INTERNATIONAL REFUGEE LAW: A CRITICAL REVIEW

M. Shah Alam*

INTRODUCTION

The words of Senator Edward Kennedy of the United States Senate have been often quoted by the authors of refugee related writings to vividly underline the importance of this grave international problem. There words are worth repeating

> There are few human dramas more compelling, or more revealing of the troubled times in which we live in, than the plight of millions of refugees around the globe. And there are few greater tests of the democratic and humanitarian ideals for which we stand than how we respond to the needs of the world's homeless.[1]

Staggering number of people languishing in numerous refugee camps around the world; miserable life they live in these camps; circumstances of their flight to seek refuge; and, above all, the very sources of threats which compel them to flee from their own countries; point to a universal human tragedy which humanity must endeavour to stop. This tragedy is not only limited to those who are compelled to cross international borders, but it also concerns the internally displaced. What is more appalling is that the magnitude of the problem is constantly on the rise.

While national and international responses to the needs of the millions of refugees have never been discouraging, they are insufficient and oftentimes constrained by factors which inhibit appropriate response to the ever increasing challenge of protection and rehabilitation of the refugees. Mankind's conscience and concern as reflected in humanitarian activities undertaken by so many national and international organisations as well as by the states to face this challenge are the fundamental bed-rocks on which must be built the edifice of laws and institutions to fight these ills of our time. The humanitarian actions must also be firmly inscribed in a broader context of political initiatives to promote peace, human rights and development. The subject of refugees and displaced people is high on the list of international

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* M. Shah Alam, LL.M. and Ph.D. Patrice Lumumba University, Mosow, is a Professor and Dean of Faculty of Law, Chittagong University, Chittagong.

1 Senator Kennedy, E., "Introduction" in US Committee for Refugees, 1980 World Refugee Survey , New York, 1980, p. 5.

concerns to-day not only because of its humanitarian significance, but also because of its impact on international peace, security and stability. The world cannot reach a new order without effectively addressing the problem of human displacement.[2]

Mere political goodwill and humanitarian actions are insufficient to cope with the problem of human displacement; appropriate normative order and institutional net-work on an international plane are also necessary. Unfortunately, the problems of refugees have grossly outgrown the norms of law that exist to regulate them. At the same time, whatever norms the international community has been able to create do not apply to the internally displace people although international community can not and does not remain indifferent to their plight. The United Nations High Commissioner for Refugees has often paid its attention to and mobilised its limited resources for these people.

Norms of refugee law apply to those who have been compelled for reasons of fear of persecution to cross international borders or who having crossed borders under normal circumstances are not able to return to their homes for reasons of their security. The whole body of refugee specific laws center around principally two objective:

(1) non-refoulement i.e. not to refuse entry the territory of a country to the people fleeing from imminent danger from the country of their origins; and

(2) protection of their lives in the country of refuge.

Both these objectives are related to age-old institution of asylum under international law. Grant of asylum implies that the entry and protection of the persons seeking asylum is guaranteed by the asylum state, until the time he can go back to his own country. Law of asylum has evolved over the years to provide security and protection to the individuals whose lives are at danger in their own countries. This law points to one of the most humanistic features of international law.

Characteristically, problems of refugees are basically the problem of grant of asylum to the people who have a fear of being persecuted in their own countries. But the harrowing dimensions of the problems of refugees in recent years have rendered the institution of asylum virtually inoperative in the cases of massive refugee influx. The problem is that states are understandably reluctant to provide asylum regime to those who pour into their territories as refugees in large numbers. It is, therefore, neither possible nor desirable that norms and principles of international refugee law develop in the same way as those of the law of asylum, although the core problem of the two sets of laws is the same. Emerging principles of refugee law, therefore, mainly emphasise

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2 Ogata, S., The State of the World's Refugees, UNHCR, 1993, p. iii.

(i) Non-refoulement, (ii) temporary protection of the refugees in the country of refugee and (iii) obligation of the international community to rehabilitate the refugees in their own countries or any other country or countries.

