated in almost all recommendations of the UN General Assembly

23. Florentino P. Feliciano, "Non-Refoulement : Some Reflection on the Content, Function, and Status of the Principle and Rule," *Collected Proceedings, Symposium on the Promotion, Dissemination, Teaching of Fundamental Human Rights of Refugees, Tokyo 1981*, UNHCR Geneva 1982, p. 20-21.

regarding refugees.²⁴ The Conference relating to the Status of Stateless Persons of 28 September 1954 approves the principle of non-refoulement contained in Article 33 of the 1951 Convention. The UN Declaration on Territorial Asylum states in Art. 3 (1) that "No person referred to in Art. 1 para 1 shall be subjected to measures such as rejection at the frontier or if he has already entered territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution."

In other words, non-refoulement could be availed of not only by the asylee if within the territory but also by those requesting asylum at the border of the state. However, the principle of non-refoulement is subject to two very wide exceptions, i.e., in the case of overriding reasons of national security or in order to safeguard the population.

There is enough evidence to indicate that regional organisations have made notable provisions for asylum and non-refoulement in various conventions, e.g.,

- (i) The Convention on Territorial Asylum adopted at Caracas on 28th March 1954, Art. 3;
- (ii) The American Human Rights Convention adopted in November, 1969, Art. 22 (8);
- (iii) Resolution on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe, 29th September, 1967;
- (iv) The Asian African Legal Consultative Committee at its sessions in Cairo (1964), in Baghdad (1965) and in Bangkok

24. See, General Assembly Resolutions 8 (i) of 12 Feb. 1946, 62 (i) of 15 Dec, 1946 resolution 423 (V).

(1966), specially Art. III relating to granting of asylum to a refugee; and

- (v) The OAU Convention Governing Specific Aspects of the Problem of Refugees in Africa, Art. II (3), 1969.²⁵

Article II (5) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa states that "where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangements for his resettlement."

The adoption of the concept "temporary refuge" in the context of admission and non-refoulement was a very significant development. The proper function of temporary refuge is to facilitate admission and obtain satisfactory solutions. In certain large scale influx situations where a state receives millions of people, it may face difficulties in accommodating them and providing adequate food, their accommodation is of a temporary nature and they are held at the threshold of the community in order to maintain law and order within the receiving state. Naturally, the country of refuge becomes concerned about their early return and resettlement particularly where the influx continues. It is in such cases that the grant of temporary refuge facilitates admission and continuous presence in the country of refuge. It also acts as an indication to the international community that the country of refuge would welcome satisfactory durable solutions.²⁶

25. J. N. Saxena *op. cit.* p. 22.

26. H. J. L. Coles, *Temporary Refugee and the Large-Scale Influx of Refugees*, Paper submitted as a working paper for the Expert Group on Temporary Refugee in Situations of Large Scale Influx, Geneva, April 21-24, 1981, pp. 3-4.

V. INTERNATIONAL SOLIDARITY AND BURDEN SHARING

International solidarity and co-operation in dealing with large scale influx of refugees is of great significance in the development of the international protection system. International solidarity relates to all aspects of the refugee problem including security and well being of refugees, defence of their rights, political and moral support to states in protecting refugees, search for durable solutions, etc. The country of refuge may be in grave difficulties in handling the entire burden of the refugee single-handedly. It may need emergency assistance and support of others in finding a lasting solution to the problem.

The initial outlook of international action in favour of refugees tended to be individualistic where there was an inclination on the part of the state to regard refugee problem as the primary responsibility of the receiving state. Present attitude, though improved, still seems in practice to be very selective. For example, massive aid has been provided for the refugees in South East Asia (though support did not come from all quarters), but until recently international concern for refugee situations in Africa has not been proportionate to the size of the refugee problem there.²⁷ The individualistic approach is quite evident in the 1951 Convention relating to the Status of Refugees where there is no specific provision on international solidarity and cooperation except for a preambular paragraph stating, "considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognised the international scope and nature cannot, therefore, be achieved without international cooperation."

27. See, *Asian Working Group on the International Protection of Refugees and Displaced Persons (Background Paper)*, Prepared by G. J. L. Coles, 1980, pp. 152-153.