If the country of refuge is willing to accord asylum to any or many of the refugees with all the rights and obligations accruing therefrom, it can only be characterised as the most ideal variant. The term asylum as a legal category signifies certain rights and obligations of both the asylum state and the person who has been granted asylum. It may also mean providing mere shelter to an alien for a very temporary period, reserving the right for the asylum state to expel him any moment. In common parlance of international law and relations, the term asylum is used more as a matter of degree than of a kind. Be that as is may, asylum indicates a particular attitude of the asylum state towards the asylum seekers.[3] In general, all aliens finding themselves in a foreign country en masse or in unison, whose entry into that country was dictated by the fear of persecution in the home country and was not formalised under usual visa and passport regime maybe held to be asylum seekers until they are expelled they may be said to be enjoying some sort of asylum in the country where they have taken refuge. Before various aspects of legal regulation of the problems of refugees in their modern ramifications are investigated, the concept of asylum under international law needs an appraisal.

ASYLUM UNDER INTERNATIONAL LAW

In ordinary sense, asylum means providing shelter to an alien in the territory of a state which will also imply permitting him to enter the territory, if he has not already entered. A man who qualifies for asylum is a man who has a reasonable fear of being persecuted in his own country.

Under international law, asylum has two fundamental aspects: (i) every state has a right to grand asylum to an alien, and (ii) every person who has a well-founded fear of being persecuted in his own country for reasons of race, religion, ethnicity, political opinion or membership of a social group has a right to seek asylum in other countries. This later right is becoming more and more entrenched in positive international law under universal movement for human rights.[4] On the other hand, right of a state to grant asylum to a person for above reasons is recognised under customary norms of international law. Asylum state can unquestionably grant asylum to a person in its own territory — the so called territorial asylum. But their are instances of granting asylum in the embassy, consulate, premises of the international organisations, war or

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3 Hyndman, P., "Developing International Refugee Law in the Asian Pacific Region: some Issues and Prognoses", 1 (1993) Asian Year Book of International Law, p.28.

4 Tunkin, G. I., International Law, Moscow, 1986, at p.350.

merchant vessels — the so called extra-territorial or diplomatic asylum which is not universally recognised. The right to grant territorial asylum to a person is the manifestation of sovereignty of the asylum state which it exercises as its discretion.

To grant asylum is not a passive act. Its objective is not limited only to permitting entry of a person to the territory of a state. Grant of asylum creates certain obligations for the asylum state which it must fulfill towards the person who has been granted asylum, i. e., to protect him from any internal or external source of threat to him life and property; not to send him to any country where his security might be at stake; and to provide him assistance in procuring food and accommodation.

The right of a state to grant asylum is a legal right; the right of a person to asylum is not a legal right as yet,[5] although it is recognised in many international documents including Universal Declaration of Human Rights. The right to asylum is steadily growing to become a universally accepted norm of basic human right. In fact, democratic states provide asylum to persons who genuinely need it. The constitutions of France and Italy recognise right of a person to asylum.[6]

While there is no mandatory international norm on the right of a person to asylum, the Declaration of the UN General Assembly of 1967 on Territorial Asylum has called upon the states to perform certain obligations towards asylum seekers. It has been stated in the Declaration that it is not desirable that a person running away from persecution be refused entry into the territory of another state or if the person concerned has already entered the territory, be expelled therefrom. The Declaration, however, states that asylum may not be extended for reasons of national security or in case of excessive numbers seeking asylum which pose a threat to the local population. In such cases, the Declaration has called upon the states to provide temporary refuge or to assist the asylum seekers in moving to any third country.[7] If it is difficult for any particular state to provide or to continue to provide shelter to a large body of refugees, other states ought to come to its assistance.[8]

Civil wars, genocide or gross repression of national minorities or groups, policy of ethnic cleansing, religious or national elimination pursued by any state, which have unfortunately become rather frequent in the contemporary world, have adduced complexities to the problems of asylum. Sudden influx of refugees to the neighbouring countries has become a common phenomenon.

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5 Starke, J. G., Introduction to International Law, 10th edition, New Delhi, 1994, at p.359.

6 *Ibid.*

7 The Declaration of the UN Gen. Assembly of 1967 on Territorial Asylum, Art. 3.

8 *Ibid.*, Art. 2.

Totally grotesque dimension that to-day's refugee problems have acquired is exerting tremendous pressures on the institution of asylum.

Asylum has so far dealt with singular or small groups of individuals who have been under threat of persecution for various reasons at home, or at best as a special and emergency measure, with the displaced people after the Second World War. But to-day the refugee problems have become so perennial as to retard the normal growth of asylum law. The crux of the problem is that unless the refugees, huge in number as they are, can be returned to and rehabilitated in their own countries, their permanent solution is not possible only by the grant of temporary territorial asylum. The sheer number prevents the asylum states from applying their own laws to the people for whom they have been enacted. It is, therefore, imperative to look for alternative means and regulations which, without guaranteeing the full benefits of the regime of asylum, would ensure for them temporary refuge and shelter. This would help states to remain non-committal and would induce them to take more lenient attitude towards the refugees. Permission to enter and provisions for temporary shelter and protection is also asylum. This must be distinguished from conventional grant of asylum which creates entire range of obligations towards the asylum seeker that the asylum state must perform unless he can be resettled safely in his own country. It is, therefore, necessary that the nascent refugee law be distinguished from customary asylum law and the norms of the former be made more acceptable to the asylum states.

Keeping in view the urgency of the issue, the United Nations took initiative in the mid-seventies to work out a draft convention on territorial asylum. A tentative draft was accordingly prepared. The principles contained in the Declaration on Territorial Asylum were more specifically and vividly enunciated in the draft. While recognising that to grant asylum or not to grant it is the sovereign prerogative of the state, the draft required the states to make all possible efforts to grant asylum to the person on humanitarian ground whose fear of persecution would seem justified on the basis of the definition and conditions as laid down in the Convention.[9]

The above draft convention was discussed in the UN Conference on Territorial Asylum held in Geneva from January 10 to February 4, 1977. Although participants agreed on many separate issues, they failed to adopt a convention on consensus. Laws relation to asylum have, therefore, remained as customary as before and also a matter of discretion and good grace of the asylum states.[10]

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9 Supra note 5, at pp. 359-360.

10 See for treatment of various aspects of asylum, Report of the 51st Conference of the International Law Association, Tokyo, 1964, at pp.215-293; and for more recent examination of the subject in the light of new developments, Bevan, V.,

EMERGING NORMS OF INTERNATIONAL REFUGEE LAW

Aftermaths of the First and Second World Wars saw massive rise in the number of refugees which threw a big challenge before the European state. Europe successfully negotiated the problem under special programmes. In the late forties, Palestine refugee problem was created in the wake of the establishment of the state of Israel and gradually it grew to be one of the humanity's great tragedies. From the early seventies, the refugee problem has grown throughout the world at an alarming pace. At present it has acquired a grotesque size — a body of above nineteen million human beings by the beginning of 1993.[11]

The rights and obligations of the refugees on the one hand and that of the state where they have sought or got refuge, on the other, are the subject-matter of the international refugee law. Since laws and customs of asylum have not grown in the context of massive refugee problem, they are not designed to provide satisfactory resolution to the problem of refugee. As observed earlier, obligations of providing habitation, protection and other facilities to a person, once he is granted asylum, until such time as he can be otherwise rehabilitated, are difficult to be performed by the asylum states in the case of a very large number of refugees. Period of return to home country or any other form of rehabilitation is often not specified. But during this period, however, long it is, asylum state is obliged to perform certain obligation. The burden of such obligation may make the states reluctant to provide refuge to its seekers. Therefore, entry of the refugees to and their temporary protection in the territory of a state until they can be safely returned to the home state or otherwise rehabilitated with the aid of international community is the fundamental objective of refugee law. Focus, however, must now be shifted from the asylum state to the international community. Asylum state is only called upon to play its part in the broader scheme of international care for the refugees. Appropriate laws and institutions have to be made with this end in view. A positive development in this regard in recent years is that there has already emerged a concept that there has already emerged a concept that responsibility for looking after the refugees rests on the international community as a whole, not only on the states where the refugees have found temporary habitation. The concept is maturing into customary norms of international law.

The Development of British Immigration Law, 1986, at pp. 213-223; and Hingorani, R.C., (ed.) Humanitarian Law , 1987, at pp. 121-131.