The deficiency was remedied when both the Carnegie draft Convention and the consolidated text of articles prepared by the 1975 United Nations Group of Experts contained a common article 5 on international solidarity. The Carnegie draft Convention stated that : "when in the case of a sudden or mass influx, or for other compelling reasons, a state experiences difficulties in granting or continuing to grant the benefits of this Convention, other Contracting states, in a spirit of international solidarity, shall take appropriate measures as individuals, jointly, or through the United Nations or other international bodies, to share equitably the burden of that state."

A similar provision appears in the 1967 Declaration on Territorial Asylum in which article 2 (2) provides, "Where a state finds difficulties in granting or continuing to grant asylum, states, individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden of that state."

Article II (4) of the 1969 OAU Convention, however, contains a more forthright provision. It states, "where a member state finds difficulty in continuing to grant asylum to refugees, such member state may appeal directly to other member states and through the OAU, and such other members states shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the member state granting asylum."

A somewhat weaker formulation is found in Principle 4 of Resolution 14 (1967) on Asylum to Persons in Danger of Persecution adopted by the Committee of Ministers of the Council of Europe where it states, "where difficulties arise for a member state in consequence of its action in accordance with the above recommendations, governments of other member states should, in a spirit of European solidarity and of common responsibility in this field, consider individually, or in cooperation, appropriate measures in order to overcome such difficulties."

The principle of burden sharing implies that the international community will make every effort to relieve the burden placed on the state granting refuge. The sharing of responsibility whether through international funds or resettlement opportunities in their countries cannot be severed from the concept of regional responsibility and solidarity. The principle of burden-sharing should not be regarded as a precondition to the observance of basic humanitarian principles.²⁸ Solidarity in dealing with refugee influx is not only a humanitarian obligation but a requirement of self interest, because failure to provide adequate assistance may directly affect other states. Problems can only be minimised or avoided if solidarity is expressed promptly and effectively. Narrow political considerations should be discarded because playing politics with human beings is not only cruel but short-sighted and such attitude almost always imports more misery.

The modalities of burden-sharing may vary in accordance with political, economic and social conditions. Among the factors involved, perhaps peace and development may be the most important because when peace is disrupted, situations for massive influx of refugees are created. On the other hand, restoration of peace is usually the most essential pre-conditions for promoting relief activities and durable solutions of the crises.²⁹

28. P. M. Moussalli, "Fundamental Principles in the International Protection of Refugees and Displaced Persons : The Role of UNHCR," See, *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons (UNHCR)*, Philippines, 1980, International Institute of Humanitarian Law, University of Philippines, Law Center, p. 14.

29. Ohtori Kurino, "Concept of Burden Sharing", See the *Collected Proceedings of the Symposium on the Promotion, Dissemination and Teaching of Fundamental Human Rights of Refugees*, Tokyo, 7-11, Dec. 1981, Published by UNHCR, Geneva February 1982, p. 59.

VI. PROTECTION OF REFUGEES IN INTERNATIONAL LAW

International protection is granted to refugees for reasons of humanity because there is an undeniable link between mass exodusés and the violation of human rights. The founding fathers of international law - Grotius, Suarez and Wolff regarded asylum as a natural right of the individual and corresponding duty of the state. They were of the opinion that the states which granted asylum were acting on behalf of the *civitas maxima* on the community of the states.³⁰

Analysis of the international protection system cannot be made without examining the causes of the present mass flows. The obvious causes of mass exodusés are violations of basic civil and political rights, but violations of economic, social and cultural rights have contributed significantly to the problem. Violation of basic rights may be seen both at the international and the domestic level. Sufferings of victims of natural disasters or man-made disasters, such as riots and internal strife, always arouse a special compassion. Deprived of the protection and support of their community such persons are forced to seek external support.

The concept of international protection first materialized after the First World War and in 1930 international protection made its official entry into international affairs when the Assembly of League of Nations directed its competent bodies to ensure the legal and political protection of refugees. This attitude culminated in the creation of the Office of United Nations High Commissioner for Refugees (UNHCR) on 1 January 1951 followed by the Convention Relating to the Status of Refugees of 28 July 1951. Between two World Wars however, a series of

30. Richardo C. Puno, "Basic Rationale of International Refugee Law", See, *Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, op. cit.*, p. 70.

international instruments relating to refugees were adopted. On 12 February, 1946 the United Nations General Assembly in Resolution 8 (1) laid down the principle that the refugee problem "is international in scope and nature." This principle is confirmed in the Preamble to the Refugee Convention which states ". that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem, of which the United Nations has recognised the international scope and nature, cannot therefore be achieved without international cooperation".³¹

The rationale for the international protection of refugees is the deprivation of national protection. Refugees, being aliens, are subject to unwitting discrimination, at times international, leading to destitution. Thus, in the absence of the protection usually offered by the state to its nationals, international protection of refugees is found in the Statute of the Office of the UNHCR and in the Refugee Convention. Article 1 of the Statute states that the UNHCR "shall assume the function of providing international protection under the auspices of the United Nations to refugees who fall within the scope of the present Statute." and Article 8 reads "the High Commissioner shall provide for the protection of refugees falling under the competence of his Office by undertaking the functions and activities enumerated thereunder." Article 35 of the Refugee Convention provides that "The Contracting States undertake to cooperate with the Office of the UNHCR, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of this Convention and to provide them in the appropriate form with information and statistical data requested concerning : (a) the conditions of refugees, (b) implementation of this Convention and (c) laws, regulations and decrees which are or may hereafter, be in force relating to refugees."

31. *Ibid*, p. 70.

The Office of the UNHCR and the 1951 Convention Relating to the Status of Refugees relate primarily to humanitarian function. It is, therefore, obvious that the international community should consider situations involving large scale influx of refugees from every relevant perspective. Some of the universal treaties relating to refugees that are available are :

- (a) the 1951 Convention relating to the Status of Refugees;
- (b) the 1967 Protocol relating to the Status of the Refugees;
- (c) the 1957 Hague Agreement relating to Refugee Seamen;
and
- (d) 1973 Protocol to the 1957 Hague Agreement.

In addition, other universal treaties relevant to the status of refugees include :

- (i) the 1954 Convention relating to the Status of Stateless Persons;
- (ii) the 1961 Convention on the Reduction of Statelessness;
- (iii) the 1961 Geneva Convention relating to the Protection of Civilian Persons in Time of War, and
- (iv) the 1977 Protocol Additional to the 1949 Geneva Convention relating to the Victims of Internal Armed Conflicts.

International instruments on human rights are also relevant :

- (a) Universal Declaration of Human Rights, 1948;
- (b) International Covenants on Civil and Political Rights, 1966;

- (c) International Covenant on Economic, Social and Cultural Rights, 1966;
- (d) Final Act of the International Conference on Human Rights (Proclamation of Tehran), 1968;
- (e) International Convention on the Elimination of All Forms of Racial Discrimination 1965; and
- (f) Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity 1968, etc.

VII. INTERNATIONAL PROTECTION OF REFUGEES

One of the features of the post-war period in the area of the development of international law is the importance attached to the protection of human rights. The Charter of United Nations regards the protection of human rights as one of the principal duties of the Organisation. The entry into force of the International Covenants on Human Rights (1966) is of great significance for the reinforcement of the international protection of refugees. Protection of refugees is also an important feature in the International Humanitarian Law applicable in armed conflicts. During the Diplomatic Conference of 1949 which adopted the four Geneva Conventions on the protection of war victims the delegates also discussed the problems of refugee protection. It may be noted that various belligerent states made allowances for refugees living in the territories of the belligerents by introducing laws exempting them from measures taken against enemy aliens.

The Fourth Geneva Convention of 1949

Article 44 of the Fourth Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War provides : "In applying the measures of control mentioned in the present

convention the detaining power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy state, refugees who do not in fact enjoy the protection of any government".

This provision applies to a person, a national of an enemy state, who is without diplomatic protection either because he has severed relations with his country's government or because he does not wish to claim its protection. Since a refugee is technically an enemy alien being devoid of assistance of a protecting power, he occupies a special position. Article 44 reduces the difficulties of the refugee by imposing an obligation on the detaining power not to treat the refugee as an enemy alien who may very well be a "friendly enemy". On the other hand, article 44 does not exempt refugees absolutely from security measures such as internment. The status of refugee does not itself guarantee immunity.³²

Article 70 para 2 provides, "Nationals of the occupying power who before the outbreak of hostilities have sought refuge in the territory of the occupied state, shall not be arrested, prosecuted, convicted or deported from the occupied territory except for offences committed after the outbreak of hostilities which according to the law of the occupied state, would have justified extradition in time of peace." This paragraph deals with the protection of persons who escaped from their country before the outbreak of hostilities and found refuge or asylum in the occupied country.