11 The State of the World's Refugees, UNHCR, 1993, at p. 153.

Fall of the Ottoman Empire, the Russian Revolution in 1917 and the First World War gave rise to refugee problems in Europe and Asia Minor in a massive scale. The League of Nations made great efforts to deal with the problem. The League observed that the refugees are a special class of individuals who, if they wanted to return to their own home countries, would be exposed to dangers, and, therefore, needed protection.[12]

In 1921, the League of Nations appointed a High Commissioner for Russian refugees. Later the League took various measures for the interests of refugees coming from other countries. International Refugee Organisation was established in 1947 after the United Nations had come into being. This Organisation undertook the task of rehabilitating 21 million refugees created by the Second World War, besides taking care of the refugees already displaced. Although the Organisation worked on the primary objective of safe return of the refugees to their own countries, but later it appeared that owing to fear of possible persecution or threat of persecution due to religious, ethnic, national or political reasons, many of them were enable to return. Consequently, it became necessary to rehabilitate them in other places.[13]

The Office of the United Nations High Commissioner for refugees replaced the International Refugee Organisation in 1951. The Statute of the UNHCR declares that to protect the refugees and to look for the permanent settlement of their problems is the fundamental objective of this office. The Convention on the Status of the Refugees was adopted in the same year. The Convention defines the term 'refugee' as

> Any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... , is unable or, owing to such fear, is unwilling to return to it.[13a]

Article 33 of the Convention states that "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 of a particular social group, or political opinion."

The 1951 Convention on the Status of the Refugees was applicable only to those who become refugees before the time of the adoption of the Convention. Besides, application and operation of the Convention beyond the geographical area of Europe was made dependent on the consent of the state-

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12 *Ibid.*, at p. 11.

13 *Id.*

13a Art. 1A(2) as amended by Art. 1(2) of the 1967 Protocol.

parties. A Protocol to the Convention was adopted in 1967 in order to make it universal and to waive the time factor. The 1967 Protocol has accepted the provisions of the 1951 Convention eliminating at the same time the later's time and space constraints. The Convention and the Protocol are now the two fundamental international documents for protecting the rights of the refugees. By 1996, number of signatory states to these two documents stood at 132.[14] Besides establishing the principle of non-refoulement, i.e., not to refuse entry to the asylum seekers at the border or not to return those who have already taken refugee in the territory of a state, these two documents have adequately provided for general welfare, protection, habitation, education, maintenance, employment etc. of the refugees. In a similar vein Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, touching on refugee issue, has stated:

> No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a particular pattern of gross, flagrant or mass violations of human rights.

Organisation of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, and the Cartagena Declaration on Refugees, 1984, also made substantial contributions to the development of refugee law.

The problems of refugees have reached such a stage as to render the conventional norms or the international framework for their implementation largely ineffective. While international efforts are constantly being made to improve the existing norms, no new convention has yet been possible to adopt. For the adoption of a universal convention on refugees and for effective application of its provisions, what is primarily necessary and imperative is to recognise the refugee problem of any state as international problem and to take initiative to solve it on an international plane.

Any comprehensive plan for a universal convention on refugees must also take into account the problem of abuse and misuse of refugee rights as well. Armed infiltrations with ulterior motives, sabotage from outside under the cover of refugee may pose threat to the asylum states. Besides, it is often difficult to distinguish the genuine refugees from economic migrants.[15] Due to the wide gap in the standard of living between different countries, the issue of economic migrants is proving to be an insurmountable hazard. Hunger as persecutor is compelling many to flee home and seek refugee elsewhere. The

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14 *Ibid.*, at p. 12.

15 *Ibid.*, at p. 6.

use of refugees for political purposes is also turning out to be an acute problem.

The problem of refugees is a problem of human rights. To identify the causes and sources of the problem of refugees, and to take initiative to eradicate them is as important as protection and rehabilitation of the refugees. Therefore, the question of improving human rights situation in the countries wherefrom people flee to escape persecution is one of prime importance.

LIMITATIONS OF THE EXISTING NORMS AND ATTEMPTS TO FIND REMEDIES

Since the current global refugee situation has reached critical proportions, presenting formidable challenges to the existing normative framework as well as to national and international institutions designed to cope with the movement of asylum-seekers,[16] the primary task of the international community is to keep its endeavour ever alive to look for consensus as to the international norms for regulating the problem and to strengthen the institutional mechanism for their application. Provisions of the 1951 Convention on the Status of the Refugees and the 1967 Protocol are the foundations on which must rest further development of the refugee related norms. As noted earlier, some of the lacunae of the 1951 Convention have been filled by the 1967 Protocol. But the Protocol could not extend the definition of a refugee to include new categories of people who are turning refugees but cannot be termed as such under the Convention provisions and hence cannot claim refugee status. The Convention and the Protocol have confined the application of their provisions to persons who owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, find themselves outside the territory of their own countries and cannot return home due to the same fear. But it is too obvious in today's world that people can become refugees as a result of civil war, external aggression, generalised violence and natural calamities of great severity. Moreover, international border crossing is a prerequisite to claim refugee status which the innumerable people who find themselves displaced inside their own country leading miserable refugee' lives might not be able to avail themselves of the protection of the country.

Some regional arrangements have attempted to overcome the limitations of the existing universal norms. The 1969 OAU Refugee Convention extended the definition of

> "refugee" to include "every person who owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to

16 Nanda, P. (ed), Refugee Law and Policy, Green Wood Press, 1989, at p. ix.

leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[17]

Subsequently, in the 1981 African Charter on Human and Peoples' Rights, specific protections are provided for asylum seekers. Among other regional arrangements, the Council of Europe also provides for such protections; the American Convention on Human Rights provides for the right of asylum. The Cartagena Declaration of 1984 recommended that the definition of refugee in Central America be broadened explicitly to include victims of generalised violence, international conflicts and massive violations of human rights.[18]

Another Convention requirement to qualify for refugee status is that there must be a well-founded fear of persecution for reasons stated in the Convention. This requirement consists of both subjective and objective elements. Subjective element has two aspects: (i) fear in the consciousness of the persons fleeing persecution and (ii) the government of the refugee state which evaluates the well-foundedness of such fear.[19] Of course, there must exist objective circumstances which provide grounds for such fears.

Subjective evaluation by the state of refuge, which may always refer to the provision of national security and public order [Art.32(1)] in order not to allow refuge seekers into its territory or to expel those already in the territory, is capable of negatively affecting the interests of the genuine refugees.

The questions of qualification of the well-foundedness and the factor of national security have always posed danger to proper application of the refugee Convention. While the state practices have not been as restrictive as one might have feared considering the wide power of discretion given to the refugee state in these matters by the Convention, the massive increase in the number of people seeking refuge and asylum certainly tend to influence the asylum or refugee states to interpret the related provisions in a manner damaging to the interests of the potential refugees. Discretion to decide on the question of well-foundedness of fear of persecution [Art.1(2)] and of national security and public order [Art.32(1)], accorded to the refugee states, may tend to defeat the purpose of the Convention on Refugees. This calls for rational interpretation of the convention provisions so as to contribute to the progressive development of refugee law. The UNHCR has, in fact, stated that the preparatory work of the convention argues in favour of a restrictive interpretation of the provision on national security and public order in the sense that a refugee should only be expelled as a last resort and as only

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17 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Art. 1(2).

18 Supra note 16, at p. 7.

19 Stenberg, G., Non-expulsion and Non-refoulement, Uppsala, 1987, at pp.63-65.

practicable means of protecting the legitimate interests of the state.[20] The obligations which states have undertaken under Art.35 of the 1951 convention to cooperate with UNHCR gives this UN agency certain measure of control over the actions taken by the state, and UNHCR has, thus, been able to intervene in cases where it has considered that the state in question has been about to violate or has already violated its obligations under the Convention.

PRINCIPLE OF NON-REFOULEMENT

Despite the fact that the current refugee laws cannot cope with the ever increasing dimensions of the refugee problem and its many facets and that, to make things worse, increasing pressures of the refugees are making the host countries conservative in interpreting and applying the Refugee Convention and the Protocol, certain norms and principles have strongly emerged out of the state practices to acquire universal recognition. This first of all relates to the principles of non-refoulement and temporary refugee.

While in the Convention and the Protocol, individual persecution formed the core of refugee law, collective or group persecution or mass displacement resulting from natural or man-made disaster like armed conflicts have now become the primary concerns and the law has to respond to the new situations, if refugee law has to survive at all. The humanitarian idea of providing protection to individuals in imminent danger which underlies all refugee conventions and state practices, is also relevant for all situations of such dangers whether they are covered by the conventions or not. Pending creation of new norms, interpretation of the existing ones ought to be one that is closer to fulfilment of law's ultimate objective.