A tragic consequence of armed conflicts and war is that a large number of people are forced to leave their homes to find themselves dispersed in different countries. The International

32. See J. Patrignic, *International Protection of Refugees in Armed Conflicts*, Reprinted by UNHCR Protection Division from *Annales De Droit International Medical*, (July 1981).

Committee of Red Cross (ICRC) through its Central Prisoners of War Agency contributed greatly in establishing contacts between people separated from their families. Article 26 of the fourth Geneva Convention 1949 which is concerned with the reunion of dispersed persons with their families provides, "Each party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage in particular the work of organisations engaged in this task provided they are acceptable to it and conform to its security regulation."

The main aim of article 26 is to safeguard family unity and to facilitate the re-establishment of contacts between members of a family group. The exchange of news appears often as a phase which precedes the re-establishment of family ties.³³ However, no specific provision regarding reunion of dispersed families appears in the Convention.

Protocol Additional to the Geneva Conventions

During the discussion regarding the formulation of Additional Protocols to the Geneva Conventions on 12 August, 1949, the Representative of U.N. Secretary General expressed the hope that the Conference would consider the insertion of a draft article stipulating that refugees and stateless persons would be considered as "protected persons" under the provisions of Article 4 of the Fourth Geneva Convention 1949. The Conference eventually adopted as Article 73 of Protocol I : "Persons who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refugee or state of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction".

33. *Ibid.*

Parts I and III of the fourth Geneva Convention safeguard the protection of civilian persons and the acknowledgement of refugees and stateless persons which means that they should benefit from the protection provided in the same.

This entails the involvement of the ICRC and the UNHCR in concrete humanitarian actions relating to the protection of refugees in armed conflicts.³⁴ As for reunification of dispersed families, Article 74, Protocol I provides, "The High Contracting Parties and the Parties to the Conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organization engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective regulations." For the first time a specific provision regarding the reunion of dispersed families was thus introduced in an International Convention.

Role of UNHCR

The principle organ today which caters to the needs of the refugees in different parts of the world is the Office of the United Nations High Commissioner for Refugees. The foremost function of UNHCR is to extend international protection to refugees (Para 1, UNHCR Statute) and in discharging this function the High Commissioner shall have to be strictly non-political (Para 2, UNHCR Statute).

UNHCR's functions may be broadly classified into :

- (i) Promotion of grant of asylum;
- (ii) Reunion families;
- (iii) Application of the doctrine of non-refoulement;

34. *Ibid.*

- (iv) Maintenance and material assistance;
- (v) Voluntary repatriation;
- (vi) Assimilation or resettlement;
- (vii) Supervision;
- (viii) Coordination; and
- (ix) Public relations.

UNHCR has contributed significantly in persuading states to grant initial asylum to persons fleeing from neighbouring states for fear of persecution or other inhumane deprivations. Article 8 (d) of the UNHCR Statute empowers UNHCR to promote admission of refugees to the territories of states. UNHCR has seen to it that no person is returned to the original state and has taken measures to reunite dispersed families. In discharging its functions, UNHCR is required to treat the refugees according to internationally accepted standards.³⁵ The Office of the UNHCR which was awarded the Nobel Prize for Peace in 1981, has awakened the world consciousness to the plight of refugees, which has now become the focal point of international care and compassion. It is not for UNHCR to impose standards or provide solutions. Its role is promotional and essentially catalytic in helping states deal with refugee problems properly and humanely.

Refugees in Internal Legislation of States

The International treatment of the refugee problem should not make one forget that the refugee lives under the same rules that apply to him in the same manner as they apply to the rest of the members of the national community. Having entered the country in an irregular manner his normal status is that of an alien, who is

35. R. C. Hingorani, "International Institutions and the Protection of Refugees, *Collected Proceedings, Symposium on the Promotions, Dissemination and Teaching of Fundamental Human Rights of Refugees*, Tokyo, Dec. 7-11, Published by UNHCR, Geneva, 1982, pp.35-36.