Notwithstanding radical increase in the number of people seeking refuge and proliferation of newer sources of refugees which adversely affect states' attitude towards the people at distress seeking entry into their territories from across the border, individual states and world community's endeavour to face them are commendable. This is reflected in world community's numerous activities under UNHCR to ameliorate the plight of refugees. It also calls for changed interpretative attitude towards existing conventions and laws. These all indicate an emerging new law of refugees where emphasis is made on non-refoulement and temporary refuge with the ultimate aim of rehabilitating them in third countries or countries of origin, with international support and assistance. The new law seeks to shift emphasis from providing permanent asylum which according to the Convention has been the main concern of the refugee states. The new law seeks to provide fresh ground where objective interpretation of existing norms is called upon to play more important role.

20 *Ibid.*, at p. 132.

The provisions of the 1951 convention on non-refoulement (Art.33), interpreted on the basis of their objective that human lives have to be protected from potential dangers, are capable of covering situations of generalised violence which has in recent years become the primary cause of refugee exodus. This view is actually corroborated by the world community and states practices.

The French word *refouler* which means `to drive back' may be considered to encompass measures of rejection at the frontier, expulsion or extradition which are supposed to be prohibited by Art.33.[21] The evidence relating to the meaning and scope of non-refoulement in its conventional sense also amply supports the conclusion that to-day this principle forms part of general international law. There is substantial, if not conclusive, authority to say that the principle is binding upon all states, independently of specific assent. State practice before 1951 is, at the least, equivocal as to whether, in that year, Article 33 of the convention reflected or crystallised a rule of customary international law. State practice since then, however, is persuasive evidence of the concretisation of a customary rule, even in the absence of any formal judicial pronouncement. In this context, special regard should also be paid to the practice of international organisation such as the UN General Assembly and the UNHCR.[22]

Professor Joan Fitzpatrick Hartman of the University of Washington, who participated in the defense of some of the US sanctuary cases, asserts that international law mandates the non-return of persons to countries involved in armed conflicts and she marshals evidences in support of this claim. Guy Goodwing-Gill likewise argues that the principle of non-refoulement should be considered to shelter a far wider range of persons in need than simply those who fit within the traditional refugee definition in 1951 Convention.[23]

The application of the principle of non-refoulement is independent of any formal determination of refugee status by a state or an international organisation. Non-refoulement is applicable as soon as certain objective conditions occur. A state which returned foreign nationals to a country known to produce refugees, or to have a consistently poor human rights record, or to be in civil war or a situation of disorder, must therefore justify its actions in the light of the conditions prevailing in the country of origin. The very existence of a programme of involuntary return should shift the burden of proof to the

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21 *Ibid.*, at p. 21.

22 Gooddwin-Gill, G.S., The Refugee in International Law, Oxford, 1983, at pp. 97-98.

23 David, A. (ed), The New Asylum Seekers: Refugee Law in the 1980s, The Hague et all, 1988, at p. xi.

returning state when the facts indicate the possibility of some harm befalling those returned for any of the above reasons.[24]

State practice has undoubtedly broadened the scope of Article 33 of the 1951 Convention. First, it has confirmed that the duty of non-refoulement extends beyond expulsion and return and applies to measures such as rejection at the frontier and even extradition. Second, it has further established the principle of non-refoulement in international law by extending its application to a broader category of refugees.[25] While the principle may not necessarily entail asylum, admission, residence, or indeed any particular solution, it does prohibit any action on the part of a state which returns or has the effect of returning refugees to territories where their lives or freedom may be threatened.[26]

TEMPORARY REFUGE, PROTECTION AND RESETTLEMENT

A natural and legal corollary to non refoulement is the temporary asylum given to the refugees in the country of refuge with the guarantee of protection of their persons and with definite perspective of their resettlement in any third country or in the country of origin. While the principle of non-refoulement is guaranteed by treaty provisions, temporary refuge is not. Nevertheless, the United Nations High Commissioner for Refugees has recently begun to speak of temporary refuge as a component included within the customary principle of non-refoulment.[27] Indeed, the fullest understanding and genuine application of the principle of non-refoulement and wide state practice have elevated temporary refuge and protection of refugees to the norm of customary international law. In situations of mass influx triggered by fears of generalised violence stemming from internal armed conflicts, fleeing civilians are seeking, and to a great extent receiving, temporary refuge in the states to which they flee. This temporary refuge resembles the traditional refugee law concept of non-refoulement in that it consists essentially of a ban on forced repatriation.[28]

Appreciating state practice—the key source of customary international law—is essential in grasping the recently crystallised norm of temporary refuge. This consistent state practice of providing temporary refuge has occurred in recent years in many parts of the world, against a backdrop of authoritative statements of its obligatory character by intergovernmental organisations, groups of experts,

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24 *Ibid.*, at p. 105.
25 *Id.*
26 *Ibid.*, at p. 106.
27 *Ibid.*, at p. 88.
28 *Ibid.*, at p. 87.

and state representatives. This practice can be well-documented and it impressive in its consistency and extent.[29]

Temporary refuge means a prohibition on forced repatriation so long as the conditions in the country of origin remain unsafe. This formulation of the norm has been repeatedly stated by the organs of the UNHCR which have also noted that the protection these refuge seekers receive does not necessarily include the full range of treatment provided for in the 1951 Convention and the 1967 Protocol. Indeed, while the UNHCR insists, in increasingly peremptory terms, upon the absolute nature of this prohibition on forced repatriation of civilian war victims, even referring to it as a rule of *jus cogens*, the UNHCR also candidly recognises that defining the legal status of these refuge-seekers still requires greater elaboration and clarity.[30]

As noted earlier, we find extremely high degree of compliance with the ban on forced and involuntary repatriation. But under ever increasing pressure of refugee inflows and the growing tendency of restrictive interpretation of the international legal instruments by many western governments, UNHCR emphasises that the concept of temporary refuge and protection bypass the need for individual scrutiny under cumbersome and restrictive eligibility procedures. It must give protection to broad categories of persons in urgent need. Conceived as one element in a comprehensive approach that would include efforts to solve the conflict and enable safe return, temporary protection encompasses admission of victims of war and violence; non-refoulement, or non-return to danger; humanitarian treatment; and repatriation when conditions in the countries of origin significantly improve. In order words, temporary protection is seen as an emergency measure of short duration, to provide mass inflows of people with a kind of *prima facie* recognition and a more limited range to benefits.[31]

The time has come for temporary refuge to be given broader, more coherent and consistent recognition as a legitimate tool of international protection. In order to be accepted, temporary refuge must conform to certain minimum standards of protection against discrimination, refoulment and expulsion. It should also come with clearly defined guarantees of humane treatment and fundamental human rights, such as the right to family unity.[32] The viability of temporary protection depends on an active search for political solution to refugee-producing conflicts, and greater exertion of coordinated pressure to bring the solutions to fruition,[33] for otherwise it could mean abetting forcible

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29 *Id.*

30 *Ibid.*, at p. 89.

31 99 (1995) Refugees, UNHCR, at pp.23-24.

32 The State of the World's Refugees, UNHCR, 1993, p.41.

33 *Ibid.*, at p. 50.

expulsion. Few countries would want to face the situation of the refugees being permanently settled in their own countries. This renders the need for resettlement of the refugees in the third or home countries under international arrangement imperative.

CONCLUSION

The above discussion leads to the following conclusions:

First, the problems of refugees have outgrown the norms of law which exist to regulate them. There is no alternative to making constant international efforts to reach consensus as to a common legal platform to deal with the increasing number of refugees.

Second, traditional institution of asylum is insufficient to cope with massive influx of refugees, it often being results of generalised violence in the home countries. Significant increase in the number of people seeking refuge is exerting tremendous pressure on the institution of asylum which has so far effectively dealt with individual or small group cases of asylum seekers, and which, for reasons of such pressure, is failing to perform even its former role.

Third, while fear of persecution for reasons of race, religion, nationality, membership of particular group or opinion, has been the only condition for the grant of asylum, immediate danger to life and liberty as a result of violence, internal or international conflicts and civil war has now become the major cause of massive refugee influx which the existing norms cannot effectively deal with.

Fourth, pending creation of new norms, liberal interpretation of the existing norms is required to cover new categories of refugees and to deal with their massive influx.

Fifth, traditional asylum or refugee law has mainly concentrated on asylum or refugee state and its obligations in relation to asylum seekers or refugees. On the contrary, the emerging new law has shifted the focus from asylum state to international community and its responsibility to care for these displaced people.

Sixth, the principle of non-refoulement, i.e., a state cannot return a fleeing person to a territory where his life can be in danger, has become a universally acceptable norm of international law.

Seventh, non-refoulement necessarily implies temporary refuge and protection of the refugees in the territory of the refugee state, with the ultimate aim of rehabilitating them in other places, with international initiative and assistance.