immediately confronted by the authorities of the country of reception to whom he is required to prove his refugee status. Absence of necessary papers presented a major problem in the exercise of the most common fundamental rights and after the First World War certain governments took the initiative of introducing special procedures to handle the special situations of refugees. These procedures gradually developed, sometimes at the initiative of the concerned states and sometimes it originated in a Convention or an international custom to which countries wished to adhere. In countries having Anglo-Saxon Legal System, international treaties have no automatic legal place in municipal law and unless they are specifically incorporated in national legislation, they remain largely ineffective. Even in countries applying international treaties in national laws, considerable difficulties arise when municipal laws are not brought into conformity with the provisions of the relevant international treaty.³⁶ One of the basic efforts on the part of the UNHCR is to try to enforce such instruments on the territory of the Contracting States.

An important aspect of international solidarity is regional solidarity which is an important factor in the protection of refugees in recent refugee situations. The ASEAN countries together sought solutions for refugee situations which resulted in burden-sharing and whole-hearted co-operation.

For example, Indonesia and the Philippines offered regional processing centres in their domestic territories which would receive Indo-Chinese refugees from other ASEAN countries who had received guarantees of resettlement elsewhere. Regional solidarity is also expressed by religious or ideological affinities. For example, Islamic Solidarity has been expressed in many ways

36. Gilbert Jaeger, *Status and International Protection of Refugees*, International Institute of Human Rights, 9th study session, July 1978, p. 31.

in refugee situation as far apart as Pakistan and Malaysia. Malaysia which was unwilling to provide permanent residence to any Vietnamese because of the delicate ethnic situation prevailing in Malaysia, was able to accept and accomodate quite a large number of Muslim refugees from the Philippines and Kampuchea. Similarly Western or Christian solidarity has a long history since the early days of the League of Nations.³⁷

Many states have accepted the fact that refugees deserve protection and assistance. The grant of asylum is itself a protective measure which is expressly acknowledged in the constitutions of some states. Ratification of the 1951 Convention and the 1967 Protocol may directly influence local laws followed by the enactment of specific refugee legislation and adoption of adequate administrative procedures. However, legislative incorporation may not be expressly demanded but effective implementation requires some form of procedure whereby refugees may be identified and protected against expulsion. In Australia neither the 1951 Convention nor the 1967 Protocol has been expressly incorporated in its municipal law and the reugee is dealt by the discretionary powers of the Migration Act of 1958, as amended. France determines refugee status by following the Preambular provision of the 1958 Constitution which includes a statement on the principle of asylum and a series of laws and administrative decrees. In the United Kingdom the entry, residence and removal of foreigners are controlled by the Immigratoin Act of 1971 which does acknowledge a class of persons who should be accepted and not deported on account of a well-founded fear of persecution. As for the United States legislation it expressly incorporates the refugee definition of the Convention and Protocol.³⁸ Countries which have no domestic

37. G. J. L. Coles, "International Protection of Refugees and Displaced Persons" (Background Paper), Asian Working Group 1980, p. 156-157.

38. Guy S. Goodwin-Gill, *op. cit.*, p. 167, 173, 182, 185.

legislation to implement the Convention have nonetheless accepted refugees, e.g., Burundi, Cameroon, Nigeria and Sudan had more than one million refugees in their populations in 1981, Pakistan hosts a substantial bulk of Afghan refugees while Thailand shelters refugees from Kampuchea, Laos and Vietnam. Palestinian refugees are scattered in Lebanon, Jordan, Syria and the Gaza Strip.³⁹ Once permitted to reside permanently in the receiving state, the refugee becomes subject to the law of that country and as such enjoys the guarantees given to all persons under its jurisdiction. The protection afforded by internal legislation is vital because international protection can function as a supplement to the protection accorded by internal institutions.

VIII. CONCLUSION

The refugee problem has presented the international community with formidable challenges. Human behaviour is bound to be affected directly by certain events which in their turn are likely to have certain broad consequences. Such problems must be solved at every level by humanitarian methods. In order to maintain a humanitarian outlook, there has to be a general respect for human rights. Communities are increasingly unwilling to accept cruel or inhuman methods of solving their problems. The humanitarian nature of those problems means that the international community has to develop its co-operation to resolve them.

The law relating to the refugee problem therefore, must be more than just a bundle of rules relating to the status and protection of refugees because this problem not only concerns

39. David Carliner, "Domestic and International Protection of Refugees", See, *Guide to International Human Right Practice*, edited by Hurst Hannum, for the International Human Rights law Group, University of Pennsylvania Press, Philadelphia, 1986, p. 258-259.

individuals in their relations with states but also states in their relations with one another. It relates not only to the physical safety of the refugees but also to the security of the states. People in genuine distress must not be turned away at land or maritime borders nor must they be sent to territories where they may have to face intolerable misery or persecution. They should be treated in a manner which befits their status as human beings. Solution of the refugee problem would be greatly facilitated if the basic principles of international refugee law could be included in national legislations and official regulation not only in the states which are parties to the refugee Convention but also in other countries.

The challenge before the international community is to develop international solidarity in humanitarian action through active and sincere co-operation for promotion of justice, peace and the development of the peoples. Though international solidarity cannot be made a precondition for compliance with basic humanitarian principles without such solidarity the prospect of many millions of people in the future, and for the world as a whole, is bleak. In terms of the modern problems in different parts of the world, the 1951 Convention relating to the Status of Refugees is only of limited applicability. Though it is the only universal instrument available it does not contain adequate provisions on administration, refugee status, asylum, international solidarity in burden sharing, etc. The vacuum created by the 1951 Convention relating to the Status of Refugees may be minimized to some extent by general practice of states and by the extension of general principle of law to the refugee situation. Regional action, of which the OAU Convention 1969 is a prime example, has an important part to play in the protection of refugees. States which are not parties to the Refugee Convention or any international instrument concerning refugees are bound by customary international law to provide minimum standards of treatment respecting fundamental human rights of the refugee and

this is usually found in national legislations. States should be engaged in a global discussion for the effective solution of the refugee problems. Recent events, however, show that refugee problems can no longer be confined within regions because lately it is seen that the refugee situation extends beyond the regional dimension to encompass the entire international community. If global efforts are not made, then a serious imbalance will develop that will make it difficult to find a satisfactory system of international management and control of refugee problems at the global level. The Asian contribution to global consideration of the refugee situation has been quite negligible. There is however, a growing awareness that the primary need in the modern world is for global solidarity in order to deal with problems of large scale refugee influx.

States have to be aware of the origins of the refugee as well as the consequences. States shall run a greater risk if the exodus of refugee attains unmanageable proportions. More international attention may be given to the possibility of eventual voluntary repatriation as a remedial response to the problems of mass exodus. Though there is no express provision for the dissemination and teaching of international refugee law, these activities are essential for the effective functioning of the legal protective system. The observance of the rights of the refugees depends upon the general social consciousness of the refugee problems and the effectiveness of the law when human rights of refugees are researched, documented and publicized. The need to strengthen international efforts in the defence and promotion of the fundamental rights of refugees is stronger today than ever before. While human rights may be traced in the UN Charter which ensures protection of the human rights as one of its cardinal principles, Art. 14 (i) of the Universal Declaration of Human Rights, 1948 is more emphatic when it states that "everyone has the right to seek and enjoy asylum from persecution." There is a linkage between the protection of human rights of refugees on

the one hand and international peace and security on the other. If nations could be made to respect these rights then that would spell considerable achievement for mankind.

At a time when the world is torn by armed conflicts, wars and hostilities human misery has increased manifold. Recent situations in the Gulf have further added to the already mammoth problems existing in the international arena. The refugee problem threatens to grow to monstrous proportions where maintenance of national and international peace and security would be almost impossible. In a world where peace is an elusive phenomenon, solutions to such problems seem to be equally elusive. Unless there is a world-wide co-operation and respect for the ideals for which each state stands there can be no lasting cure to human despair and men will continue to be the victims of inhuman conduct and cruel persecution. A satisfactory approach to the refugee problems requires states to deal with the protection and assistance aspects since they both relate to the well-being of the refugees. Where a man has no home, life, liberty and property become meaningless. To safeguard a man's right to enjoy the freedom of his home legal responses are necessary where such rights and obligations of states may be determined in relation to the refugees, other states and the entire international community. The gap between theory and practice must be removed for the effective implementation of the protective systems available to grapple with the refugee problems. Nations should join hands in making this world a better place to live in for generations to come. The humanitarian nature of the refugee situation requires expression of international solidarity by material assistance coupled with the adoption of fundamental principles in practice for the effective solution of the refugee problem.